FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Iannuzzi (No 3) [2024] FCA 45

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| File number: | NSD 1510 of 2017 |
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| Judgment of: | **MARKOVIC J** |
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| Date of judgment: | 2 February 2024 |
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| Catchwords: | **CORPORATIONS** – applications to discharge or vary orders which reinstated the registration of deregistered companies pursuant to s 601AH(2) of the ***Corporations Act*** *2001* (Cth) – where order was made pursuant to s 601AH(3)(d) of the Corporations Act to disregard the period between the date of the relevant companies’ deregistration and the date of the order for the purpose of calculating the period ending three years after the relation-back day (**Order 3**) – where order was made granting the companies liberty to apply to vary or discharge Order 3 – where Order 3 was made by consent without notice – where the three year limitation period under s 588FF(3) of the Corporations Act had expired at the time Order 3 was made – whether the Court has power to make Order 3 other than by s 588FF(3) of the Corporations Act – whether Order 3 should be set aside as of right – whether s 601AH(3)(d) of the Corporations Act may be used to augment the reckoning of time for limitation purposes – whether s 601AH(3)(d) or alternatively s 536 (now repealed) of the Corporations Act empower the Court to make an order extending time (or suspending time) for the purposes of s 588FF(1) of the Corporations Act – applications granted |
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| Legislation: | *Corporations Act 2001* (Cth) ss 494, 536 (now repealed), 588FC, 588FDA, 588FF subs (1) and subs (3), 601AH subss (2), (3) and (5), 601AG, 1322, 1551, 1615 and 1617  *Corporations Law* (now repealed) s 459G and s 1322  *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act 2001* (Cth), s 90-10 and s 90-15  *Corporations Regulations 2001* (Cth) r 10.25.01(1) and (2)  *Limitation Act 1963* (NSW) s 63  *Limitation of Actions Act 1974* (Qld) s 11  *Workers’ Compensation Act 1990* (Qld) (now repealed) s 186  *Uniform Civil Procedure Rules 2005* (NSW) r 36.16 |
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| Cases cited: | *Allianz Australia Insurance Ltd v Viksne* (2021) 106 NSWLR 306  *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1  *Bell Group Ltd (in liq) v Australian Securities and Investments Commission* (2018) 358 ALR 624; [2018] FCA 884  *BL & GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558; [2010] NSWSC 959  *BP Australia Ltd v Brown* (2003) 58 NSWLR 322  *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44  *Chalker v Clark* [2008]VSCA 92  *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd* (2006) 201 FLR 296; [2006] NSWSC 690  *Commissioner of Taxation v Iannuzzi (No 2)* [2019] FCA 1818  *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053  *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265  *Del Borrello v Australian Securities and Investments Commission* [2008] WASC 48  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89  *Gordon v Tolcher* (2006) 231 CLR 334  *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477  *Hall v Poolman* (2009) 75 NSWLR 99  *JPMorgan Chase Bank, National Association v Fletcher* (2014) 85 NSWLR 644  *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543  *Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd* (2008) 71 NSWLR 262  *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566  *Morgan v Sydney Allen Manufacturing Pty Limited (in Liquidation)* [2021] FCA 169  *Pagnon v Workcover Queensland* [2001] 2 Qd R 492  *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011)244 CLR 144  *Project Blue Sky Inc and Australian Broadcasting Authority* (1998) 194 CLR 355  *Re Austral Bronze Co Pty Ltd (No 2)* (2020) 149 ACSR 221; [2020] NSWSC 1633  *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 92 ACSR 554; [2013] NSWSC 1  *Re Bele & Co Pty Ltd* [2017] NSWSC 1824  *Re European Metal Recyclers Pty Ltd (in liq) (deregistered)* [2018] NSWSC 946  *Re Harule Pty Ltd; Ex parte Olita Super Readymixed Concrete Pty Ltd (in liq)* (1994) 13 ACSR 500  *Re Regional Planners* *Developments Co Pty Ltd* (2015) 110 ACSR 457; [2015] NSWSC 1996  *Saba Bros* *Tiling (ACT) Pty Ltd v Australian Securities and Investments Commission* [2021] ACTSC 47  *Smith v Australian Securities and Investments* [2018] NSWSC 1695  *Stork ICM Australia Pty Ltd v SFS 007.298.633 Pty Ltd (formerly Stork Food Systems Australasia Pty Ltd)* (2010) 77 ACSR 517; [2010] FCA 53  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404  *Wallman v Milestone Enterprises Pty Ltd* (2006) 205 FLR 68; [2006] WASC 260  *White v Baycorp Advantage Business Information Services Ltd* (2006) 200 FLR 125; [2006] NSWSC 441 |
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| Division: | General Division |
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| Registry: | New South Wales |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 319 |
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| Date of hearing: | 4-6 April 2023 |
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| Counsel for the Plaintiff/First Respondent: | Mr LT Livingstone SC with Ms CT Ensor |
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| Solicitor for the Plaintiff/First Respondent: | MinterEllison |
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| Counsel for the 20th – 22nd, 29th and 46th Respondents: | Mr DR Pritchard SC with Mr AJ Macauley |
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| Solicitor for the 20th – 22nd, 29th and 46th Respondents: | Kekatos Lawyers |
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| Counsel for the First and Third – Seventh Applicants: | Mr S Golledge SC with Mr R Johnson |
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| Solicitor for the First and Third – Seventh Applicants: | Shaba & Thomas Lawyers |
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| Counsel for the Second – 15th Respondents: | Mr AJ McInerney SC with Mr F Tao |
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| Solicitor for the Second – 15th Respondents: | Norton Rose Fulbright Australia |
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| Counsel for the Defendant/49th Respondent and 48th Respondent: | Ms N Bailey |
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| Solicitor for the Defendant/49th Respondent and 48th Respondent: | Johnson Winter & Slattery |
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| Counsel for the 18th and 19th Respondents: | Mr SA Lees |
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| Solicitor for the 18th and 19th Respondents: | Brown Wright Stein |

ORDERS

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|  | | NSD 1510 of 2017 |
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| BETWEEN: | COMMISSIONER OF TAXATION  Plaintiff | |
| AND: | MR DAVID NICHOLAS IANNUZZI  Defendant | |
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| IN THE INTERLOCUTORY APPLICATION: | | |
| BETWEEN: | RUNCITY PTY LTD ACN 164 920 432  First Applicant | |
|  | CALABRO REAL ESTATE PTY LTD (IN LIQUIDATION) ACN 07 440 140  Second Applicant | |
|  | INTERFREIGHT TRANSPORT PTY LTD ACN 165 673 085 (and others named in the Schedule)  Third Applicant | |
| and: | COMMISSIONER OF TAXATION  First Respondent | |
|  | RC GROUP AUSTRALIA PTY LTD (IN LIQUIDATION) ACN 164 000 462 (and others named in the Schedule)  Second Respondent | |

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| order made by: | MARKOVIC J |
| DATE OF ORDER: | 2 february 2024 |

THE COURT ORDERS THAT:

1. The parties are to confer on the form of orders to be made to give effect to these reasons.

2. Within 14 days of the date of publication of these reasons:

(a) if the parties can agree on the form of orders to be made, including, if agreement can be reached, on the question of costs or the manner in which any dispute as to costs is to be resolved, they are to provide to the Associate to Markovic J draft orders to be made in Chambers; or

(b) if the parties cannot agree on the form of orders to be made:

(i) each party is to provide to the Associate to Markovic J their proposed draft orders including on the question of costs, the manner in which any extant applications for costs are to be dealt with by the Court and for a timetable for the filing and service of affidavits and submissions, not exceeding eight pages in length, in support of and in response to any application for indemnity costs by any of the Applicants (as defined in these reasons); and

(ii) the proceeding will be listed for case management hearing on 23 February 2024 at 9.30 am AEDT to resolve the form of orders to be made.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 On 25 August 2017 the plaintiff, the **Commissioner** of Taxation, commenced this proceeding seeking, among other things, an inquiry pursuant to s 536 of the ***Corporations Act*** *2001* (Cth) into the conduct of the defendant, David Nicholas Iannuzzi. At that time and leading up to the making of final orders in November 2019, the Commissioner and Mr Iannuzzi were the only parties to the proceeding. The conduct of the proceeding as between the Commissioner and Mr Iannuzzi is described below.

2 On 2 September 2019, after the trial judge, Stewart J, had reserved his judgment in relation to the relief sought by the Commissioner, the Court made orders by consent including relevantly that:

1. Pursuant to s 601AH(2) of the [Corporations Act] the Australian Securities and Investments Commission (**ASIC**) forthwith reinstate the registration of each of the following companies:

a) RC Group Aust Pty Limited (Deregistered) ACN 164 000 462;

b) Inter Management Group Pty Limited (Deregistered) ACN 105 115 759;

c) Co-ordinated Transport Solutions Pty Limited (Deregistered) ACN 110 905 774;

d) Diesel Dan Pty Limited (Deregistered) ACN 127 303 682;

e) Silverhills Haulage Australia Pty Limited (Deregistered) ACN 128 613 016;

f) ACN 133 636 414 Pty Limited (Deregistered) ACN 133 636 414;

g) Fara Logistics (Aust) Pty Limited (Deregistered) ACN 146 285 029;

h) Machinery Moves Australia Pty Limited (Deregistered) ACN 159 498 254; and

i) Brisbane Inner City Tilt Tray Services Pty Limited (Deregistered) ACN 159 968 840,

(jointly, the **Companies**).

2. Pursuant to s 601AH(3)(d) of the [Corporations Act], upon the reinstatement of the registration of the Companies, Ms Gayle Dickerson and Mr Stephen Vaughan be appointed as the joint and several liquidators of each of the Companies.

3. Pursuant to section 601AH(3)(d) of the [Corporations Act], when calculating the period ending three years after the relation-back day for any of the Companies, the period between the date of the deregistration of the relevant company and the date of these orders shall be disregarded.

4. Pursuant to section 601AH(3)(d) of the [Corporations Act], if proceedings are commenced by Ms Dickerson and Mr Vaughan as the joint and several liquidators of any of the Companies in reliance upon Order 3, Ms Dickerson and Mr Vaughan must cause a copy of these Orders to be served upon the defendant with the initiating process by which the proceedings are commenced and the defendant shall thereafter be at liberty to apply to this Court to vary or discharge Order 3 in relation to itself.

(**Reinstatement Orders**).

3 Since the Reinstatement Orders were made, Gayle Dickerson and Stephen Ernest Vaughan (**Liquidators**) in their capacity as joint and several liquidators of the Companies (as defined in the Reinstatement Orders) have, in reliance upon Order 3 of the Reinstatement Orders, commenced a number of proceedings in the **Supreme Court** of New South Wales. Upon doing so, in compliance with Order 4 of the Reinstatement Orders, they served a copy of those orders on the defendants to the proceedings.

4 Having done so, pursuant to the liberty granted by Order 4 of the Reinstatement Orders, four groups of defendants to the various proceedings commenced by the Liquidators in the Supreme Court have filed interlocutory applications in which they seek, in effect, that Order 3 of the Reinstatement Orders be discharged or, in the alternative, that it be varied so it does not operate in respect of claims made against the relevant defendants or, in the further alternative, that Order 3 be varied so that it does not operate as against the relevant defendants in relation to claims by any of the Companies as defined in Order 3 of the Reinstatement Orders or the Liquidators under Div 2 of Pt 5.7 of the Corporations Act.

5 Interlocutory applications seeking orders to that effect have been filed by:

(1) **Runcity** Pty Ltd, **Calabro Real Estate** Pty Ltd, Interfreight Transport Pty Ltd (**Interfreight 2**), Diesel Dan (NSW) Pty Ltd (**Diesel Dan 2**), John Tabuso, Mirjana Tabuso and Maurizio Ligori (**Tabuso Application**). Since the filing of the interlocutory application, a liquidator has been appointed to Calabro Real Estate. Accordingly, the orders sought are pressed only by the balance of the applicants to the interlocutory application who I will refer to collectively as the **Tabuso Applicants**;

(2) Katherine Khalil and **Kito Investments** Pty Ltd who I will refer to collectively as the **Kito Applicants** (**Kito Application**);

(3) Michael Borg, **Borg Family** Pty Ltd and **746 Greendale Road** Greendale Pty Ltd who I will refer to collectively as the **Borg Applicants** (**Borg Application**); and

(4) **Givana (Holdings)** Pty Ltd and **Givana** Pty Ltd who I will refer to collectively as the **Givana Applicants** (**Givana Application**).

Although the Borg Applicants and the Givana Applicants have each filed an interlocutory application they are represented by the same solicitors and counsel and make the same submissions. I will refer to those applicants collectively as the **Borg & Givana Applicants** and to the four applicant groups collectively as the **Applicants**.

6 On 9 December 2022 the Commissioner filed an interlocutory application (**Commissioner’s Application**). That application only arises for consideration in the event that any of the Applicants are successful in having Order 3 of the Reinstatement Orders discharged or varied. In that event, the Commissioner seeks:

(1) an order pursuant to s 601AH(3)(d) of the Corporations Act to the effect that, when calculating the period ending three years after the relation-back day for any of the reinstated companies, the period between the date of the deregistration of the relevant company and 2 September 2019 be disregarded;

(2) in the alternative an order pursuant to s 536(1) of the Corporations Act (now repealed) to the effect that, when calculating the period ending three years after the relation-back day for any of the reinstated companies, the period between the date of the deregistration of the relevant company and 2 September 2019 be disregarded or, alternatively, an order to the same effect; and

(3) an order that if an order in the terms of [6(1)] and/or [6(2)] above is made, that order operate *nunc pro tunc* with effect from 2 September 2019.

# BACKGROUND

## Phoenix taskforce established

7 In 2014 a Phoenix Taskforce was established. The agencies involved in the taskforce included the Australian Taxation Office (**ATO**) and the Australian Securities and Investments Commission (**ASIC**) as well as other government agencies. As described by Michael Hughes, a partner of MinterEllison, the solicitors for the Commissioner, the aim of the inter-agency operation was to detect, deter and disrupt certain behaviours including phoenixing activity, incorrect tax refund claims, taxation irregularities and money laundering, by investigating, among other things: tax agents promoting and facilitating this behaviour; insolvency practitioners facilitating this behaviour; and companies and individuals profiting from this behaviour.

## The ATO commences an investigation into Mr Iannuzzi

8 A focus of the Commissioner’s investigation was on potential phoenixing activity in which Mr Iannuzzi was involved arising from his relationship withBanq Accountants and Advisors Pty Limited (in liquidation) trading as **Banq Accountants**.

9 In 2015 the ATO commenced an investigation into Mr Iannuzzi’s conduct in his capacity as external administrator of various entities of which the **Deputy Commissioner** of Taxation was, or may be, a creditor.

10 According to a document titled “Agreed Statement of Facts” which was tendered by Mr Iannuzzi in this proceeding in the circumstances described at [24] and [26] below and treated as a statement of concessions:

(1) at all relevant times Mr Iannuzzi was the sole director of **Veritas** **Advisory** Services Pty Ltd which, among other things, carried on a business of providing insolvency related services;

(2) prior to his death on 16 June 2015 Murray Godfrey was also a director of Veritas Advisory;

(3) Mr Iannuzzi inherited the relationship with Banq Accountants from RMG Partners, Mr Godfrey’s former business;

(4) Banq Accountants was a referring entity to Mr Iannuzzi. It provided Mr Iannuzzi’s contact details to a director, debtor or creditor for the purpose of seeking specialist insolvency advice which may result in an appointment for Mr Iannuzzi; and

(5) Mr Iannuzzi received referrals from Banq Accountants to act as liquidator in a creditors’ voluntary liquidation for at least 28 companies.

## The Liquidation and deregistration of RC Group and the Tabuso Group of companies

11 On 18 August 2014 **RC Group** Aust Pty Ltd was placed into liquidation and Messrs Iannuzzi and Godfrey were appointed as liquidators.

12 On 8 December 2014 the following companies were placed into liquidation:

(1) **Inter Management** **Group** Pty Ltd;

(2) **Co-ordinated Transport** Solutions Pty Ltd;

(3) Diesel Dan Pty Ltd (**Diesel Dan 1**);

(4) **Silverhills Haulage** Australia Pty Ltd;

(5) ACN 133 636 414 Pty Ltd (formerly known as Interfreight Transport Solutions Pty Ltd) (**Interfreight 1**);

(6) **Fara Logistics** (Aust) Pty Ltd;

(7) **Machinery Moves** Australia Pty Ltd; and

(8) **Brisbane Inner City Tilt Tray** Services Pty Ltd,

collectively **Tabuso Group**.

13 Messrs Iannuzzi and Godfrey were appointed as liquidators of each of the Tabuso Group companies.

14 RC Group and each of the Tabuso Group companies were deregistered on the dates set out below:

(1) RC Group on 27 December 2015;

(2) Machinery Moves on 29 May 2015;

(3) Silverhills Haulage and Inter Management on 29 December 2015;

(4) Co-Ordinated Transport, Diesel Dan 1, Fara Logistics and Brisbane Inner City Tilt Tray on 30 December 2015; and

(5) Interfreight 1 on 8 May 2016.

## The Commissioner commences this proceeding against Mr Iannuzzi

15 It was agreed between the parties that the Commissioner first retained MinterEllison to act for him on 1 April 2016. Mr Hughes explains that he was retained to advise and act in connection with the Commissioner’s complaints and concerns about Mr Iannuzzi’s conduct.

16 As set out above, on 25 August 2017 the Commissioner commenced this proceeding against Mr Iannuzzi as defendant by filing an originating process. On 3 May 2019 the Commissioner filed an amended originating process, the amendments to which only affected Sch B to the originating process. In his amended originating process the Commissioner sought:

(1) interlocutory relief including, among other things:

(a) an order for an inquiry pursuant to s 90-10 of the *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the Corporations Act (**IPS**) or alternatively s 536(1) of the Corporations Act (now repealed) (**Inquiry Application**) into the external administration by Mr Ianuzzi of each of the companies listed in Sch A to the amended originating process; and

(b) orders pursuant to s 601AH of the Corporations Act directing ASIC to reinstate the registration of RC Group and to appoint Robyn Erskine as its liquidator; and

(2) final relief including, among other things:

(a) orders pursuant to s 90-50 of the IPS or alternatively s 536(1) of the Corporations Act (now repealed) that Mr Iannuzzi cease to be the liquidator of the companies listed in Pt 1 of Sch A to the amended originating process and that a person other than Mr Iannuzzi be appointed liquidator to each of those companies; and

(b) orders pursuant to s 90-15 of the IPS or alternatively s 536(1) of the Corporations Act (now repealed) that:

(i) Mr Iannuzzi’s name be removed from the register of liquidators maintained pursuant to the Corporations Act;

(ii) Mr Iannuzzi be restrained for a period of 10 years, or such other period as the Court thinks fit, from applying to be a registered liquidator under the Corporations Act; and

(iii) Mr Iannuzzi be restrained for a period of 10 years, or such other period as the Court thinks fit, from holding the office of trustee in bankruptcy, liquidator, provisional liquidator, voluntary administrator, administrator of a deed of company arrangement, or as a receiver or other controller of property of any corporation, as that term is defined in s 57A of the Corporations Act.

17 On 23 April 2018 Perram J heard the Inquiry Application. On 16 July 2018 his Honour made an order, among others, that the Inquiry Application be heard at the same time as the hearing of the Commissioner’s claims for final relief: see *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053.

18 On 1 May 2019 Stewart J fixed the hearing of the Inquiry Application and any subsequent inquiry for three days commencing on 17 July 2019.

19 As part of their preparation for hearing the Commissioner and Mr Iannuzzi exchanged lists of affidavits and other documentary evidence on which they intended to rely as well as objections to each other’s evidence.

20 On 5 July 2019 Johnson Winter & Slattery (**JWS**), the solicitors for Mr Iannuzzi, sent an email to MinterEllison attaching a letter of the same date (**5 July 2019 Letter**) and draft orders. The 5 July 2019 Letter included (as written):

2 Our client’s health has deteriorated. In those circumstances, and given the ongoing toll that the Proceeding is taking on our client, he is prepared to consent, without admission, to the orders sought in the Amended Originating Processed filed on 3 May 2019 (**OP**) as appropriately modified in the form enclosed with this letter.

3 As to the modifications, we note that prayer 5 of the OP seeks compensation for each of the companies the subject of the Proceeding (**Companies**) for any loss sustained because of our client’s alleged breach of duty as a liquidator. Our client does not consider that your client has put evidence before the Court which would support an order of compensation in respect of any of the Companies. Further, the Court will not be able to quantify the alleged loss suffered by the individual Companies on the basis of the evidence before the Court. As such, our client would be willing to consent to orders that the registration of any of the Companies of your client’s choosing be reinstated and that a liquidator of your client’s choice be appointed to any of the Companies, who may then pursue compensation.

4 While our client considers that the Court would be able to make the orders enclosed on the basis of the evidence currently before it, we understand that you may consider that an agreed statement of facts is required. Accordingly, we are in the process of preparing one and, to that end, we ask that you provide us with a word version of your client’s OP.

(Emphasis in original.)

21 On 9 July 2019 MinterEllison responded to the 5 July 2019 Letter. As to the suggestion made by Mr Iannuzzi that certain companies the subject of the proceeding be reinstated, that letter included:

Finally, our client welcomes your client’s offer to consent to orders reinstating Companies of our client’s choosing and to appoint new liquidators to these entities. However, and for the avoidance of any doubt, our client does not consider that such orders would obviate the need for any compensation to be paid by your client. As you and your client would be aware, the ability of any replacement liquidator to pursue compensation would no doubt be contingent upon our client expending further time and expense in dealing with, funding and indemnifying any replacement liquidator to pursue that claim, with which the Court is currently seized within these proceedings, and as to which our client will invite the Court to take a view concerning your client’s conduct, as a whole, over all of the liquidations which are the subject of these proceedings.

22 Thereafter the parties exchanged further correspondence including in relation to a preliminary hearing of the proceeding scheduled for 15 July 2019 at 2.15 pm for the purpose of addressing and determining objections to the tender of evidence.

23 On the morning of 15 July 2019 JWS communicated with the Court on behalf of the parties notifying it that Mr Iannuzzi had withdrawn his objections to the tender of the Commissioner’s evidence but requesting that the proceeding remain listed at 2.15 pm that afternoon to address other matters.

24 At 2.15 pm on 15 July 2019 the proceeding was listed before Stewart J. At that time the Commissioner handed up a document titled “**Agreed Statement of Facts**” which had been served by Mr Iannuzzi on the Commissioner but which was not agreed between the parties. As described by Mr Hughes, this document contained a statement of admissions made by Mr Iannuzzi for the purposes of the Court making certain orders sought by the Commissioner in the amended originating process.

25 On 16 July 2019, at the request of the Court, the parties each provided their written submissions in relation to relief. MinterEllison also provided the Court with draft orders to be made by consent.

## The hearing before Stewart J

26 The Inquiry Application was listed for hearing commencing on 17 July 2019. At that hearing:

(1) the Agreed Statement of Facts was tendered and marked as an exhibit. While it was titled “Agreed Statement of Facts” it was not agreed to by the Commissioner and was, as set out above, treated as a statement of concessions or admissions made by Mr Iannuzzi for the purpose of the proposed orders;

(2) all of the documents referred to in the Agreed Statement of Facts were tendered;

(3) all of the documents referred to in the Commissioner’s submissions on relief which were not referred to in the Agreed Statement of Facts were tendered, save for a psychologist’s report served by Mr Iannuzzi on the Commissioner;

(4) a document titled “Admission made by the defendant relevant to paragraph 17 of the Commissioner’s submissions” was tendered; and

(5) at the commencement of the hearing senior counsel appearing for the Commissioner, Mr McLure SC, provided the Court with a revised form of the proposed draft consent orders which had been amended to include two additional proposed orders at paragraphs 5 and 6. The additional orders concerned reinstatement of the registration of certain companies (**Draft Consent Orders**).

27 The Agreed Statement of Facts was a detailed document which included a concession by Mr Iannuzzi that he had “in relation to each of the companies subject of the proceeding failed to exercise reasonable care and diligence in his conduct of the relevant liquidation or administration”: at [14]. Relevantly the companies included RC Group and the Tabuso Group.

28 In relation to RC Group the Agreed Statement of Facts included (omitting document identification numbers):

(1) by way of introduction that:

104. At all material times, RC Group was owned and controlled by George Khalil, brother of Fred Khalil.

105. On 18 August 2014, the members of RC Group resolved to wind up the company voluntarily and appoint Iannuzzi and Godfrey as joint and several liquidators.

(2) under the heading “Inadequate disclosure in [declaration of independence and relevant relationships and declaration of indemnities (**DIRRI**)]”:

107. On 25 August 2014, Iannuzzi circulated the First Report to Creditors in respect of RC Group, which amongst other things, annexed a DIRRI signed by Iannuzzi.

108. The DIRRI:

…

d) failed to disclose the Banq Referral Relationship in circumstances where the Company’s director was the brother of Fred Khalil of Banq; and

e) failed to disclose that Iannuzzi and Godfrey had received a number of referrals from Gino Cassaniti, an employee of RC Group, and director of Original Banq.

(3) under the heading “Investigations conducted by liquidators and inadequate disclosure to creditors” that:

(a) in about August 2014 the Commonwealth Bank of Australia (**CBA**) informed Veritas Advisory that RC Group held two accounts with it, details of which were provided, and that Messrs Iannuzzi and Godfrey:

failed in August 2014, or at any time before August 2016 to obtain the bank statements referred to in the preceding paragraph from the CBA. In failing to do so, Iannuzzi and Godfrey failed to identify or investigate transactions totalling more than $6 million, including more than $888,885.00 in cash withdrawals, which were possibly unfair preferences within the meaning of s 588FA of the *Corporations Act* and therefore possibly voidable transactions within the meaning of s 588FE of the *Corporations Act* made by RC Group to various entities within the period 6 months before the relation-back day …

(at [110]-[111]);

(b) on 1 September 2014 Mr Iannuzzi chaired the first meeting of creditors of RC Group during which two issues were raised, one concerning whether there were other companies of which the director had been a director which had been placed into liquidation and the other concerning why all business activity statements (**BAS**) for RC Group had been lodged at the same time, both of which Mr Iannuzzi said he would investigate: at [112];

(c) in his final report to creditors Mr Iannuzzi failed to disclose confirmation of the two bank accounts held by RC Group, failed to report to creditors in relation to companies of which the director had been a director and which had been placed into liquidation in the last seven years and failed to report on any investigations undertaken in relation to lodgement of the BAS at the same time: at [120]; and

(d) on 28 August 2015 the Deputy Commissioner sent a letter to Mr Iannuzzi advising him of his concerns with Mr Iannuzzi’s conduct of the liquidation of RC Group and on 10 September 2015 Mr Iannuzzi responded to that letter but, in doing so, failed to disclose correspondence which had passed between his office and the CBA: at [121]-[123].

29 In relation to the Tabuso Group the Agreed Statement of Facts included:

(1) that at all material times the companies in the Tabuso Group were owned by Mr and Mrs Tabuso or entities associated with them: at [173];

(2) under the heading “Conduct of liquidations” that:

(a) on 16 December 2014 Mr Iannuzzi approved the transfer of a phone line from Inter Management Group to Interfreight 2: at [177];

(b) a reasonably competent liquidator in Mr Iannuzzi’s position would reasonably have suspected the possibility that the persons in control of the Tabuso Group companies were involved in activity to deliberately liquidate the companies in the group and transfer the assets of the group to a new entity, in the circumstances set out relating to the phone line transfer: at [178];

(c) a reasonably competent liquidator in Mr Iannuzzi’s position would have suspected that some or all of the proofs of debt provided by Banq Accountants on behalf of Interfreight 2 and Diesel Dan 2 in relation to each of the Tabuso Group companies warranted further investigation in the circumstances there set out including that Interfreight 2 and Diesel Dan 2 had been registered on 5 September 2013, a date after the Tabuso Group companies had ceased trading: at [183];

(d) the proofs of debt submitted by Banq Accountants were admitted to proof by Mr Iannuzzi for the amounts stated, except that those lodged by Diesel Dan 2 were admitted as debts owing to Diesel Dan 1 and Mr Iannuzzi did not disclose to creditors any investigations which he undertook to establish the veracity of the proofs of debt: at [184];

(e) in his DIRRI attached to the first report to creditors Mr Iannuzzi failed to disclose his professional relationship with Banq Accountants and failed to provide an updated DIRRI to disclose that relationship: at [185]-[186], [190]; and

(f) in his final report to creditors Mr Iannuzzi failed to provide explanations for a number of matters as set out in the Agreed Statement of Facts: at [191]-[195].

30 In the course of the hearing on 17 July 2019 in considering paragraph 5 of the Draft Consent Orders, which concerned reinstatement of particular companies, the following exchange took place between the Court, Mr McLure SC and senior counsel for Mr Ianuzzi, Mr Pike SC (as his Honour then was):

His Honour: Yes. There was a point that I overlooked and that’s you were going to explain to me order 5.

Mr McLure: Yes. So at paragraph 6 of the originating process, the Commissioner seeks orders for compensation – it’s paragraph 5? All right. Sorry. Thank you. Your Honour can see that there is no order agreed for the compensation as part of this process. The alternative avenue to seek compensation is to have liquidators appointed to these companies, some of them have to be reregistered, and then for such newly appointed liquidator to pursue Mr Iannuzzi for compensation, or, for that matter, pursue anyone else for compensation.

What we are asking your Honour to do, by consent, is for that topic to be stood over until 30 August 2019 so that the Commissioner can give consideration to whether or not he would wish to fund that activity, bearing in mind there’s an issue about what would be the likely proceeds to be obtained from pursuing those actions, whether it be the ability of Mr Iannuzzi to satisfy a judgment or some other potential respondent, and we would also have to identify who an appropriate liquidator would be. And as to paragraph 6, we would urge your Honour to make that order to signify the court’s interest in ensuring that these kind of matters are brought to the attention of people who are involved, or agencies that are involved, in the regulation of insolvency practitioners.

His Honour: I’m not sure that I have schedule A to the amended originating process.

…

Mr McLure: Well, schedule A is the list of the companies and schedule B is the –

…

His Honour: **But, now, is that relief – so the relief covered by paragraph 5 of the amended originating process is for compensation for the defendant – it’s that the defendant compensate each of the companies. Yes. In order for that to happen, the companies would have to be – those that have been deregistered would have to be reregistered**.

Mr McLure: **Yes. Yes**.

His Honour: **So, I mean, my question is really twofold, I suppose. One is: is the foreshadowed relief of your order 5, which is to say the reinstatement of the registration of the companies listed in schedule A, is that covered by the process in this case? And then, secondly, is it competent for me to make that order in this case or are there other parties that needed to have been notified or anything else to have occurred**?

Mr McLure: **There would certainly be some other procedural steps that would need to occur. For example, in terms of appointing new liquidators, we would need to obtain consents and so on. Would your Honour excuse me one moment. So there’s steps that we would need to take to make**..

His Honour: But that would be revisited on – or visited on a future occasion.

Mr McLure: Yes.

His Honour: Yes.

Mr McLure: **But in terms of power, that’s, we submit, plainly within both section 536 of the Corporations Act, in terms of making any order necessary to give effect to the objects of that provision. But we need not trouble your Honour with that issue today**. We’re just asking your Honour to defer that issue until 30 August 2019, by which time we will have made some decisions, that is the Commissioner will have made some decisions about what, if anything, he wants to do about that.

His Honour: And does that – that deferral doesn’t depend on me having made a decision on paragraphs 1 to 4 and given reasons for it. So, in other words, I can make order 5 now.

Mr Pike: Yes.

Mr McLure: That’s right. And …

His Honour: And I shouldn’t wait, because it may be that my reasons, or, indeed, my orders, don’t come until after 30 August or - - -

Mr McLure: That’s right. I think Mr Pike will correct me, but I think we both agree that that’s an order your Honour could make by consent, without having been satisfied about the underlying material.

His Honour: It’s a case management order, really. Yes. Yes. Thank you, Mr McLure. Mr Pike.

Mr Pike: May it please the court, can I just then address, just briefly, before I come back to a few other matters, and hopefully I will be able to be brief, just the orders that my learned friend was just addressing. ...

In relation to order 5, as we understand what is contemplated by that is, **rather than the Commissioner seeking compensation in these proceedings, as was originally proposed, what will occur is that the Commissioner will consider which of the companies he wishes to have reinstated, in other words and new liquidators appointed, that will occur as part of these proceedings and then the new liquidator, once appointed, will determine issues such as whether claims should be proceeded, including against my client or otherwise**. So your Honour won’t need – once order 5 is made, and we would say your Honour can do that now, then once orders for reinstatement, such as they are necessary, are made at a future time, that will be done with any issue of compensation in these proceedings.

(Emphasis added.)

31 At the conclusion of the hearing Stewart J reserved judgment on the question of the relief sought in paragraphs 1 to 4 of the Draft Consent Orders and stood over the proceeding to 3 September 2019 for case management in relation to the making of orders for the reinstatement of registration of the companies contemplated by paragraphs 5 and 6 of the Draft Consent Orders.

## Events leading up to and the making of the Reinstatement Orders

32 On 30 August 2019 MinterEllison sent a letter to JWS which included (as written):

As you will recall, on the last occasion his Honour noted that the listing on 3 September 2019 would be for case management in relation to the making of orders for the reinstatement of the registration of the companied listed in Schedule A of the Amended Originating Process unless the proposed orders were by consent and the parties were able to satisfy his Honour that the making of those orders was justified.

In light of his Honour’s comments, we are instructed to give notice to your client that our client intends to seek the reinstatement of RC Group and the Tabuso Group of Companies, and the appointment of Ms Gayle Dickerson of KPMG as liquidator of these entities upon reinstatement, in accordance with the enclosed draft short minutes of order.

Could you please confirm by 10 am on 2 September 2019 whether your client consents to these draft short minutes of order?

33 The Commissioner’s draft orders enclosed with MinterEllison’s letter sought reinstatement of the registration of the RC Group and the companies in the Tabuso Group, the appointment of Ms Dickerson as liquidator of the reinstated companies, that ASIC be provided with a copy of the orders and that there be liberty to apply on two days’ notice. The proposed draft orders did not seek any order to the effect of Order 3 of the Reinstatement Orders.

34 By email sent at 1.22 pm on 2 September 2019 MinterEllison sought an urgent response to its 30 August 2019 letter. JWS responded later that afternoon noting that its client was prepared to consent to the Commissioner’s proposed orders, that he was also prepared to consent to “the attached orders” and querying whether the Commissioner was prepared to consent to orders in the form of the “attached orders”. The “attached orders” amended the form of the Commissioner’s proposed orders and introduced for the first time proposed orders in the form of Orders 3 and 4 of the Reinstatement Orders.

35 By email sent at 4.02 pm on 2 September 2019 the Commissioner agreed to the orders in the form proposed by Mr Iannuzzi referred to in the preceding paragraph. In its email MinterEllison noted that there would be a joint appointment of Ms Dickerson and Mr Vaughan as liquidators, provided further amended orders reflecting that change and informed JWS that the Commissioner wished to provide the proposed orders to the Associate to Stewart J with submissions in the form attached. JWS consented to that course on Mr Iannuzzi’s behalf and provided a signed copy of the proposed orders by return email.

36 Later on 2 September 2019, prior to the making of the Reinstatement Orders, MinterEllison sent an email to the Associate to Stewart J, copying in JWS, attaching the Commissioner’s three page submission in support of the proposed orders. Those submissions addressed the requirements of s 601AH(2) of the Corporations Act, namely the Commissioner’s standing as a “person aggrieved” and the factors which the Court may take into account in considering whether it is just that the registration of a company be reinstated. The submissions focussed (at [5]) on Mr Iannuzzi stating that:

The Commissioner submits that the reinstatement of RC Group and each of the Tabuso Group companies is just in the following circumstances:

(a) Prior to RC Group and the Tabuso Group of companies being deregistered, the defendant was appointed as liquidator of each of these companies. In this regard, the Statement of admissions made by the defendant for the purposes of this proceeding and provided to the Court on 15 July 2019 (**Statement of Admissions**), contains a number of admissions concerning the defendant’s negligence in carrying out his duties as external administrator of these companies prior to their deregistration, including, by way of example, failing to investigate in excess of $6 million in potential uncommercial transactions in relation to RC Group, including more than $1.3 million in cash transactions.

(b) The reinstatement of the companies identified is necessary in order for any claims for compensation against the defendant to be pursued for the benefit of the creditors of these companies. For this purpose, the draft consent orders include orders providing for Ms Gayle Dickerson of KPMG, a registered liquidator, to be appointed as the liquidator of RC Group and each of the Tabuso Group of companies upon reinstatement.

(c) The defendant, as the person likely to be prejudiced by the reinstatement of the companies, has been notified of, and consents to, the orders for reinstatement of these companies.

(d) The public interest weighs in favour of reinstatement in circumstances where the new liquidator’s pursuit of any such claims against the defendant will not only potentially assist the creditors of the companies, but also assist in generally deterring other registered liquidators from engaging in misconduct.

(Emphasis in original.)

Mr Iannuzzi did not file or serve any written submissions in support of the proposed orders.

37 On 2 September 2019 by consent between the Commissioner and Mr Iannuzzi the Court made the Reinstatement Orders. On the evening of 2 September 2019 the Associate to Stewart J sent an email to the solicitors for the Commissioner and Mr Iannuzzi stating:

His Honour was satisfied that the Commissioner is a person aggrieved and that it is just that the Companies registration be reinstated and has accordingly made the **attached** orders in Chambers this afternoon. They will be available on the Commonwealth Courts Portal shortly. The case management tomorrow has been vacated and no attendance is required.

(Emphasis in original.)

38 Pursuant to the Reinstatement Orders, ASIC reinstated the registration of the RC Group and each of the companies in the Tabuso Groupand Ms Dickerson and Mr Vaughan were appointed as the joint and several liquidators of each of those companies.

## Final orders and reasons for judgment

39 On 7 November 2019 the Court made the following orders by consent:

(1) Mr Iannuzzi’s name be removed from the register of liquidators maintained pursuant to the Corporations Act;

(2) Mr Iannuzzi be restrained for a period of 10 years from applying to be a registered liquidator under the Corporations Act;

(3) Mr Iannuzzi be restrained for a period of 10 years from applying to be registered as a trustee in bankruptcy and from accepting appointment as liquidator, provisional liquidator, voluntary administrator, administrator of a deed of company arrangement, or as a receiver or other controller of property of any corporation, as that term is defined in s 57A of the Corporations Act; and

(4) Mr Iannuzzi pay the Commissioner’s costs of the proceeding as agreed or assessed.

See *Commissioner of Taxation v* ***Iannuzzi (No 2****)* [2019] FCA 1818.

40 In *Iannuzzi (No 2)* Stewart J made findings about Mr Iannuzzi’s conduct. By way of example in relation to RC Group and Mr Iannuzzi’s final report to creditors at [75]-[78] his Honour said:

75 Mr Iannuzzi failed to report to creditors in relation to the names of the nine companies that had been placed into liquidation in the last seven years of which the director had also been a director. He also failed to report to creditors on any investigations and findings in relation to why all business activity statements for RC Group had been lodged at the same time and to set out what investigations he had made into the $100,000 proof of debt filed by George Khalil to ensure the claim was legitimate.

76 On 28 August 2015, the Deputy Commissioner of Taxation sent a letter to Mr Iannuzzi raising some of the above failures in the report. On 10 September 2015, Mr Iannuzzi sent a letter in response advising that, amongst other things, the CBA had failed to advise of the bank accounts held by RC Group, despite the earlier correspondence from CBA confirming the existence of two accounts (see above at [67]).

77 Although not admitted by Mr Iannuzzi, I find this to be a breach by him of his duties of diligence and candour. A liquidator acting with the requisite diligence and candour would have taken the necessary care to ensure that the correspondence to the Deputy Commissioner was accurate and would have advised of the bank accounts that he had been advised of by the CBA.

78 Further, a candid liquidator presented with the information by the Deputy Commissioner would have made enquiries of his staff and CBA to investigate the matters raised and would have reported on these investigations to the Deputy Commissioner who was a major creditor.

41 In relation to Mr Iannuzzi’s conduct of the external administration of companies in the Tabuso Group at [125] his Honour concluded that:

Mr Iannuzzi admits that the matters in paragraphs [104]-[124] above reasonably suggest that he has failed to exercise reasonable care and diligence in the exercise of his powers and the discharge of his duties as external administrator of each of the companies in the Tabuso Group. Once again, in my judgement Mr Iannuzzi’s conduct in relation to these companies fell very substantially below the level that the law expects of a liquidator.

42 At [188]-[196] of *Iannuzzi (No 2)* under the heading “Mr Iannuzzi’s insight with regard to his conduct” Stewart J set out, in effect, a history of the proceeding, albeit through the prism of Mr Iannuzzi’s conduct of his defence, as follows:

188 As indicated, this proceeding was commenced in August 2017. Annexed to the originating process was a schedule in the nature of a pleading setting out more than 90 pages of detailed factual averments on the basis of which it was said that the relief sought was justified. That schedule was subsequently amended, in May 2019, but for the most part the amendments merely added references to documents underpinning the averments and made very few substantive changes.

189 The Commissioner also served affidavits and 10 volumes of documents that had been produced under subpoenas to third parties. However, the attitude taken by Mr Iannuzzi right up to the week of the final hearing, which is to say over a period of nearly two years, was to deny what was put against him and to raise obstacles to the Commissioner’s case.

190 Mr Iannuzzi served a defence, in December 2017, in which certain averments that were subsequently admitted were denied, and which resisted even an inquiry into his conduct, never mind conclusions with regard to that conduct that might justify sanctions.

191 Mr Iannuzzi served an affidavit, in March 2018, in which he either denied averments which he has subsequently admitted, or he sought to place an exculpatory gloss on averments in respect of which he now accepts that findings critical of his conduct should be made.

192 Mr Iannuzzi also objected to the admissibility of most of the documents sought to be relied on by the Commissioner, which objection was rejected by Perram J. As indicated, Mr Iannuzzi then sought leave to appeal against that decision but that application was dismissed. Even thereafter, albeit on marginally different terms, Mr Iannuzzi continued to press the objection to the Commissioner’s evidence. Whereas the original objection that was rejected by Perram J was that the documents were not admissible at the stage of deciding whether there should be an inquiry, it was now contended that the documents were not admissible at the stage of determining whether any disciplinary orders should be made against Mr Iannuzzi.

193 The hearing of the evidence objection was listed for 15 July 2019, two days before the hearing on the inquiry. Both sides of the case filed submissions, and I prepared for the hearing. Then, on the morning of the hearing on the objection, I was advised through my Associate that Mr Iannuzzi withdrew his objection but that the matter should still be called. When it was called, I was advised that Mr Iannuzzi was prepared to make the admissions contained in the so-called statement of agreed facts and that orders would likely be sought by consent.

194 It was an admitted fact in the proceeding that as recently as 23 May 2019, that is to say only about seven weeks before the hearing, Mr Iannuzzi in a counselling session with a psychologist expressed some disbelief, frustration and significant feelings of injustice surrounding the matter. He said that he perceived he had been unfairly targeted by the Commissioner. Thus, at that late stage Mr Iannuzzi lacked an appreciation of the delinquency of his conduct.

195 Notwithstanding that history of dogged opposition and resistance, at what might quite appropriately and without exaggeration be described as the eleventh hour, Mr Iannuzzi accepted much of the wrongdoing alleged against him. Senior counsel on his behalf candidly and rightly accepted that his new-found insight, coming when it did, was “belated” and that that counts against him and points in favour of a strong sanction. In that regard, Mr Iannuzzi was prepared to consent to very serious, “life-changing” consequences. Senior counsel accepted, without prompting, that Mr Iannuzzi’s conduct constituted “a very significant departure” from the standard expected of him.

196 It goes without saying that Mr Iannuzzi’s conduct in defending the matter until very near the end has taken up a considerable amount of time and effort of the Court which is to the detriment of other litigants, and it has put the Commissioner to considerable effort and costs not all of which will be made good by the party/party costs order to which he has consented. These matters all count against him in so far as an appropriate penalty is concerned.

## Supreme Court Proceedings

### Voidable transaction proceedings

43 On 23 April 2021 RC Group and the Liquidators in their capacity as liquidators of RC Group commenced proceeding number 2021/115083 in the Supreme Court (**RC Group Voidables Proceeding**)against a number of defendants including, among others:

(1) Runcity, the first applicant in the Tabuso Application;

(2) Mrs Khalil, the first applicant in the Kito Application;

(3) Kito Investments, the second applicant in the Kito Application;

(4) Mr Borg, the first applicant in the Borg Application;

(5) Borg Family, the second applicant in the Borg Application;

(6) 746 Greendale Road, the third applicant in the Borg Application;

(7) Givana (Holdings), the first applicant in the Givana Application; and

(8) Givana, the second applicant in the Givana Application.

44 On 1 April 2021 Interfreight 1 and the Liquidators in their capacity as liquidators of Interfreight 1 commenced proceeding number 2021/00091488 in the Supreme Court (**Interfreight Proceeding**) against a number of defendants including, among others:

(1) Interfreight 2, the third applicant in the Tabuso Application;

(2) Diesel Dan 2, the fourth applicant in the Tabuso Application; and

(3) Mrs Tabuso, the sixth applicant in the Tabuso Application.

45 On 9 August 2021 Silverhills Haulage, Co-ordinated Transport, Diesel Dan 1, Fara Logistics, Inter Management Group and the Liquidators in their capacity as liquidators of each of those companies commenced proceeding number 2021/00227002 in the Supreme Court (**Silverhills Haulage Proceeding**) against a number of defendants including, among others:

(1) Interfreight 2;

(2) Diesel Dan 2;

(3) Runcity;

(4) Mr Tabuso, the fifth applicant in the Tabuso Application;

(5) Mrs Tabuso; and

(6) Mr Ligori, the seventh applicant in the Tabuso Application.

46 As described by Mr Vaughan:

(1) in the RC Group Voidables Proceeding, the Interfreight Proceeding and the Silverhills Haulage Proceeding (collectively **Supreme Court Proceedings**) the Liquidators seek relief under s 588FF(1) of the Corporations Act for uncommercial transactions pursuant to s 588FC of that Act and unreasonable director-related transactions pursuant to s 588FDA of the Corporations Act (**Statutory Claims**). In each of the proceedings, the Liquidators rely upon the Reinstatement Orders in relation to those claims;

(2) for example, in the RC Group Voidables Proceeding at [79] to [83] of their statement of claim the plaintiffs contend that:

79 On 27 December 2015, RC Group was deregistered by ASIC.

80 On 2 September 2019, in Federal Court of Australia Proceedings Number NSD1510/2017, Stewart J ordered that:

(a) ASIC reinstate RC Group as a company pursuant to section 601AH(2) of the Corporations Act;

(b) pursuant to section 601AH(3)(d) of the Corporations Act, when calculating the period ending three years after the relation-back day for RC Group, the period between the date of deregistration and the date of the order shall be disregarded;

(c) the Second Plaintiffs be appointed as the joint and several liquidators of RC Group.

81 On or about 3 September 2019, RC Group was reinstated as a company by ASIC.

82 By reason of the matters pleaded in paragraphs 74, 79, 80(b) and 81 above, for the purposes of calculating the period ending three year after the Relation-back Day, the period between 27 December 2015 and 2 September 2019, being a period of 1345 days, is to be disregarded.

83 By reason of the matter pleaded in paragraphs 74, 79, 80(b) and 81 above, the period ending three years after the relation-back Day in respect of RC Group is 23 April 2021.

(3) in the RC Group Voidables Proceeding the Liquidators also seek accounts and equitable compensation for moneys had and received and money retained without lawful entitlement; and

(4) there remain 28 defendants to the RC Group Voidables Proceeding against whom the Liquidators claim relief totalling $11,577,157. The number of defendants has reduced because:

(a) since the commencement of the proceeding the Liquidators have settled their claims against nine of the 39 named defendants on confidential terms; and

(b) on 2 November 2022 AKA Civil Australia Pty Ltd (in liquidation) and AKA (NSW) Pty Ltd (in liquidation), the ninth and tenth defendants to the proceeding, were placed into liquidation.

47 Mr Vaughan also notes in relation to the transactions the subject of the Statutory Claims that:

(1) in the case of RC Group, they comprise electronic funds transfers or cash withdrawals, which, in turn, comprise a portion of the total of over $29 million which was withdrawn from the company’s accounts;

(2) in the case of the Interfreight Proceeding and Silverhills Haulage Proceeding, they comprise electronic funds transfers and the disposition of the assets of the plaintiff companies;

(3) the Liquidators have not been able to identify any or any material benefit to the plaintiff company that made the payment in each case;

(4) there was no or no adequate record that would explain the nature of the transaction or otherwise be expected to be retained in the books and records of RC Group or the companies in the Tabuso Group; and

(5) the Liquidators have not been able to identify any or any adequate consideration provided by the recipient to the plaintiff companies.

### Negligence proceedings

48 Two further proceedings have been commenced:

(1) on 17 August 2020 RC Group and the Liquidators commenced proceeding number 2020/00239747 in the Supreme Court against Mr Iannuzzi, Maggie Chan in her capacity as the executrix of the estate of the late Mr Godfrey and Veritas Advisory as defendants (**RC Group Negligence Proceeding**); and

(2) on 7 December 2020 the Tabuso Group companies and the Liquidators commenced proceeding number 2020/00347646 in the Supreme Court against Mr Iannuzzi, Ms Chan in her capacity as the executrix of the estate of the late Mr Godfrey and Veritas Advisory as defendants (**Tabuso Negligence Proceeding**).

49 In the RC Group Negligence Proceeding and the Tabuso Negligence Proceeding (together **Negligence Proceedings**) the plaintiffs seek damages for breach by the defendants to those proceedings of ss 180, 181, 182 and 183 of the Corporations Act and of their general law duties. Mr Vaughan explains that those proceedings were commenced in circumstances where Mr Iannuzzi, by the Agreed Statement of Facts, admitted that he breached various duties owed to RC Group and to the Tabuso Group and where in *Iannuzzi (No 2)* at [220] the Court acknowledged that there were possible losses to creditors.

50 According to Mr Vaughan, the damages sought by the Liquidators in the Negligence Proceedings cannot be quantified until the Supreme Court Proceedings have concluded.

## Consequences if the Reinstatement Orders are discharged or varied

51 Mr Vaughan understands that if the Reinstatement Orders are set aside or varied the Statutory Claims would be time barred by reason of s 588FF(3) of the Corporation Act and those claims, which are assets available to RC Group and the Tabuso Group companies, would be extinguished.

52 Mr Vaughan notes that the Liquidators have alternative causes of action on foot by which they seek to recover the value of the Statutory Claims, including the Negligence Proceedings and the alternative equitable causes of action pleaded in the RC Group Voidables Proceeding. However, the Liquidators consider that there are risks to their ability to recover the full value of the Statutory Claims by way of those alternative causes of action. In particular:

(1) Mr Vaughan believes that there is generally a better chance of recovery against a wide variety of defendants (many of whom, such as Mr and Mrs Tabuso, own real estate) than there would be in pursuing a smaller number of defendants, particularly the defendants to the Negligence Proceedings;

(2) the defendants to the Negligence Proceedings have pleaded in their respective defences that their liability is limited pursuant to the CPA Australia Professional Standards (Accountants) Scheme with the effect that damages are limited to $2 million; and

(3) Mr Vaughan understands that Mr Iannuzzi and Veritas Advisory, two of the three defendants to the Negligence Proceedings, have effectively said in correspondence that they are impecunious, the insurer has denied coverage and the Liquidators ought to expect no meaningful recovery from those proceedings.

## The Applicants’ evidence

53 The following Applicants gave evidence in support of their respective applications:

(1) Mrs Khalil;

(2) Mr Borg;

(3) Mr Tabuso;

(4) Ms Tabuso; and

(5) Mr Ligori.

54 In addition:

(1) Christine Louise Perry, the solicitor for the Tabuso Applicants, gave evidence; and

(2) the Borg & Givana Applicants sought to rely on evidence given by Gino Robert Cassaniti.

### Mr Cassaniti

55 Gino Robert Cassaniti is the sole director of Givana (Holdings) and Givana. Givana (Holdings) and Givana are respectively the fifteenth and thirty-eighth defendants in the RC Group Voidables Proceeding and on 22 December 2021 they filed their defence in that proceeding in which they contend that the claim was filed out of time and is statute barred.

56 Mr Cassaniti did not make himself available for cross-examination. On that basis, objection was successfully taken to most of his evidence. Accordingly, his evidence was limited to the following:

(1) at no time prior to the making of the Reinstatement Orders was Mr Cassaniti informed about this proceeding or that the Commissioner and Mr Iannuzzi intended to seek the Reinstatement Orders; and

(2) at no time prior to or after the making of the Reinstatement Orders until 7 October 2021 when Mr Cassaniti was served with the statement of claim dated 23 April 2021 commencing the RC Group Voidables Proceeding (**RC Group Voidables Proceeding SOC**) was he made aware of the allegations pleaded against him in that proceeding.

### Mrs Khalil

57 Katherine Khalil is the sole director of Kito Investments which is the trustee of the Kito Investment Trust, a discretionary trust originally established for the benefit of Mrs Khalil and her former husband Faouzi (Fred) Khalil.

58 Mrs Khalil and Kito Investments are respectively the third and fourth defendants to the RC Group Voidables Proceeding.

59 Mrs Khalil deposes that:

(1) at no time prior to the making of the Reinstatement Orders was she informed about this proceeding or that the Commissioner and Mr Iannuzzi intended to seek the Reinstatement Orders;

(2) at no time prior to or after the making of the Reinstatement Orders until she was served with the RC Group Voidables Proceeding SOC on 7 October 2021 was she made aware of the allegations in that statement of claim;

(3) at no time prior to or after the Reinstatement Orders were made was she directed to preserve her records;

(4) given that more than nine years have passed since the events in dispute in the RC Group Voidables Proceeding, her memory of that time is not as good as it was and many of her records have been thrown away, lost or destroyed; and

(5) in November 2013 she moved house.

60 Between about July 2011 and December 2016 Mrs Khalil worked at Banq Accountants. Mr Khalil was a director of and also worked at Banq Accountants and both Mrs Khalil and Kito Investments were clients of Banq Accountants. During the period that Mrs Khalil worked at Banq Accountants she had three children with her former husband, in January 2012, November 2013 and March 2017, and after each birth she took at least one year off. Mrs Khalil explains that:

(1) some of the records and documents that are relevant to the allegations made against her and Kito Investments in the RC Group Voidables Proceeding were likely previously stored with Banq Accountants;

(2) Banq Accountants moved premises in January 2017 from a property located in Punchbowl to one located in Silverwater where it now trades as “Stratum Accountants”;

(3) she does not think that Banq Accountants still trades and she does not know where the records went;

(4) she has been informed by Mr Khalil that sometime before 2018 Mr Cassaniti took all of Banq Accountants’ records to a storage facility on Mr Tabuso’s farm and that rainwater got into the storage facility and destroyed the records stored there; and

(5) despite having attempted to do so by telephone, online and by attending the Bankstown branch, she has been unable to obtain banking records for the period 2011 to 2014 from the National Australia Bank (**NAB**), where she and Kito Investments banked. In cross-examination Mrs Khalil explained that the reason given to her by the NAB for not being in a position to provide banking records for that period was because they were more than seven years old.

61 On 16 February 2017 Mr and Mrs Khalil separated. On 23 June 2021 they agreed on consent orders for their property settlement and on 24 September 2021 orders were made. Mrs Khalil says that, had she been served with the RC Group Voidables Proceeding SOC or been given notice of the allegations made in the RC Group Voidables Proceeding, she probably would have settled with Mr Khalil on different terms based on advice from her lawyers. While she does not know what different orders she would have sought, she says that she would have obtained legal advice about that matter and any impact of the proceeding on her.

62 In cross-examination Mrs Khalil was taken to a document titled “Application for voluntary deregistration of a company” for Kito Investments dated 16 May 2022 (**Kito Investments Deregistration Application**). Despite the fact that Mrs Khalil is Kito Investments’ sole director, she said that she did not sign that document, she had not seen the document before it was shown to her in cross-examination and she could not recall discussing it with anyone in May 2022. The Kito Investments Deregistration Application was lodged by **Stratum Accountants** Pty Ltd. Mrs Khalil accepted that she had worked for Stratum Accountants since about 2019.

### Mr Borg

63 Michael Borg is the sole director of Borg Family, the sixth defendant to the RC Group Voidables Proceeding, and from 1 December 20217 to 3 August 2022 was the sole director of 746 Greendale Road. He is also the fifth defendant in the RC Group Voidables Proceeding.

64 Mr Borg noted that in the RC Group Voidables Proceeding relief is sought against:

(1) him in relation to certain payments totalling $600,000 allegedly made between 17 June 2013 and 10 June 2014; and

(2) Borg Family in relation to certain payments totalling $70,000 allegedly made between 6 June 2014 and 1 July 2014.

65 Mr Borg, Borg Family and 746 Greendale Road have filed a defence in the RC Group Voidables Proceeding.

66 Mr Borg was not informed at any time prior to 2 September 2019, when the Reinstatement Orders were made, of the hearing of this proceeding before Stewart J or that the parties at the time intended to apply for the Reinstatement Orders.

67 At no time prior to or after the making of the Reinstatement Orders until he was served with the RC Group Voidables Proceeding SOC on or about 12 October 2021 was Mr Borg made aware of the allegations made in that statement of claim.

68 The sums claimed by the plaintiffs from Mr Borg and Borg Family arise out of a loan made by Mr Borg to RC Group at Mr Khalil’s request. Mr Borg says that it was a term of the loan that fixed interest of $70,000 would be paid and he directed that sum to be paid to Borg Family.

69 Mr Borg says that a decade has passed since he entered into the loan agreement with RC Group, he has changed accountants since that time as a result of a dispute he had with the accountants who were assisting him at the time of the loan agreement and, due to the passage of time, he has not retained a copy of the loan agreement and, because of the dispute, is unable to procure a copy from his former accountants. In summary Mr Borg says that, as a result of the passage of time and his dispute with his former accountants, it has been very difficult for him to locate the loan agreement.

70 The RC Group Voidables Proceeding continues to cause Mr Borg and his family both emotional and financial distress.

71 Mr Borg was cross-examined. He accepted that Borg Family and 746 Greendale Road used Banq Accountants as their accountants but ceased to do so in about 2016 to 2017.

72 Mr Borg was taken to the transcript of his examination carried out by the Liquidators on 6 October 2020 and directed to the following exchange:

Q: You haven’t produced any documents, pursuant to an order for production addressed to yourself, have you?

A: I don’t know.

Q: Well, have you or not?

A: Privilege. I don’t know.

Q: But you have got boxes of documents relating to your business records back at your home, is that correct?

A: I have got a few little things.

Q: Well, you said boxes earlier, didn’t you?

A: Well, I have given them whatever they have wanted if they have asked for it.

73 Mr Borg accepted that he has boxes of documents containing his business records, including in relation to Borg Family and 746 Greendale Road, at his home. He searched through those boxes but did not find “the paper he needed”, namely the loan agreement for the moneys that he loaned personally to RC Group.

74 Mr Borg was also directed to the following evidence which he gave during the course of the Liquidators’ examination on 6 October 2020:

Q: Are you, did you receive money from RC Group (Aust) Pty Ltd between 17 June 2013 and 9 June 2014?

A: Mate, I honestly, can’t remember. I would have to have a look.

Q: Did you or your company receive some $600,000 from RC Group (Aust)?

A: Mate, I - I doubt it. I doubt it.

Q: RC Group (Aust), as I've shown you through the invoices, is a labour hire company. What would RC Group (Aust) Pty Ltd be paying you or your company money?

A: Mate, I don't know. I would have to look at the bank statements. I don’t know.

Q: Well, before you can’t- - -?

A: I can’t remember. It was that long ago. I’ve had that much money in and out of my accounts. I can’t remember.

75 Mr Borg said that at the time he gave that evidence, 6 October 2020, it was truthful but it no longer is truthful. That is because he has received money from RC Group, namely the money relating to the loan agreement that he has not been able to locate. Mr Borg also said that is the nature of the defence he wishes to rely on in the RC Group Voidables Proceeding.

76 Mr Borg accepted that during the course of the Liquidators’ examination he was asked questions on this topic. When it was put to him that in responding to those questions he said nothing about a loan agreement he gave the following evidence:

Well, I didn’t know. Like I said, I’ve had millions of dollars go through my accounts. To be asked on the spot, I answered as I did, I – which I didn’t know, which now I know where it’s from or whatnot and what you’re going to ask me, so I’m answering your truthfully. Yes, I did receive it.

### Mr Tabuso

77 John Tabuso is married to Mirjana Tabuso. He is the director of Diesel Dan 2 and Interfreight 2 and was the director of Calabro Real Estate from 8 June 1999 to 6 July 2013, at which time Mrs Tabuso became the sole director and shareholder of Calabro Real Estate.

78 Mr Tabuso is not educated. He has difficulty reading and understanding documents.

79 In the early 1990’s Mr Tabuso started a mechanical workshop, working on cars and trucks mostly for himself. His only formal qualification is a trade certificate in mechanical repairs. Over time, with experience, he has developed an understanding of engines.

80 In about 1998 Mr Tabuso started working as a truck driver and in about 1999 he started a trucking transport business with Jose Sanchez and commenced freight transport on an intra and interstate basis (**Trucking Business**). Mr Sanchez left the Trucking Business in about 2005.

#### The development of the Trucking Business

81 At first, the Trucking Business used contractors who drove their own trucks. However, over time, as it grew, the Trucking Business was able to purchase its own trucks and engage drivers who drove trucks for the various companies allocated to perform work.

82 In around 1999 Mr Tabuso’s accountant, Sam Cassaniti, recommended and implemented a structure whereby a series of separate companies were incorporated or transferred to him and trusts were established for two principal reasons: asset protection; and the reduction of the cost of workers’ compensation where administrative staff and truck drivers had different rates for workers’ compensation risk and calculation of premiums. One company, Calabro Real Estate, leased or bought the plant and equipment and any real estate and other companies rented the property or equipment from it. Calabro Real Estate had two trusts: one in which property was owned; and a second in which trucks and equipment were owned. As at the date Mr Tabuso swore his affidavit, Calabro Real Estate continued to trade in this capacity.

83 **Interfreight (Aust)** Pty Ltd, which was incorporated in about June 2003, was the main trading entity. It conducted the Trucking Business which at that time was mostly interstate freight transport. By about 2005 Calabro Real Estate owned around eight trucks and Interfreight (Aust) received purchase orders and rented premises and trucks from Calabro Real Estate to carry out the transport work.

84 On 30 August 2007 Diesel Dan 1 was incorporated on the advice of Mr Tabuso’s accountant, at the time Christian Fox. Diesel Dan 1 supplied fuel and tyres for, and carried out maintenance and repairs on, the trucks and related equipment such as forklifts and pickers.

85 Initially, the Trucking Business’ operations were located at 12 Ash Road, Prestons. In 2009 it moved to 395 Devonshire Road, Kemps Creek, into premises owned by Runchief Pty Ltd. Mr Tabuso worked seven days a week in the Trucking Business and by 2010 it had grown and owned between 15 to 18 trucks.

86 Over the years, the Trucking Business bought or “opened” several additional companies, which were “ownerdriver” companies including in about 2007 Silverhills Haulage, in about 2010 Fara Logistics and in about 2012 Machinery Moves and Brisbane Inner City Tilt Tray. The Trucking Business maintained these companies to keep their customer bases or to have differentiation in the market with a view to maximising work received from allocators and loading agents, who booked freight transport and who were generally unable to use a single freight company. Mr Tabuso explained that occasionally, on behalf of Interfreight (Aust), he would make a customer angry. That customer would then ring up, for example, Silverhills Haulage on its different number and engage it to carry the freight. However, it was always Interfreight (Aust), and later, Interfreight 1, that would perform the work.

87 By around 2009, Interfreight (Aust) employed about 15 full-time employees and used subcontractors, who were mostly truck drivers. Other employees included booking staff, loading staff, administrative and accounting staff and allocators who distributed the jobs. Some employees were employed in different companies or split their time between several companies which paid all or part of their wages. Most employees were employed by Interfreight (Aust). The costs of premises rental, insurance premiums, accounting fees and wages were spread across all entities, as invoiced or based on usage. Diesel Dan 1 would invoice Interfreight (Aust) or Calabro Real Estate, as appropriate, for fuel, repairs, service charges and tyres. The Trucking Business was carried out entirely within the group.

88 As set out in the preceding paragraph, most employees were employed by Interfreight (Aust). However, from time to time, employees would provide services to other companies and the relevant employee’s wages would be based on the entities for whom they were working. For example, Mr Ligori, a mechanic, primarily carried out tasks for Diesel Dan 1 in repairing and maintaining trucks. While his wages were generally paid by Interfreight (Aust), some were paid by Diesel Dan 1.

89 Mr Tabuso has engaged a number of accountants over the years for his personal affairs and for the Trucking Business. For the Trucking Business: from 2012 to 2016 he engaged Mr Khalil of Banq Accountants; and since 2016 he has engaged Andrew Dunstan of Strategic Accountants.

#### Mr Tabuso’s illness

90 In 2013 Mr Tabuso fell ill having suffered a heart attack. He underwent several surgeries and was in hospital for some time. Following this, he was required to lower his stress levels and not work as hard.

91 Mr Tabuso explained that while he was away from work and attending to his medical condition, the Trucking Business unravelled. There was no-one in the business with his knowledge to direct staff or to manage the intercompany payment obligations. Mr Tabuso returned to work on a part-time basis and was unable to manage the Trucking Business.

92 In about mid 2013, Mr Khalil advised Mr Tabuso that the Trucking Business needed to be “cleaned up” and that he should start new entities and phase out and wind down, over time, the “old companies”. Accordingly, Interfreight 2 and Diesel Dan 2 were incorporated and they began servicing the Trucking Business while the older entities were wound down. In cross-examination Mr Tabuso agreed that this occurred a little while after he was made a bankrupt in July 2013 and that until about 2017 the registered office of each of the newly incorporated companies was Banq Accountants.

93 Mr Tabuso explained that there were difficulties with the transition process, including, for example, that customers would often continue to pay Interfreight (Aust) or Interfreight 1 rather than the new company, Interfreight 2, which had performed the work. Where that occurred funds had to be remitted to Interfreight 2 but sometimes administrative staff would use those funds to pay intercompany expenses in order to save double movement of funds.

#### RC Group

94 At one point Vince Macri, Mr Tabuso’s solicitor, advised Mr Tabuso to use a payroll services company to employ all employees. Accordingly, in about 2013 or 2014 Mr Tabuso raised the engagement of a payroll services company with Mr Khalil. A few weeks later Mr Khalil informed Mr Tabuso, among other things, that he had “set [Mr Tabuso] up with [RC Group]”. Mr Khalil provided details about the process Mr Tabuso would need to undertake to enable RC Group to pay the Trucking Business’ employees.

95 Mr Tabuso says that had nothing to do with the business of RC Group other than engaging it to handle the Trucking Business’ payroll.

#### The Tabuso Group goes into liquidation

96 By the end of 2014, when the transition of the Trucking Business from the “old companies”, which included the Tabuso Group companies, to the newly incorporated companies was complete, Banq Accountants advised Mr Tabuso to put the “old companies” into liquidation. This occurred in December 2014 at which time Messrs Iannuzzi and Godfrey were appointed as liquidators of those companies.

97 The only debt owing to a creditor outside the Trucking Business of which Mr Tabuso was aware at the time of the liquidations was a debt of approximately $20,000 owed to the ATO by, he thinks, Silverhills Haulage. After the liquidations of the “old companies” Mr Tabuso attempted, without success, to pay the outstanding debt to the ATO, but there were penalties and other difficulties which he did not understand and the ATO refused to deal with him directly. Mr Tabuso assumed this had all been resolved through the liquidation process.

98 Mr Tabuso understands that in about December 2014 Messrs Iannuzzi and Godfrey in their capacity as the liquidators, through Banq Accountants, took all the books and records for each of the “old companies” including electronic accounting records.

#### Books and records

99 In about 2016 Mr Tabuso was in dispute with Banq Accountants over its fees. It was at that time that Mr Tabuso moved his accounting business from Banq Accountants to Mr Dunstan of Strategic Accountants. Mr Tabuso’s dispute with Banq Accountants continued for a long time. From about 2015 Mr Tabuso sought the Trucking Business’ accounting records from Banq Accountants but it claimed a lien over them and, as the fees dispute was never resolved, Banq Accountants refused to release any of the Trucking Business’ records.

100 By letter dated 25 March 2015 Mr Iannuzzi, in his capacity of liquidator of each of the Tabuso Group companies, sought from Mr Tabuso, in his capacity as a former director, the books and records in his possession for each of those companies. In cross-examination Mr Tabuso agreed to two propositions: first, that he did not produce any documents in response to that request because he said “the accountant had it all”; and secondly, that he did not respond to Mr Iannuzzi’s letter.

101 Mr Tabuso said that during the liquidation of the Tabuso Group companies he did not have access to a single document that related in any way to their financial affairs but that he asked Banq Accountants several times to provide the documents.

102 Mr Tabuso explained that most of the records for the Tabuso Group were hard copy but there were some computer files and that Banq Accountants also took those files. Mr Tabuso could not say whether the Tabuso Group maintained copies of the latter but said that he would not know how to keep such a file and that he did not even know how to turn on a computer.

103 Mr Tabuso understands that in order to comply with taxation, accounting and workers’ compensation obligations, Mr Dunstan had to work from bank statements. In about 2016 the Trucking Business purchased new computers and installed new accounting software which was used in connection with Diesel Dan 2 and Interfreight 2. However, it became apparent in cross-examination that it was possible in 2020, in response to orders for production issued by the Liquidators, to produce from computer records material dating back to 2014. I pause to observe that Mr Tabuso’s evidence on this topic is difficult to accept.

104 It is apparent that he simply ignored Mr Iannuzzi’s request for the provision of the books and records of the Tabuso Group companies. He attempts to explain that attitude by his evidence that he did not have access to any documents relating to those companies as they were with Banq Accountants. Assuming that to be the case, I do not accept that, if requested to do so, those accountants would not provide the material sought. The dispute with Banq Accountants did not, on Mr Tabuso’s evidence, arise until “about 2016” so that could not have been a reason for the failure to produce the material. In any event, as became apparent in cross-examination, computer records were held which enabled production of material from 2014.

#### The reinstatement of the registration of the Tabuso Group and subsequent events

105 Neither Mr Tabuso, Interfreight 2 or Diesel Dan 2 were given an opportunity to be heard in relation to the Reinstatement Orders.

106 In about September 2020 Mr Tabuso was served with a summons for public examination (**Tabuso Summons**) which he attended on 30 September 2020. The Tabuso Summons also required Mr Tabuso to produce the documents listed in the schedule to it. Mr Tabuso said that he undertook a thorough review of all books and records in his possession at that time and produced to the Court all records in his possession in answer to the Tabuso Summons. He was put to significant personal and legal expense in that process for which he was not reimbursed by the Liquidators.

107 Mr Tabuso was also served with an order for production dated 15 February 2021 (**Tabuso Order for Production**). On 13 April 2021 Mr Tabuso produced what he described as a “small number of documents” in answer to the Tabuso Order for Production. In response to the Tabuso Order for Production Mr Tabuso located and produced documents relating to Interfreight 2 and Diesel Dan 2 as negotiated between his solicitor and the Liquidators’ solicitor.

108 On 9 August 2021 Mr Tabuso was served with the statement of claim filed in the Silverhills Haulage Proceeding. Mr Tabuso has filed a defence in the Silverhills Haulage Proceeding and has caused a defence to be filed by each of Interfreight 2 and Diesel Dan 2 who are also defendants to that proceeding.

109 Interfreight 2 and Diesel Dan 2 are also defendants to the Interfreight Proceeding (see [44] above) and Mr Tabuso has caused those companies to file a defence in that proceeding.

110 Mr Tabuso’s evidence is that:

(1) he was not requested at any time to preserve his records relating to the allegations made in the Interfreight Proceeding or the Silverhills Haulage Proceeding;

(2) he has undertaken a thorough review of all of his records and has reviewed his computer records and stored files, including with the assistance of his solicitor at the time, Ms Perry, and his banks. He believes that he no longer has records relevant to the claims the subject of the Interfreight Proceeding or the Silverhills Haulage Proceeding. They were either destroyed in the ordinary course or are with Banq Accountants, which no longer exists, or Mr Iannuzzi;

(3) he has contacted his accountant, Mr Dunstan, who confirms that he does not hold records in relation to the 2011, 2012 or 2013 financial years in relation to his affairs, Interfreight 2 or Diesel Dan 2; and

(4) he has contacted his bank to try to obtain banking records going back to the period from 2011 to 2013.

111 Mr Tabuso says that the Silverhills Haulage Proceeding and the Interfreight Proceeding are causing him and his wife significant stress and anxiety, which is also affecting their five children. He explains that he is not educated but has built a successful business that provides a valuable service, while also allowing him to support his family. In doing so he has relied upon professional advisors in relation to how to structure his business and meet its financial, accounting and taxation obligations.

112 The events the subject of the Silverhills Haulage Proceeding and the Interfreight Proceeding occurred nearly a decade ago. The Trucking Business has moved on but it was difficult for the business to be profitable during the COVID-19 period when interstate transportation was curtailed. As far as Mr Tabuso understands the “old companies” through which the Trucking Business used to operate did not have any substantial creditors other than other companies in that business.

### Mrs Tabuso

113 Mirjana Tabuso is the sole director and shareholder of Calabro Real Estate and the sole director and shareholder of Runcity. She is the fifth defendant in the Silverhills Haulage Proceeding and the first defendant in the Interfreight Proceeding.

114 In cross-examination Mrs Tabuso accepted that until liquidators were appointed to Runcity in 2014, she had access to the books and records for Runcity and, at least until liquidators were appointed to Calabro Real Estate in January 2023, she had access to the books and records for Calabro Real Estate.

115 Mrs Tabuso also accepted in cross-examination that, although she did not deal directly with Banq Accountants in her capacity as a director of Runcity and of Calabro Real Estate, she provided information about those companies to Banq Accountants for the purpose of preparing their income tax returns and financial reports. She said however that requests for information would have gone to Mr Tabuso.

116 On or about September 2020 and 15 February 2021 respectively Mrs Tabuso was served with: a summons for public examination filed on 4 September 2020 in this Court (**Mrs Tabuso’s Summons**) which included a schedule of documents to be produced; and an order for production dated 15 February 2021 (**Mrs Tabuso’s Order for Production**).

117 Mrs Tabuso believes that she undertook a thorough review of all books and records in her possession at the time of Mrs Tabuso’s Summons and produced all records to the Court in her possession in answer to it. She was put to significant personal and legal expense in relation to that process, for which she was not reimbursed by the Liquidators.

118 In response to Mrs Tabuso’s Order for Production, Mrs Tabuso was able to locate some documents that she says were produced on 15 September 2020.

119 Mrs Tabuso attended for examination on 30 September 2020.

120 On or about 15 November 2021 a statement of claim was served on Mrs Tabuso’s solicitor, although Mrs Tabuso does not identify in which proceeding. Nonetheless there is no dispute that Mrs Tabuso is aware of both the Silverhills Haulage Proceeding and the Interfreight Proceeding. She has caused defences to be filed on her behalf and on behalf of Runcity in the Silverhills Haulage Proceeding and on her behalf in the Interfreight Proceeding. Mrs Tabuso makes no reference in her affidavit to the RC Group Voidables Proceeding to which Runcity is a defendant, but it was clear from her cross-examination that she is also aware of that proceeding.

121 Mrs Tabuso notes that the plaintiffs in the Interfreight Proceeding make claims pursuant to s 588FF(1)(a) and/or s 588FF(1)(c) of the Corporations Act and seek payment of the sum of $84,345 from her. Mrs Tabuso gives the following evidence:

(1) she believes that the amounts she received from Interfreight 1 were for “employee rental”, reimbursement of expenses and wages;

(2) she understands that at, or at about the, time of any expense being incurred, all paperwork relating to any expense, including tax invoices, was provided to Mr Tabuso or the then bookkeeper for the Tabuso Group; and

(3) she was paid wages from time to time but no longer has any payslips. She understands that all wages she received were declared to the ATO in her tax returns.

122 Mrs Tabuso was not requested at any time to preserve her records relating to the allegations made in the Silverhills Haulage Proceeding or the Interfreight Proceeding. She has:

(1) reviewed all of her available records. At about the time of service of the Silverhills Haulage Proceeding in September 2021, she had a conversation with Mr Tabuso who said to her words to the following effect:

All of the company records were either given to the liquidator or kept by Banq Accountants under a claimed lien for made up account fees or were destroyed in the ordinary course of business. I have nothing going back to 2010-2013.

(2) contacted her tax agent, Mr Dunstan, and believes that he does not hold any of her records for the 2011, 2012 or 2013 financial years;

(3) contacted her bank to obtain records for the period 2011 to 2013; and

(4) undertaken a thorough examination of all of her records but has been unable to locate any records referring to the claims against her in the proceedings.

123 The Silverhills Haulage Proceeding and the Interfreight Proceeding are causing Mrs Tabuso significant stress and anxiety.

#### Application for deregistration of Runcity

124 In evidence was an “Application for voluntary deregistration of a company” for Runcity dated 23 May 2022 which was lodged by Strategic Accounting Advisers Pty Ltd and which named Mrs Tabuso as applicant and included Mrs Tabuso’s name as signatory, although the document was not signed (**Runcity Deregistration Application**). It also included a declaration that, among other things, “the company is not a party to any legal proceedings”.

125 Mrs Tabuso does not specifically recall signing the Runcity Deregistration Application. She did not lodge any documents electronically with ASIC, as it appears was the case for that form, although she does recall signing some ASIC documents in early 2022 but cannot recall to what those documents related. That said, Mrs Tabuso accepts that she may have signed or approved “deregistration paperwork” for Runcity but that would have occurred because Mr Tabuso first spoke to her about it. Mrs Tabuso did not appreciate that she may have signed or approved any “paperwork” that may have impacted any of the Supreme Court proceedings to which Runcity is a party. She understands that her accountant has withdrawn the Runcity Deregistration Application and that Runcity remains registered.

126 In cross-examination, when taken to the Runcity Deregistration Application, Mrs Tabuso gave the same evidence. She said that she did not know if she had signed a copy of that form on 23 May 2022 and that she “signed pretty much everything that everyone has asked [her] to” but she could not recall if she had signed this form.

127 Mrs Tabuso was also taken to letters dated 5 October 2022 and 10 November 2022 from Norton Rose Fulbright, the Liquidators’ solicitors, to Ms Perry of Pure Legal, who at the time was the solicitor for Mrs Tabuso. In those letters Norton Rose Fulbright sought an explanation for the lodgement of the Runcity Deregistration Application given that it relied on “declarations that are false” and sought to have that application withdrawn. Mrs Tabuso could not recall seeing those letters prior to her cross-examination.

128 Nor could Mrs Tabuso recall seeing the response from Ms Perry sent by email dated 18 November 2022 in which Ms Perry informed Norton Rose Fulbright that she had spoken to her client who “informs me that there has been no steps taken nor is there any intention of deregistering [Runcity]”. Mrs Tabuso said that she did not tell Ms Perry in November 2022 that no steps had been taken to deregister Runcity, she did not discuss that matter with Mr Tabuso at the time and she was not asked after 25 November 2022, when Norton Rose Fulbright sent a further letter to Ms Perry stating that her instructions were incorrect, to explain whether any steps had been taken to deregister Runcity.

### Mr Ligori

129 Maurizio Ligori is a diesel motor mechanic, having completed an apprenticeship as a motor mechanic in about 1980, and the sixth defendant to the Silverhills Haulage Proceeding. From 2004 to 2021 he was employed by Interfreight 1 and from time to time other companies associated with Mr Tabuso. From about late 2014 Mr Ligori’s wages were paid by a labour hire company, RC Group.

130 From about 2007 to 2013 Mr Ligori managed the operations of Diesel Dan 1, which performed maintenance and mechanical work on trucks and made tyre sales. His tasks involved mechanical repairs to, and maintenance of, trucks and equipment, trailers, forklifts, etc, purchase and sale of tyres and fuel, purchase of parts and consumables for repairs and maintenance and supervision of staff. From time to time Mr Ligori paid expenses personally, including with his own credit card, and was reimbursed by Mr Tabuso or entities in the business including Diesel Dan 1.

131 As far as Mr Ligori is concerned, he has never had possession, custody or control of Diesel Dan 1’s books and records. He understood that Diesel Dan 1’s financial records were kept in the office on the premises occupied by administrative staff.

132 In about September 2020 Mr Ligori was served with a summons for public examination which also included a requirement that he produce certain specified documents. At the time, at his own expense, Mr Ligori undertook a review of all books and records in his possession and produced all records in his possession to the Court in answer to the summons. In doing so Mr Ligori located what he described as a “small number of documents” concerning his current assets, assets he had recently sold, some ASIC forms, his tax return for the financial year ended 30 June 2019 and St George Bank statements dating from November 2019 onward.

133 Mr Ligori attended for public examination on 30 September 2020.

134 In November 2021, at the time Mr Ligori was served with the statement of claim in the Silverhills Haulage Proceeding, he also received a copy of the Reinstatement Orders. Mr Ligori has filed a defence in the Silverhills Haulage Proceeding.

135 Mr Ligori explains that Sch 4 to the statement of claim filed in the Silverhills Haulage Proceeding sets out the payments alleged to have been made to him and which, I infer, the plaintiffs in that proceeding seek to impugn. In relation to those payments Mr Ligori gives the following evidence:

(1) he believes that the amounts of $974, which he says comprise most of the payments listed in the schedule, are for wages and the remaining payments are reimbursement of sundry expenses which he had paid;

(2) his practice was that at the time of an expense being incurred he would provide all paperwork relating to any expense, including tax invoices, to Mr Tabuso or the then bookkeeper of the Tabuso Group;

(3) other than wages and reimbursement of expenses he paid to third parties, Mr Ligori has no recollection of receiving any other moneys from any of the companies associated with Diesel Dan 1 or any of the companies named in Order 1 of the Reinstatement Orders;

(4) as best he can recall, in the period 2011 to 2013 payslips were printed and handed to Mr Ligori at work and wages and reimbursement of expenses were electronically transferred to his St George Bank account (number XXXXXX581). Mr Ligori cannot recall which of Mr Tabuso’s entities paid his wages; and

(5) Mr Ligori was aware that from time to time Mr Tabuso caused his wages to be paid by different companies, depending on the time he allocated in carrying out tasks for the various companies.

136 Mr Ligori says that at no time prior to or after the making of the Reinstatement Orders until the commencement of the Silverhills Haulage Proceeding was he directed by the plaintiffs in that proceeding to preserve his records relating to the allegations made against him. Insofar as his records are concerned Mr Ligori:

(1) believes that he reviewed all of his records and at about the time of service of the statement of claim in the Silverhills Haulage Proceeding contacted Mr Tabuso who informed him that he no longer had any of the wage or reimbursement of expense records in relation to Diesel Dan 1;

(2) contacted his bank, St George Bank, to try to obtain banking records for the period 2011 to 2013 but was informed by St George Bank that it no longer holds any credit card or bank account statements for the period covered by the statement of claim in the Silverhills Haulage Proceeding; and

(3) has examined all of his stored records but has not been able to locate any wage or reimbursement expense records, including credit card statements, or any documents which on his understanding refer to the claims against him in the Silverhills Haulage Proceeding.

137 The Silverhills Haulage Proceeding is causing Mr Ligori significant stress and anxiety.

# STATUTORY FRAMEWORK AND SOME LEGAL PRINCIPLES

138 Chapter 5A of the Corporations Act concerns, among other things, deregistration of a company. Sections 601AA, 601AB and 601AC provide for how a company may be deregistered: either voluntarily at the instigation of the company; initiated by ASIC; or following amalgamation or completion of a winding up.

139 Section 601AD of the Corporations Act sets out the effect of deregistration and relevantly provides that a company ceases to exist on deregistration: see s 601AD(1).

140 The Reinstatement Orders were made pursuant to s 601AH of the Corporations Act which concerns reinstatement of the registration of a company. It provides:

*Reinstatement by ASIC*

(1) ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered.

(1A) ASIC may reinstate the registration of a company deregistered under subsection 601AB(1B) if:

(a) ASIC receives an application in relation to the reinstatement of the company’s registration; and

(b) the levy imposed on the company by the *ASIC Supervisory Cost Recovery Levy Act 2017* is paid in full; and

(c) the amount of any late payment penalty payable in relation to the levy is paid in full; and

(d) the amount of any shortfall penalty payable in relation to the levy is paid in full.

*Reinstatement by Court*

(2) The Court may make an order that ASIC reinstate the registration of a company if:

(a) an application for reinstatement is made to the Court by:

(i) a person aggrieved by the deregistration; or

(ii) a former liquidator of the company; and

(b) the Court is satisfied that it is just that the company’s registration be reinstated.

(3) If:

(a) ASIC reinstates the registration of a company under subsection (1) or (1A); or

(b) the Court makes an order under subsection (2);

the Court may:

(c) validate anything done during the period:

(i) beginning when the company was deregistered; and

(ii) ending when the company’s registration was reinstated; and

(d) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

…

*Effect of reinstatement*

(5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

…

141 As set out above, an application to the Court under s 601AH(2) for an order to reinstate a company’s registration can only be made by a “person aggrieved” or a former liquidator of the company in question.

142 The expression “person aggrieved” is said to be of wide import and is to be construed liberally. It includes a person who has been damaged in a legal sense: see *Re European Metal Recyclers Pty Ltd (in liq) (deregistered)* [2018] NSWSC 946 at [17]-[18]. In ***Re Regional Planners*** *Developments Co Pty Ltd* (2015) 110 ACSR 457; [2015] NSWSC 1996 at [11] Brereton J held that a person is aggrieved by the deregistration of a company if they are thereby precluded from suing the company and it may be just for the company’s registration to be reinstated for the purpose of enabling that applicant to pursue its remedies.

143 The second requirement for the Court to make an order directing ASIC to reinstate the registration of a deregistered company is that the Court must be satisfied that the reinstatement of the company’s registration is just. In relation to that requirement in ***Re Austral Bronze*** *Co Pty Ltd (No 2)* (2020) 149 ACSR 221; [2020] NSWSC 1633 at [129] Rees J explained that:

The second matter to consider is whether it is “just” that the company’s registration be reinstated. His Honour Austin J succinctly explained this requirement in *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688; 34 ACSR 232; [2000] NSWSC 316 at [27]:

The wording of the section is very broad, and the cases confirm that it gives the court a wide discretion. The court takes into account the circumstances in which the company came to be dissolved, whether, if the order were made, good use could be made of it, and whether any person is likely to be prejudiced by the reinstatement: *Re Kilkenny Engineering Pty Ltd (in liq)* (1976) 13 SASR 258; 1 ACLR 285; *Drysdale v Australian Securities Commission* (1992) 8 ACSR 563; 10 ACLC 1427; *Re Steelmaster Pty Ltd (in liq)*; *Kenney v McCann (as liquidator of Steelmaster Pty Ltd)* (1992) 6 ACSR 494.

144 In *CGU Workers Compensation (NSW) Ltd v* ***Rockwall Interiors*** *Pty Ltd* (2006) 201 FLR 296; [2006] NSWSC 690 at [6] Barrett J observed the following about the operation of s 601AH(2):

The court has little if any discretion when an application of this kind comes before it. Under s 601AH(2), it must inquire into whether the plaintiff is “a person aggrieved by the deregistration” and whether it is “just” that the registration be reinstated. If positive findings are made on those matters, it should normally follow that an order for reinstatement is made. That course is indicated by the decision of the Court of Appeal (Mason P, Sheller and Ipp JJA) in *WorkCover Authority (NSW) v Picton Truck and Trailer Repairs Pty Ltd* (2004) 51 ACSR 102.

145 Section 601AH(5) of the Corporations Act sets out the effect of an order reinstating the registration of a company. In *Allianz Australia Insurance Ltd v Viksne* (2021) 106 NSWLR 306 Meagher JA (with whom White JA and Simpson AJA agreed) explained (at [34]) that by its use of the expression “is taken to have” s 601AH(5) deems the reinstated company to have continued in existence, contrary to the fact, and thereby creates a statutory fiction which countermands the otherwise unqualified application of s 601AD(1) of the Corporations Act.

146 However, s 601AH(5) provides “only a limited measure of retrospectivity”: see ***White v Baycorp*** *Advantage Business Information Services Ltd* (2006) 200 FLR 125; [2006] NSWSC 441 at [115]; *Re Austral Bronze* at [64]. In *White v Baycorp* at [115] Campbell J said the following about the operation of s 601AH(5)*:*

Approaching the matter purely as one of statutory construction, the effect of s 601AH(5) is that, now, the statute requires everyone to treat Capital Corporate as though it had never been deregistered. However, that does not mean that anything which purported to be done on behalf of Capital Corporate during the period of its deregistration is thereby regarded as valid. If a director had purported to act on behalf of a deregistered company during the period of deregistration, mere reinstatement would not validate his action, because s 601AH(5) provides only a limited measure of retrospectivity, so that the director regains his office only from the time of reinstatement. Similarly, s 601AH(5) provides only a limited measure of retrospectivity concerning title to the property of the company, so that the property revests in it only from the time of reinstatement. …

147 In *Rockwall Interiors* at [16] Barrett J held that “[t]he deemed continuity created by s 601AH(5)” could not “support a fiction that, in the period after deregistration, there was both service of and non-compliance with a statutory demand”. At [17], among other things, his Honour said:

… Section 601AH(5) creates only a limited form of retrospectivity. It recognises expressly that the persons who were directors at the time of deregistration are not to be regarded as having continued as directors throughout the period of the company’s non-existence. It likewise recognises expressly that property of the company at the time of deregistration (which, by force of the Act, thereupon becomes vested in ASIC under s 601AD(2)) is not to be regarded as owned by the company throughout the period of the company’s non-existence. I adopt, in this respect, the thorough analysis appearing in the judgment of Campbell J in *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 441 at [115] and following. Section 601AH(5) cannot, in a retrospective way, give efficacy to active steps taken in relation to a company which, because of the company’s non-existence, were, when taken, simply devoid of legal effect.

148 At the heart of the applications before me for consideration is the operation of s 601AH(3) of the Corporations Act which empowers the Court to make ancillary orders. I consider that provision in detail below.

149 The Supreme Court Proceedings each make claims under Div 2 of Pt 5.7B of the Corporations Act which concerns voidable transactions. In each case the Liquidators seek relief under s 588FF(1) of the Corporations Act which provides:

Where, on the application of a company’s liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;

(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

(c) an order requiring a person to pay to the company an amount that, in the court’s opinion, fairly represents some or all of the benefits that the person has received because of the transaction;

(d) an order requiring a person to transfer to the company property that, in the court’s opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned—an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;

(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

150 Section 588FF(3) sets out the time in which an application under s 588FF(1) is to be made. It provides:

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

(a) during the period beginning on the relation‑back day and ending:

(i) 3 years after the relation‑back day; or

(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;

whichever is the later; or

(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

The “relation-back day” is defined in s 91 of the Corporations Act.

# APPROACH TO THE APPLICATIONS

151 Before proceeding to consider both the Applicants’ and the Commissioner’s respective applications it is necessary to say something about the approach to them.

152 As set out above, Order 4 of the Reinstatement Orders provides that, in the event that proceedings are commenced by the Liquidators in their capacity as liquidators of any of the Companies (as defined in Order 1) in reliance upon Order 3, which has occurred, among other things, each of the defendants to those proceedings is granted liberty to apply to vary or discharge Order 3 insofar as it affects that defendant.

153 The Applicants have each exercised that liberty to apply to seek a variation or discharge of Order 3. They put their respective applications on a number of different bases: first, they contend that because of the proper construction of s 588FF of the Corporations Act, absent an application under s 588FF(3)(b), there was no power to make Order 3 at all or pursuant to s 601AH(3)(d) of the Corporations Act; secondly, and in the alternative, they contend that s 601AH(3)(d) does not empower the Court to extend time for limitation purposes, whether in respect of a cause of action against or vested in the company; and thirdly, and further in the alternative, they contend that, even if the Court had power to make Order 3 of the Reinstatement Orders, it was not within the proper exercise of discretion under s 601AH(3) of the Corporations Act to make that order.

154 I also note as a preliminary matter that there was some debate between the parties as to who bears the onus on the Applicants’ applications, although the real focus of the Applicants’ argument was whether they were entitled to have Order 3 of the Reinstatement Orders set aside as of right. It would follow that if they were, the Applicants’ contention that, despite the terms of Order 4 of the Reinstatement Orders granting them liberty to apply, it is the Commissioner and the Liquidators who bear the onus of establishing that the Reinstatement Orders were appropriately, or should be, made. As a practical matter and given my conclusion in relation to the Applicants’ principal argument relating to whether the Court had power to make Order 3, the answer to that question may be of little consequence. However, I consider it below.

155 If, based on any of the above arguments, any of the Applicants are successful in discharging or varying Order 3, the Commissioner’s Application by which he seeks the relief set out at [6] above will fall for consideration.

156 Before turning to consider the substance of the applications before me I note that, in contrast to the position before Stewart J, I have had the benefit of a significant volume of material going to the issues that arise including detailed written and oral submissions about the applicable legislative scheme, the Court’s powers and the approach to be taken to the making of orders under s 601AH of the Corporations Act, including discretionary considerations that may apply. Justice Stewart did not have the benefit of such material. His Honour came to make the orders by consent in the circumstances described at [32]-[36] above with the assistance only of a three page submission which did not canvas the issues raised before me.

157 I make that observation simply to explain the very different contexts in which: first, Stewart J made the Reinstatement Orders; and secondly, I have come to reconsider Order 3 of those orders. The conclusions I have reached are based on the detailed submissions, both written and oral, made by the parties, a factor which was absent when the Reinstatement Orders were sought before his Honour.

# THE APPLICANTS’ APPLICATIONS

158 I address below each of the arguments relied on by the Applicants on their respective applications. In doing so I note that while each of the Borg & Givana Applicants, Tabuso Applicants and Kito Applicants made submissions on each of the issues raised by those applications, they also, for the most part, adopted each other’s submissions. Similarly, the Commissioner and the Liquidators adopted each other’s submissions on those issues. Accordingly, I have for the most part to avoid repetition collectively referred to the Applicants’ submissions, on the one hand, and the Commissioner’s and the Liquidator’s submissions, on the other.

## Does the Court have power to make Order 3 of the Reinstatement Orders other than by s 588FF(3) of the Corporations Act?

159 The first argument put by the Applicants is that Order 3 should be discharged because, given the proper construction of s 588FF of the Corporations Act, the Court had no power to make Order 3 (or an order to the effect of Order 3) other than in accordance with the terms of s 588FF(3). The Applicants contend that s 601AH(3)(d) of the Corporations Act, properly construed, cannot be utilised to augment the time in which to bring a claim under s 588FF and it follows that the Court had no such power pursuant to s 601AH(3)(d) of the Corporations Act to make Order 3.

### The parties’ submissions

160 The Applicants submit that the Court does not have power to make Order 3 in reliance upon the ancillary power in s 601AH(3)(d) of the Corporations Act where the purpose and effect of the Order would be to override the specific limitation period in s 588FF(3)(a)(i) of that Act. They contend that it is clear from use of the words “may only” in s 588FF(3) that this is a jurisdictional gateway which tells against such a power being made available by the statutory sidewind of s 601AH of the Corporations Act.

161 The Applicants rely on a series of decisions which considered s 588FF(3) of the Corporations Act, which I address below, and submit that, while the High Court in ***Grant Samuel*** *Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477was not concerned with the question presently before the Court and whether s 601AH(3) could be used to extend time under s 588FF(3), the High Court’s (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ) dictum at [22]-[23] cannot be distinguished on that account. They contend that the sole means of extending time to commence an action under s 588FF(1) of the Corporations Act is via the procedure set out in s 588FF(3)(b), which is consistent with the use of the words “may only”. The Applicants observe that in *Grant Samuel* the High Court referred (at [22]) to ***David Grant & Co*** *Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277 which reinforces their position and the absolute dictum of the High Court as to how s 588FF(3) of the Corporations Act is to be read.

162 The Applicants submit that their conclusion accords with the well established principle of statutory construction espoused in ***Anthony Hordern*** *& Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7. Given its prominence in the parties’ submissions, it is convenient at this stage to set out that principle. Relevantly, at 7 Gavan Duffy CJ and Dixon J observed that “[w]hen 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”.

163 The Applicants contend that the person invested with the right to bring an action under s 588FF(1) or to seek an extension of time to do so under s 588FF(3) is the liquidator, not the company, that the rights under s 588FF are statutory rights of the liquidator and not proprietary rights of the company and that this factor further attenuates the purported use of s 601AH(3) to affect the time limit imposed under s 588FF(3). The Applicants contend that what is occurring is not the augmentation or extension of time in which to allow the formerly deregistered company to bring a claim; it is the extension of time for the liquidators to pursue a statutory right inuring to their office.

164 The Applicants submit that limitation periods exist to bring finality and commercial certainty so people may conduct their affairs with confidence and that this principle applies specifically to s 588FF(3) of the Corporations Act. They submit that the relevant context includes the provisions in Pt 5.7B of the Corporations Act governing the commencement of proceedings for orders under s 588FF which reveals a deliberate choice by the legislature in relation to time limits and reflects a considered balance between the interests of companies and creditors, on the one hand, and putative defendants, on the other. Relevantly s 588FF contains its own mechanism for altering the limitation period in an appropriate case and is, in that sense, self contained. The Applicants submit that s 588FF(3) cannot be characterised merely as a procedural stipulation as to time but instead provides a “precondition to the [Court’s] jurisdiction under s 588FF(1)”, citing *Grant Samuel* at [17].

165 The Commissioner and the Liquidators submit that s 588FF(3)(b) of the Corporations Act does not cover the field for time limits for bringing proceedings in respect of voidable transactions to the exclusion of s 601AH(3)(d) in the case of reinstated companies. They contend that where a liquidator fails to commence proceedings prior to the deregistration of a company, and where claims were not statute barred at the time of deregistration, the power in s 601AH(3)(d) to disregard a period of time for the purpose of calculating the period ending three years after the relation-back day is available. The Commissioner and the Liquidators say that the exercise of that power is ultimately a matter for the Court’s discretion to be exercised in light of relevant considerations.

166 The Commissioner and the Liquidators submit that ***BP Australia*** *Ltd v Brown* (2003) 58 NSWLR 322 is authority for the specific proposition that former s 588FF(3) of the Corporations Act was intended to cover the field of extensions of time with respect to applications concerning voidable transactions under s 588FF(1) to the exclusion of power conferred on the Court to extend time under s 1322(4)(d). Itdid not concern s 601AH and it did not consider s 588FF(3) in its current form, but its predecessor.

167 The Commissioner and the Liquidators submit that in contrast to s 1322(4)(d) of the Corporations Act, which is a general provision, s 601AH(3)(d) is a specific provision. Section 601AH(3)(d) gives the Court power to make appropriate orders upon the reinstatement of a formerly deregistered company and is not a general source of power as is the case for s 1322(4)(d). They submit that s 1322(4) confers an unfettered discretion upon the Court, subject to the requirements of s 1322(6). The Commissioner and the Liquidators contend that each application for exercise of the Court’s relieving power requires consideration of all of the circumstances of the case to ensure that relief is granted where appropriate and not to undermine the requirements of the Corporations Act. They note that the heading of Ch 9 of the Corporations Act supports the construction of s 1322 as a general rather than a specific provision and that headings of a chapter, part, division or subdivision of an act may be taken into account in construing the sections within it and the act generally although they cannot support adoption of an interpretation which the operative words of the statute cannot reasonably bear.

168 The Commissioner and the Liquidators submit that the principle in *Anthony Hordern* depends upon the existence of two provisions which confer the same power arising under a statute, where only one is subject to conditions on its exercise. Section 588FF(3)(b) and s 601AH(3)(d) do not confer the same power, in the relevant sense; the former provision has a wider field of operation but confers a more specific power. They submit that:

(1) section 588FF(3)(b) operates in relation to all companies regulated by the Corporations Act and permits the Court to order that an application in respect of a voidable transaction may be brought during a longer period than otherwise permitted under the Corporations Act, provided that the application is brought within the otherwise applicable limitation period. Section 588FF(3)(b) is expressly concerned with circumstances where a company’s liquidator wishes to seek an extension of time and thus postpone the limitation date for any voidable transaction claims available to him or her;

(2) by contrast s 601AH is the only section in the Corporations Act which concerns the circumstances in which a company may be reinstated and, where reinstated, the types of orders which may be made. Section 601AH(3)(d) operates only with respect to previously deregistered companies that are reinstated to the register under subss (1), (1A) or (2) and not to companies at large and empowers the Court to make “any other order it considers appropriate” upon such reinstatement. It bears no express connection to extensions of time; and

(3) accordingly, these provisions do not confer the same power, substantively or at all, and the *Anthony Hordern* principle does not apply.

169 The Commissioner and the Liquidators submit that in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [61] Gummow and Hayne JJ recognise that, for the purpose of applying the *Anthony Hordern* principle, it is incorrect to fix upon the practical consequences of the respective provisions; rather, one must consider whether the subject matter of the power is, in law, substantially the same. They contend that applying that approach here leads to the conclusion that, although in some cases the exercise of the powers under s 588FF(3)(b) and s 601AH(3)(d) might produce a similar practical consequence, the subject matter of the two powers is not, in law, substantially the same.

170 The Commissioner and the Liquidators submit that it is doubtful that Order 3 of the Reinstatement Orders could have been made under s 588FF(3)(b) at all as that section only confers a power to permit “such longer period as the Court orders” on an application made during the period specified in subs (3)(a) and does not confer a power to disregard a specified period when calculating the period ending three years after the relation-back day. The Commissioner and the Liquidators submit that this illustrates that, although capable of producing a similar practical consequence, s 588FF(3)(b) and s 601AH(3)(d) of the Corporations Act do not confer a power that, in law, is substantially the same.

171 The Commissioner and the Liquidators contend that where there is an apparent inconsistency between provisions within an act, the conflict must be alleviated so far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of all statutory provisions, referring to ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]. They observe that reconciling conflicting provisions will often require the Court to determine the leading and subordinate provision, and which must yield to the other. In the circumstances of this case, they contend that s 601AH(3)(d) is the leading provision and s 588FF subordinate. The Commissioner and the Liquidators submit that the purpose of s 601AH(3)(d) is to empower courts with the jurisdiction and flexibility to make appropriate orders, as required by the circumstances peculiar to the reinstatement, so as to bring the company to the position it was in at the point of deregistration.

172 The Commissioner and the Liquidators submit that the power in s 601AH(3)(d) is used to address the peculiarity and injustice arising from the legal fiction caused by s 601AH(5) and that, as the subordinate provision, s 588FF must be read as being “subject to any orders made upon the reinstatement of a deregistered company”. They say that this approach to statutory construction gives effect to the statutory purpose of 601AH(3)(d), being to place the formerly deregistered company, or others, in the same position as if the company had not been deregistered and that it also allows s 588FF to continue to impose a three year limitation period calculable with time running while the company remained registered.

173 The Commissioner and the Liquidators contend that if, alternatively, s 588FF was given priority as the leading provision, s 601AH(3)(d) would be unable to fulfill its purpose in circumstances where a company had extant voidable transaction claims at the date of deregistration, but which would otherwise become time barred after the date of deregistration.

### Consideration

174 The question to be determined is whether the time within which an application is to be brought under s 588FF(1) of the Corporations Act can be extended other than in accordance with s 588FF(3)(b) and thus whether s 601AH(3)(d) of the Corporations Act empowers the Court to make an order in the form of Order 3 of the Reinstatement Orders. That is, an order which disregards the period in which a company was deregistered and has the effect of extending time for bringing a claim pursuant to s 588FF(1) of the Corporations Act beyond the periods specified in s 588FF(3) (see [150] above).

175 It is convenient to commence consideration of this question by reference to the cases that have addressed the operation of s 588FF(3) of the Corporations Act and, in particular, whether an order can be made extending the time specified in s 588FF(3)(a) to bring a claim under s 588FF(1) other than in accordance with the method prescribed in s 588FF(3)(b).

176 That analysis starts with the decision in *Grant Samuel*. In that case on 4 June 2008 an application was made to wind up **Octaviar** Ltd and subsequently a winding up order was made. It followed that the relation-back day for the purposes of s 588FF of the Corporations Act was 4 June 2008. On 30 May 2011, upon an application by the liquidators of Octaviar, an order was made pursuant to s 588FF(3)(b) extending the time for the liquidators to make an application under s 588FF(1) to 3 October 2011 (**May 2011 Order**).

177 By an amended originating process dated 19 September 2011 the liquidators applied for a further order under s 588FF(3)(b) that the time for making an application under s 588FF(1) be further extended to 3 April 2012 or, in the alternative, an order that the May 2011 Order be varied under r 36.16 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) to insert 3 April 2012 in lieu of 3 October 2011. When the matter came on for hearing before a judge of the Supreme Court, only the latter application was pressed and an order was made pursuant to r 36.16 of the UCPR varying the May 2011 Order in the manner sought (**Variation Order**). The appellants did not appear on that application, despite having been given notice of it. They subsequently applied by interlocutory process for an order vacating the Variation Order but were unsuccessful in that application.

178 The question before the High Court was whether a court, on an application made outside the period in s 588FF(3)(a) but within an extended period ordered under s 588FF(3)(b) on an application made in the period permitted by s 588FF(3)(a), may exercise power under the general rules of procedure, relevantly the UCPR, to further extend time for the making of an application under s 588FF(1). The High Court’s attention was therefore directed to the relationship between the provisions of the Corporations Act and the general procedural rules of the UCPR. In addressing that question at [7] the High Court observed that:

Section 79(1) of the *Judiciary Act 1903* (Cth) provides that the laws of each State or Territory, including the laws relating to procedure, shall, “except as otherwise provided by the Constitution or the laws of the Commonwealth”, be binding on all courts exercising federal jurisdiction in that State or Territory. It has been observed that the *Corporations Act* does not directly impose a universal, federal procedural regime, but rather leaves s 79 of the *Judiciary Act* to operate according to its terms in the State or Territory concerned. The particular question on these appeals arises from those terms. It is whether s 588FF(3) “otherwise provides”, so that the UCPR are not picked up by s 79.

(Footnote omitted.)

179 After referring to the reasoning of both the majority of the New South Wales **Court of Appeal** and Beazley P in dissent in *JPMorgan Chase Bank, National Association v Fletcher* (2014) 85 NSWLR 644 and summarising the facts of and analysis in *Gordon v Tolcher* (2006) 231 CLR 334, at [17] the High Court said:

The Court in *Gordon v Tolcher* said that s 588FF deals with the period within which an application under s 588FF(1) is to be made, as an essential aspect of the regime s 588FF creates. The provision in s 588FF(3), as to the time for the making of the application, is not to be characterised merely as a procedural stipulation as to time. It would follow that the bringing of an application within the time required by s 588FF(3)(a) or (b) is a precondition to the court’s jurisdiction under s 588FF(1).

(Footnotes omitted.)

180 Relevantly, in allowing the appeals, at [19]-[23] the High Court said:

19 In a passage from *BP Australia Ltd v Brown* which was cited in *Gordon v Tolcher*, Spigelman CJ said that the legal policy which underlies s 588FF(3) is one which favours certainty. Whilst that provision does not have the effect of requiring all applications under s 588FF(1) to be brought within a short period of time, it does have the effect “of requiring those who wish to keep open the option to do so, to determine that they do wish to do so within the three year period and to seek a determinate extension of the period”. His Honour said that “Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time”.

20 At the time *BP Australia Ltd v Brown* was decided, s 588FF(3)(a) contained only the requirement now appearing in sub-para (i), that proceedings be brought within three years of the relation-back day. Subsequently, in 2007, an alternative time limitation, that appearing now in sub-para (ii), was added whereby an application under s 588FF(1) may be brought twelve months after the first appointment of a liquidator in a winding up. The provision in s 588FF(3)(b), whereby the court may fix a further period, has remained throughout.

21 The addition of the alternative time limitation in s 588FF(3)(a)(ii) does not detract from the force of what was said in *BP Australia Ltd v Brown* concerning the statutory aim of certainty which is evident in s 588FF(3). If anything, it tends to reinforce the decision of the legislature, in balancing in a liquidation the competing interests of creditors and those who have dealt with the company and might be the subject of s 588FF(1) proceedings, to limit the times within which such proceedings may be brought. Section 588FF(3) does so in language which may be described as “clear and emphatic”.

22 Section 588FF(3) provides that an application under s 588FF(1) “may only be made” within the periods set out in paras (a) and (b) of s 588FF(3). The phrase “may only be made” should be read with both paragraphs. **So understood, the term “may only” has the effect of defining the jurisdiction of the court by imposing a requirement as to time as an essential condition of the right conferred by s 588FF(1) to bring proceedings for orders with respect to voidable transactions. An element of that right is that it must be exercised within the time specified.** This is what is conveyed by *Gordon v Tolcher*.

23 The only power given to a court to vary the para (a) period is that given by s 588FF(3)(b). That power may not be supplemented, nor varied, by rules of procedure of the court to which an application for extension of time is made. The rules of courts of the States and Territories cannot apply so as to vary the time dictated by s 588FF(3) for the bringing of a proceeding under s 588FF(1), because s 588FF(3) otherwise provides. It provides otherwise in the sense that it is inconsistent with so much of those rules as would permit variation of the time fixed by the extension order.

(Footnotes omitted. Emphasis added.)

181 I pause to note that the Commissioner and the Liquidators do not dispute that s 588FF(3) of the Corporations Act provides for a jurisdictional requirement. They accept that use of the phrase “may only be made” in s 588FF(3) is a timing requirement which is a jurisdictional precondition and which must be satisfied before a liquidator has an entitlement to make an application under s 588FF(1). However, they dispute that s 588FF(3) covers the field for calculation of time orders, to the exclusion of s 601AH of the Corporations Act in the case of reinstated companies.

182 Bearing that in mind I return to the cases. In *Grant Samuel*, in observing at [22] that an element of the right conferred to bring proceedings under s 588FF(1) was that it must be exercised within the time specified, the High Court referred (at footnote 36) to its earlier decision in *David Grant & Co* at 277 where Gummow J (with whom Brennan CJ, Dawson, Gaudron and McHugh JJ agreed) said:

The force of the term “may only” is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s 459G. An integer or element of the right created by s 459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in *The Crown v McNeil*, it is a condition of the gift in sub-s (1) of s 459G that sub-s (2) be observed and, unless this is so, the gift can never take effect. The same is true of sub-s (3).

183 *David Grant & Co* concerned the statutory period imposed by s 459G of the then *Corporations Law* to file an application to set aside a statutory demand. That section provided that an application for an order setting aside a statutory demand which had been served on the company “may only be made within 21 days after the demand is so served”. The appellants, who had filed their applications to set aside the statutory demands outside the 21 day period prescribed by s 459G, argued that s 1322(4) of the *Corporations Law* may be available to extend time. That section relevantly provided:

Subject to the following provisions of this section but without limiting the generality of any other provision of this Law, 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:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Law or in relation to a corporation is not invalid by reason of any contravention of a provision of this Law or a provision of the constitution of a corporation;

…

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Law 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.

184 At 275 Gummow J observed that:

On the present appeals, the difficulty in construction arises, perhaps not so much from the particular text of either s 459G or s 1322, as from the interrelation between the two provisions in circumstances where the enactment of s 1322 preceded that of s 459G, and the earlier section is general and the later section specific in its operation.

185 At 276 his Honour referred to the principle in *Anthony Hordern* (see [162] above) which he noted had been applied in subsequent decisions in the High Court and observed that “[i]n addition, the temporal requirements in sub-ss (2) and (3) of s 459G operate to define the jurisdiction of the court in respect of an application to set aside a statutory demand”. At 277 Gummow J addressed the function of the term “may only” in s 459G stating that:

The force of the term “may only” is to define the jurisdiction of the court by imposing a requirement as to time as an essential condition of the new right conferred by s 459G. An integer or element of the right created by s 459G is its exercise by application made within the time specified. To adapt what was said by Isaacs J in *The Crown v McNeil*, it is a condition of the gift in sub-s (1) of s 459G that sub-s (2) be observed and, unless this is so, the gift can never take effect. The same is true of sub-s (3).

This consideration gives added force to the proposition which has been accepted in some of the authorities that it is impossible to identify the function or utility of the word “only” in s 459G(2) if it does not mean what it says, which is that the application is to be made within twenty-one days of service of the demand, and not at some time thereafter and that to treat s 1322 as authorising the court to extend the period of twenty-one days specified in s 459G would deprive the word “only” of effect.

(Footnote omitted.)

186 His Honour concluded (at 278) that the requirements in s 459G, that the application for which that section provides may only be made within 21 days after service of the demand, could not be treated as supplemented or qualified by the operation of s 1322(4) of the *Corporations Law*.

187 In *Grant Samuel*, the High Court also referred to *BP Australia*, an earlier case in which the Court of Appeal considered the interpretation of s 588FF(3) of the Corporations Act. At the time s 588FF(3) was in slightly different terms and provided:

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 made by the liquidator within those 3 years.

188 The facts of *BP Australia* were somewhat complicated. In summary, in late 1997 DML Resources Pty Ltd (in liquidation) and DML Resources (WA) Pty Ltd (in liquidation) (collectively, **DML** **companies**) were placed into liquidation. The appellant, **BP** Australia Ltd, was the recipient of over $5.7 million in payments from the DML companies which, the liquidators alleged, constituted voidable transactions under Pt 5.7B of the Corporations Act. However, the liquidators did not make an application under s 588FF(1) of the Corporations Act within three years after the relation-back day.

189 Over the course of seven judgments by a single judge of the Supreme Court, the liquidators received the requisite extension, then they lost it and finally, in the seventh judgment, they regained it. Relevantly, the primary judge held that s 1322(4)(d) of the Corporations Act was available to support an order extending the three year period, otherwise set by s 588FF(3), for an application by liquidators seeking an extension of time to make a further application challenging voidable transactions: see *BP Australia* at [9]-[10]. BP appealed from that judgment.

190 At [77] Spigelman CJ (with whom Mason P and Handley JA agreed) relevantly observed:

In a sense, the section that falls to be construed on the appeal is not s 588FF(3) itself, but s 1322(4)(d). The issue that arises is whether or not any time period specified in s 588FF(3) is a “period for doing any act, manner or thing or instituting or taking any proceeding under this Act” within the meaning of s 1322(4)(d).

191 At [78]-[79] his Honour referred to the purpose of s 1322 of the Corporations Act saying:

78 Section 1322 confers a series of powers designed to mitigate the strict application of the various kinds of provisions found elsewhere in the legislative scheme of the *Corporations Act*. It constitutes a recognition by the legislature that, in the wide variety of unpredictable circumstances that arise in the conduct of the affairs of corporations, the precise rules for which the statute provides may operate unfairly or unjustly in some circumstances.

79 Nevertheless the requirements of certainty or of deterrence or of other objectives performed by particular regulatory sub-regimes within the legislative scheme, may be such that the flexibility for which s 1322 makes provision is not appropriate. Such a conclusion is particularly likely where, as with respect to s 588FF, the sub-regime makes its own particular provision for flexibility. The general words found in s 1322 may need to be read down with respect to any section which is intended to operate to the exclusion of the general power. However, as a remedial provision, s 1322 is to be construed liberally and will be read down only where the specific power is intended to cover the field with regard to the sub-regime under consideration.

192 At [83]-[85] in referring to the text of s 588FF(3) Spigelman CJ said:

83 Insofar as the word “only” indicates a purpose to ensure that a particular procedure is observed, it has that effect in this context by reason of its combination with that part of par (b) that requires an application to be made within the original period of three years.

84 It is the combined effect of the word “only” and the express requirement that an application for an extension of the period must be made within the period, that gives the time limit force and indicates the significance for the legislative scheme of the three year period.

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.

193 After referring to the Harmer Report and the fact that in enacting s 588FF(3) the legislature went further than the Harmer Inquiry and subsequent report recommended, at [112]-[118] Spigelman CJ observed:

112 There is, in my opinion, a broader public interest to be served by allowing persons who have had dealings with companies which become insolvent to conduct their commercial affairs with a degree of certainty about their exposure to having past transactions unravelled.

113 I note the traditional hostility of the common law to the exhumation of bodies which was once described as an “inhuman and barbarous felony”. … This policy is informed by considerations of decency and human respect. Nevertheless, in my opinion, there is also a public policy against the disinterring of corporate corpses. Commercial life must at some stage rule off the past and focus energy on the future.

…

115 A creditor or other person who has received the benefit of a voidable transaction is at risk of having to surrender it. The time limit in s 588FF(3) has the effect that at the end of the period of three years, such a person will know whether s/he remains at risk. In a legislative scheme which seeks to balance conflicting commercial interests of this character, that appears to me to be a perfectly reasonable requirement. Those who have an interest, or who represent those who have an interest, to disturb transactions must indicate, within three years, whether they wish to keep open the option of doing so. In this, as in other areas, legal policy favours certainty.

116 As the House of Lords said in another context in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593 at 1608 [46]; [2002] 3 All ER 97 at 112:

“… [L]egal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime.”

117 While s 70 and s 1322 of the Act may constitute contrary indications for many purposes, the legal policy in favour of certainty is nevertheless manifest in the text of s 588FF(3).

118 Section 588FF(3) does not have the effect of requiring all applications to be brought within a short period of time. It does, however, have the effect of requiring those who wish to keep open the option to do so, to determine that they do wish to do so within the three year period and to seek a determinate extension of the period. One thing that must be decided within the three year period is how long the process of deciding whether to pursue voidable transactions will take. Eventually, investigations to overcome deficiencies of information or the pursuit of funding must cease. Parliament has identified a reasonable time for such matters to occur, subject to a single determinate extension of time.

(Citation omitted.)

194 Without grappling with them, the Commissioner and the Liquidators observe that none of these cases concern the operation of s 601AH of the Corporations Act and do not consider whether that section empowers a court to make an order, as was made here, providing that the period between date of registration and the date of reinstatement of each of the relevant companies is to be disregarded for the purposes of s 588FF(3)(a) of the Corporations Act. So much is true. But, it is, as developed below, difficult to distinguish between s 1322, on the one hand, and s 601AH(3)(d) on the other. Both are general powers designed to address or, to adopt Spigelman CJ’s description, mitigate, in the case of s 1322, the application of other provisions in the Corporations Act or, in the case of s 601AH(3), the practical effect of deregistration.

195 The Commissioner and the Liquidators submit that to understand the nature and content of the jurisdictional requirement in s 588FF(3) one needs to focus on the language of the subsection as well as the purpose of the provision and its interrelationship with other provisions in Ch 5 and Ch 5A of the Corporations Act.

196 First, the Commissioner and the Liquidators say that s 588FF(3) identifies a beginning date, the relation-back day, and an end date. However, it says nothing about how time is calculated within that period and is silent as to whether days can be disregarded. They submit that is significant because the language chosen by the legislature does not exclude the potential for the period in s 588FF(3)(a) to be affected by an order as to how time is to be calculated within the period otherwise specified therein. Put another way, the Commissioner and the Liquidators submit that if there is a provision elsewhere in the Corporations Act that, on its proper construction in the circumstances it addresses, confers power on a court to disregard time, there is nothing in s 588FF(3) that prevents such an order from operating.

197 Secondly, the Commissioner and the Liquidators submit that s 588FF(3)(b) provides an alternative pathway. Having regard to its language, they submit that s 588FF(3)(b) only deals with the concept of enlarging or extending time, but says nothing about how time is calculated or about whether or why time might be disregarded. Subsection (3)(b) is expressly concerned with circumstances where a liquidator wishes to seek an extension of time and thus *postpone* the limitation date for any voidable transaction claims. Subsection (3)(b) also says nothing about the circumstances in which a court might be entitled to make an order, supported by another provision in the Corporations Act, about disregarding time or reckoning time. Rather, s 588FF(3) is concerned only with the time within which a voidable transaction claim must be brought. The Commissioner and the Liquidators submit that Order 3 of the Reinstatement Orders does not engage the terms of s 588FF(3)(b) and further that the question of whether the Court had power to make Order 3 is not answered by focussing on the practical effect of the order.

198 To address these submissions and those recorded at [160]-[173] above, it is next necessary to consider the language of the relevant sections, as the Commissioner and the Liquidators urge, having regard to the applicable principles of statutory construction.

199 As to the latter the starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose: see *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]. The parties referred to *Project Blue Sky* at [69]-[71] where McHugh, Gummow, Kirby and Hayne JJ said:

69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was “a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent”.

(Footnotes omitted.)

200 Also relevant is the principle set out in *Anthony Hordern* at 7 (see [162] above).

201 In ***Plaintiff M70****/2011 v Minister for Immigration and Citizenship* (2011)244 CLR 144 at [84], in considering an argument made by the plaintiffs in that case about the power in the *Migration Act 1958* (Cth) that could be engaged to remove them from Australia, Gummow, Hayne, Crennan and Bell JJ referred to the principle of statutory construction in *Anthony Hordern* and continued:

As was explained in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*, the relevant principle of construction has been identified by using a number of different terms. These have included whether the two powers are the “same power” or are with respect to the “same matter”, or whether the general power encroaches upon the same subject matter exhaustively governed by the special power. But the central question is whether “the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power”.

202 Taken at face value the Commissioner’s and the Liquidators’ submissions have some attraction, particularly given the relevant facts, which the Commissioner sought to emphasise. However, upon a considered examination and, having regard to the text and context of the two statutory provisions in play and the decisions summarised at [176]-[193] above, they must be rejected. That is for the following reasons.

203 The two sections in issue are s 588FF(3) and s 601AH(3)(d) of the Corporations Act.

204 Section 588FF(3) of the Corporations Act is a specific provision which dictates the time in which a liquidator may bring an application under s 588FF(1). Namely, during the period beginning on the relation-back day and ending on the later of: (a) three years after the relation-back day; or 12 months after the first appointment of a liquidator in relation to the winding up of the company; or (b) within such longer period as the Court orders on an application made by the liquidator during the period in (a). True it is that s 588FF does not address how time is to be calculated between the relation-back day and the alternate specified end dates within which any application under s 588FF(1) is to be made. However, it does not follow that by another route, or the application of a different provision, time can be enlarged or extended other than in accordance with the method prescribed by s 588FF(3)(b) of the Corporations Act.

205 As set out at [182] above in *Grant Samuel*, in the context of an attempt to use court rules to amend an order made under s 588FF(3)(b) by extending its operation after the period in s 588FF(3)(a) had expired, the High Court held that the term “may only” in s 588FF(3) had the effect of defining the jurisdiction of the court by imposing a requirement as to time as an essential condition of the right under s 588FF(1) to bring proceedings. As the High Court said “[a]n element of that right is that it must be exercised within the time specified”. In other words, s 588FF establishes a statutory scheme as to how and when a proceeding for relief under s 588FF(1) of the Corporations Act can be commenced.

206 Section 601AH(3)(d) of the Corporations Act is a provision of general application. It empowers the Court, where it makes an order reinstating the registration of a company, to “make any order it considers appropriate”. What is appropriate will depend on the circumstances of each case. But that general provision cannot, in my view, override the explicit power in s 588FF(3) of the Corporations Act.

207 Contrary to the Commissioner’s and the Liquidators’ submissions, the two powers are with respect to the same matter. To adopt the characterisation in *Plaintiff M70* at [84], the Corporations Act “confers only one power to take the relevant action”, namely to extend the time in which to bring a proceeding under s 588FF(1), “necessitating the confinement of the generality of another apparently applicable power”, s 601AH(3)(d), “by reference to the restrictions in” s 588FF(3).

208 The Commissioner and the Liquidators attempt to characterise Order 3 of the Reinstatement Orders, made pursuant to the power in s 601AH(3)(d) of the Corporations Act, as one which goes only to the method of calculating time because it merely suspends, or directs those affected by the Order to exclude, the period between deregistration and reinstatement of the registration of the relevant companies from the period in s 588FF(3)(a)(i). Order 3 is ancillary to reinstatement of the deregistered companies, such that upon reinstatement, the new liquidators are given the power and time to exercise a power that would only be available during the period in which the company exists and the liquidator is in office. As set out above, the Commissioner and the Liquidators highlight that s 588FF(3)(b) does not address the subject matter in s 601AH(3)(d), that is, it does not confer power to make a calculation of time order nor does it confer power to disregard time.

209 But to characterise Order 3 in that way is to ignore its true operation. As the Applicants submitted, the Commissioner’s and the Liquidators’ analysis incorrectly commences by reference to the deregistered companies the subject of the Reinstatement Orders. However, the correct analysis is to ask, with reference to the context, what is the purpose of Order 3? The Applicants submit, and I accept, that its purpose is to ascertain the relevant period in which a proceeding under s 588FF(1) can be brought. Accordingly, Order 3 is directly referrable to s 588FF(3)(a) of the Corporations Act. It does not merely go to the method of calculation of time between the two dates identified in s 588FF(3)(a)(i). Rather, it picks up the wording of s 588FF(3) and extends the period within which a proceeding under s 588FF(1) of the Corporations Act can be brought by a method which is other than that prescribed by s 588FF(3)(b). That is, by excluding from the period prescribed in s 588FF(3)(a) the time between deregistration and reinstatement of each of the companies the subject of the Reinstatement Orders.

210 Turning to context, relevantly s 588FF is in Pt 5.7B of the Corporations Act titled “Recovering property for the benefit of creditors of insolvent company”. More particularly it is in Div 2 of Pt 5.7B titled “Voidable transactions” which includes provisions governing the commencement of proceedings for orders under s 588FF. The scheme for recovery of voidable transactions and s 588FF itself reflects a deliberate choice by the legislature in relation to the time in which such a proceeding is to be brought by a liquidator. The scheme and s 588FF itself reflect a considered balance between the interests of companies and creditors, on the one hand, and putative defendants, on the other. Relevantly s 588FF contains its own mechanism for extending the limitation period in an appropriate case and is, in that sense, self-contained. As submitted by the Applicants, the Court cannot change the jurisdictional requirements set by the legislature by resorting to other powers.

211 As Spigelman CJ observed in *BP Australia* at [115] (see [193] above) the time limit in s 588FF(3) serves a purpose. That is, at the end of the period of three years (or such further period as ordered in accordance with the requirements of that subsection) a person who has received the benefit of a voidable transaction will know that he or she is no longer at risk of having to surrender the moneys received. As his Honour somewhat colourfully observed at [113] there is a public policy against the “disinterring of corporate corpses” and commercial life must at some stage “rule off the past” and focus on the future.

212 Section 601AH(3)(d) of the Corporations Act empowers a court, upon reinstatement of a company, to make any order it considers appropriate. In *Re Bele & Co Pty Ltd* [2017] NSWSC 1824 at [6] Black J “read the power to make any other order that the Court considers appropriate in s 601AH(3)(d) of the Corporations Act as incidental to the Court’s power to reinstate a deregistered company, and not as independent of it”. In ***Chalker v Clark***[2008]VSCA 92Osborn AJA (with whom Maxwell P and Dodds-Streeton JA agreed) observed at [39] that the power under s 601AH(3)(b) of the Corporations Act (which was in the same terms as s 601AH(3)(d)) “is one which allows the court to make orders ancillary or complimentary (sic) to the reinstatement of a company” and that it was “for the applicant to persuade the court that it was just to do so in all of the circumstances of the case”.

213 In *Rockwall Interiors* at [18] Barrett J said that the jurisdiction in s 601AH(3) of the Corporations Act should be used principally to remove anomalies or impediments. In ***Bell Group*** *Ltd (in liq) v Australian Securities and Investments Commission* (2018) 358 ALR 624; [2018] FCA 884, which is further discussed below, McKerracher J considered the legislative history behind s 601AH(3)(d) concluding that on its face the provision was wide and wide enough to permit the orders sought in that case. At [115]-[116] his Honour said that:

115 Section 601AH(3)(d) of the Corporations Act, was inserted into the law following the Company Law Review Act 1998 (Cth), when Pt 5A of the law replaced the old Div 8 of Pt 5.6. Unlike its predecessor, s 601AH(3)(d) no longer contained the wording that ancillary orders may be made that seem just for placing the company and all persons in the same position, so far as possible, as if the company’s registration had not been cancelled: see the recent discussion by Brereton J in *Re Regional Planners Developments Co Pty Ltd* (2015) 110 ACSR 457; [2015] NSWSC 1996 (*Re Regional Planners*) at [24]. His Honour said, and I would respectfully agree, that:

**The re-enacted section no longer contains the limitation** that appeared in its predecessors to the effect that the order be made for the purpose of placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. That indicates **an intention to remove what was seen in some of the cases as a constraint on the types of orders** that could be made [see in that respect, in particular, *Re Huntington Poultry Ltd* [[1969] 1 All ER 328] (at 330–1); [*Deputy Commissioner of Taxation v] Action Workwear [Pty Ltd (deregistered)* (1996) 20 ACSR 712] at 722–3]. Parliament, by re-enacting the section, should be taken to have intended to confirm the way in which it had been interpreted to that point, and to reduce the constraints which had been applied to its application. Nonetheless, I do not think the earlier cases, in directing attention to remediating any disadvantage that had been occasioned by the deregistration are irrelevant; they continue to give useful guidance as to the application of the provision, though they must be interpreted having regard to the wider power that now is available.

(Emphasis added.)

116 The exposure draft of the Second Corporate Law Simplification Bill in June 1995, which was accompanied by the ‘Report of the Simplification Taskforce’, which gave rise to the Bill, observed, as noted in *Foxman v Credex National Australian Trade Exchange Pty Ltd (in liq)* (2007) 65 ACSR 476; 215 FLR 392; [2007] NSWSC 1422 (*Foxman*) at [58] by White J, that the reinstatement power had been preserved by s 601AH(2), and in relation to s 601AH(3) that:

As under the current Law, the Court will be able to make such ancillary orders as are just for putting the company and any other person in the same position, so far as is possible, as if the company had not been deregistered (Bill subsection 601AH(3)).

214 Section 601AH(3)(d) is a power that enables a company upon reinstatement to be treated as though it had continued in existence from the date of deregistration or, to adopt McKerracher J’s shorthand, it is a provision that enables an “as-you-were” position: see *Bell Group* at [136]. For example, it could be used to put beyond doubt the validity of transactions apparently undertaken by a company during its period of deregistration (*Re Regional Planners* at [18]), or, as was the case in *Bell Group,* to make orders deeming that certain companies held shares in other companies on and from their respective dates of dissolution or, as was the case in some instances (discussed below), to exclude for the purposes of a limitation period, the period of deregistration of a company. Although, as to the latter that has not occurred where, as in this case, there is a specific provision in the Corporations Act dealing with the manner and time within which to bring the type of proceeding in question.

215 The general and somewhat ample power under s 601AH(3)(d) of the Corporations Act must however be exercised having regard to all of the circumstances of the particular case and the broader context of the operation of the Corporations Act. In this case the exercise of the power in s 601AH(3)(d) is subordinate, and must give way, to the specific power in s 588FF(3) in relation to the question of the time within which a voidable transaction proceeding can be brought. Put simply, in my opinion s 588FF(3) covers the field for extensions of time to bring a claim under s 588FF(1) to the exclusion of s 601AH(3)(d).

216 In ***Saba Bros* *Tiling (ACT)*** *Pty Ltd v Australian Securities and Investments Commission* [2021] ACTSC 47, albeit in *obiter*, Mossop J reached the same conclusion.

217 That case concerned an application by **Saba Bros** Tiling (ACT) Pty Ltd for reinstatement of the registration of two companies, 113 134 964 Pty Ltd (formerly **Chase** Building Group Pty Ltd) and **Manhattan** Development Pty Ltd. Saba Bros’ application was opposed by the former director of Chase, Andrew Jolley, who submitted, among other things, that there would be no utility in reinstating the companies and that Saba Bros had delayed in bringing the application. In considering whether it was “just” to reinstate the companies, Mossop J addressed Mr Jolley’s submission that there would be no utility in reinstatement because causes of action relating to voidable transactions were statute barred. His Honour accepted (at [45(b)]) that there were “unavoidable time bars precluding a claim in relation to any voidable transactions” but noted that the making of an incorrect declaration of solvency under s 494 of the Corporations Act was directly related to the existence of the time bars.

218 Relatedly, at [50] Mossop J considered a submission made by Saba Bros that the limitation bar applicable to any claim by the liquidator to recover a voidable transaction could be overcome by the making an order under s 601AH(3)(d) of the Corporations Act. Relying on the decision in ***Pagnon*** *v Workcover Queensland* [2001] 2 Qd R 492, Saba Bros submitted that an order should be made to stop time counting against Chase in relation to any insolvent transactions arising from distributions to shareholders or unreasonable director-related transactions (s 588FC and s 588FDA of the Corporations Act). After noting that *Pagnon*, insofar as it permitted such an ancillary order, relates to claims against the company rather than by the company Mossop J continued:

Further, it cannot be said that any such actions are more than a possibility at this stage. Finally, because of the failure to seek such an order in the Originating Process, the persons against whom such actions might be brought, other than Mr Jolley, are not on notice of the possibility of such an order, have not been joined as parties to the proceedings and have not otherwise been given the opportunity to be heard. For those reasons, I would not in this case make such an order. I note also that the making of such an order would be contrary to the specific limitation provision in s 588FF(3) and it would not be usual to read that specific provision as subject to variation by a general power such as s 601AH(3)(d*). David Grant & Co Pty Ltd v Westpac Body Corporation* (1995) 184 CLR 265 is an example, in a corporations context, of the general principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

219 Finally and for completeness, I note that in ***Morgan*** *v Sydney Allen Manufacturing Pty Limited (in Liquidation)* [2021] FCA 169 Rares J touched upon the question of whether an order could be made under s 601AH(3)(d) of the Corporations Act to extend time under s 588FF(3). However, his Honour did not resolve the issue. After referring to the decisions in *Pagnon*, *Chalker v Clark, Grant Samuel*, *Saba Bros Tiling (ACT)* and *David Grant & Co*, at [76]-[78] his Honour said:

76 …The position here is slightly different from those cases. *First*, s 601AH(3) has been amended several times since the decision in *Pagnon* [2001] 2 Qd R 492 and a provision, now in the terms of s 601AH(3)(d), has been retained. That provision enables the Court to deal specifically with the situation of a company that, at relevant times, has not existed while a limitation period would be running. It may well be possible for the Court to exercise the specific power in s 601AH(3)(d) to prevent a statutory limitation provision running where it would be just to do so.

77 *Secondly*, as Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said in *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421:

It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

78 It may be open to argue that the specific power in s 601AH(3)(d) is within that principle in its application to the similarly specific limitation period in s 588FF. However, it is not necessary for me to resolve this issue now. …

220 I note that while *Morgan* was overturned on appeal, this issue was not considered by the Full Court: see *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543. In any event Rares J made no more than passing observations, raised a potential issue but did not determine the question that has fallen to me to determine.

221 For the reasons set out above I am of the view that s 588FF(3) of the Corporations Act “covers the field”. As the parties accept, s 588FF is jurisdictional, that is the Court only has jurisdiction to hear a claim under s 588FF(1) of the Corporations Act if it is brought within the period specified in s 588FF(3)(a) or that period extended by an order made in accordance with s 588FF(3)(b). There is no power to extend the period within which a liquidator can bring an application under s 588FF(1) other than as specified in the section. More particularly, the power in s 601AH(3)(d) of the Corporations Act to make any other order the Court considers appropriate when reinstating the registration of a company cannot be used to extend the time under s 588FF(3) for the purposes of bringing an application under s 588FF(1).

222 It follows that in my view there was no power to make Order 3 of the Reinstatement Orders and for that reason Order 3 should be discharged.

## Other grounds relied on by the Applicants

223 As set out above, the Applicants raise other bases upon which they say Order 3 should be set aside or varied so that it does not operate against them. They are: as a preliminary issue, whether Order 3 of the Reinstatement Orders should be set aside as of right, an issue which in turn affects the question of onus; that s 601AH(3)(d) does not empower the Court to extend time for limitation purposes; and, in the alternative, that, even if the Court had power to make Order 3 of the Reinstatement Orders, it was not within the proper exercise of discretion under s 601AH(3) of the Corporations Act to make that order.

224 Given my conclusion in relation to the Applicants’ primary argument concerning the construction of s 588FF of the Corporations Act, it is not necessary for me to address any of these alternate bases in detail or at all. However, against the possibility that I am found to be wrong in concluding that the Court had no power to make Order 3 I briefly address the first two questions set out in the preceding paragraph. I have not, in the circumstances and having regard to the reasons why in my view Order 3 should be discharged, considered whether, assuming the power question in favour of the Commissioner, it was within the proper exercise of the Court’s discretion under s 601AH(3)(d) to make Order 3 (or undertaken a re-exercise of that discretion).

### Should Order 3 of the Reinstatement Orders be set aside as of right?

225 Putting to one side the question of power addressed above, this is the first question to be addressed. The Applicants submit that in circumstances where Order 3 was procured without notice to any debtor now sought to be sued it is liable to be set aside as of right.

#### The parties’ submissions

226 While each group of Applicants makes slightly different submissions as to why they are entitled to have Order 3 set aside as of right, particularly given the different facts applying to each group, at a general level they put the arguments summarised below.

227 The Applicants submit that they had a material interest in the matters giving rise to the Reinstatement Orders and the parties to the proceeding at the time either knew or should have known that the Applicants’ rights or liabilities would be affected by those orders such that they should have been joined to the interlocutory proceeding before the Reinstatement Orders were considered.

228 The Applicants submit that they were given no notice of the intention to seek the Reinstatement Orders and, in the case of the Tabuso Applicants, the failure to give notice occurred in circumstances where the evidence suggests the Commissioner and Mr Iannuzzi had them in mind as prospective defendants in proceedings under Div 2 of Pt 5.7B of the Corporations Act from around mid-2017. Notably, that was within the three year limitation period in s 588FF(3)(a)(i) for those companies. It was open to the Commissioner in mid-2017, on evidence he had available, to seek orders for reinstatement under s 601AH(2) and the appointment of new liquidators who would have been within time to seek an extension of the limitation period under s 588FF(3)(b) to allow for conduct of investigations, which is what is ordinarily done.

229 The Applicants submit that instead this proceeding, insofar as it led to the Reinstatement Orders, was heard, in effect, *ex parte*. The Applicants contend that there was insufficient disclosure to the Court by the parties prior to the making of the orders. The Applicants observe that this was in circumstances where the Commissioner and Mr Iannuzzi were represented. T++here is: no evidence of submissions being made about what prospective defendants (such as the Applicants) might say about the making of Order 3 of the Reinstatement Orders; no evidence of any party seeking to explain the absence of notice to prospective defendants before the Reinstatement Orders were made; no evidence which indicates that relevant authorities were supplied to the Court, or argued or alluded to; and nothing in the record from which the Court could be satisfied that the notion of expired substantive limitation periods was ever a subject of debate. The Applicants submit that in 2019, as now, the authorities were far from clear as to whether orders like Order 3 of the Reinstatement Orders are possible as a matter of power or discretion and it appears that none of this was brought to the attention of the Court.

230 The Applicants submit that while liberty to apply granted by Order 4 of the Reinstatement Orders has now been exercised, they were deprived of the opportunity to make submissions on the application of s 601AH of the Corporations Act concerning the issue of whether reinstatement of the registration of one or more of the deregistered companies was just, in the face of s 588FF(3)(a)(i) of the Corporations Act. They say that that if the Court had been taken to some of the relevant authorities the Court may well have refused to reinstate the companies on the basis that the application was brought as a device to circumvent the limitation period which could not be achieved by such a route. They contend that, at a minimum, the Court would have been alerted to the relevant authorities bearing on the exercise of the discretion to make Order 3 of the Reinstatement Orders.

231 The Applicants submit that in his written submissions in support of the Reinstatement Orders, the Commissioner only identified Mr Iannuzzi as “the person likely to be prejudiced by the reinstatement of the companies” and relied upon his consent as a circumstance which supported reinstatement. They contend that, whilst it was correct that Mr Iannuzzi was prejudiced by reinstatement of the companies, as that would enable the Liquidators to bring claims against him for compensation in relation to his alleged negligence, Mr Iannuzzi was also not prejudiced by, and in fact stood to benefit from, the making of Order 3 of the Reinstatement Orders. That was because it was in Mr Iannuzzi’s interest that the period for a liquidator to bring s 588FF actions be extended because, the more recovered by the Liquidators under s 588FF(1), the lower his potential exposure to liability for damages or compensation for his alleged negligence.

232 The Applicants submit that there is no evidence from the Commissioner or Mr Iannuzzi of any exceptional circumstances which would have justified the making of Order 3 of the Reinstatement Orders in the absence of the persons affected by it and there was no apparent urgency to the making of Order 3, given that as at the date it was made the proceeding had been on foot for over two years and the s 588FF(3) period ending three years after the relation-back day had already expired for any claims to be brought by liquidators of RC Group or any of the companies in the Tabuso Group.

233 The Commissioner and the Liquidators observe that in the email from the Court covering the orders made on 2 September 2019 (see [37] above) Stewart J gave reasons for making the Reinstatement Orders, noting that his Honour had reached a state of satisfaction, independent of the consent of the parties, that it was just that the companies’ registrations be reinstated and accordingly made the Reinstatement Orders. They submit that the making of Order 3, and the Court’s reasons for doing so, should be assessed by reference to the context supplied by the admissions made, the fact that it was common ground between the parties that it was just for the entities to be reinstated, and the reasons subsequently delivered by the Court. They contend that in the specific context of this case it was open to the Court to be satisfied that it should exercise its discretion pursuant to s 601AH(3)(d) to make Order 3 of the Reinstatement Orders.

234 The Commissioner and the Liquidators submit that this proceeding was not *ex parte* and the fact that both parties consented to certain orders being made does not render them *ex parte*.

235 The Commissioner and the Liquidators submit that the Commissioner did not fail to disclose to the Court any matters which he was required to disclose. They contend that: no binding authority provides that s 588FF(3)(b) of the Corporations Act covers the field with respect to time limits for bringing proceedings in respect of voidable transactions to the exclusion of s 601AH(3)(d) of the Corporations Act in the case of reinstated companies where a liquidator failed to commence proceedings prior to deregistration and where the claims were not statute barred at the time of deregistration; there is authority that the Court has power to make a calculation of time order in favour of a creditor to permit the creditor to make a claim against a previously deregistered company in such circumstances; and, given the Court has this power, and in the absence of any contrary authority, in the ordinary course the Court would also hold the corresponding power, namely, to make a calculation of time order in favour of a reinstated company against a third party.

236 The Commissioner and the Liquidators submit that because the initial liquidation was not conducted competently in compliance with the Corporations Act, it is not surprising that any potential defendants to recovery proceedings were not joined to this proceeding prior to the making of Order 3 of the Reinstatement Orders. Without a competent liquidation having been undertaken, the identity of potential defendants to recovery proceedings, including any potential proceedings under Div 2 of Pt 5.7B of the Act, could not have been, and was not, known by Mr Iannuzzi, nor by any third party creditor, such as the Commissioner. They contend that in these specific circumstances, it was not possible for unknown prospective defendants to be heard prior to the making of Order 3 and that the Court had power to make the Order despite this.

237 The Commissioner and the Liquidators submit that the present applicants were not denied procedural fairness, nor a right to be heard and are not entitled to have Order 3 set aside as of right. They contend that the liberty to apply granted by Order 4 specifically provided procedural fairness to all affected parties, including the present applicants. By that order, they were given a full opportunity now to be heard and that in circumstances of an unknown party, it is only where no such liberty to apply is granted that an entitlement arises to apply, as of right, to have the original order set aside.

238 After referring to the decision in ***Wallman*** *v Milestone Enterprises Pty Ltd* (2006) 205 FLR 68; [2006] WASC 260, the Commissioner and the Liquidators submitted that Order 4 of the Reinstatement Orders expressly reserved to each of the Applicants the right to apply to have Order 3 set aside and that now they are before this Court and able to be heard on a *de novo* application. Accordingly, they submit that there is no entitlement for Order 3 to be set aside as of right and, absent any right to have Order 3 set aside, the ordinary test for seeking to set aside an interlocutory order applies, namely, whether there has been a material change in circumstances since the original application was heard which warrants the setting aside of the order, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application. They contend that no such material change or new material is evident, nor contended for by the Applicants.

#### Consideration

239 The first question that arises is whether the Reinstatement Orders were made *ex parte*.

240 The Reinstatement Orders were not made *ex parte* in the sense that they were made having regard to the fact that at the time the only parties to the proceeding were the Commissioner and Mr Iannuzzi and both of those parties were given an opportunity to be heard in relation to the proposed orders. Indeed, they were made by consent with only the Commissioner providing submissions. At the time those submissions only identified Mr Iannuzzi as a party potentially affected by the Reinstatement Orders. This was so despite, as I have found to be the case (see [209] above), those Orders contemplating that the period in s 588FF should, in effect, be extended to permit the bringing of claims in relation to alleged voidable transactions.

241 The proposal to reinstate the registration of some of the companies was in mind and discussed briefly at the hearing on 17 July 2019 but seemingly in the context of those companies, once reinstated, seeking compensation from Mr Iannuzzi (see [30] above). At that time no response was given to Stewart J’s query as to whether other parties needed to be notified of the intention to seek orders for reinstatement of registration for some of the companies and the Commissioner suggested that the Court’s power to make the proposed order came from s 536 of the Corporations Act (now repealed). That exchange between his Honour and senior counsel for the Commissioner was focussed on recovery from Mr Iannuzzi.

242 The Reinstatement Orders in the form made were, it seems, raised at the last minute. It is conceivable, given the way in which they came about (see [32]-[35] above), that neither the Commissioner nor Mr Iannuzzi turned their minds to the question of whether potential defendants should be given notice. However, both the Commissioner and Mr Iannuzzi were aware of the companies to be reinstated and that an order was to be sought with the effect of extending time to bring proceedings under s 588FF(1) of the Corporations Act. Those proceedings would not be against Mr Iannuzzi but against third parties. The Reinstatement Orders were made in the absence of those third parties including the Applicants. To that extent they were made *ex parte.*

243 In *BP Australia* commencing at [130] Spigelman CJ addressed the cross-appeal filed by the liquidators and the DML companies. His Honour noted that the first issue that arose on the cross-appeal was the primary judge’s determination in the second judgment that he denied procedural fairness to BP by making *ex parte* orders on 4 September 2000. In relation to that issue at [133]-[136] his Honour relevantly said:

133 The power to make orders, and the power to extend time under s 588FF(1) and s 588FF(3) are conferred on a court. There can be no doubt that such a body must obey the rules of procedural fairness. An order of a superior court is not a nullity even if made in breach of this obligation. Nevertheless, a person affected is entitled *as of right* to have any such order which affects that person set aside. …

134 The obligation to comply with procedural fairness imports a higher level of content when imposed on a court than in decision-making processes conducted by administrators or tribunals. It requires, in my opinion, that a person likely to be adversely affected by the order of the court is given an opportunity of making submissions to the court *before* any such order is made or if, before exceptionally, an order is made without such an opportunity being given that, upon application, the person must be put in the same position as he or she would have been prior to the order being made. It is the inherent difficulty of achieving the latter that makes an ex parte order a course to be followed only in the case of necessity or other strong reason.

135 The creation of a situation in which a person must apply to vacate or vary an order after the order has been made is an exceptional situation. Nothing on the facts of the present case, as at the time of the first judgment, was such as to justify the exceptional course.

136 Perhaps there will be circumstances in which it is not appropriate to give all who may be affected by an order under s 588FF(3)(b) an opportunity to make submissions prior to the order being made. It is not necessary to determine this question. Here there was a clearly identified party with a substantial interest in the question to be determined. Nothing appeared by way of urgency or otherwise to require an ex parte order to be made. The appellant was unnecessarily placed in the position of applying to the court, pursuant to leave reserved by order of the court, to have the order discharged.

244 In *Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd* (2008) 71 NSWLR 262 at [85] in relation to the Court’s exercise of the power under s 601AH(2) of the Corporations Act to reinstate the registration of a company Spigelman CJ said (Tobias and Campbell JJA agreeing):

It is axiomatic that when a statutory power like s 601AH(2) is conferred on a court, the legislature intends that procedural fairness will be accorded to all who may be affected by the order, unless there is a clear statement to the contrary. The denial of procedural fairness by a court is a “fundamental irregularity” which would entitle a person aggrieved to set aside an order as a matter of unconditional right.

245 In *Saba Bros Tiling (ACT)* Mossop J observed (at [50]) that a reason why he would not make an order under s 601AH(3)(d) of the Corporations Act extending time for the purposes of bringing a claim under s 588FF(1) was because such an order was not included in the originating process, the persons against whom any claims might be brought, other than the former director, were not on notice of the possibility of it, had not been joined as parties to the proceedings and had not otherwise been given the opportunity to be heard.

246 As set out at [219] above, in *Morgan* Rares J did not resolve the question of the interplay between s 588FF and s 601AH(3)(d) of the Corporations Act, but preferred to make an order that after reinstatement the liquidator may apply for an order under s 601AH(3)(d) “provided that he gives notice to any person against whom he seeks that a limitation period not run against him or [the deregistered company], so that the matter can be fully argued on its merits at that time”: see *Morgan* at [78].

247 Order 3 of the Reinstatement Orders was made in the absence of the Applicants and, to that extent, as the Applicants submit, it was made *ex parte*. There was no particular urgency to the making of Order 3 of the Reinstatement Orders. The time prescribed by s 588FF(3) of the Corporations Act for the bringing of an application under s 588FF(1) had already expired and therefore there was no reason why steps could not have been taken by the Liquidators upon reinstatement to attempt to identify the parties likely to be affected by that Order before making any application for it to be made. Seemingly Mr Iannuzzi in fact benefitted from Order 3. Any funds recovered in proceedings brought under s 588FF(1) will reduce any amount for which he is found to be liable in the Negligence Proceedings. There was no real contradictor to assist the Court at the time the Orders were made.

248 While Stewart J was satisfied that the Reinstatement Orders could be made, that satisfaction was reached based on the submission provided by the Commissioner which addressed the question of “person aggrieved” in s 601AH of the Corporations Act and whether it was just in circumstances where the only person said to be affected by the proposed orders at the time was Mr Iannuzzi. No submissions were made going to the issues that were raised before me and in particular the question of whether s 601AH(3)(d) of the Corporations Act empowered the Court to make Order 3 of the Reinstatement Orders.

249 In my opinion the Applicants are entitled to have Order 3 set aside as of right. It follows that the Commissioner is left in the position where he must establish on this application that an order in the form of Order 3 of the Reinstatement Orders should be made.

250 Even if that were not the case, the Commissioner (and the Liquidators) would bear that onus in that they would need to demonstrate that Order 3 of the Reinstatement Orders should remain. That is because, as the Commissioner accepts, upon the Applicants exercising the liberty granted by Order 4 of the Reinstatement Orders to approach the Court to have Order 3 of those Orders discharged or varied, their applications are to be conducted on the basis of a hearing *de novo*: see *Wallman* at [34].Similarly, as Spigelman CJ characterised the position in *BP Australia* at [134], the applicant affected by the order made in his or her absence and seeking that it be set aside or varied “must be put in the same position as he or she would have been prior to the order being made”.

251 Finally, contrary to the Commissioner’s and the Liquidators’ submissions, the principle in *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 that “an application to set aside, vary or discharge [an interlocutory] order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application”has no role to play here*.* In that case McLelland J was considering an application to vary an interlocutory order of a substantive nature “made after a contested hearing in contemplation that it would operate until the final disposition of the proceedings”: at 46.

252 That is not the case here. The order in question was effectively made by consent with the Court being asked to satisfy itself that the order should be made on the barest of submissions, without identification of the Applicants as persons who might be affected by the order and without raising with the Court those authorities of most relevance to Order 3 of the Reinstatement Orders.

### The construction of s 601AH of the Corporations Act

253 As an alternative argument and in the event that I am found to be wrong in concluding that s 588FF(3) of the Corporations Act covers the field in relation to the time in which a claim under s 588FF(1) can be brought, the Applicants contend that s 601AH(3)(d) of the Corporations Act cannot in any event be used to augment the reckoning of time for limitation purposes.

#### The parties’ submissions

254 The Applicants submit that appellate authority, and first instance judgments of significant weight, have singularly decried the use of s 601AH(3) to augment the running of time in respect of any cause of action vested in the company, referring by way of example to *Chalker v Clark* at [37] (Osborn AJA) and [45] (Maxwell P) and ***Re Auzhair*** *Supplies Pty Ltd (in liq)* (2013) 92 ACSR 554; [2013] NSWSC 1 at [21].

255 The Applicants submit that the issue is not one about an order not being “appropriate” or a lack of “sufficient nexus”, as was the case in *Re Auzhair*,but is one squarely of power. They contend that s 601AH(3) of the Corporations Act cannot be exercised to “deny…the retrospective effect provided for in s 601AH(5)”, by treating the company as not in existence for the purposes of calculating the period in which a cause of action can be commenced by or against the company.

256 The Applicants recognise that this submission faces the problem that courts have been prepared to recognise s 601AH(3) as permitting a court to augment the running of time in respect of causes of action where the company is the proposed defendant. They submit that those decisions include the appellate decision in *Pagnon* but that the dictum in that case concerning s 601AH(3) of the *Corporations Law* did not form part of the *ratio decidendi*. Instead, the decision concerned the interpretation of s 186 of the ***Workers’ Compensation Act*** *1990* (Qld) (now repealed) and, further, the reasoning is scant, with s 601AG of the *Corporations Law* said to “put to rest” any “remaining doubt about the correctness of [the] conclusion” reached: see *Pagnon* at [16]. The Applicants submit that s 601AG concerns actions against an insurer of the deregistered company and permits such an action to be pursued without first reinstating the company: see *Pagnon* at [17]. They say that s 601AG does not bolster or assist the conclusion embraced by the court about the breadth of power conferred under s 601AH(3)(d) and, while it is true that s 601AH is a “wider remedy” than s 601AG, this does not advance matters.

257 The Applicants recognise that the Court would feel constrained to follow these decisions unless plainly wrong but submit that it should reach that state of satisfaction because:

(1) it accords with the proper construction of s 601AH(3). Augmenting the running of time for any limitation period (whether in respect of a cause of action against or vested in the company) countermands the retrospective effect provided for in s 601AH(5) of the Corporations Act;

(2) issues presented by limitation periods, and the running of time during the period when a company is deregistered, are either already dealt with by the automatic effects of reinstatement or can be addressed under s 601AH(3)(a) of the Corporations Act. There is accordingly no room, nor permissible need (it not being “appropriate”), for an order under s 601AH(3)(d) to exclude days in reckoning the period in which an action can be brought against (or indeed by) the deregistered company; and

(3) the contended for construction avoids the curiosity of a “court exercising federal jurisdiction under the Corporations Act, which would alter the effect of the [*Limitation Act 1963* (NSW)] (and in particular s 63) for the purposes of State law generally”: see *Smith v Australian Securities and Investments* [2018] NSWSC 1695 at [21] (Parker J). While that is not the present case, given the relevant limitation period arises under s 588FF(3) of the Corporations Act, the same principle must operate across the reckoning of all limitation periods. As a matter of power, it should not matter whether the relevant limitation period is one based in state law or federal law, the constraint is the same.

258 The Applicants submit that their construction avoids the potentially artificial distinction between s 601AH(3)(d) of the Corporations Act being used to augment the running of time where the company is the proposed defendant to an action, but not where it is the proposed plaintiff, and leaves unaugmented the running of time under all limitation periods for all causes of action (whether against or vested in the company), which are the periods prescribed by the legislature in which actions are to be brought, having regard to a broad array of economic and societal considerations.

259 The Commissioner and the Liquidators submit that upon reinstatement pursuant to the limited fiction created by s 601AH(5), the company does not come back into existence in the same form nor are all incidents or attributes of the company taken to have continued. The Commissioner and the Liquidators contend that in the broader legislative framework, s 601AH(3)(d) empowers a Court, upon reinstatement of a company, to make any other order it considers appropriate. The objective of this broad power includes to place the company or others in the same position (or such position as the Court considers appropriate) as if the company had not been dissolved, subject to the interests of affected third parties.

260 After referring to *Rockwall Interiors* at [19] the Commissioner and the Liquidators submit that in circumstances where no proper or competent liquidation occurred pursuant to the Corporations Act prior to premature deregistration, and where causes of action had not expired at the time of deregistration, it would not be appropriate to visit any adverse effects by reason of inactivity during the period of deregistration on the availability of those causes of action. They contend that the period of non-existence of a company is a time in which it is impossible for any potential voidable transactions to be investigated or pursued and in these circumstances, a calculation of time order under s 601AH(3)(d) can appropriately be made to remedy any adverse effects of s 601AH(5).

261 The Commissioner and the Liquidators submit the starting point in construing s 601AH(3)(d) of the Corporations Act is that it is a power conferred on a court and that such a provision is not to be construed narrowly. They contend that there is nothing inconsistent between a calculation of time order being made and the operation of s 601AH(5). They do not seek to deny the operation of s 601AH(5) but note that s 601AH(3)(d) is unconfined by any express requirement for any particular purpose, other than the Court considering the subject order appropriate.

262 The Commissioner and the Liquidators submit that the Court’s power under s 601AH(3)(d) extends to making adjustments or qualifications to what the effect of s 601AH(5) otherwise would be and, in particular, enables the Court to makes orders if the Court considers it appropriate to do so. This does not in any way deny the operation of s 601AH(5). The Commissioner and the Liquidators contend that, rather, it empowers the Court, in the exercise of its discretion, to make appropriate orders in the circumstance of the particular case so as to address or modify the practical consequences that otherwise would flow from s 601AH(5).

263 The Commissioner and the Liquidators submit that the cases in which a calculation of time order has been made, or where the jurisdiction to make such an order was accepted, demonstrate that there is no inconsistency between s 601AH(5) and the making of such an order, where considered appropriate in the circumstances revealed by the evidence in the particular case.

#### Consideration

264 The Applicants’ submissions in relation to the power in s 601AH(3)(d) generally are of some complexity as are the arguments made in response. Given the conclusion which I have reached in relation to s 588FF of the Corporations Act I only intend to address the Applicants’ contention briefly.

265 I accept the Commissioner’s and the Liquidators’ submission that there is nothing inconsistent between an order augmenting time for the purposes of a limitation period under s 601AH(3)(d) and the operation of s 601AH(5) of the Corporations Act. The terms of s 601AH(3)(d) permit the Court upon reinstating the registration for a company to make any order it considers appropriate.

266 In *Bell Group* McKerracher J considered an application made by the liquidator of Bell Group Ltd (in liq) pursuant to s 601AH(2) of the Corporations Act on its behalf and other companies in the group for reinstatement of certain subsidiary companies that had been deregistered between 1992 and 1994. The liquidator also sought orders that the reinstated companies be wound up upon reinstatement pursuant to s 461(1)(k) of the Corporations Act and orders pursuant to s 601AH(3) of the Corporations Act the effect of which was that certain of the companies were deemed to have beneficially held shares in other companies from and including the date of those companies’ dissolution. That relief was referrable to income tax relief which the liquidator sought to obtain for the Bell Group companies.

267 The Commissioner opposed the application. Relevantly, he contended that the Court was not empowered to make the order sought pursuant to s 601AH(3) because it would be contrary to the proper construction of s 601AH(5) of the Corporations Act.

268 At [104]-[105] McKerracher J referred to the final contested issue to be resolved which concerned the deregistered companies and other affected Bell Group companies joining the Bell Group tax consolidated group with effect from 1 July 2002. At [106] his Honour noted that the main issue was whether making the order sought was within the Court’s power. The Commissioner contended that none of the three alternative forms of order proposed by the plaintiffs were within power. Among other things the Commissioner argued that the plaintiffs’ proposed orders were inconsistent with the “limited” form of retrospectivity provided by s 601AH(5) of the Corporations Act because they sought to restore beneficial ownership of the property (i.e. the shares) to the deregistered companies during the period of deregistration.

269 At [119] his Honour set out the two principles which the Commissioner contended were central to the operation of Pt 5A.1 of the Corporations Act as follows:

(a) section 601AH(5) provides only a ‘limited form’ of retrospectivity upon the reinstatement of a deregistered company; and

(b) on deregistration, the property of the company vests in ASIC by operation of s 601AD and if an order is made to reinstate the company pursuant to s 601AH(2), the property of the company re-vests only from the time of reinstatement, not from the time of deregistration.

270 At [122] McKerracher J referred to the decision in *Stork ICM Australia Pty Ltd v SFS 007.298.633 Pty Ltd (formerly Stork Food Systems Australasia Pty Ltd)* (2010) 77 ACSR 517; [2010] FCA 53 in which Lindgren J considered s 601AH(3)(b) (now s 601AH(3)(d)) of the Corporations Act (emphasis in original):

In *Stork*, the applicant sought to have the reinstatement operate from the date of the reinstatement orders, rather than the period spelt out in the first sentence of s 601AH(5). As noted, Lindgren J held that s 601AH(3) cannot be used for such purpose, saying (at [27]):

I do not think, however, that s 601AH(3)(b) empowers the court to make an order **denying to a reinstatement the retrospective effect provided for in s 601AH(5)**. Subsection (3) assumes that an order has been made under subs (2), and in my view **the only order that the court is able to make under subs (2) is one having the retrospective effect provided for in subs (5)**. There is a question, however, precisely what that retrospective effect is.

(Emphasis added.)

271 At [123] his Honour expressed his agreement with Lindgren J’s observations that it was not possible to make an order under the equivalent of s 601AH(3)(d) of the Corporations Act to the effect that the reinstatement of the registration of a company only took effect from the date of the order but went on to observe that the ancillary orders sought had the retrospective effect provided for in subs (5).

272 At [136] of *Bell Group* McKerracher J said that there was no reason to limit the power in s 601AH(3)(d) of the Corporations Act in the manner contended for by the Commissioner and that there was nothing in the extrinsic materials to support a suggestion that there was a legislative intention to diminish or limit the purpose of the power. His Honour continued:

The power has always existed to achieve the primary purpose of treating a company upon reinstatement as though it had continued in existence from the date of deregistration, that is to say, the ‘as-you-were’ position.

273 At [137] McKerracher J addressed the Commissioner’s submission that any of the plaintiffs’ proposed orders would be inconsistent with the limited form of retrospectivity provided for by s 601AH(5) because they sought to restore beneficial ownership of the shares to the deregistered companies during the period of deregistration. His Honour said:

It is true that the adjective ‘limited’ has been used by the courts in relation to the retrospectivity described in the first sentence of s 601AH(5), but in my view, that retrospectivity underlies the whole purpose of reinstatement. Section 601AH(5) provides for a fictional deemed continuation of the company‘s corporate existence during the period of deregistration. There are no other automatic retrospective legal consequences, but that is why there is the facility within the Corporations Act to make both validating provisions and *any* other orders considered appropriate in the circumstances in conjunction with the reinstatement. Section 601AH(3)(d) clearly permits an ancillary order which has significant, not merely incidental, retrospective consequences.

274 There have been several cases in which a calculation of time order has been made, or where the jurisdiction to make such an order was accepted. As the Commissioner and the Liquidators submit those cases demonstrate that there is no inconsistency between s 601AH(5) and the making of such an order, where considered appropriate in the circumstances of the particular case. In order for the Applicants to succeed in their general contention that s 601AH(3)(d) cannot be used to “deny…the retrospective effect provided for in s 601AH(5)”, by treating the company as not in existence for the purposes of calculating the period in which a cause of action can be commenced *by or against the company*, I must find that those decisions are plainly wrong.

275 The decisions identified by the Applicants are: *Re Harule Pty Ltd; Ex parte Olita Super Readymixed Concrete Pty Ltd (in liq)* (1994) 13 ACSR 500; *Re* *Regional Planners*; *Re Austral Bronze*; *Pagnon*; and *Del Borrello v Australian Securities and Investments Commission* [2008] WASC 48.

276 One of the decisions referred to in the preceding paragraph, *Pagnon*, is a decision of an intermediate court of appeal in relation to Commonwealth legislation. I would not depart from a decision of an intermediate appellate court in another jurisdiction on the interpretation of Commonwealth legislation unless satisfied it was plainly wrong: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]. In *Pagnon* the plaintiff had been employed by **Croway** Pty Ltd and in the course of his employment, prior to 19 June 1996, alleged that he injured his back. Croway was deregistered on 11 December 1998 and on 22 June 1999 Mr Pagnon gave notice to the defendant under s 186 of the Workers’ Compensation Act(now repealed) by the service of a draft claim to be filed in the District Court of Queensland which was filed on the following day.

277 The proceeding before the Queensland Court of Appeal was for leave to appeal from an answer given by the District Court of Queensland on the following question of law: whether s 11 of the ***Limitation of Actions Act*** *1974* (Qld), imposing a three year limitation on the bringing of an action in negligence for damages for personal injury, applied. The primary judge found that it did not. Section 186 of the Workers’ Compensation Act (now repealed) relevantly provided:

(1) If a worker suffers injury in respect of which compensation under this Act is payable in circumstances conferring a right of action for damages in respect of the injury against the worker’s employer who –

(a) has died; or

(b) being a corporation, has ceased to exist; or

(c) cannot be served with process;

a person who might have obtained judgment for damages against the employer in respect of the injury may recover by action against the board, as if the board were the employer, the sum that would have been payable by way of damages to that person by the board under section 183(1) had judgment been given against the employer.

…

(3) Subsection (1) does not confer on a person any right or advantage that the person would not have had if action had been brought or pursued against the employer of the worker who has suffered injury

278 In considering the application before the Court McPherson JA observed at [3] that there was a consistent line of authority in relation to statutory provisions like s 186 holding that they create a new cause of action that is not complete until all the requirements for bringing the action are complied with at which time the cause of action then accrues. At [7] his Honour concluded that the right conferred was a new right or cause of action against the substituted defendant subject to the unexpired duration of the limitation period fixed by s 11 of the Limitation of Actions Act. McPherson JA then turned to consider the effect of s 186(3) of the Workers’ Compensation Act observing, among other things, at [8] that:

A plaintiff who sues under s. 186(1) may still be liable to be defeated by a defence under s. 11 of the *Limitation of Actions Act* after the lapse of three years from the date on which the cause of action against the board accrued under s. 186(1). It is true that, if only because of the need to give notice under s. 186(2), the date of accrual of the statutory cause of action under s. 186(1) would invariably be later than that of the common law action; but that is an inevitable incident of creating or characterising it as a new cause of action. It is a consequence of imposing the additional requirement of notice under s. 186(1) rather than of anything in subs. (2) of s. 186. It is, moreover, in my opinion a right or advantage which, quite apart from s. 186, the plaintiff already enjoyed and enjoys in an action for damages against a corporate employer that has been dissolved.

279 McPherson JA set out his reasons for reaching that conclusion. In doing so his Honour considered the effect of dissolution of a company on time running under a limitation period. In that context his Honour considered the provisions of Pt 5A of the *Corporations Law* (which at the time was in force). At [14]-[15] his Honour relevantly said:

[14] The same policy is now manifest in the provisions of Part 5A of the *Corporations Law,* which took effect on or from 1 July 1998. On deregistration, as it is now called, a company ceases to exist: s. 601AD(1). However, under s. 601AH(1), ASIC may reinstate the registration of a company if satisfied that it ought not to have been deregistered. Section 601AH then proceeds:

….

When reinstated, the company is taken to have continued in existence as if it had not been deregistered: s. 601AH(5).

[15] It will be seen that the Court’s power to order reinstatement under s. 601AH(2) is predicated only on the need to be satisfied that it would be ‘‘just’’ to do so. That is the criterion which the courts have applied in the past in cases of this kind: see, for example, ... Furthermore, the power conferred by s. 601AH(3)(b) is now very wide, and extends to making ‘‘any other order’’ that the Court ‘‘considers appropriate’’. I would have no doubt that under this provision the court could, and in a case like the present would if asked to do so, exercise the power under s. 601AH(3)(b) to order that the time between dissolution of the company on 11 December 1998 and the expiration of the limitation period under s. 11 of the *Limitation of Actions Act* 1974 should not be counted against the plaintiff here. There is every reason why it would be ‘‘just’’ to adopt that course.

280 At [16] McPherson JA referred to s 601AG of the *Corporations Law* by way of reinforcing the conclusion his Honour had reached. Relevantly in that case the defendant to the action was an insurer.

281 *Pagnon* has been considered and applied on a number of occasions. In *Re Regional Planners* at [15]-[28] Brereton J undertook a detailed analysis of the relevant cases, including *Pagnon*, and was satisfied that there was jurisdiction under s 601AH(3)(d) to make an order which would have the effect of suspending the limitation period in respect of any action that the plaintiff might have against the company. There is nothing that the Applicants point to in that analysis that leads me to conclude that it or the decisions upon which it is based are plainly wrong.

282 I am not satisfied that there is any inconsistency, as contended by the Applicants, between the making of an order to suspend time for the purposes of a limitation period on reinstatement of a company and the statutory fiction in s 601AH(5) of the Corporations Act. As Brereton J found to be the case in *Re Regional Planners*, s 601AH(3)(d) empowers the Court in an appropriate case to make such an order. However, whether such an order should be made will be a matter for the Court’s discretion.

# THE COMMISSIONER’S APPLICATION

283 As I have determined that an order should be made discharging Order 3 of the Reinstatement Orders, the Commissioner’s Application arises for determination. That application relies on s 601AH(3)(d) or, in the alternative, s 536 of the Corporations Act (now repealed).

284 I can deal briefly with the Commissioner’s Application insofar as it relies on s 601AH(3)(d) of the Corporations Act. An order cannot be made afresh under that section *nunc pro tunc* for the same reasons as I have concluded that Order 3 should be discharged, namely because s 588FF(3) of the Corporations Act is a jurisdictional gateway and provides for the only means by which the period in s 588FF(1) can be extended. Section 601AH(3)(d) does not empower the Court to make an order extending time (or suspending time) for the purposes of s 588FF(1).

285 I turn to consider former s 536 of the Corporations Act as an alternate source of power.

286 Section 536 was headed “Supervision of liquidators” and provided:

(1A) In this section:

***liquidator*** includes a provisional liquidator.

(1) Where:

(a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:

(i) a requirement of the Court; or

(ii) a requirement of this Act, of the regulations or of the rules; or

(b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;

the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.

(2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.

(3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

## The Commissioner’s submissions

287 The Commissioner submits, having regard to the relevant transitional provisions, that because this proceeding was commenced by originating process filed on 25 August 2017, repealed s 536 of the Corporations Act continues to apply. He submits that in order to determine the scope of the Court’s power under former s 536(1) of the Corporations Act it is necessary first to consider the process and purpose of an application under former s 536.

288 As to process, the Commissioner submits that an application under former s 536 involves a three step process: first, the Court determines whether an inquiry into the liquidator’s conduct is warranted. The applicant must establish something about the liquidator’s conduct constituting a sufficient basis for ordering an inquiry; secondly, if the Court orders an inquiry it is conducted in the nature of an adversarial proceeding and the Court must make a judgment in relation to the liquidator’s conduct; and thirdly, if the Court decides from the inquiry that the liquidator’s conduct was deficient, then the Court can make appropriate orders.

289 As to purpose, the Commissioner submits that the purpose of an inquiry under former s 536 is for the regulation, supervision, discipline and correction of liquidators in upholding the public interest in honest and efficient administration of liquidations. He says that the predominant factor is to consider what is needed by way of regulation, supervision, discipline and correction for the due administration of the winding up in the public interest and, given this, the action which the Court considers fit to take pursuant to s 536(1) of the Corporations Act necessarily depends upon the nature of the deficiency found at the enquiry stage, referring to *BL & GY International Co Ltd v* ***Hypec*** *Electronics Pty Ltd* (2010) 79 ACSR 558; [2010] NSWSC 959 at [45].

290 The Commissioner submits that former s 536 of the Corporations Act was directed to the supervision of liquidators by the Court and ASIC and, in that context, s 536(1) empowered the Court to “take such action as it thinks fit”. He contends that this broad power encompasses the ability for the Court to make any consequential orders necessary to remedy delinquent conduct of a liquidator, including where that liquidator has not faithfully performed his or her duties or not observed a requirement of the Corporations Act. The Commissioner submits that former s 536(1) supplies ample power for upholding Order 3 of the Reinstatement Orders in the present circumstances and that this is particularly so in circumstances where:

(1) the companies were deregistered prior to a competent liquidator undertaking necessary investigations in compliance with the Corporations Act;

(2) the companies were deregistered prior to a competent liquidator commencing proceedings in respect of viable claims or seeking, within time, an extension of time under s 588FF(3)(b) of the Corporations Act; and

(3) the causes of action now pursued were not statute barred at the time of deregistration.

291 The Commissioner submits that former s 536 does not expressly limit the persons against whom an order may be made or the types of orders which may be made. He contends that it is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words, referring to *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404at 421. The Commissioner submits accordingly that the omission of such qualifications supports the Court’s power under former s 536 extending to the making of declarations, orders or directions in favour of or against persons other than the relevant liquidator.

292 The Commissioner submits that the word “action” may be understood to encompass the full gamut of powers available to the Court such as the making of declarations, orders or directions and that it is consistent with an interpretation that the legislature intended to confer on the Court a full range of options subject to the Court’s own powers and what it “thinks fit”. The Commissioner submits that this interpretation is supported by former s 536(2) of the Corporations Act and that the other order or orders which the Court may make under the provision are unconstrained, other than by reference to the Court thinking the order fit.

293 The Commissioner also submits that former s 536 does not expressly limit the Court’s power except by what the Court “thinks fit” to give effect to the purpose of the section and the matters arising from the enquiry and that there is no reason to read down the breadth of the Court’s power subject to the express qualification of what the Court “thinks fit”.

294 The Commissioner submits that the effect of Order 3, or a *nunc pro tunc* order to the same effect, would ameliorate harm to the reinstated companies resulting from Mr Iannuzzi’s breaches of duty so as to preserve the companies’ otherwise statute barred potential claims under s 588FF(1) of the Corporations Act. Such an order would put those companies back to the position they would have been in, but for Mr Iannuzzi’s deregistration of them, and is analogous to a compensation order made in favour of an applicant against a liquidator. The Commissioner contends that both Order 3 of the Reinstatement Orders and a compensation order would, in practicable terms, help put the applicant or the relevant company back to its former position had the breach of duty or misfeasance not occurred.

295 The Commissioner submits that the practical effect of Order 3 would, to the extent possible, restore the proper conduct of the external administration of the companies and would ensure that potential claims which the companies may have against third parties are duly investigated and appropriately pursued for the benefit of creditors. He contends that in that sense former s 536 is sufficiently broad and flexible to support orders, such as Order 3, which seek to realise such an objective.

296 The Commissioner denies that the Court lacks power to make Order 3 pursuant to s 601AH(3)(d) of the Corporations Act but submits that if the Court decides otherwise the absence of a more appropriate remedy would weigh in favour of the Court exercising its discretion to make an order pursuant to former s 536(1).

297 For completeness I note that the Liquidators make no application. In their written submissions they sought to adopt the Commissioner’s submissions in relation to the availability of former s 536 of the Corporations Act as a source of power to make the orders sought. However, in oral submissions (at T 244) Mr McInerney SC, senior counsel for the Liquidators, informed the Court that it was not a matter for the Liquidators to make any submissions about the operation of former s 536. I will in the circumstances treat the Liquidators’ position on the Commissioner’s Application as neutral.

## Consideration

298 Section 536 does not provide an alternate source of power.

299 It confers only broad or general powers which cannot be used to circumvent the jurisdictional requirement set out in s 588FF(3) of the Corporations Act. My reasons set out above apply equally here.

300 Further, in the event I am found to be wrong about the operation of s 588FF of the Corporations Act for the reasons that follow in my opinion former s 536 does not empower the Court to make an order in the form of Order 3 of the Reinstatement Orders.

301 There was no dispute that, despite its repeal with effect from 1 March 2017, s 536 continues to apply to this proceeding. That is because of the operation of s 1617 of the Corporations Act. The Commissioner submits and the Applicants accept that:

(1) with effect from 1 March 2017 s 536 was replaced by s 90-10 of the IPS;

(2) section 90-10 of the IPS applies in relation to an “ongoing external administration”, whether or not the matter to be reviewed occurred before, on or after the “commencement day”: see s 1615 of the Corporations Act. Pursuant to rr 10.25.01(1) and (2) of the ***Corporations Regulations*** *2001* (Cth) “commencement day” is defined to be 1 September 2017 and an “ongoing external administration” is defined to mean an external administration of a company that started before 1 September 2017 and ends after that day;

(3) the general rule set out in the preceding subparagraph is subject to s 1617 of the Corporations Act which relevantly provides that if a proceeding is brought under the “old Act” before the “commencement day” (as defined in r 10.25.01(1) of the Corporations Regulations) the “old Act” continues to apply to the proceeding despite the amendments and repeals made by Sch 2 to the *Insolvency Law Reform Act 2016*(Cth) i.e. the IPS; and

(4) relevantly the “old Act” means the Corporations Act as in force immediately before 1 March 2017 (see s 1551 of the Corporations Act) and “proceedings” for the purpose of s 1617 of the Corporations Act is defined to include “civil and criminal proceedings, inquiries by the court, enforcement processes and any other processes”: see s 1617(4) of the Corporations Act.

302 However, that s 536 continues to apply to the proceeding is not sufficient. The question is whether it empowers the Court to make an order in terms of Order 3 of the Reinstatement Orders.

303 The Court’s jurisdiction to undertake an inquiry under former s 536 of the Corporations Act is supervisory with the Court performing a regulatory role.

304 ***Hall v Poolman***(2009) 75 NSWLR 99 concerned the operation of repealed s 536. The applicants were the liquidators of companies in the Reynolds Wines Group, Messrs Hall and Carter. They sought leave to appeal from an order that there be an inquiry into their conduct pursuant to s 536 of the Corporations Act and, if leave was granted, they sought on appeal to set aside that order. The relevant conduct related to legal proceedings commenced and prosecuted by the liquidators with the assistance of a litigation funder.

305 Commencing at [52] the Court of Appeal (Spigelman CJ, Hodgson JA and Austin J) considered the interpretation of s 536. At [53]-[55] the Court of Appeal relevantly observed that:

53 The court must bear in mind the place of s 536 in the regulatory system established under Australia’s corporations legislation when construing the section. It must be recognised that this section, together with the virtually identical provision applicable to controllers of the property of a corporation in s 423, is a broadly expressed supervisory jurisdiction over the conduct of persons in control of the affairs of a corporation, in circumstances where normal market forces and the exercise by shareholders of their rights to control are attenuated or non-existent. These powers are one part of a range of regulatory powers conferred on the court and/or ASIC to ensure the lawful, orderly and efficient conduct of the affairs of corporations during such a period. The detailed regulatory scheme found in the *Corporations Act* (Cth) manifests in this, as in so many other respects, the central significance of corporate conduct for the economic and social life of the nation.

54 Powers that can be characterised in this way are not to be narrowly construed, nor confined by fine distinctions. Where a statute grants a power to a superior court to deploy as the circumstances of the case necessitate, it is a basic rule of statutory interpretation that the grant should not be narrowly construed or cut back unless there are very clear reasons for doing so: …

55 Notwithstanding the plenary nature of the powers conferred by s 536, the case law has developed a number of principles bearing on the exercise of the court’s discretion to order an inquiry. It is pertinent to mention four matters in the present context, which we shall address under the headings:

* the “prima facie case” submission;
* the court’s supervisory role over the conduct of liquidators;
* the relevance of alternative remedies;
* the analogy with inquiries into the conduct of trustees in bankruptcy.

306 At [61]-[68] the Court of Appeal considered the second of those principles, namely the court’s supervisory role over the conduct of liquidators including at [61] and [66]-[67] that:

61 The powers conferred by s 536 have a common element, namely that they are powers of a regulatory nature concerned with the supervision of liquidators of all kinds. The court has a long-established role in the supervision of court appointed liquidators, and s 536 confers a statutory supervisory jurisdiction in respect of liquidators of all kinds.

…

66 It is pertinent to recognise that the powers conferred by s 536(1) are vested in *both* the court and the regulator, and therefore that the court is performing a regulatory role, in the sense that its function under s 536, like the function of ASIC under the section, is supervisory. …

67 The court’s supervisory role is recognised in the frequently cited observations of McLelland J in *Northbourne Developments* (at 438), where his Honour said of the predecessor to s 536 that it “is concerned with aspects of the conduct of liquidators which are liable to attract sanctions or control for what might broadly be described as disciplinary reasons.” For subsequent applications of this approach, see, for example, *Re Glowbind Pty Ltd (In Liq)*; *Takchi v Parbery* (at 217 [21]; 465 [21]), per Burchett AJ; *Australian Securities and Investments Commission v Forestview Nominees Pty Ltd (Receivers and Managers Appointed)* (2006) 236 ALR 652 at 656 [15]; 24 ACLC 1567 at 1570 [15]; *Leslie v Hennessy* (at 656 [4]); *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137 at 152 [48], per Dodds-Streeton J; *Vink v Tuckwell*, per Robson J.

307 In *Hypec* there were two applications before the Supreme Court in relation to orders that had previously been made for an inquiry to be undertaken pursuant to former s 536(1)(b) of the Corporations Act. By one of those applications the new liquidator of the company, **Hypec** Electronics Pty Ltd, sought to expand the description of the inquiry which had been previously ordered so as to include “an inquiry as to damages, as to the amount of loss incurred or suffered by [Hypec] by reason of misconduct of the former liquidator of [Hypec], David Patrick Watson”: at [8].

308 In considering the scope of s 536, Barrett J considered whether s 536(1) was capable of supporting an order for compensation by a derelict liquidator. After tracing the history of the provision and relevant authorities, his Honour concluded that it was, stating at [36] that:

In summary, s 536 appears capable of supporting a compensatory order where the court finds, upon inquiry, that an order of that kind is necessary to the effectuation of the section’s purpose; and, while the court’s power in that respect is not otherwise subject to limitation and a s 536 inquiry is not the occasion for trying an action for negligence or breach of duty, general law concepts will necessarily inform the decision whether such an order should be made and the basis on which it should be made.

309 Justice Barrett then considered the purpose of former s 536 of the Corporations Act observing first at [37] that:

While it may thus be open to the court, in a s 536(1) case, to order that loss to the estate be made good by the liquidator, the order the court makes in a particular instance will be determined by the whole of the circumstances. What the court “thinks fit”, in s 536(1) terms, will be judged according to what is best calculated to achieve the purpose for which s 536 exists.

310 Again, after surveying the relevant authorities at [41] his Honour said:

As the several judicial statements about s 536 make clear, the emphasis is on regulation, supervision, discipline and correction of liquidators in the interests of honest and efficient administration of the estates of companies subject to winding-up. The interest to be served is a public interest. The section is not concerned in any direct way with vindication of private rights. Rather and as Steytler J said in *GIS Electrical Pty Ltd v Melsom* (2002) 43 ACSR 481; 172 FLR 218; [2002] WASCA 302 at [49] echoing an observation of McLelland CJ in Eq in *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 438; 1 ACSR 79 at 83, it “is concerned with aspects of the conduct of liquidators which are liable to attract sanctions or control for what might be broadly described as disciplinary reasons”. The preoccupation is, as I put it in *Re Bauhaus Pyrmont Pty Ltd* [2006] NSWSC 742 at [4], with “the broader question of due administration of the winding up in the public interest”.

311 Commencing at [42] Barrett J set out the process to be followed in undertaking a proceeding under former s 536 of the Corporations Act noting it involved three stages. His Honour described the third stage at [45]-[46] as follows:

[45] If, having heard the competing submissions at the second stage, the court decides that the liquidator’s conduct was in some way deficient, it embarks upon the third stage and decides whether or not to make an order. The nature of the order will depend on the nature of the deficiency found. As noted above, the orders at the court’s disposal include an order that the liquidator make good loss occasioned by the liquidator’s deficient conduct. The predominant consideration, however, is effectuation of the purpose for which s 536 exists and, therefore, what is needed by way of regulation, supervision, discipline and correction for the due administration of the winding-up in the public interest.

[46] The power of the court at the third stage is the power to “take such actions it thinks fit”. But that power is not exercisable unless and until the second stage as been completed by means of an inquiry. This is the effect of the statutory language: “and *where the court … so inquires*, the court may take such action as it thinks fit” [emphasis added]. The court cannot take substantive action except as a consequence of an inquiry. It follows that it is not open to the court, as a matter of jurisdiction, to make an order simply on the basis that relevant parties consent to the making of the order.

312 It is clear from the authorities that former s 536 of the Corporations Act confers a supervisory jurisdiction on the Court and that its purpose is to discipline, correct and supervise the conduct of liquidators. It is with regard to that purpose that the power in former s 536(1) to take such action as the Court sees fit must be construed. The Commissioner points to no authority which supports his construction of former s 536 as permitting an order that by reason of a liquidator’s dereliction of duty the Court can exclude days for the purpose of calculating a period in which an action vested in the office of liquidator can be commenced.

313 It would be odd, if not perverse, if former s 536 of the Corporations Act permitted the Court, after concluding that a liquidator had not faithfully performed his or her duties, to make an order in terms of Order 3 of the Reinstatement Orders or to the effect of that sought by the Commissioner in paragraph 2 of his application. Such an order does not have as its purpose the disciplining, correction or supervision of the delinquent liquidator or for the “due administration of the winding up”. The section is concerned with the conduct of liquidators which is liable to attract sanctions or control for broadly disciplinary reasons. Any action taken as a result or as the Court sees fit must reflect that purpose.

314 By contrast such an order if made would have the effect of reducing the delinquent liquidator’s liability for compensation or damages, which seems to run counter to the purpose of former s 536, and would require third parties to defend claims made after the expiry of the period in which to bring such a claim prescribed by s 588FF of the Corporations Act, again to the financial benefit of the wrongdoer.

# CONCLUSION

315 The Applicants have been successful in their applications to have Order 3 of the Reinstatement Orders discharged. The Commissioner has been unsuccessful in the Commissioner’s Application. The Liquidators sought no relief but adopted the Commissioner’s submissions in opposition to the Applicants’ applications.

316 In the circumstances, costs would ordinarily follow the event with the Commissioner and the Liquidators paying the Applicants’ costs of the Applicants’ applications and the Commissioner paying the Applicants’ costs of the Commissioner’s Application.

317 However, given the variations in costs orders sought by the parties, including that the Kito Applicants and the Borg & Givana Applicants seek orders for indemnity costs from Mr Iannuzzi and the Commissioner, I indicated during the hearing that I would reserve on the question of costs.

318 I will make orders requiring the parties to confer and to provide within 14 days of the date of publication of these reasons:

(1) if they can agree on their form, draft orders which give effect to my reasons, including, if agreement can be reached, on the question of costs or the manner in which any dispute as to costs is to be resolved with an appropriate timetable for the filing and service of affidavits and submissions, not exceeding eight pages in length in each case; or

(2) if they cannot agree on their form:

(a) each party is to provide their proposed draft orders including on the question of costs, the manner in which any extant applications for costs are to be dealt with and for a timetable for the filing and service of affidavits and submissions, not exceeding eight pages in length, in support of and in response to any application for indemnity costs by any of the Applicants; and

(b) the proceeding will be listed for case management hearing on 23 February 2024 at 9.30 am to resolve the form of orders to be made.

319 To the extent there are any issues to be resolved in relation to the question of costs of the various applications, unless any party requests an oral hearing they will be dealt with on the papers.

|  |
| --- |
| I certify that the preceding three hundred and nineteen (319) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic. |

Associate

Dated: 2 February 2024

# SCHEDULE OF PARTIES

No: NSD 1510 of 2017

|  |  |
| --- | --- |
| **Applicants** |  |
| Fourth Applicant: | DIESEL DAN (NSW) PTY LTD ACN 165 673 101 |
| Fifth Applicant: | JOHN TABUSO |
| Sixth Applicant: | MIRJANA TABUSO |
| Seventh Applicant: | MAURIZIO LIGORI |
|  |  |
| **Respondents** |  |
| Third Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF RC GROUP AUSTRALIA PTY LTD (IN LIQUIDATION) ACN 164 000 462 |
| Fourth Respondent: | ACN 128 613 016 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS SILVERHILLS HAULAGE AUSTRALIA PTY LTD) ACN 128 613 016 |
| Fifth Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF ACN 128 613 016 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS SILVERHILLS HAULAGE AUSTRALIA PTY LTD) ACN 128 613 016 |
| Sixth Respondent: | ACN 110 905 774 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS CO-ORDINATED TRANSPORT SOLUTIONS PTY LTD) ACN 110 905 774 |
| Seventh Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF ACN 110 905 774 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS CO-ORDINATED TRANSPORT SOLUTIONS PTY LTD) ACN 110 905 774 |
| Eighth Respondent: | DIESEL DAN PTY LTD (IN LIQUIDATION) ACN 127 303 682 |
| Ninth Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF DIESEL DAN PTY LTD (IN LIQUIDATION) ACN 127 303 682 |
| 10th Respondent: | ACN 146 285 029 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS FARA LOGISTICS (AUST) PTY LTD) ACN 146 285 029 |
| 11th Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF ACN 146 285 029 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS FARA LOGISTICS (AUST) PTY LTD) ACN 146 285 029 |
| 12th Respondent: | INTER MANAGEMENT GROUP PTY LTD (IN LIQUIDATION) ACN 105 115 759 |
| 13th Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OF INTER MANAGEMENT GROUP PTY LTD (IN LIQUIDATION) ACN 105 115 759 |
| 14th Respondent: | ACN 133 636 414 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS ITS – INTERFREIGHT TRANSPORT SOLUTIONS PTY LTD) |
| 15th Respondent: | GAYLE DICKERSON AND STEPHEN ERNST VAUGHAN IN THEIR CAPACITY AS THE JOINT AND SEVERAL LIQUIDATORS OR ACN 133 636 414 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS ITS – INTERFREIGHT TRANSPORT SOLUTIONS PTY LTD) |
| 16th Respondent: | GEORGE KHALIL |
| 17th Respondent: | FRED KHALIL |
| 18th Respondent: | KATHERINE KHALIL |
| 19th Respondent: | KITO INVESTMENTS PTY LIMITED |
| 20th Respondent: | MICHAEL BORG |
| 21st Respondent: | BORG FAMILY PTY LIMITED |
| 22nd Respondent: | 746 GREENDALE ROAD GREENDALE PTY LTD |
| 23rd Respondent: | THE GREAT BROTHERS PTY LTD |
| 24th Respondent: | AKA CIVIL AUSTRALIA PTY LTD (IN LIQUIDATION) |
| 25th Respondent: | AKA (NSW) PTY LTD (IN LIQUIDATION) |
| 26th Respondent: | MAGIC GLASS PTY LIMITED |
| 27th Respondent: | LEVEL 33 PROPERTY GROUP PTY LIMITED |
| 28th Respondent: | THE HADD GROUP PTY LIMITED |
| 29th Respondent | GIVANA (HOLDINGS) PTY LIMITED |
| 30th Respondent: | CANER DOGAN |
| 31st Respondent: | BORN PTY LTD |
| 32nd Respondent: | EASTBORN PTY LTD |
| 33rd Respondent: | SONIA HADDAD |
| 34th Respondent: | JONATHON COOPER |
| 35th Respondent: | ACE GADIS |
| 36th Respondent: | ANNIE CRABBIE |
| 37th Respondent: | NIZAR HAIDAR |
| 38th Respondent: | MIRVAT HAIDAR |
| 39th Respondent: | MONICA ABBOUD |
| 40th Respondent: | PASCKAL MITRY |
| 41st Respondent: | VICTOR PACE |
| 42nd Respondent: | CATHERINE PACE |
| 43rd Respondent: | SLAVEN SURLA |
| 44th Respondent: | MARIAN RAHME |
| 45th Respondent: | PETER ABBOUD |
| 46th Respondent | GIVANA PTY LTD |
| 47th Respondent: | MAGGIE CHAN IN HER CAPACITY AS THE EXECUTRIX OF THE ESTATE OF THE LATE MURRAY RODERICK GODFREY |
| 48th Respondent: | VERITAS ADVISORY PTY LTD |
| 49th Respondent: | DAVID NICHOLAS IANNUZZI |