The Plans of "Seeds" – Roaming by Du Feichen

KWM ANNUAL DIGEST OF JUDGMENTS AND PROCEEDINGS AGAINST DIRECTORS

Published or commenced in 2022

KING&WOOD MALLESONS
金杜律师事务所

INTRODUCTION

In this digest we provide a summary of key judgments and proceedings against directors in 2022.

We summarise court judgments and proceedings instigated by the Australian Securities and Investments Commission (**ASIC**) as well as private litigants, ASIC administrative proceedings, workplace health and safety proceedings and a selection of relevant international court proceedings.

A common trend we observed in 2022 is that ASIC continued to take a "stepping stones" approach to cases involving breaches of directors' duties. In these cases, ASIC first seeks to prove that the relevant company has breached its legal obligations. ASIC then argues that by failing to prevent the relevant company from breaching its legal obligations when a breach was reasonably foreseeable, the director breached their duties under the *Corporations Act 2001* (Cth) (**Corporations Act**) (in particular, their duty to act with due care and diligence). In some cases, we also observed private litigants taking a similar "stepping stones" approach (for example, *DSHE Holdings Ltd (in liq) v Potts*).

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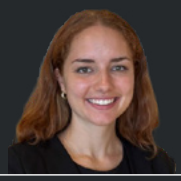

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OVERVIEW

Court Judgments and Proceedings: Regulators

CASE	OVERVIEW
Cruickshank v ASIC (2022) 292 FCR 627	Continuous disclosure breach by the company; "Stepping stones" breach of duty of care and diligence (s180(1)); Director not "involved in the contravention" so no breach of s674(2A)
ASIC proceedings against Nuix Limited directors (Ongoing)	Alleged continuous disclosure breaches; Alleged "stepping stones" breach of the duty of care and diligence (s180(1))
ASIC proceedings against The Star Entertainment Group directors (Ongoing)	Alleged contraventions of the duty of care and diligence (s180(1))
ASIC v Austal Ltd [2022] FCA 1231	Breach of continuous disclosure obligations by the company; Involvement by the CEO in breach of s674(2)
ASIC v Select AFSL Pty Ltd (No 2) [2022] FCA 786	Breach of Corporations Act and ASIC Act by company; "Stepping stones" breach of duty of care and diligence (s180(1))

Court Decisions: Private Litigants

CASE	OVERVIEW
TD's Insurance Pty Ltd and others v Reliance Online Pty Ltd [2022] WASC 15	Breaches of duty of care and diligence and duty of good faith; Order that directors pay damages
Crowley v Worley Ltd (2022) 293 FCR 438	Alleged continuous disclosure breaches by the company; Whether conduct and knowledge is limited to the conduct and knowledge of the board
Slea Pty Ltd v Connective Services Pty Ltd (No 9) [2022] VSC 136	Breach of duty to act in good faith and for a proper purpose (s181)
Re Bryve Resources Pty Ltd [2022] NSWSC 647	Breaches of duty of care and diligence and duty of good faith; Director ordered to pay damages
DSHE Holdings Ltd (in liq) v Potts (2022) 371 FLR 349	Risk of s254T breach in connection with dividend payment; CEO and CFO breached duty of care and diligence, but NEDs did not; CEO and CFO ordered to pay damages

ASIC Administrative Proceedings

CASE	OVERVIEW
Former Director of Radar Iron Ltd	Former director banned from providing financial services for three years and sentenced to 12 months imprisonment
Stellar Group Director	Director disqualified for three years and six months due to his involvement in the failure of numerous companies
Stellar Group Director	Director disqualified for two years due to his involvement in the failure of Stellar Group

Workplace Health and Safety Proceedings

CASE	OVERVIEW
Workers Compensation Nominal Insurer v Jamal [2022] NSWDC 10	Requirement to have workers compensation insurance; Director liable for worker injury compensation where no workers compensation insurance was in place
SafeWork NSW v All Seasons (Aust) Gourmet Produce NSW Pty Ltd [2022] NSWDC 12	Breaches of the Work Health and Safety Act; Director charged
SafeWork NSW v Elcorp Commercial Pty Ltd & Salvatore Treffiletti [2022] NSWDC 198	Breaches of the Work Health and Safety Act; Director charged
SafeWork NSW v PCW Constructions Pty Ltd & Peter James Woodhouse [2022] NSWDC 290	Breaches of the Work Health and Safety Act; Director charged
SafeWork NSW v Tunny Pty Ltd; SafeWork NSW v Waring [2022] NSWDC 306	Breaches of the Work Health and Safety Act; Director charged

Selected International Court Proceedings

CASE	OVERVIEW
United Kingdom: *BTI 2014 LLC v Sequana SA and ors* [2022] UKSC 25	Unsuccessful claim for breach of duty to creditors by paying a dividend
Hong Kong: *Koo Ming Kown & Anor v Commissioner of Inland Revenue* [2022] 6 HKC 322	Unsuccessful claim against directors for payment of unpaid company tax
USA: *Re Cognizant Technology Solutions Corporation Derivative Litigation* 2022 WL 4483595 9	Proper procedure for derivative actions in Delaware

COURT JUDGMENTS AND PROCEEDINGS: REGULATORS

Cruickshank v ASIC (2022) 292 FCR 627

Continuous disclosure breach by the company; "Stepping stones" breach by the director of the duty of care and diligence (s180(1)); Director not "involved in the contravention" so no breach of s674(2A)

This case relates to a failure by Antares Energy Limited (**Antares**), an ASX listed company, to disclose material information to the market and a consequential breach by its director (Mr Cruickshank) of his duty to act with due care and diligence.

On 5 September 2015, Antares entered into a purchase and sale agreement with Wade Energy Corporation (**Wade Energy**) for the sale of resource assets. On 6 September 2015, the Wade Energy CEO sent an email to Mr Cruickshank stating that he had received lender approval for certain assets but was still working on lender approval for other of the assets. On 7 September 2015, several ASX Announcements were released by Antares announcing the sale of all resource assets. Following the announcement, trading volume and share price in Antares increased. Some days after the initial announcements to the market, trading in shares in Antares was halted at the request of Antares and ultimately suspended by the ASX.

At first instance, the Federal Court found that Antares contravened s674(2) of the Corporations Act by failing to disclose the identity of the purchaser of the assets to the market, the fact that Antares had not verified the capacity of Wade Energy to complete the purchase and sale agreements and the fact that Wade Star had not yet received lender approval for the purchase of some of the resource assets (the **Undisclosed Information**).

The Court also found that Mr Cruickshank had not been "involved" in the contravention for the purposes of s674(2A) because he did not have actual knowledge of, or was wilfully blind to, the fact that the Undisclosed Information was of a nature that had to be disclosed.

However, the Court found that Mr Cruickshank had contravened s180(1) of the Corporations Act by causing or otherwise permitting Antares to breach its disclosure obligations.

The primary judge ordered that Mr Cruickshank pay, pursuant to s1317G of the Corporations Act, a pecuniary penalty in relation to the contraventions and disqualified Mr Cruickshank from managing a corporation for a period of four years.

Mr Cruickshank appealed the decision to the Full Federal Court. The Full Federal Court rejected the appeal, found in favour of ASIC and upheld the original judgment.

Link to judgment

ASIC proceedings against Nuix Limited directors (Ongoing)

In September 2022, ASIC commenced proceedings against Nuix Limited (**Nuix**) and five members of its board. ASIC alleges that Nuix failed to promptly disclose material information to the ASX and failed to correct misleading statements about forecasts it had previously published to the market.

Nuix was listed on the ASX in late 2020 through an IPO. Nuix's IPO prospectus contained a revenue forecast of $193.5 million for FY21. However, Nuix's financial results for the first half of FY21 were materially lower than forecast. These results were announced to the market on 26 February 2021. Between February 2021 and April 2021, the board received revenue forecasts for FY21 that forecasted revenue materially lower than the prospectus revenue forecast (between $185 million and $186.7 million). This information was not released to the market until 21 April 2021. Instead, Nuix released two ASX announcements (in February and in March) reaffirming the prospectus forecasts.

ASIC is alleging that the five directors breached their directors' duties by failing to take reasonable steps to prevent Nuix from making the misleading statements and breaching its continuous disclosure obligations. ASIC is seeking declarations, pecuniary penalties and disqualification orders from the Federal Court. These proceedings are ongoing with a hearing scheduled for late 2023.

Link to ASIC announcement

ASIC proceedings against The Star Entertainment Group directors (Ongoing)

Alleged contraventions of the duty of care and diligence (s180(1))

In December 2022, ASIC commenced proceedings against eleven current and former directors and officers of The Star Entertainment Group (**The Star**). ASIC alleges that the defendants breached their statutory duties of care and diligence in connection with The Star's dealings with junkets and its principal banker (NAB). Junkets are arrangements where a period of gambling is facilitated for a group of players.

ASIC is alleging that the defendants were aware of (or ought to be aware of) risks that entities within The Star group may be unable to comply with casino regulatory frameworks and statutory anti-money laundering obligations and failed to mitigate that risk. ASIC is seeking declarations, pecuniary penalties and disqualification orders against the directors. ASIC is also alleging that certain officers made inaccurate and misleading statement to NAB.

These proceedings are ongoing with a hearing scheduled for early 2024.

Link to ASIC announcement

ASIC v Austal Ltd [2022] FCA 1231

Breach of continuous disclosure obligations by the company; Involvement by the CEO in breach of s674(2)

In October 2022, the Federal Court found that David Singleton (the former CEO of Austal Limited (**Austal**)) was knowingly involved in Austal's breach of continuous disclosure laws. The Federal Court ordered Mr Singleton to pay a penalty of $50,000 and Austal a fine of $650,000.

The Court also found that Mr Singleton (who was the CEO of Austal at this time) was knowingly concerned in the contravention.

In this case, Austal admitted that between 16 June 2016 and 4 July 2016, it failed to notify the ASX that a one-off writeback of work in progress of at least US$90 million was required for FY16. The writeback could generate significant loss for Austal in FY16 and rendered the EBIT margin guidance previously announced to the ASX no longer reliable. The Court found that failure to disclose this information was in breach of Austal's continuous disclosure obligations.

Prior to the hearing in 2022, Austal and Mr Singleton admitted to the contraventions and the parties agreed on the declaratory relief and pecuniary penalties that would be sought jointly at the proceedings. The Federal Court accepted Austal's and Mr Singleton's admissions and in accordance with submissions by the parties, imposed a $50,000 civil penalty on Mr Singleton and a $650,000 fine on Austal.

Note that Mr Singleton was not disqualified, and no admission was made by Mr Singleton of a breach of the duty of care and diligence.

Link to judgment

ASIC v Select AFSL Pty Ltd (No 2) [2022] FCA 786

Breach of Corporations Act and ASIC Act by company; "Stepping stones" breach by the director of the duty of care and diligence (s180(1))

In this case, the Federal Court found that Select AFSL Pty Ltd (**Select**), BlueInc Services Pty Ltd (**BlueInc**) and Insurance Marketing Service Pty Ltd (**IMS**) engaged in unconscionable conduct when selling life, funeral and accidental injury insurance. The Court also found that Russel Howden, the director of Select, BlueInc and IMS breached his duty to act with due care and diligence.

The Court found that in the course of selling life, funeral and accidental injury insurance, Select, BlueInc and IMS engaged in conduct contrary to the Corporations Act and the ASIC Act. In particular, Select and BlueInc had in place remuneration schemes for sales agents contrary to the Corporations Act. Further, all three defendants made misleading or deceptive representations, coerced consumers, unduly harassed consumers and treated consumers unconscionably contrary to the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). Select also breached its general obligations as a holder of an Australian Financial Services Licence (**AFSL**).

Consequently, the Court found that Mr Howden breached his duties by failing or take reasonable steps to prevent Select, BlueInc and IMS from engaging in these contraventions. The Court noted that a director in Mr Howden's position and with his skills and experience would have taken steps to prevent the contraventions.

In particular, a reasonable director would have informed themselves of their obligations under financial services law, sought advice from relevant experts as to compliance and adapted any incentive schemes to reduce the risk of driving poor sales practices.

Link to judgment

COURT DECISIONS: PRIVATE LITIGANTS

TD's Insurance Pty Ltd and others v Reliance Online Pty Ltd [2022] WASC 15

Breaches of duty of care and diligence and duty of good faith; Order that directors pay damages

In this case, the Supreme Court of Western Australia found two directors (Mr Hanson and Mr Donnelly) breached their statutory and common law duties of due care and diligence and to act in good faith and in the best interests of the company.

The breaches occurred in connection with an Asset Sale Agreement entered into by Reliance Online to buy an insurance business. VHG guaranteed Reliance Online's obligations under the Asset Sale Agreement. At all material times, Mr Hanson and Mr Donnelly were directors of Reliance Online and Mr Donnelly was also director of VHG. Reliance Online was a subsidiary of VHG.

At the time the Asset Sale Agreement was entered into, the financial positions of Reliance Online and VHG were described by the Court as 'precarious'. VHG's Board had resolved that VHG and its subsidiaries were not to undertake any new acquisitions. Mr Hanson and Mr Donnelly were aware that they required VHG board approval to undertake any new acquisitions but executed the Asset Sale Agreement without consulting the other Reliance Online or VHG directors.

The Court found that Mr Donnelly and Mr Hanson breached their duty to act with care and due diligence in connection with this transaction. In particular, they committed Reliance Online to a transaction that offered at best a marginal benefit to it but exposed it to insolvency. Further, they executed the Asset Sale Agreement without discussing the purchase with the other Reliance Online or VHG directors. Mr Donnelly, who conducted the negotiations, ignored many indicators of potential problems with the business that was being acquired. Mr Hanson committed Reliance Online to the Asset Sale Agreement without reading or seeing the contract before it was signed in a situation where there was no urgency justifying this action.

For similar reasons as set out above, the Court also found that the directors breached their duty to act in good faith and in the best interests of the company.

The Court ordered Mr Donnelly and Mr Hanson to pay damages and legal costs.

Link to judgment

Crowley v Worley Ltd (2022) 293 FCR 438

Alleged continuous disclosure breaches by the company; Whether conduct and knowledge is limited to the conduct and knowledge of the board

This case is an appeal of a shareholder class action relating to Worley Ltd's (**Worley**) continuous disclosure obligations as a publicly listed company. The Full Court of the Federal Court found in favour of the appellants and remitted the matter to the Federal Court for further hearing.

On 14 August 2013, Worley published an earnings guidance statement projecting a net profit after tax (**NPAT**) figure of over $322 million for FY14. This earning guidance was based on Worley's internal budget which projected an NPAT of $352.1 million for FY14. On 20 November 2013, Worley then published a correcting statement projecting the FY14 NPAT figure to be between $260 million and $300 million. The applicants argued that Worley breached its continuous disclosure obligations and engaged in misleading or deceptive conduct causing them loss. In particular, they argued that Worley failed to disclose the fact that it did not have a reasonable basis for the August forecast.

At first instance, the Federal Court found in favour of Worley. The Federal Court found that Worley did not lack reasonable grounds when issuing its earning guidance statement on 14 August 2013. The Court also found that it was reasonable to maintain this revenue statement until the revised statement was issued on 20 November 2013.

The Federal Court's judgment at first instance was appealed to the Full Court of the Federal Court. The Full Court of the Federal Court found in favour of the appellants and remitted the matter to the Federal Court for further consideration by a single judge.

In its judgment, the Full Court held that the judge at first instance mistakenly focused on the conduct and knowledge of the board, as opposed to the conduct and knowledge of Worley when assessing Worley's liability. In that regard, the conduct and knowledge of other officers of Worley was relevant.

The Court clarified that the relevant issue is whether Worley had reasonable grounds for making the representations about the FY14 revenue forecast, not whether the board acted reasonably or unreasonably given the information made available to it.

Similarly, the Full Court held that following the primary judge's finding that the FY14 budget upon which the August forecast was based was not a P50 budget, the relevant question was whether Worley knew or ought to have known that fact. A P50 budget is a budget that meets a particular statistical confidence threshold.

Slea Pty Ltd v Connective Services Pty Ltd (No 9) [2022] VSC 136

Breach of duty to act in good faith and for a proper purpose (s181)

The Supreme Court of Victoria found that directors of Connective Services Pty Ltd and Connective OSN Pty Ltd (together, the **Connective Companies**) breached their duty to act for a proper purpose in relation to a restructure of the business. Slea Pty Ltd (**Slea**) was a minority shareholder of the Connective Companies. The other shareholders were Millsave Pty Ltd (**Millsave**) and Mr Mark Haron (who is also a director of the Connective Companies). Mr Glenn Lees is a director of Millsave and a dominant director of the Connective Companies and Mr Graham Maloney was also a director of the Connective Companies.

In 2011, the companies were restructured without Slea's knowledge. Following the restructure, a 25% interest in the new holding company and thus the business was sold to Macquarie Bank. The restructure was executed in a manner that allowed Millsave and Mr Haron to maintain control of the business and realise a portion of their equity in the business, without enlivening Slea's pre-emptive rights.

The Court found that the restructure was exercised for an improper purpose. The Court emphasised that the relevant purpose is the immediate purpose for which the powers were exercised. In this case, the Court found that the immediate purpose of the restructure was to circumvent Slea's pre-emptive rights. The Court held that directors are not conferred the power of sale to manipulate the structure of a company in order to avoid shareholders being able to exercise their constitutional rights. This purpose does not involve any consideration of management within the proper sphere of the directors. The Court made an order entitling Slea to purchase the majority of shares in the Connective Companies at their current value.

Re Bryve Resources Pty Ltd [2022] NSWSC 647

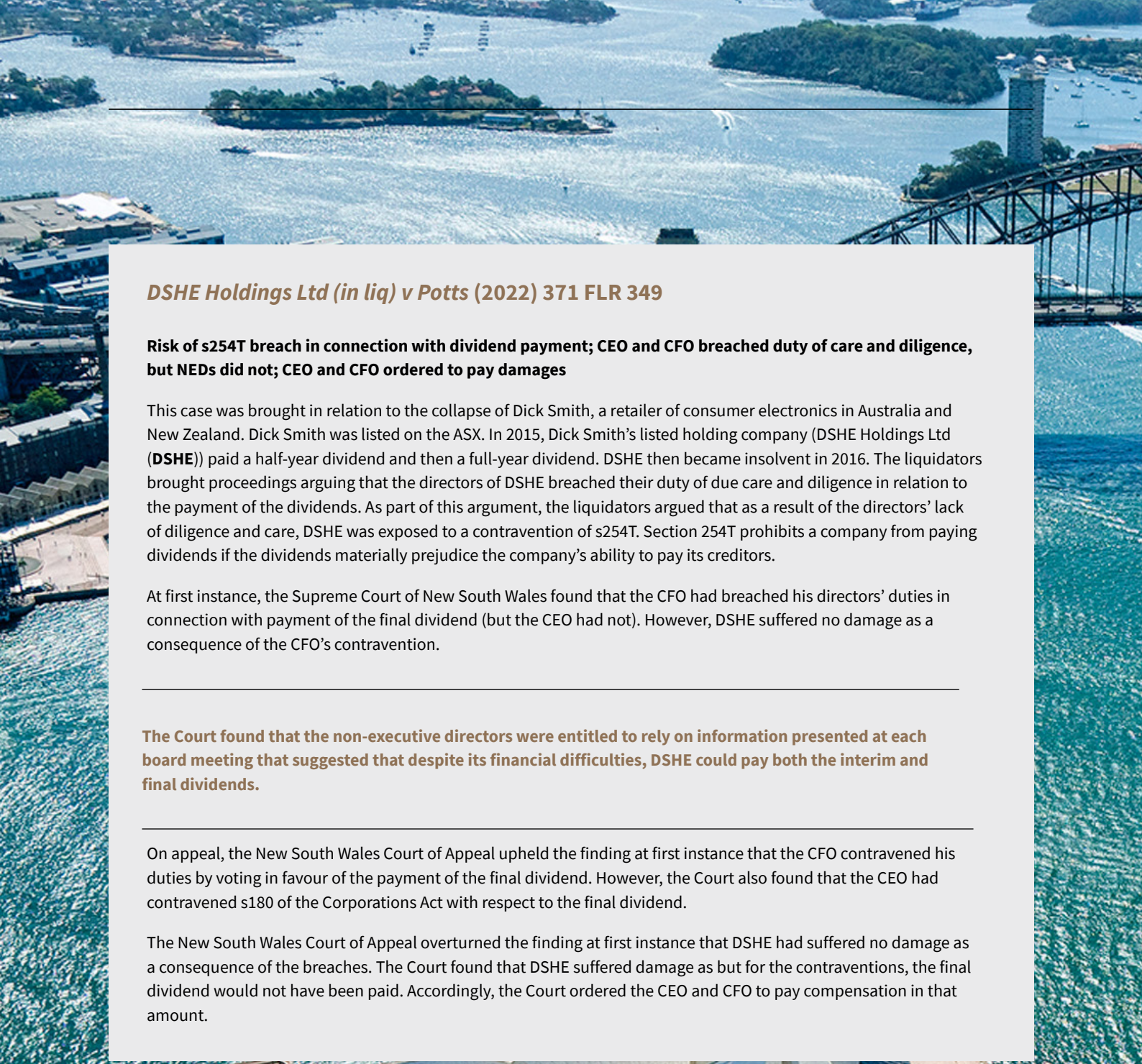
Breach of duty of care and diligence and duty of good faith; Director ordered to pay damages

This case relates to a breach of directors' duties by Mr Stanton, the former director of Bryve Resources Pty Ltd (**Bryve**). The Supreme Court of New South Wales found that Mr Stanton breached his duties under sections 180(1) and 181(1) of the Corporations Act in relation to a series of payments made by Bryve to Qube Logistics Pty Ltd (**Qube**). Qube is a company incorporated in Namibia. Mr Stanton is also a director and sole shareholder of Qube.

Between 2014 – 2016, Bryve loaned $1,547,158.39 to Qube. The terms of the loan were not documented but there was no security or interest payable attached to the loan. Qube's ability to repay the loan was doubtful as it had been trading for a relatively short time, had been operating at a loss and there was no evidence to suggest its assets could be readily realised to repay the loan.

The Court found that in entering into the above transactions Mr Stanton breached his directors' duties towards Bryve. In particular, Mr Stanton breached the duty to act with due care and diligence and in the best interests of the company and the duty to act in good faith. The Court emphasised that the interests of Bryve are not to be equated with the interests of Mr Stanton, despite the fact that he was a significant creditor of Bryve.

The Court ordered Mr Stanton to pay Bryve $1,514,823.52 for the losses suffered as a result of the unsecured, interest-free advancements made to Qube.



DSHE Holdings Ltd (in liq) v Potts (2022) 371 FLR 349

Risk of s254T breach in connection with dividend payment; CEO and CFO breached duty of care and diligence, but NEDs did not; CEO and CFO ordered to pay damages

This case was brought in relation to the collapse of Dick Smith, a retailer of consumer electronics in Australia and New Zealand. Dick Smith was listed on the ASX. In 2015, Dick Smith's listed holding company (DSHE Holdings Ltd (**DSHE**)) paid a half-year dividend and then a full-year dividend. DSHE then became insolvent in 2016. The liquidators brought proceedings arguing that the directors of DSHE breached their duty of due care and diligence in relation to the payment of the dividends. As part of this argument, the liquidators argued that as a result of the directors' lack of diligence and care, DSHE was exposed to a contravention of s254T. Section 254T prohibits a company from paying dividends if the dividends materially prejudice the company's ability to pay its creditors.

At first instance, the Supreme Court of New South Wales found that the CFO had breached his directors' duties in connection with payment of the final dividend (but the CEO had not). However, DSHE suffered no damage as a consequence of the CFO's contravention.

The Court found that the non-executive directors were entitled to rely on information presented at each board meeting that suggested that despite its financial difficulties, DSHE could pay both the interim and final dividends.

On appeal, the New South Wales Court of Appeal upheld the finding at first instance that the CFO contravened his duties by voting in favour of the payment of the final dividend. However, the Court also found that the CEO had contravened s180 of the Corporations Act with respect to the final dividend.

The New South Wales Court of Appeal overturned the finding at first instance that DSHE had suffered no damage as a consequence of the breaches. The Court found that DSHE suffered damage as but for the contraventions, the final dividend would not have been paid. Accordingly, the Court ordered the CEO and CFO to pay compensation in that amount.

ASIC ADMINISTRATIVE PROCEEDINGS

Former Director of Radar Iron Ltd Banned for Three Years

ASIC banned Ananda Kathiravelu, former director of ASX listed Radar Iron Ltd and the private company, Armada Capital Pty Ltd from providing financial services for three years. Mr Kathiravelu was convicted in the Supreme Court of Western Australia for conspiring to manipulate the market for Radar Iron Ltd for which he was sentenced to 12 months imprisonment and was released on recognisance in the sum of $10,000.

Mr Kathiravelu received the ban because ASIC found he failed to comply with financial services law and was involved in the contravention of a financial services law by another person.

Link

Stellar Group Director Simon Pitard Disqualified

ASIC disqualified former director Simon Pitard from managing companies for three years and six months due to his involvement in the failure of numerous companies. Mr Pitard was the director of 42 companies within the Stellar Group which all went into insolvency. ASIC found that Mr Pitard:

- lacked strategic management of his companies and failed to provide oversight and monitor the companies' activities;
- did not ensure ACN 169 565 673 kept accurate books and records;
- allowed ACN 169 565 673 to loan funds to related entities without conducting appropriate assessments and monitoring;
- allowed ACN 169 565 673 to retain the risk of a finance agreement after transferring the legal right and title of the asset to a related entity;
- did not ensure Steller Cranes Pty Ltd complied with ATO lodgement obligations; and
- did not ensure Steller Cranes Pty Ltd and ACN 169 565 673 made timely reporting and payments to the ATO.

The total amount owed to secured and unsecured creditors across all 42 companies is estimated to be more than $617 million. Specifically, in regard to ACN 169 565 673, Stellar Cranes Pty Ltd and Stellar Safety Pty Ltd, the total amount owed to secured and unsecured creditors was approximately $6.6 million of which approximately $1 million is owed to the ATO.

Link

Stellar Group Director James O'Donahue Disqualified

ASIC disqualified former director James O'Donahue from managing corporations for two years due to his involvement in the failure of Stellar Group. Mr O'Donahue was a director of 23 Companies within the Stellar Group which all entered insolvency.

ASIC found that Mr Donahue:

- **accepted appointments to act as a director of companies within the Stellar Group in situations where companies were in financial difficulty;**
- **failed to ensure that Stellar Safety Pty Ltd complied with its statutory obligations to lodge business activity statements and income tax returns with ATO; and**
- **failed to perform adequately his duties as a director of companies within the Stellar Group.**

The total amount owed to secured and unsecured creditors across all 23 companies is estimated to be more than $31 million of which approximately $1 million is owed to the ATO.

Link

ASIC ENFORCEMENT OUTCOMES – 2022

The tables below summarise the outcomes of ASIC enforcement actions in the 2022 calendar year, related to financial services, markets and corporate governance.

Financial Services Enforcement Outcomes (number of respondents by misconduct and remedy type)

MISCONDUCT TYPE	CRIMINAL	CIVIL	ADMINISTRATIVE	TOTAL
Credit misconduct	2	9	25	**36**
Financial advice misconduct	2	7	24	**33**
Insurance misconduct	0	6	0	**6**
Investment management misconduct	2	3	21	**26**
Superannuation misconduct	3	12	3	**18**
TOTAL	**9**	**37**	**73**	**119**

Markets Enforcement Outcomes (number of respondents by misconduct and remedy type)

MISCONDUCT TYPE	CRIMINAL	CIVIL	ADMINISTRATIVE	TOTAL
Continuous disclosure	0	3	1	**4**
Insider trading	2	0	0	**2**
Market manipulation	1	2	1	**4**
Other market misconduct	1	2	5	**8**
TOTAL	**4**	**7**	**7**	**18**

Corporate Governance Enforcement Outcomes (number of respondents by misconduct and remedy type)

(*NOTE: No civil penalty outcomes for governance failures in 2022*)

MISCONDUCT TYPE	CRIMINAL	ADMINISTRATIVE	TOTAL
Auditor misconduct	1	56	**57**
Liquidator misconduct	0	2	**2**
Directors' duties and governance failures	1	0	**1**
Other corporate governance misconduct	3	1	**4**
TOTAL	**5**	**59**	**64**

Statistics extracted from ASIC summary of enforcement outcomes reports:

January 2022 – June 2022 **July 2022 – December 2022**

WORKPLACE HEALTH AND SAFETY PROCEEDINGS

Workers Compensation Nominal Insurer v Jamal [2022] NSWDC 10

Requirement to have workers compensation insurance; Director liable for worker injury compensation where no workers compensation insurance was in place

Ms Jamal was sole director of Al Maamoun & Co Pty Ltd (**Company**) between 4 October 2013 and 22 January 2017 during which time the Company operated a grocery store. The plaintiff was the Workers Compensation Nominal Insurer (**WCNI**), which is a body that was created to provide cover to injured employees in circumstances where their employer is unable to. Mr Khaled Jamal was employed by the Company to oversee a new fit out to the premises of the grocery store. His employment was expected to last no more than six weeks and his remuneration was $1,165 gross per week for that period. Mr Khaled Jamal was a family member of Ms Jamal's and a number of other family members worked at the grocery store however, Mr Khaled Jamal was the only one to receive a salary – the others received non-financial remuneration such as goods from the store and cash from the store's cash register for expenses.

Mr Khaled Jamal received a serious injury during the course of his employment. The Company had no workers compensation insurance and cover was provided to Mr Khaled Jamal by WCNI to the effect of $258,565 for which WCNI sought reimbursement under s145 of the *Workers Compensation Act 1987* (NSW). As the Company had been dissolved, WCNI sought that reimbursement from Ms Jamal personally.

The Court found that the Company was not an exempt employer and that Ms Jamal was a culpable director and ordered Ms Jamal to pay the plaintiff $258,565,75 with liberty to apply in relation to interest and costs.

Link

SafeWork NSW v All Seasons (Aust) Gourmet Produce NSW Pty Ltd [2022] NSWDC 12

Breaches of the Work Health and Safety Act; Director charged

On 24 December 2018, an employee of All Seasons (Aust) Gourmet Produce Pty Ltd (**Company**) suffered serious injury when his right hand came in contact with the rotating blade of a spinach cutter while clearing the blockage on a conveyor belt. After a SafeWork NSW investigation, Skevos Kakias, sole director of the Company was charged with breaches of sections 32 and 27(1) of the *Work Health and Safety Act 2011*.

Mr Kakias was fined $37,500, reduced from $50,000 for an early plea of guilty.

Link

SafeWork NSW v Elcorp Commercial Pty Ltd & Salvatore Treffiletti [2022] NSWDC 198

Breaches of the Work Health and Safety Act; Director charged

On 7 February 2019, a truck driver suffered serious injuries when he climbed onto a pile of formwork screens to direct the movement of the screens by a tower crane when he fell between the stacks on a construction site subject to the health and safety systems administered by Elcorp Commercial Pty Ltd (**Company**). Salvatore Treffiletti, sole director of the Company, was charged with breaches of sections 32 and 27(1) of the *Work Health and Safety Act 2011*.

Mr Treffiletti was fined $22,500.

Link

SafeWork NSW v PCW Constructions Pty Ltd & Peter James Woodhouse [2022] NSWDC 290

Breaches of the Work Health and Safety Act; Director charged

On 13 June 2020, an apprentice carpenter employed by PCW Constructions Pty Ltd (**Company**) sustained serious injuries when he fell approximately 6.5 metres through a skylight while removing roof sheets in the course of his employment. The Company's sole director, Peter Woodhouse, was charged with breaches of sections 32 and 27(1) of the *Work Health and Safety Act 2011*.

Mr Woodhouse was fined $30,000.

Link

SafeWork NSW v Tunny Pty Ltd; SafeWork NSW v Waring [2022] NSWDC 306

Breaches of the Work Health and Safety Act; Director charged

On 15 June 2019, an employee of Tunny Pty Ltd (**Company**) sustained injuries when the tray of a flatbed truck, being lifted by a wheel loader, struck him while he was adjusting the chain slings in the course of his employment. The Company's sole director, Aiden Waring, was charged with breaches of sections 32 and 27(1) of the *Work Health and Safety Act 2011*.

Mr Waring was fined $30,000.

Link

SELECTED INTERNATIONAL COURT PROCEEDINGS

UNITED KINGDOM

BTI 2014 LLC v Sequana SA and ors [2022] UKSC 25

Unsuccessful claim for breach of duty to creditors by paying a dividend

In May 2009, the directors of AWA (**Company**) resolved to distribute a dividend of €135 million (**Dividend**) to its sole shareholder Sequana SA. At the time of the resolution the Company was solvent, but it had a contingent liability for clean-up costs, the value (if any) of which was uncertain but was potentially substantial enough to create a real risk of insolvency in the future.

The clean-up costs eventually drove the Company into insolvent administration in October 2018. BTI 2014 LLC (**BTI**), as the assignee for the Company, sought to recover the amount of the Dividend from the Company's directors arguing that the resolution to distribute the Dividend was in contravention of the duty the directors owed to the Company's creditors (**Creditor Duty**) because the directors had failed to consider or act in the interests of those creditors. BTI's claim had failed at first instance and then again in the Court of Appeal. In this case, BTI sought to appeal the Court of Appeal's decision in the Supreme Court.

The Supreme Court addressed the following issues:

- Is there a common law Creditor Duty?
- Can the Creditor Duty apply to a decision to pay an otherwise lawful dividend?
- What is the content of the Creditor Duty?
- When is the Creditor Duty engaged?

The Court dismissed the appeal and found (with the support of Australian case law, among other authorities) that:

- **The Creditor Duty did exist in common law and further clarified that directors are required in certain circumstances to consider and/or act in the interest of creditors and this is due to the creditor's economic interest in the company assets. It follows, the importance of that interest increases when a company is facing issues as to its solvency;**
- **The Creditor Duty can apply to a dividend which is otherwise lawful;**
- **Where a company is insolvent or bordering on insolvency but insolvent liquidation is not imminent or certain, directors should balance creditors' interests with that of the company's shareholders. However, the greater the risk of insolvent liquidation the more directors should prioritise the interests of creditors;**

The Creditor Duty was not engaged in relation to the Dividend as at the time the Dividend was resolved to be distributed, insolvency was neither imminent nor certain.

BTI's appeal was dismissed.

Link

HONG KONG

***Koo Ming Kown & Anor v Commissioner of Inland Revenue* [2022] 6 HKC 322**

Unsuccessful claim against directors for payment of unpaid company tax

The Inland Revenue Department (**IRD**) had found that the tax returns for Nam Tai Electronic & Electrical Products Limited (**Company**) were incorrect following an audit and additional tax assessments were raised against the Company. The Company attempted to challenge the assessments to the IRD Board of Review which was unsuccessful. The Company failed to pay the amounts assessed and was wound up by the court on petition from the Commissioner of the IRD. The IRD then assessed the directors for additional tax on the basis that the directors had signed off the incorrect tax returns for the Company. The directors successfully appealed to the Court of First Instance, being the first time a court in Hong Kong has had to address this issue. This decision was subsequently upheld in the Court of Appeal.

The IRD appealed the Court of Appeal decision to the Court of Final Appeal on the basis that it involved a question of great general or public importance. The key issue was whether a director signing off an incorrect tax return for a company could be held liable to additional tax under Hong Kong's Inland Revenue Ordinance (Cap 112) (**IRO**).

The Court found that only the Company was obligated to repay its tax liability, the IRO placed an obligation on the directors to ensure the Company makes a return but not an obligation to make a return on the Company's behalf.

Link

USA

Re Cognizant Technology Solutions Corporation Derivative Litigation 2022 WL 4483595 9

Proper procedure for derivative actions in Delaware

In 2016, Cognizant Technology Solutions Corporation (**Company**) publicly disclosed that a number of its senior managers and other employees were engaged in a bribery scheme in India from 2010 to 2015. It was revealed that approximately $6 million had been paid to Indian officials for the purpose of securing construction related permits and licensing.

The Company conducted an internal investigation as well as notifying the Department of Justice and the Securities and Exchange Commission (**SEC**) leading to over $60 million in investigation costs and $25 million in penalties imposed by the SEC on the Company.

Several institutional shareholders in the Company (**Plaintiffs**) filed a derivative class action against 11 of the Company's former directors and executives (**Defendants**) claiming breaches of fiduciary duties and unjust enrichment, among other things. This case is a consolidation of 4 separate actions.

The Defendants applied to the United States District Court, Delaware, New Jersey to have the action dismissed on the basis that the Plaintiffs had failed to make a demand that the Company's board brought forth the action on behalf of the Company prior to the Plaintiffs doing so. The Plaintiffs argued that the demand would have been futile on the basis that the director Defendants would face substantial liability under the action.

The Court found that the director Defendants would not be substantially liable under the action and the action was dismissed.

Link

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