JUDICIAL CASE LAW UPDATE

THE HON JUSTICE M J BEAZLEY AO

Introduction

1 I have been asked to provide an update on recent decisions of interests to those practising in the fields of banking, financial services and insolvency. In light of the time available, I am going to focus my discussion on four decisions in particular. The first concerns class constitution in schemes of arrangement; the next two are insolvency cases, and finally a case concerning the application of the law of negligence in the conduct of equity rights issues.

***First Pacific*: Class composition in schemes of arrangement**

2 The scheme of arrangement provisions in Chapter 5 Part 5.1 of the *Corporations Act 2001* (Cth) provide a regime for binding, court-approved agreements that allow the reorganisation of the rights and liabilities of members and creditors of a company. Under Part 5.1 of the *Corporations Act*, s 411 court approval of a scheme is a 2 stage process, usually referred to as the "*first hearing*" and "*second hearing*".

3 The "*first hearing*" stage occurs after draft scheme documents have been provided to ASIC for review. At that point a Part 5.1 body, creditor or member seeking to implement a scheme of arrangement must seek orders from the court convening a meeting or meetings of members or creditors of the body, as the case may be, in such classes as are marshalled.[1]

[1] *Corporations Act 2001* (Cth), s 411(1)

4 The essential task of the court at the first hearing is to determine whether "*the scheme is of such a nature … that if it achieves the statutory majority at the meeting the court would be likely to approve it on the hearing of a petition which is unopposed*".[2] The role of the court at the first hearing is a limited one.[3] At the stage of the first hearing, the scheme documents will not have been distributed to members or creditors, and most of the members or creditors affected by the proposed scheme will not have the awareness or opportunity to make submissions at the first court hearing.[4]

5 As the High Court observed in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, at 504-505, the first hearing is in the nature of an interlocutory proceeding and does not amount to a final determination that the proposed scheme is one which falls within the scope of s 411. Although questions of class constitution are properly addressed at the first hearing when they so arise, it is well recognised that the position reached on class constitution at this hearing does not preclude further debate at the second hearing.[5]

6 Where a scheme has achieved the requisite meeting approvals, separate approval of the court is still required for the scheme to take effect.[6] This final determination of the court is the concern of the "*second hearing*", as part of which the court will consider factors required both as a matter of statute under s 411 and as a matter of general law principle. The court at the second hearing retains a discretion whether to approve the scheme.

---

[2] *FT Eastman & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72; *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116 at [39]

[3] *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116 [40]

[4] Ibid [40]

[5] Ibid [40]-[41]

[6] *Corporations Act 2001* (Cth), s 411(4)(b)

7 In the *Boart Longyear* litigation in the New South Wales Court of Appeal two interesting questions arose. The first related to class constitution and arose out of the first hearing stage.[7] The second related to the breadth of the discretion to approve a scheme, which only arises at the second hearing stage.[8]

8 The scheme of arrangement in question in *First Pacific* was a creditors' scheme in respect of a company in a parlous financial state and carrying significant debt liabilities. Boart Longyear Ltd, a Utah-based but ASX-listed drilling company, sought to propound two creditors' schemes. The first concerned indebtedness of approximately US$294 million to certain unsecured note holders and proposed the release of US$206 million of principal and interest, variation of the remaining debt and the issue of 42% of the ordinary equity of Boart Longyear post-recapitalisation.

9 The second scheme, and the one which formed the subject of the proceedings in the Court of Appeal, was described as the "Secured Creditors' Scheme". Without reciting too much of the detail, Boart Longyear owed approximately US$205 million to certain secured note holders under a secured indenture. The appellant First Pacific held 29.07% of those secured notes, whereas 50.8% were held by companies associated with Centerbridge Partners, Ares Management and Ascribe II Investments.

10 Boart Longyear also owed approximately US$113 million in Term Loan A debt and US$137 million in Term Loan B debt. The principal amounts of the Term Loan A and B debt were secured over the same assets as the secured notes, but a significant proportion of the associated interest was unsecured. The only holders of the Term Loan A and B debt were companies associated with Centerbridge.

---

[7] *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116
[8] *Snowside Pty Ltd as trustee for the Snowside Trust v Boart Longyear Ltd* [2017] NSWCA 215

11 Broadly stated, what the Secured Creditors' Scheme proposed was as follows. In terms of the secured notes, the proposed scheme would involve variation in the rate of interest payable from 10% payable in cash to, at the option of the company, either 12% payable in kind or 10% in cash up to 31 December 2018 and thereafter payable at a rate of 10% in cash for the period from 31 December 2016; second, an extension of maturity date; third, waiver of rights in relation to any change of control event arising from the implementation of the scheme and associated transactions; and fourth, a secured debt cap. In terms of the Term Loan A and B debt, the proposed scheme involved a similar variation to a change in control provision.

12 Centerbridge, Ares and Ascribe had bound themselves to vote in favour of the schemes under a restructuring support agreement, and creditors in support of the schemes thus held approximately 77.9% by value of the debt the subject of the proposed Secured Creditors' Scheme. There were a number of additional agreements as part of the broader recapitalisation of the group upon which the Secured Creditors' Scheme was conditional. Without reciting the detail, the net anticipated effect on the shareholdings was that Centerbridge would end up with 56% of the ordinary shares in BLY, Ascribe 19.2%, Ares 18%, unidentified note holders 4.8% and previous shareholders other than Centerbridge 2%.

The class constitution issue in the Secured Creditors' Scheme

13 At the first hearing, Black J made orders convening respective meetings for the purpose of creditors considering the Secured Creditors' Scheme and the Unsecured Creditors' Scheme. His Honour rejected the appellant's arguments that it was inappropriate for the secured note holders and Centerbridge as holders of Term Loan A and Term Loan B debts to vote as a single class on the Secured Creditors' Scheme. Black J's view was affirmed on appeal to the New South Wales Court of Appeal.

14 Argument on the appeal proceeded by reference to two main issues, which were referred to at the hearing as the "equity issue", concerning the differential grant of equity and the effect of the change of control waiver and certain director nomination rights; and the "interest issue", concerning the effects of the scheme on the interest payment obligations on the secured notes and Term Loan A and B debt.

15 Accepting that the equity issue encompassed not only the grant of equity to Centerbridge, but also the director nomination rights and the waiver of change of control rights, on Bathurst CJ's reasoning it was the additional grant of equity to Centerbridge that was the critical issue.[9] This clearly entailed a change in legal rights under the scheme. The effect of the proposed Secured Creditors' Scheme would be each secured creditor losing the right to call up their loans on a change of control but Centerbridge alone would get the benefit of being able to attain legal control of BLY.

16 The key point in the Court's reasoning was not that there was no difference in rights, but rather that, in the Court's view, that did not make it impossible for the creditors in question to consider the scheme as one class. Context was vital in this respect, including the likelihood that BLY would otherwise be placed into insolvency.

17 Likewise with respect to the interest issue. In terms of the first and second questions posited by Bathurst CJ, the respective creditors' right to payment of interest were different and would be treated differently by the scheme.[10] Accepting that to be so, the question was whether that difference would prevent the secured note holders and the holders of the Term Loan A and B debt from consulting together. Considered in the context of imminent liquidation, that question was answered in the negative.

[9] Ibid [94]

[10] Ibid [99]

18 It is important to understand a number of aspects of Bathurst CJ's exposition of the relevant principles governing the task at the first hearing and in relation to class constitution, but I should do so by indicating that his Honour did not espouse any new principle of law. Rather, the impact of this decision – as I will discuss shortly – related to the emphasis placed by the Court on a number of conventional features of schemes of arrangement.

19 The apparent passion with which the class composition issue was fought both at first instance and on appeal is perhaps best captured in this early submission by *First Pacific* who was complaining that it ought not be part of the same class as the Centerbridge group.

> … this is on the key issue on the appeal, what this shows is that at the very centre of this scheme, not the periphery, not some de minimus matter, the very centre of it is that of this supposed single class of creditors, one subclass is being told, you can exchange part of your debt for equity, and that opportunity is not being given to the other people in the same class.
>
> … the essence of the scheme, it's a scheme dealing with secured debt, supposed secured debt, one creditor has the ability to give up part of its debt, that is part of the very thing it's supposedly voting on in the meeting, to get equity, and the others don't, and it's not just any old equity, it's equity which gives control, legal control, 56%.

20 In terms of the actual class constitution question, Bathurst CJ commenced his analysis by setting out the remarks of Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583:

> It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

21 One interesting aspect of the case was the extent to which the Chief Justice drew on the recent case law of other jurisdictions. This is apparent, for example, in his Honour's reference to the summary in *UDL Argos Engineering*

& Heavy Industries Co Ltd v Li Oi Lin[11] of what the test in *Sovereign* involves in practical terms, namely:

> "…(2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.
> (3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.
> (4) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class.
> (5) The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.
> (6) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question."

22 Bathurst CJ having emphasised, at [78] that the concern is with difference in the rights of relevant creditors as distinct from their commercial financial interest. Bathurst CJ explained the class constitution issue in terms of three questions:

> First, what are the rights which existing creditors (or members) have against the company and to what extent are they different. Second, to what extent are those rights differently affected by the scheme. Third, does the difference in rights or different treatment of rights make it impossible for the creditors (or members) in question to consider the scheme as one class.[12]

[11] [2001] 3 HKLRD 634
[12] Ibid [80]

23 In relation to the third question posited by his Honour, which is fundamental to understanding the ultimate outcome of *First Pacific,* the context in which the scheme is propounded will be significant, to whether any difference in rights or the treatment of rights identified under the first and second questions will make it impossible for the creditors to consult together as a class.[13]

24 The relevant context in this case was that the only alternative to the scheme was insolvency, which in turn led Bathurst CJ to endorse the observations David Richards J (as his Lordship then was) in *Re Telewest Communications PLC* [2004] BCC 342; [2004] EWHC 924 (Ch) at [29]:

> "… the relevant rights of creditors to be compared against the terms of the scheme are those which arise in an insolvent liquidation. Strictly speaking, because the company is not in liquidation, the legal rights of the bondholders are defined by the terms attached to the bonds. However, the reality is that they will not be able to enforce those rights and that in the absence of the scheme or other arrangement their rights against the company will be those arising in an insolvent liquidation."

25 In *Re T & N Ltd (No 4)* [2007] 1 All ER 851; [2006] EWHC 1447 (Ch), David Richards J elaborated on what he said in *Re Telewest* supra in making the following remarks (at [87]):

> "In considering the rights of creditors which are to be affected by the scheme, it is essential to identify the correct comparator. In the case of rights against an insolvent company, where the scheme is proposed as an alternative to an insolvent liquidation, it is their rights as creditors in an insolvent liquidation of the company: *In re Hawk Insurance Co Ltd* [2001] 2 BCLC 480. Those rights may be very different from the creditors' rights against a company which is solvent and will continue in business. In the latter case the creditors' rights against the company as a continuing entity are the appropriate comparator: *In re British Aviation Insurance Co Ltd* [2005] 1 BCLC 665."

26 Importantly, what is to be considered is not a single right but a bundle of rights held by each creditor either under the existing loan agreements or under the proposed scheme: *see Re Cortefiel SA* [2012] EWHC 2998 (Ch). Bathurst CJ pointed out that when the scheme was being considered in context, it was

[13] Ibid [82]

to be kept in mind that there may be alternatives to liquidation, such as a Deed of Company Arrangement, although, on the evidence in *First Pacific* there was no other viable alternative.

27 This raised another issue, namely the relevance of expert valuation evidence as to the value of the company pre-liquidation and the return to creditors in a liquidation as compared to the position should the scheme be approved.[14] As one commentator has pointed out, this is the first time in Australia that contested expert valuation evidence has been considered for the purposes of valuing rights pre and post the proposed scheme.[15] This will undoubtedly be a space to watch.

28 I should reiterate that the Court's conclusions need to be understood in light of the preliminary nature of the first hearing and the difficulties of class constitution at that stage. As Finkelstein J observed in *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 179 FCR 20 at [66], if the court is "*too assiduous in identifying classes, it is possible to end up with any number of classes*". This has the potential to foster oppression by the minority, in that each and every class will be given the opportunity to effectively veto the scheme. Taken too far, the insistence on narrowly defined classes thus has the potential to undermine the regime for which Part 5.1 provides.

29 Did the decision in *First Pacific* do any damage to existing principle or to put the matter more accurately, to accepted application of principle? It has certainly been said of the decision that it goes beyond any previous restructuring by way of scheme of arrangement (so far as reported authority goes) insofar as different groups of creditors who would receive different rights under a proposed scheme are being treated as part of the same class.

[14] Ibid [87]-[88]
[15] David Brown, 'Schemes of Arrangement and Classes – Boart Longyear – A Class Act to Follow?' (ROCIT blog, 5 June 2017).

30 I have made reference to the emphasis that was placed on context, the identification of insolvency and consequent liquidation as the relevant comparator in that case, and the utilisation of expert valuation evidence in assessing the value of the rights of "the scheme players".

31 It has been suggested that the approach by the Court to the *Sovereign Life* test was too narrow in using insolvency to assess whether rights were not so dissimilar as to make it impossible for the secured creditors to consult together with a view to their common interest.[16] On this approach it is said that valuation evidence is likely to become the norm. Other commentary on the decision is to the effect that the decision has introduced a degree of uncertainty into schemes of arrangement.

32 I would suggest however that the approach is not narrow nor any more uncertain than the complexity of the scheme and the financial position of the company, as has been suggested. This is apparent by Bathurst CJ's reference to the need to take into account, as part of the context, the availability of other alternatives to liquidation.[17] The decision reflects an intensely pragmatic approach where, on the evidence, the only alternative was liquidation. Rather than introducing uncertainty into class constitution, I would suggest that the Court has recognised that classes cannot be narrowly confined. In brief, the metes and bounds of a class should not be restricted in a commercial world where debt and equity can take a myriad of forms.

33 Let me move to the second hearing stage, where, as we know, the question of class composition can remain a live issue. Did it in this case? The question was 'yes' for the first 3 days of the hearing. However, in an inspired piece of judicial manoeuvring Black J suggested that the parties mediate to see if some other arrangement could be agreed upon such that he could exercise the power under s 411(6), pursuant to which the Court "*may grant approval to*

[16] Ibid.
[17] Ibid at [86]

an arrangement subject to such alterations and conditions as the Court thinks just".

34 The parties came up with such an alternate arrangement at the mediation and Black J gave the Court's approval to it, notwithstanding that it was different in a significant degree to that which had been approved at the creditor's meeting, including alterations to the interest rates and the terms governing the redemption of the Senior Secured Notes and a reallocation of the ordinary shares to be issued. Notwithstanding that some noteholders were disadvantaged they nonetheless supported the variation.

35 Snowside Pty Ltd as trustee for the Snowside Trust Snowside Pty who held 2.8% of the shares in the Boart Lonyyear challenged the Court's order approving the scheme.[18] It contended that the Court did not have power to approve a scheme under s 411(6) in respect of which there were substantial amendments. It argued that the power under s 411 (6) had never been used in respect of a scheme which had been amended so significantly as the present scheme and that the section was directed to minor amendments only which did not affect the substance of the scheme as approved at the creditors' meeting.

36 The summons seeking leave to appeal was filed on the morning of Monday 28 August 2017 and was heard that afternoon. Judgment was delivered the following morning.

37 The New South Wales Court of Appeal endorsed as correct Black J's observation at [92] that the power was conferred in unconfined terms, and the circumstances before him were unusual. As his Honour stated:

> "[I]t must first be recognised that the section confers a discretion on the Court, to be exercised judicially, having regard to its statutory purpose in the light of the whole of the circumstances surrounding the matter, but unconfined by any particular statutory criteria as to its exercise. I should not approach that

[18] *Snowside Trust v Boart Longyear Ltd* [2017] NSWCA 215.

> discretion on the basis of any assumption that it may only be exercised in a manner that it has previously been exercised, particularly if an analogous situation has not arisen in previous cases. Many of the cases in which this power has been exercised relate to alterations that are of a technical or minor character. However, it does not seem to me that that has the consequence that the alteration power cannot be used in a case where the amendment is of a substantive character, those who are most directly affected by it consent to it, and it is otherwise just to make that alteration. That, obviously, will be a relatively rare case and that may readily explain the lack of earlier examples of alterations of that nature in the case law."

38 In short, the Court of Appeal approached the matter as one of statutory construction. It observed that power conferred by s 411(6) was in broad terms and was "*not to be confined in a way which has not been articulated by Parliament*": see for example *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270; [2000] HCA 30 at [17]. In relation to the power conferred by s 447A:

> "The power is not cast in terms of a power to make orders to cure defects or to remedy the consequences of some departure from the scheme set out in the other provisions of Pt 5.3A. Its operation is not confined to such cases. Nor is there anything on the face of s 447A(1) that suggests that it should be read down. In particular, the words of the provision are wide enough to confer power to make orders which will have effect in the future but which are occasioned by something that has been done (or not done) under the other provisions of Pt 5.3A before application is made under s 447A(1). As was said in the judgment of the Court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*:
>
> > '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.'
>
> Cogent reasons must be advanced, then, if the power given by the general words of s 447A(1) is to be read down."

39 The practical consequence of all this is that Boart Longyear has, as had been noted in the media, survived the death throes of near liquidation once again. To quote from the SMH: its plan "*to stiff investors – again – and hand most of the equity to its debt holders – again – in an attempt to stave off collapse – again*" has succeeded. One can merely observe, by way of conclusion, that whatever its commercial future, its place in legal history has been secured.

Sakr: Liquidators' remuneration

40 The first of the insolvency decisions I wish to discuss is *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38, concerning the courts' approach to determining liquidators' remuneration. In particular, the decision gives consideration to the competing available measures of liquidators' remuneration including time based remuneration and *ad valorem*-style fixed percentage fee measures.

41 In recent years, *ad valorem* or proportional remuneration has been one of the key issues for the insolvency profession. A series of cases decided by Brereton J in the Supreme Court, leading up to *Sakr*, which was also decided by Brereton J, had emphasised the importance of liquidator remuneration being proportionate to the realisations of the liquidation process. In *Clout as Liquidator of Mainz Developments Pty Ltd (in liq)* [2016] NSWSC 1146, Rob J surveyed Brereton J's judgments of the previous two years. These involved:

(1) Allowing remuneration of approximately 20% of the assets realised in *AAA Financial Intelligence Pty Ltd (in liq) (No 2)* NSWSC 1270;

(2) Allowing remuneration of 10% for the first $50 000 realised and 5% thereafter in *Re Hellion Protection Pty Ltd (in liq)* [2014] NSWSC 1299;

(3) Allowing remuneration of 10% for the first $100 000 realised and 5% thereafter in *Re Gramarker Pty Ltd (in liq) (No 2)* [2014] NSWSC 1045; and

(4) Allowing remuneration of 2% on realisations and 15% on distributions, with an uplift which resulted in approximately 14% on gross realisations in *Independent Contractor Services Pty Ltd (in liq) (No 2)* [2016] NSWSC 106.

42 *Sakr* was concerned with liquidators' remuneration under s 473 of the *Corporations Act* as it stood prior to 1 March 2017, when aspects of the *Insolvency Law Reform Act 2016* (Cth) came into force. I will return shortly to that enactment and remuneration under the *Insolvency Practice Schedule (Corporations*) which now forms Schedule 2 to the *Corporations Act.*

43 Section 473(3) provided, relevantly, that a liquidator was entitled to receive such remuneration, by way of percentage or otherwise, as is determined:

(a) by agreement between the liquidator and the committee of inspection; or

(b) by resolution of creditors; or

(c) by the Court, if there is no such resolution.

44 Subsection 473(10) went on to provide that in exercising its powers to determine remuneration under s 473(3), the Court was required to have regard to whether the remuneration was reasonable taking into account a range of matters, including, *inter alia*:

> (a) the extent to which the work performed by the liquidator was reasonably necessary;
>
> …
>
> (d) the quality of the work performed, or likely to be performed, by the liquidator;
>
> (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the liquidator;
>
> …
>
> (h) the value and nature of any property dealt with, or likely to be dealt with, by the liquidator

Background

45 The appellant, Mr Clifford Sanderson, was appointed as liquidator of Sakr Nominees Pty Ltd in late 2012. The only significant assets of the company when it was wound up were three properties in Sydney, which the appellant realised for $3.72 million. By late 2014, the appellant had paid out some $2 million to secured creditors and approximately $900,000 to unsecured creditors, leaving a surplus of $517,830.

46 The appellant liquidator's fees for the period up to November 2014 had been approved by creditors' resolution. A further $34,870 of remuneration was approved by creditors' resolution in November 2014. In total, the creditors approved remuneration of approximately $197,000. Thereafter, the creditors having been fully paid, the appellant sought court approval for further remuneration in the sum of $63,577.80 including GST.

47 The primary judge, Brereton J, approved additional remuneration of $20,000. Noting that the Court had a wide discretion in fixing the level and basis of remuneration, his Honour made a number of observations in relation to the competing merits of remuneration by way of commission on assets realised or distributed and remuneration on a time basis.[19] Brereton J stressed that liquidators will not always be entitled to remuneration at their firm's standard hourly rates (particularly in small liquidations),[20] and set out the following remarks from his previous judgment in *Re AAA Financial Intelligence Ltd (in liq) (No 2)* [2014] NSWSC 1270 at [45]:

> [The application of standard hourly rates] does not reward liquidators for value, but indemnifies them against costs. It disregards considerations of proportionality. Thus it is wrong to assess "reasonable remuneration" by reference only to time reasonably spent at standard rates, which though a relevant consideration is only one of several, and should not be regarded as the default position or dominant factor, and is to be considered in the context

---

[19] *In the matter of Sakr Nominees Pty Ltd* [2016] NSWSC 709 at [14].
[20] Ibid [15]

of other factors, including the risk assumed, the value generated, and proportionality.

48 His Honour then expressed the view that, "*[w]hile not without its shortcomings, ad valorem remuneration is inherently proportionate, and incentivises the creation of value rather than the disproportionate expenditure of time*".[21] His Honour remarked that *ad valorem* remuneration was once conventional, before making reference to *Re Carton Ltd* (1923) 39 TLR 194 and his own decisions in *Re Hellion Protection Pty Ltd (in liq)* [2014] NSWSC 1299 and *Re Gramarkerr Pty Ltd (No 2)* [2014] NSWSC 1405.

Argument on the Appeal

49 On the appeal, ASIC appeared and submitted that *ad valorem* remuneration should be preferred in smaller liquidations. Its argument centred on the following points:

(1) First, time-based remuneration focuses on costs incurred while *ad valorem* remuneration focuses on value added. In smaller liquidations, the relationship between costs incurred and value added may be such that it is not reasonable to assess remuneration based on costs;

(2) Second, time-based remuneration may encourage liquidators to take more time;

(3) Third, showing *ad valorem* remuneration is reasonable involves lower administrative and legal cost;

(4) And finally, *ad valorem* remuneration may positively guide a liquidator in determining what work should be undertaken.

[21] Ibid [16]

50 The Australian Restructuring and Turnaround Association also appeared. It submitted that a time-based approach was preferable and relied on the following points:

(1) First, many tasks required of a liquidator do not result in recovery of assets;

(2) Second, some of the factors listed in s 473(10) focused on the quality and the difficult of the work, and may be unrelated to recovery of assets;

(3) And finally, uncooperative and combative creditors can increase the work required.

The Court of Appeal's decision

51 Bathurst CJ commenced his analysis by emphasising that s 473, as it then stood, did not provide for, nor require, any particular method of calculation for the determination of liquidator's remuneration.[22] The critical question is whether the remuneration is reasonable. As his Honour noted, a judge having taken into account evidence of the work done and the matters enumerated in s 473(10) would be entitled, in an appropriate case, to apply either method of calculation.[23]

52 What Bathurst CJ emphasised was that while an *ad valorem* approach may be of assistance in appropriate cases, it is not appropriate to fix remuneration "*by <u>simply</u> applying a percentage considered appropriate to all liquidations or to a particular class of liquidations <u>without</u> regard to the particular work done or required to be done in the liquidation in question*".[24] As his Honour went on

[22] *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38 at [51]

[23] Ibid [51]

[24] Ibid [52]

to observe, to do so would be to pay no regard to the requirements of s 473(10), most of which are directed to the particular liquidation in question.[25] While not all of the factors in s 473(10) may be relevant, for a Court not to consider any of them would constitute an error.

53 Bathurst CJ acknowledged, as was recognised by the Full Court of the Federal Court in *Templeton v ASIC* [2015] FCAFC 137, that proportionality is a recognised factor in considering the question of "*reasonable*" remuneration contemplated by s 473(10). In this regard, his Honour referred with approval to the observations of Black J in *Re Idylic Solutions Pty Ltd* [2016] NSWSC 1292, at [50], that "*evidence as to the percentage that remuneration constitutes of realisations will at least provide a measure of objective testing of the proportionality of the remuneration claimed*".[26] However, Bathurst CJ then sought to emphasise two points:

- First, the mere fact that the work performed does not lead to augmentation of the funds available for distribution does not mean the liquidator is not entitled to be remunerated for it.[27]

- Second, there are commonly cases where work is undertaken in an unsuccessful attempt to recover assets and a liquidator will generally be entitled to remuneration for undertaking such work, provided it was reasonable to carry it out.[28]

54 Bathurst CJ was ultimately of the view that the primary judge had failed to give consideration to the work actually done and whether the amount to be charged for it was proportionate to the difficulty and complexity of the tasks to

---

[25] Ibid [53]

[26] Ibid [56]

[27] Ibid [57]

[28] Ibid [58]

be performed. These were factors that were required to be taken into account pursuant to s 473(10).

55 Bathurst CJ also noted that although the *Corporations Act* does not prescribe a separate approach for smaller liquidations, s 473(10)(h) directs the court's attention to the value and nature of any property dealt with, which may have some bearing in this respect.

56 Bathurst CJ also noted that the "Lodestar" approach explained by Finkelstein J in *Re Korda; in the matter of Stockford Ltd* [2004] FCA 1682 may "*in some circumstances by an appropriate method of undertaking the task*" of assessing remuneration. In *Re Korda*, Finkelstein J explained that the "Lodestar" approach derives from the United States and involves two stages.[29] First, the court calculates the number of hours reasonably spent by the liquidator and multiples this by a reasonable hourly rate. This requires the court to consider whether the work performed was necessary, whether it was performed within a reasonable time, and whether the rate charged is reasonable. This "Lodestar" amount is then adjusted according to factors such as the quality and complexity of the work, the novelty of the issues which arose and the ultimate result obtained.

57 The "Lodestar" approach has been the subject of some attention, for example it was referred to by Black J in *Idylic Solutions*.[30]

How is liquidators' remuneration to be assessed in light of the Court of Appeal's decision?

58 Prior to the Court of Appeal's decision, there was great consternation among practitioners with respect to Brereton J's approach. The Court of Appeal's decision has been met with great interest. It has been suggested that much of

[29] *Re Korda; in the matter of Stockford Ltd* [2004] FCA 1682, [47].
[30] *Idylic Solutions Pty Ltd as trustee for Super Save Superannuation Fund* [2016] NSWSC 1292, [30].

the commentary appears to indicate that the result of the Court's decision is a sanctioning of liquidators charging on an "hourly rate" system.[31]

59 Following the decision in *Sakr,* some commentators have expressed support for the Lodestar approach as offering a viable alternative approach to the assessment of remuneration.[32] Other commentators have argued that in the wake of the Court's decision "[o]*btaining remuneration approved by a creditors' committee or a creditors' resolution will typically be the most efficient way of approving liquidators' remuneration*".[33]

60 One commentator has opined that the decision may "*give a gentle indication of possible 'disruption' to the way insolvency practitioners may charge*".[34] For instance, it has been suggested that the decision will open the door to a more creative system of calculating liquidator's remuneration, incorporating, for example, a hybrid charging system that charged a fixed fee for some tasks, such as property realisation and a time-based fee for others, such as litigation.[35] The commentator recognised that this would also need to be flexible enough to adapt to the circumstances of the liquidation, taking account, for example, of the fact that property realisation can sometimes be straightforward and sometimes highly complex.

Implications in light of the Insolvency Law Reform Act 2016

61 Section 473, as considered in *Sakr,* has now been repealed by the *Insolvency Law Reform Act 2016* (Cth). Without wishing to intrude on the dedicated insolvency sessions in the Conference's program, I thought I should venture some remarks on the implications of the reasoning in *Sakr* for remuneration

[31] Alice Ruhe, "Sakr Nominees – Is It Really the Silver Bullet It's Made Out To Be?" (Sellers Muldoon Benten, 28 March 2017)
[32] Joanne Shepard, "Recent Developments: *Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38" (2017) 25 *Insolvency Law Journal* 48, 49.
[33] Allens, "Focus: Is Hourly Billing for Liquidators Back?" (Blog post, 21 March 2017)
[34] Ibid
[35] Ibid

under the the *Insolvency Practice Schedule (Corporations)* which now forms Schedule 2 to the *Corporations Act.*

62 Relevantly, s 60-10 of the *Insolvency Practice Schedule* provides that a "*remuneration determination*" specifying the remuneration that an "*external administrator*" is entitled to receive may be made by resolution of creditors, by committee of inspection or by the Court – similar to the former position under s 473(3). The term "*external administrator*" is defined under s 5-20 of the *Insolvency Practice Schedule* to include a liquidator.

63 Section 60-10(3) makes it clear that a remuneration determination may fix remuneration by specifying an amount of remuneration or by specifying a method for working out an amount of remuneration. It should also be noted that s 60-10(4) provides that if a remuneration determination specifies that an external administrator is entitled to receive remuneration worked out on a time-cost basis, the determination must include a cap. In all cases in which the Court makes a remuneration determination, however, s 60-12 requires the Court to have regard to whether the remuneration is reasonable, taking into account a range of factors which very closely mirror the factors formerly enumerated in s 473(1).

64 Given the similarities with the former remuneration provisions in s 473, I think it may still fairly be said of the regime under the *Insolvency Practice Schedule,* as Barrett AJA observed of s 473 in his brief concurring judgment in *Sakr*, at [71], that:

> "it is… impossible to say, as a general proposition, that any given basis – whether according to time, value, extent of recoveries, size of company, nature of company or any other factor – merits any claim to precedence over any other in the matter of determination of liquidators' remuneration."

65 I would suggest that the task of the Court is still, as Bathurst CJ explained the task under s 473, one of fixing reasonable remuneration on the evidence before the Court, taking into account the requisite statutory factors.

Cardinal Group: Time limits for making applications in respect of voidable transactions

66 The second insolvency decision I wish to discuss is the decision from late last year of *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (in liq)* [2016] NSWCA 329, concerning the time limits within which a liquidator may make an application under s 588FF of the *Corporations Act* in respect of a "*voidable transaction*" of a company being wound up.

67 The relevant background may be shortly stated. Section 588FF(1) of the *Corporations Act* empowers a court to make one or more of a range of orders where, on the application of a company's liquidator, it is satisfied that a transaction of the company is voidable because of section 588FE. Pursuant to s 588FF(3), a voidable transaction application must be made within the later of 3 years after the relation back day or 12 months after the liquidator's appointment, or within such time as may be extended by the court on an application **made within those periods.**

68 Section 588FF has been the subject of "*extensive judicial consideration"* as a result of its "*centrality to the organisation of Australian commercial life*".[36] In a series of decisions, including *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 and *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477, the High Court has held that the s 588FF(3) time limit for *commencing* an application is an essential precondition to the court's jurisdiction to make orders under s 588FF(1). In that respect, s 588FF(3) is taken to "*otherwise provide*" for the purposes of s 79 of the *Judiciary Act 1903* (Cth), such that procedural provisions under state and territory legislation and rules cannot be used to extend the time for *commencing* proceedings, leaving s 588FF(3)(b) as the only mechanism for an extension of time.

[36] Ruth C A Higgins, 'Corporations: Recent Cases – Corporations: Winding Up – Voidable Transactions – *Corporations Act 2001* (Cth), s 588FF(1)' (2017) 91 *Australian Law Journal* 40, 40.

69 The High Court in *Fortress Credit* sanctioned the making of so-called "*shelf-orders*" under s 588FF(3)(b) which allow an extension of time for commencing proceedings in general form, without identifying any particular transaction or transactions.

70 The question which arose in the *Cardinal Group* proceedings was a slightly different one: as a matter of construction of s 588FF, is the s 588FF(3) time limit an essential precondition to the Court's jurisdiction under s 588FF(1) to make an order in respect of each individual transaction? So, where a liquidator has brought an application for orders in respect of voidable transaction within the time limit imposed by s 588FF(3), but after the subsequent expiry of that period discovers additional transactions, can the original in time application be amended to incorporate the additional transactions? When the issue arose before Black J at first instance, his Honour held that it could: *Re Cardinal Group Pty Ltd (in liq)* [2015] NSWSC 1761.

71 A five judge bench of the New South Wales Court of Appeal (including Beach J of the Federal Court commissioned as an acting judge for the case) dismissed an appeal against Black J's decision, affirming support for the principle enunciated by the Full Court of the Federal Court in *Rodgers v Commissioner of Taxation* (1998) 88 FCR 61 and its subsequent application in *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 and *Davies v Chicago Boot Co Pty Ltd (No 2)* (2007) 96 SASR 164.

72 In their joint judgment, Bathurst CJ and Payne JA, acknowledged that "*s 588FF is open to the construction that it provides a jurisdictional time condition which is satisfied, and only satisfied, by an application commenced within time in respect of a particular identified transaction*".[37] However, as their Honours also observed s 588FF "*is also open to the interpretation that the*

[37] *Sydney Recycling Park Pty Ltd v Cardinal Group Pty Ltd (in liq)* [2016] NSWCA 329 at [72]

section is concerned and only concerned with the time limit to make an application, the form of which application is left to the relevant law of the jurisdiction where the proceeding is commenced".[38] As the High Court put it in *Fortress Credit*, there was a "*constructional choice*" to be made.

73 It was in making this constructional choice that the decision of the Full Federal Court in *Rodgers* came under consideration. In that decision, the Full Court drew a distinction between the commencement of proceedings and the amendment of proceedings commenced within time. The Court of Appeal in the *Cardinal Group* proceedings followed the central holding in *Rodgers* that s 588FF(3) is concerned with the time for the making of the application and not the amendment of a pleading commenced in time.[39] Accordingly, so long as they do not purport to extend the time for commencing proceedings, powers of amendment under state and territory procedural legislation and rules can be used to include additional transactions in an application commenced within time.

74 It is worth reflecting for a moment on aspects of the "*policy*" arguments which had been advanced in the *Cardinal Group* proceedings as telling against the *Rodgers* approach. Particular emphasis was placed on the need for "*commercial certainty*". Undoubtedly, the decision of the legislature to limit the time in which a liquidator may begin an application under s 588FF(1) can be said to reflect the desirability of commercial certainty. However, as has been repeatedly observed, on closer analysis s 588FF(3) involves a statutory balancing of interests as between creditors and those who have previously transacted with the company and whose transactions might be the subject of an application under s 588FF(1).[40] Once it is accepted, as *Fortress Credit* confirmed, that shelf orders are permissible under s 588FF(3)(b), it is difficult

[38] Ibid [74]

[39] Ibid [98]

[40] See *Fortress Credit* at [24]; *Cardinal Group* per Bathurst CJ and Payne JA at [87], Beazley P at [144].

to see why a liquidator should be shut out from challenging additional transactions by amendment when proceedings have already been commenced and the relevant defendant is already on notice that orders under s 588FF(1) are sought.[41]

75 This decision is widely seen as the "*sensible*" outcome and has been met with praise within the industry.[42] As has been repeatedly pointed out, there may be good reasons why a liquidator does not become aware of certain causes of action until after the expiry of the period specified in s 588FF(3).[43] In this respect, the Court's decision expands on the decision of the High Court in *Fortress Credit*, which addressed the problem of cases in which:

> despite the liquidator's most diligent efforts, the liquidators investigations have still not reached a sufficiently advanced stage by the end of the time limit as to enable proper identification of particular transactions in respect of which orders for extension of time could be made.[44]

76 Both cases thus offer a degree of security to liquidators at a time when it may not yet be possible to identify those transactions vulnerable to challenge. The decision in *Cardinal Group* has been subsequently applied by the New South Wales Supreme Court in *In the matter of 1st Fleet Pty Ltd (in liq)* [2017] NSWSC 506.[45]

RinRim: Application of the law of negligence in the context of rights issues

77 Finally, I wish to discuss a case that may take you beyond your comfort zone a little, the decision of *RinRim Pty Ltd v Deutsche Bank AG* [2017] NSWCA 169, concerning the application of the law of negligence in the context of an equity rights issue. The case has its origins in the 2008 rights issue

---

[41] *Cardinal Group* per Beazley P at [147]
[42] Gary Koning, 'Court of Appeal Allows Liquidators to Amend Pleadings to Recover Preference Payments Outside Time Limit' (Dibbs Barker blog, 12 December 2016).
[43] See Ashurst, 'Recent Developments on Enforcement of Director Guarantees and Voidable Transactions' (Blog, 15 December 2016).
[44] Pravin Aathreya, "Extensions of Shelf Life of Voidable Transactions Claims – Recent High Court Decisions" (2015) 26 *Journal of Business and Financial Law Planning* 131, 132-133.
[45] *In the matter of 1st Fleet Pty Ltd (in liq)* [2017] NSWSC 506, [11] per Black J.

undertaken by Primary Health Care Ltd in order to fund its acquisition of Symbion Health Ltd. It is significant as it marks the first time that accelerated entitlement offers have been the subject of judicial attention and affirms the appropriateness of this form of capital raising and the way they are conducted.[46]

78 The rights issue was conducted by way of an Accelerated Renounceable Entitlement Offer (AREO) in circumstances permitted under a waiver granted by the ASX. It should be noted that the ASX Listing Rules were subsequently amended, with effect from 14 April 2014, to incorporate a standard timetable for the conduct of AREOs.[47] Those amendments have abrogated the former need to seek waivers from compliance with certain of the Listing Rules.

79 In order to understand the negligence claim that was brought in *RinRim,* it is necessary to briefly summarise the share prices at the different stages of the Primary AREO. As part of the "*Institutional Offer*", selected exempt shareholders of Primary were offered eight new shares for every five shares already held at a price of $5.40 per share. Any entitlements under the Institutional Offer not taken up by an exempt shareholder were sold to other exempt shareholders in the "*Institutional Bookbuild*" at a price of $6.60.

80 As part of the subsequent "*Retail Offer*", all existing shareholders in Primary who had not received the Institutional Offer were also offered the opportunity to buy eight new shares for every five they held at the price of $5.40 per share. Any entitlements not taken up under the Retail Offer were sold in a "*Retail Bookbuild*".

81 As events transpired, entitlements in the Retail Bookbuild were sold at a price of $5.50 per share. Accordingly, exempt shareholders whose entitlements were sold in the Institutional Bookbuild received $1.20 per share ($6.60 less

[46] Adam D'Andreti, 'No Duty of Care Owed in Connection with Accelerated Entitlement Offers' (Gilbert + Tobin blog, 16 November 2016).
[47] See *ASX Listing Rules*, Appendix 7A

$5.40), while shareholders whose entitlements were sold in the Retail Bookbuild received only $0.10 per share ($5.50 less $5.40).

82 The appellant, RinRim Pty Ltd, was a large shareholder in Primary which received the Retail Offer and ultimately had its entitlements sold in the Retail BookBuild. There was no dispute that RinRim satisfied the definition of "*Professional Investor*" under the *Corporations Act* and was therefore eligible to receive the Institutional Offer. RinRim commenced proceedings against Primary and the underwriters and joint lead managers it had engaged to conduct the AREO. RinRim alleged that it had suffered financial loss because it would have received substantially more from the sale of its share entitlements in the Institutional Bookbuild than it in fact received from the sale of its share entitlements in the later Retail Bookbuild. As presented at first instance, the crux of RinRim's negligence claim was that the respondents, in the exercise of reasonable care, should have ascertained that it was an exempt shareholder and, having done so, should have offered it the opportunity to participate in the institutional stage of the AREO.

Rejection of the alleged duty of care

83 The appellant's claim was rejected at first instance by Bergin CJ in Eq, on two main bases. First, Her Honour held that the respondents did not owe the duty of care alleged. Secondly, her Honour concluded that even if the respondents owed and had breached the duty of care alleged, it had not been established that the breach caused RinRim it to sustain a financial loss.

84 Both conclusions were affirmed on appeal. As to the issue of causation, RinRim needed to establish that if it had been advised or was otherwise aware that it could have sought to be included in the institutional round, it would have sought to be so included; that the joint lead managers would have dealt with it on the basis that it could participate; and that it would have renounced its entitlements and had them sold in the Institutional Bookbuild. In light of powerful documentary evidence and extensive cross-examination of

the principal of RinRim, Bergin CJ in Eq observed at first instance that the "*irresistible conclusion*" was that RinRim's principal was intending to cause it to acquire shares in the Retail Offer.[48] Her Honour's conclusions on causation were affirmed on appeal.

85 It is, however, the conclusions on duty that are of most interest for today's purposes. It being accepted that RinRim's claim in negligence was a novel one, both Bergin CJ in Eq at first instance and Sackville AJA, giving the leading judgment on appeal, approached the alleged duty of care by reference to the observations of Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258, at [102], that where:

> …the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.

86 These "salient" features include:

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;

[48] *RinRim Pty Ltd v Deutsche Bank AG* [2016] NSWSC 1377 at [299]

(h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;

(i) the nature of the activity undertaken by the defendant;

(j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;

(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;

(l) any potential indeterminacy of liability;

(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;

(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

(o) the existence of conflicting duties arising from other principles of law or statute;

(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and

(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

87 On the appeal, Sackville AJA stressed that the "*salient features*" approach to identifying novel duties of care is not to be applied "*as a kind of checklist*".[49] His Honour referred to the decisions of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 as indicating that:

[49] *RinRim Pty Ltd v Deutsche Bank AG* [2017] NSWCA 169 at [125]

> …some features of the relationship between RinRim and the respondents should be given considerably more weight than others in determining whether to recognise the novel duty of care alleged by RinRim.[50]

88 As his Honour went on to observe, "*in a case in which a plaintiff relies on the existence of a duty of care in novel circumstances, the plaintiff's vulnerability to loss caused by the defendant's negligence is an extremely important if not determinative consideration*".[51] Sackville AJA noted in particular that although the law of negligence in Australian does recognise liability for economic loss, "*damages for pure economic loss are not recoverable just because the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable*".[52]

89 It is important to appreciate what is meant by "*vulnerability*" in this regard. As the High Court explained in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*, at [23], vulnerability "*is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant*".

90 In Sackville AJA's view, the conclusion at first instance that RinRim was not vulnerable in the relevant sense was an "*insurmountable barrier*" to the plaintiff's claim.[53] There were a number of relevant findings in this regard. Bergin CJ in Eq had found that by mid-November 2007, the principal of RinRim knew that Primary intended to raise capital for the Symbion take-over by way of an AREO, and knew the four stages that would comprise the AREO.[54] Her Honour found that the principal of RinRim had read the Bidder's

---

[50] Ibid [125]

[51] Ibid [133]

[52] Ibid [126]

[53] Ibid [136]

[54] *RinRim Pty Ltd v Deutsche Bank AG* [2016] NSWSC 1377 at [271]

Statement and Draft Prospectus, the latter of which "*in numerous places provided detail of the manner in which a shareholder could contact the Primary Entitlement Offer Information Line to ask "any questions" relating to or about the Entitlement Offer*".[55] In the end, her Honour found that the principal of RinRim "*had every opportunity as a sophisticated investor to make inquiries of the [respondents] about the AREO and its entitlements*".[56] As her Honour observed:

> An ironic feature of this case is that the prerequisite for acceleration in the AREO is that the shareholder is a Professional Investor or a Sophisticated Investor: s 708 of the Act. The policy of exempting certain shareholders from the necessity for disclosure before they make an investment recognises that these investors are not vulnerable to a lack of knowledge or capacity to look after themselves in making financial decisions and investments.

91 As Sackville AJA put it, in light of the primary judge's factual findings:

> …it verges on the fanciful to suggest that RinRim was vulnerable in the sense that it could not protect itself from the consequences of the JLMs' failure to inform it that it could seek to participate in the Institutional Offer. RinRim was a sophisticated investor which had all the information it needed to determine whether it should seek to participate in the Institutional Offer.[57]

92 Although, in his Honour's view, this was sufficient basis for the rejection of the novel duty of care alleged by RinRim, Sackville AJA also gave consideration to whether it could be said that the respondents had assumed responsibility for taking steps to avoid financial loss to RinRIm, another recognised salient feature. In relation to the exemption from the disclosure requirements of the *Corporations Act* in relation to Professional and Sophisticated Investors, his Honour noted that:

> …the exemption merely enabled an AREO or other offer of securities to be made to exempt Professional Investors and Sophisticated Investors without

[55] Ibid [271]

[56] Ibid [272]

[57] *RinRim Pty Ltd v Deutsche Bank AG* [2017] NSWCA 169 at [140]

> the disclosure that is required to other investors. The legislation did not require corporations or underwriters to take any particular steps to identify or make offers to all exempt investors.[58]

93 His Honour further observed that the "*Underwriting Agreement between Primary and the JLMs did not oblige the JLMs to identify and contact all exempt investors*".[59] Indeed, under the agreement "*[t]he JLMs were obliged… to use reasonable endeavours to make contact with "Institutional Shareholders*", with the relevant definition of "Institutional Investor" referring to a person whom the JLMS reasonably believed to be a person to whom an offer may be made lawfully without disclosure under Part 6D.2 of the *Corporations Act*.[60] In this light, his Honour concluded that there was "*no basis for a finding that the JLMs or Primary assumed responsibility for ensuring that all exempt investors, including RinRim, would be individually informed of their entitlement to participate in the Institutional Offer*".[61]

94 The decision in *RinRim* has been widely praised as establishing a degree of certainty for companies and their underwriters.[62] For example, an article published in the Australian Financial Review shortly after the decision of Bergin CJ in Eq was handed down stated that "*ASX boards and their investment banking advisers are collectively breathing a sigh of relief*" after the *"landmark Supreme Court ruling*".[63] The article went on to describe the decision as "*a resounding win for ASX companies and their underwriters*".[64]

---

[58] Ibid [142]

[59] Ibid [143]

[60] Ibid [143]

[61] Ibid [145]

[62] See Annabelle Green, 'A Novel Duty of Care Category Denied – RinRim Pty Ltd v Deutsche Bank AG (Australian Civil Liability blog, March 2017) 7.

[63] See Minter Ellison, "Court Rules on Negligence Claim in Primary Care's AREO" (Corporate HQ Advisory blog, 7 November 2016).

[64] Ibid.