

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

### ISSUE 3: AUTUMN 2007

#### MISLED SHAREHOLDERS TO RANK ALONGSIDE ORDINARY CREDITORS IN INSOLVENCY

*By Olga Assabgy*

The High Court's decision in *Sons of Gwalia Ltd v Margaretic* and related *ING Investment Management LLC v Margaretic* [2007] HCA 1, considered the proof and ranking of competing claims against an insolvent company as between its creditors and shareholders.

The central issues came down to the interpretation of sections 563A and 553 of the Corporations Act 2001.

Mr Margaretic bought shares in Sons of Gwalia Ltd ("Gwalia"), a publicly listed gold mining company. Shortly thereafter administrators were appointed to the company and the shares became worthless.

Mr Margaretic claimed that he was induced to purchase the shares by misleading and deceptive conduct of Gwalia, namely non disclosure to the market of facts showing it to be insolvent.

The issue in the proceedings was whether Mr Margaretic's claim should rank equally with the claims of ordinary unsecured creditors.

At first instance, Gwalia and ING Investment Management LLC ("ING"), a creditor of Gwalia, argued that Mr Margaretic's claim arose in his capacity as shareholder and was accordingly postponed under s 563A. Emmett J disagreed, and this decision was upheld by the full Federal Court.

Gwalia and ING appealed to the High Court. The appeals were dismissed by a 6:1 decision. The High Court held that Mr Margaretic's claim is:

- a provable debt in the winding up or in the deed of company arrangement of a company; and
- not a debt to a shareholder in his "capacity as a member", so that section 563A does not subordinate such claims to the debts due to ordinary unsecured creditors.

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**PERSONAL PROPERTY - MEDICAL RECORDS – Mid-City Skin Centre and Laser Centre v. Zahedi-Anarak [2006] NSWSC 844.**

Who owns medical records in a corporatised medical centre? In this case a medical centre provided premises and support services to individual doctors, but those doctors were independent practitioners.

Campbell J held that patient cards, which contained consultation notes created by individual doctors, and booking sheets, which contained the names and contact details of patients to be seen by individual doctors, were owned by the medical centre, rather than individual doctors. Pathology reports were owned by individual patients. As between the medical centre and individual doctors, the medical centre, as a bailee at will, had the better title to possession of the copy of the pathology report kept on each patient file.

**By Jason Downing**

**ENVIRONMENT LAW - Gray v Minister for Planning & Ors [2006] NSWLEC 720**

The NSW Land and Environment Court held an environmental assessment for a proposed coal mine to be inadequate as it did not sufficiently address its greenhouse gas emissions and their contribution to global warming.

The judgment has implications for a range of industries, such as electricity plants and toll roads. It also has implications for development approvals under Pt 3A Environmental Planning and Assessment Act 1979 (NSW). That Part was introduced in 2005 as a means of fast-tracking major infrastructure projects.

Justice Pain rejected the argument of one of the respondents that the fast-track process provided for under Pt 3A meant that environmental impact statements were either optional or could be less comprehensive.

Subsequent amendments to the Act, introduced in 2006, may not overcome the implications of the decision.

**By Nic Angelov**

**TRUSTEES – JUDICIAL ADVICE - Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of the Macedonian Orthodox Church of Aust and NZ [2006] NSWCA 160**

A trustee and a liquidator each has an entitlement to seek directions from a Court on a matter arising in the administration of a trust, or winding up of a company.

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In both cases proceedings for directions generally do not bind other interested parties.

In the case of company liquidations, there is, however, a limited scope for a liquidator to join claimant parties, allowing the Court to give directions to the liquidator, binding upon the parties in conflict. The principles are described in *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 680. Corporations Rules r 2.13 may be invoked to enable relevant parties to be joined.

In *Macedonian Orthodox Community Church St Petka Inc* the NSW Court of Appeal by majority held that this prospect does not extend to trustees. A trustee's application is an inappropriate vehicle for the settlement of disputes between parties to a trust. A trustee's application for advice is a non-adversarial proceeding, and cannot be converted into proceedings otherwise.

**By Kerry Eassie**

**PRACTICE POINTS**

**COMMERCIAL LITIGATION - claims under s106 of the Industrial Relations Act 1996 (NSW)**

A proceeding in the Industrial Relations Commission under s106 of Industrial Relations Act 1996 may be related to a proceeding in the Supreme Court, but the Court has no power in general to order the transfer of the former proceeding so that the entire dispute can be heard by it: *Rexam Australia Pty Ltd v Optimum Metallising Pty Ltd* [2002] NSWSC 916.

However, the result may be achieved under the cross vesting legislation. Under s 8(1) of Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW), the Supreme Court can order the IRC proceeding removed into the Supreme Court where it appears to the Supreme Court that an IRC Proceeding is related to the proceeding in the Federal Court and there are grounds on which the Federal Court proceeding could be transferred to the Supreme Court. The Federal Court may then make an order transferring its proceedings to the Supreme Court under s5(4) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth): *Resarta Pty Ltd v Finemore* (2002) 55 NSWLR 320. Commencing proceedings in the Federal Court for the purpose of having the entirety of the disputes between parties dealt with by one court, utilising the procedures under the cross-vesting legislation, is not an abuse of process: *Morningstar Research Pty Ltd v Fiduciary Ltd* (2003) 131 FCR 236

**By Nicholas Newton**