Supreme Court

New South Wales

Case Name:	Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608
Medium Neutral Citation:	[2019] NSWSC 651
Hearing Date(s):	25 October 2018; 21 March 2019; 16 April 2019; 3 May 2019
Date of Orders:	11 June 2019
Decision Date:	11 June 2019
Jurisdiction:	Equity - Corporations List
Before:	Parker J
Decision:	2018/206261: The plaintiff was validly appointed as a director of the first defendant on 20 September 2016. The cross-claim be dismissed. The second defendant pay the costs of the plaintiff and of the third to thirteenth defendants of the proceedings. 2018/300151: Leave granted to the plaintiffs to appeal against the orders of the NSW Civil and Administrative Tribunal in proceedings numbers SC/24808 on 4 September 2018. Appeal allowed. Those orders be set aside and lieu thereof the proceedings be remitted to the Tribunal for final determination on the merits.
Catchwords:	CIVIL PROCEDURE — Cross-vesting — Transfer to Federal Court — Special federal matter – whether Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), s 6 required proceedings to be transferred to the Federal Court as a “special federal matter” – whether

proceedings “in bankruptcy” under Bankruptcy Act, s 27 – distinction between exercising jurisdiction “in bankruptcy” and recognising the effect of provisions of the Bankruptcy Act – whether proceedings a “special federal matter” where trustee in bankruptcy was joined as a party although made no claim, no party sought exercise of statutory powers under the Bankruptcy Act or an order declaring for or against the title of the trustee in bankruptcy to the relevant share in the company.

CIVIL PROCEDURE — Cross-vesting — Transfer to Federal Court — Special federal matter – whether retention of proceedings would have been justified under Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), s 6(3), had proceedings constituted a “special federal matter”– relevance and weight of “convenience of the parties” under s 6(3) – where two sets of proceedings raised parallel issues and proceedings could only be heard together in Supreme Court as Federal Court has no jurisdiction to entertain the appeal from the Tribunal – where retention of the proceedings would likely result in a more efficient determination of the dispute – whether retention would have been justified where it would not just be convenient to the parties but would promote the better administration of justice.

CORPORATIONS — Directors and officers — Appointment, removal and retirement of directors — whether sole shareholder of proprietary company validly appointed himself director by shareholders resolution - where share transferred to sole shareholder in his capacity as trustee prior to his impending bankruptcy – whether upon sole shareholder’s bankruptcy the power to appoint a director which attached to the share vested in his trustee in bankruptcy under Bankruptcy Act, ss 58(1), 116(2)(a) – nature of equitable interest in the share retained by the sole shareholder during bankruptcy and nature of equitable interest acquired by his trustee in bankruptcy pursuant to Corporations Act, ss 1072B, 1072C, 1072F – whether sole shareholder’s bankruptcy restricted

exercise of power of appointment under Corporations Act, s 201G – whether Corporations Act, s 201F(3) awards trustee in bankruptcy exclusive power to appoint a director during shareholder's bankruptcy and subsequent to his discharge - grant of statutory power under s 201F(3) facultative not exclusive and must be construed in light of company members' freedom to adopt principles in company constitution for the appointment of directors.

CORPORATIONS — Directors and officers — Appointment, removal and retirement of directors – whether, if invalid, appointment of sole director of proprietary company should have been validated under Corporations Act, s 1322(4) – whether dispensing power would have been available if 201F(3) had exclusive effect – operation of requirements under s 1322(6) – consideration of "essentially of a procedural nature" where no lawful procedure for carrying out statutory requirement – whether "just and equitable" to validate appointment where trustee in bankruptcy took no action to appoint director and no person other than purported sole director asserted interest in the company – whether substantial injustice caused to party opposing claims brought by company in Tribunal proceedings - whether validation of appointment would cause company or beneficiaries "substantial injustice".

CORPORATIONS — Directors and officers — representation – validity of solicitor's retainer where retained by director whose appointment was purportedly invalid – whether retainer valid under Corporations Act, s 201M – examination of 201M and its historical predecessors alongside construction of s 1322 – whether retainer may be ratified by shareholders resolution – whether company was "competent principal" when without a director – whether majority of general meeting can ratify legal proceedings brought without authority of the company – whether general meeting carries power to make management decisions.

CORPORATIONS — Directors and officers —

representation – whether solicitor's retainer should be validated under s 1322(4) – whether "just and equitable" to make order and whether opposing party in proceedings suffered "substantial injustice" by solicitors acting for the company.

ADMINISTRATIVE LAW - administrative tribunals - statutory appeals from administrative authorities to courts – appeal from decision of Civil and Administrative Tribunal (NSW) under Civil and Administrative Tribunal Act 2013 (NSW), s 83(1) – whether Tribunal ought have adjourned proceedings to allow NSW Supreme Court to resolve challenge to retainer and validity of director's appointment - scope and limits of Tribunal's powers – whether Tribunal had power to make orders sought by virtue of jurisdiction to make "ancillary decisions" or dismiss proceedings that are "frivolous or vexatious or otherwise misconceived".

CIVIL PROCEDURE — Stay of proceedings — Inherent power — Abuse of process – Court may intervene and stay proceedings on basis of an abuse of process where challenge to corporate plaintiff's authority to bring proceedings – whether and when defendant has right to challenge plaintiff's authority – – challenge to authority not a substantive defence to plaintiff's claim but brought by notice of motion – consequences of distinction for further conduct of proceedings - judicial discretion to entertain application and appropriate circumstances to do so - Chancery rule of practice that Court ordinarily adjourn proceedings to allow opportunity for company to ratify proceedings or apply for validating order under Corporations Act, s 1322.

CIVIL PROCEDURE — Stay of proceedings — Inherent power — Abuse of process – power to award costs where proceedings brought by corporate plaintiff without authority – juridical basis and appropriate exercise of such power – whether costs order properly made against solicitor for corporate plaintiff bringing proceedings without proper authority.

Legislation Cited:	Bankruptcy Act 1966 (Cth), ss 19(1), 27, 58(1), 58(2), 116(2)(a), 129AA, 132(3), 149(4), 149A(2), 149D(1), 154(1) Civil and Administrative Tribunal Act 2013 (NSW), ss 3(d), 4, 29(2)(a), 31(2)(a), 36(1), 45(1), 55(1)(b), 60, and 83(1) Civil and Administrative Tribunal Rules 2014 (NSW), rr 31(1), 32(1)(a)(iii) Civil Procedure Act 2005 (NSW), s 98 Companies Act 1929 (UK), s 143 Companies Act 1936 (NSW), s 124 Conveyancing Act 1919 (NSW), s 66G Corporations Act 2001 (Cth), ss 9(b)(i), 124(1), 201F(3), 201G, 201M, 231, 249B(1), 1070A, 1072B, 1072C, 1072F and 1322 Income Tax Act 1918 (UK) Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), ss 3, 4(1), 6(1) and 6(3) Strata Schemes Management Act 1996 (NSW), Part 4, ss 80D, 181(2) Strata Schemes Management Act 2015 (NSW), s 232 Trading with the Enemy Act 1939 (UK) Uniform Civil Procedure Rules 2005, r 7.1
Cases Cited:	2 Elizabeth Bay Road Pty Ltd v The Owners-Strata Plan 73943 (2014) 88 NSWLR 488; (2014) 17 BPR 33,911; [2014] NSWCA 409 Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424; [1975] 1 WLR 673 Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; [2009] HCA 27 Beck v LW Furniture Consolidated (Aust) Pty Ltd (2012) 265 FLR 60; [2012] NSWCA 76 Beck v LW Furniture Consolidated (Aust) Pty Ltd [2011] NSWSC 235 Boensch (As Trustee of Boensch Trust) v Pascoe (2018) 133 ACSR 268; [2018] FCAFC 234 Boston Deep Sea Fishing and Ice Co Ltd v Farnham [1957] 1 WLR 1051 Calabretta v Redpen Developments Pty Ltd (2010) 183 FCR 47; [2010] FCA 81 Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd (2005) 55

ACSR 185; (2005) 23 ACLC 1859; [2005] NSWSC 1005
Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising Co (1975) 133 CLR 72
Danish Mercantile Co Ltd v Beaumont [1951] Ch 680; [1951] 1 All ER 925
Doulaveras v Daher (2009) 253 ALR 627; [2009] NSWCA 58
DVT Holdings v BigShop.com.au (2002) 42 ACSR 378; [2002] NSWSC 571
Ex Parte Gilchrist; Re Armstrong (1886) 17 QBD 521
Federal Commissioner of Taxation v Patcorp Investments Ltd (1976) 140 CLR 247; [1976] HCA 67
Firth v Staines [1897] 2 QB 70
Fricker v Van Grutten [1896] 2 Ch 649
Grant v John Grant & Sons Ltd (1950) 82 CLR 1; (1950) 24 ALJR 374
Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker (1982) 44 NSWLR 421
Hawkins Hill Gold Mining Co v Briscoe (1887) 8 NSWR 123 [(1887) 8 LR (NSW) Eq 123]
Hawksford v Hawksford (2005) 191 FLR 173; [2005] NSWSC 463
Herron v McGregor (1986) 6 NSWLR 246; (1986) 28 A Crim R 79
Hillig v Darkinjung Pty Ltd and Ors (No 2) [2008] NSWCA 147
Hoskins v Van Den-Braak (1998) 43 NSWLR 290
House v The King (1936) 55 CLR 499; [1936] HCA 40
Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd (1988) 13 ACLR 110; (1988) 6 ACLC 426
James v James (No 2) [2019] NSWSC 116
Kuenigl v Donnersmarck [1955] 1 QB 515; [1955] 1 All ER 46
Lewis v Condon [2013] NSWCA 204
London & Blackwall Railway Co v Cross (1886) 31 Ch D 354
Massey v Wales (2003) 57 NSWLR 718; [2003] NSWCA 212
McEvoy v Body Corporate for No. 9 Port Douglas Road [2013] QCA 168
Meriton Apartments Pty Ltd v Industrial Court of New South Wales (2008) 171 FCR 380; [2008] FCAFC 172

Morris v Kanssen [1946] AC 459
Newbiggin-by-the-Sea Gas Co v Armstrong (1879) 13 Ch D 310
Nurse v Durnford (1879) 13 Ch D 764
Official Trustee in Bankruptcy v Buffier (2005) 54 ACSR 767; [2005] NSWSC 839
Official Trustee in Bankruptcy v Buffier (2005) 54 ACSR 767; [2005] NSWSC 839
Palmer v Walesby (1868) LR 3 Ch 732
Re Burton, Willy v Burton (1994) 126 ALR 557
Re Colorbus Pty Ltd (2004) 51 ACSR 677; [2004] VSC 486
Re Galtari Ltd [2018] NSWSC 917
Ritchie v Woodward (Executor of the Estate of the late Brian Patrick Woodward) [2016] NSWSC 1715
Re Stansfield DIY Wealth Pty Ltd (in liq) (2014) 291 FLR 17; [2014] NSWSC 1484
Royal British Bank v Turquand (1856) 6 E & B 327; (1856) 119 ER 886
Scott v Bagshaw (2000) 99 FCR 573; [2000] FCA 816
Sheahan v Londish (2010) 80 ACSR 337; [2010] NSWCA 270
Shearwood (Trustee), in the matter of Allied Resource Partners Pty Ltd v Allied Resource Partners Pty Ltd [2017] FCA 1451
Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd [2011] UKPC 17; [2012] 1 WLR 1721
Tonbul Baykal v Terry Van Der Velde as trustee for bankrupt estate of Hakan Tandogan [2017] NSWSC 36
Weinstock v Beck (2013) 251 CLR 396; [2013] HCA 14
Wood v Inglis (2008) 68 ACSR 420; [2008] NSWSC 1147
Enviroco Ltd v Farstad Supply A/S [2011] UKSC 16

Texts Cited:

J D Heydon, M D Leeming, Jacobs' Law of Trusts in Australia (8th ed, 2016, LexisNexis Butterworths) at [3-15]
Lord Wrenbury, DB Buckley, N Warren, P G Brian, Buckley on the Companies Acts (12th Ed, 1949, Butterworth & Co) at 169
Robert P Austin, Ian M Ramsay, Ford, Austin and Ramsay's Principles of Corporations Law (17th ed,

2018, LexisNexis Butterworths) at [7.590]

Category: Principal judgment

Parties: 2018/206261
John Robert Preston (Plaintiff)
Diaspora Holdings Pty Ltd (First Defendant)
Owners Corporation of SP 68608 (Second Defendant)
MR Anderson and others trading as Clarke Kann (Third to Thirteenth Defendants)
Paul Gerard Weston (Fourteenth Defendant)

2018/206261
The Owners – Strata Plan No 68608 (Cross-claimant)
John Robert Preston (First Cross-defendant)
Diaspora Holdings Pty Ltd (Second Cross-defendant)
Australian Securities Investment Commission (Third cross-defendant)

2018/300151
Diaspora Holdings Pty Ltd (First Plaintiff/Appellant)
Clarke Kann (Second Plaintiff/Appellant)
Owners Corporation of SP 68608 (Defendant/Respondent)

Representation: Counsel:
2018/206261
MW Sneddon (Plaintiff)
D Knoll AM (Second Defendant)
S Docker (Third to Thirteenth Defendants)

2018/300151
MW Sneddon (First Plaintiff)
S Docker (Second Plaintiff)
D Knoll AM (Second Defendant)

Solicitors:
2018/206261
Polczynski Robinson (Plaintiff)
Strata Specialist Lawyers (Second Defendant)
Clarke Kann (Third to Thirteenth Defendants)

2018/300151
Polczynski Robinson (Plaintiff)

	Clarke Kann (Second Plaintiff) Strata Specialist Lawyers (Second Defendant)
File Number(s):	2018/206261; 2018/300151
Publication Restriction:	Nil

JUDGMENT

1 About two and a half years ago, proceedings were brought in the NSW Civil and Administrative Tribunal arising out of a strata title dispute. The parties to these proceedings are now embroiled in satellite litigation arising out of a dispute concerning legal representation in those proceedings.

2 The lot which is the subject of the dispute is owned by Diaspora Holdings Pty Ltd ("Diaspora"). Diaspora was incorporated in 2005.

3 For most, if not all, of Diaspora's corporate life it has been controlled by John Robert Preston. He was the sole director of the company from September 2006 to September 2013 when he was made bankrupt. At that time he was also registered as the holder of the sole issued share in the company. Mr Preston is still recorded in ASIC records as the sole director of Diaspora, having, according to those records, been reappointed as a director after his discharge from bankruptcy in September 2016. He remains registered as Diaspora's sole shareholder.

4 The strata scheme was created by the registration of Strata Plan 68608 in August 2002. The scheme consists of 20 lots and common property adjacent to Wynyard station concourse. Diaspora owned Lot 16, a utility lot in a basement level car park carrying a right of exclusive use over two adjacent car spaces. Diaspora had also been granted the right to install and operate an ATM on part of the common property abutting the concourse.

5 The dispute arose because, amongst other things, Lot 16 had been used by another of Mr Preston's companies to operate a commercial car parking business. The ATM had also been installed so that it encroached onto adjoining property on the concourse. The Owners Corporation for Strata Plan 68608 (to which I will refer as the "Strata Corporation") had, among other things, erected a wall obstructing the entrance to Lot 16.

6 The Tribunal proceedings began when the Strata Corporation made an application under the *Strata Schemes Management Act 1996* (NSW), Part 4, for orders restricting Diaspora's use of Lot 16 requiring it to remove the ATM. I will refer to this as the "Injunction Application". Mr Preston retained Clarke Kann, a firm of solicitors, to act for Diaspora. Clarke Kann instituted a cross-application for an order requiring the Strata Corporation to remove the wall and to reinstate electricity supply and access to Lot 16. I will refer to this as the "Counter Injunction Application".

7 The Applications came before an adjudicator, Mr John Levingston. Mr Levingston decided in favour of the Strata Corporation. The orders sought by the Strata Corporation in the Injunction Application were made. The Counter Injunction Application was dismissed.

8 Clarke Kann then, on the instructions of Mr Preston, brought an application by way of appeal to NCAT in Diaspora's name against Mr Levingston's decision. The appeal was in the nature of a rehearing: see *Strata Schemes Management Act*, s 181(2). I will refer to this as the "Review Application".

9 Clarke Kann also commenced separate proceedings in the Tribunal in Diaspora's name seeking orders under the *Strata Schemes Management Act 2015* (NSW), s 232, that the Strata Corporation consent to the application Diaspora had made to the local planning authority to remove restrictions on the development consent for Lot 16. The removal of these restrictions would have entitled the Lot to be used for the conduct of the car parking business. I will refer to this as the "Consent Application".

10 The litigation now before the Court was triggered by what happened next. Rather than defending the two Applications on the merits, the Strata Corporation challenged Clarke Kann's capacity to bring them on Diaspora's behalf. The Corporation contended that Mr Preston's purported appointment as director was invalid. Mr Preston responded by passing a resolution purporting to confirm his appointment and to ratify the retainer of Clarke Kann as the solicitors for Diaspora. The Corporation contended that this too was invalid. The arguments were that the right to appoint a director had passed to Mr Preston's trustee in bankruptcy and that no ratification was possible.

11 These arguments were ultimately upheld by the Tribunal. Both the Review Application and the Consent Application were dismissed. Diaspora and Clarke Kann were ordered to pay the Strata Corporation's costs. Now proceedings have been brought in this Court to reverse the Tribunal's ruling.

12 The unsatisfactory nature of what has happened hardly needs pointing out. The Tribunal has never resolved the strata title dispute on its merits. Instead, the parties have spent almost two years arguing about representation. It now falls to this Court to decide whether the diversion was justified.

Issues for decision

13 Before the Court are two proceedings. The first (2018/206261), to which I will refer as the Corporations proceedings, were instituted by Mr Preston in the Corporations List seeking declaratory orders. The second (2018/300151) are appeal proceedings against the Tribunal's dismissal of the Review Application. The appeal proceedings were begun in the Common Law Division of the Court but were transferred to the Equity Division to allow them to be heard together with the Corporations proceedings.

14 No appeal has been brought to this Court from the Tribunal's dismissal of the Consent Application. That order was instead challenged by way of proceedings before the Appeal Panel of the Tribunal. Those proceedings have been stayed pending the Court's decision in these proceedings.

Corporations proceedings

15 The Corporations proceedings were instituted by Mr Preston as plaintiff in July 2018. At that stage, the Tribunal had not given its decision on the representation issue. The Strata Corporation was named as the defendant. The relief sought was a declaration that Mr Preston had been validly appointed as a director of Diaspora, or alternatively that Diaspora had ratified the retainer of Clarke Kann. Alternatively, the Court was asked to validate the appointment, or alternatively, the retainer, under *Corporations Act 2001* (Cth), s 1322.

16 The Strata Corporation responded in August by filing an interlocutory application which sought that the proceedings be dismissed as unauthorised, or stayed to await resolution of the Review Application and the Consent Application in the Tribunal.

17 The Tribunal handed down its decision in the representation issue, and made orders dismissing the Review Application and the Consent Application, early in September 2018. The Appeal proceedings were begun shortly afterwards.

18 On 25 October the Corporations proceedings came on for hearing before me. Counsel for the Strata Corporation sought to move on the interlocutory application for the proceedings to be summarily dismissed or stayed. Counsel for Mr Preston sought to press on with the determination of the proceedings on a final basis.

19 After the parties' contentions had been canvassed in some detail, I came to the conclusion that the Court should not attempt to hear the interlocutory application, or to hear the proceedings finally, at that stage. I thought that the Court should deal with the Appeal proceedings at the same time as the Corporations proceedings. I also thought that the Corporations proceedings needed to be reconstituted so as to join all potentially affected parties. A question had also emerged concerning the Court's jurisdiction to entertain the Corporations proceedings and whether they needed to be transferred to the Federal Court as a "special federal matter". That would require notice to be given to the Commonwealth and New South Wales Attorneys-General.

20 The parties to the Corporations proceedings (Mr Preston and the Strata Corporation) undertook to confer with Clarke Kann to arrange for the Appeal proceedings to be heard together with the Corporations proceedings. I made orders for Diaspora and Clarke Kann to be joined as defendants. I also suggested Mr Preston's former trustee in bankruptcy, Paul Gerard Weston of Pitcher Partners, be notified of the proceedings in case he wished to be heard.

21 Mr Weston was notified of the proceedings and responded by letter of 31 October. He drew attention to the question of the proceedings involving a "special federal matter". On the substantive issues he said:

> Pursuant to s. 153 of the *Bankruptcy Act* the bankruptcy administration is continuing, notwithstanding the discharge from bankruptcy. My investigations in relation to the discharged bankrupt's shareholding in Diaspora Holdings Pty Ltd are continuing. I have sought copies of documents which have not been provided and now appear in the Court Book. I have conducted public examinations of the discharged bankrupt, his brother, David Preston, and his friend Jeffrey Persson on 6 September 2018.

> Because my examinations into the examinable affairs of the discharged bankrupt are still continuing, I cannot add to the matters which are listed on 1 November 2018 in proceedings 2018/0020626. However, my investigations into the ownership of shares in Diaspora Holdings Pty Ltd is continuing and my rights in relation to those shares under s1072C of the *Corporations Act* and ss.58 and 116(1) of the *Bankruptcy Act* the shares may remain vested in me.
>
> …
>
> As my investigations have not been completed and I am not funded in these investigations, I am currently not in a position to participate in these proceedings or to advise the Court of any final position in relation to the bankrupt estate. I would simply ask that there be no findings in relation to the ownership of the shares in Diaspora Holdings Pty Ltd.

22 Both proceedings came before me for further directions in December. It was clear that the Corporations proceedings might involve disputed issues of fact. I therefore directed that the proceedings continue on pleadings. I also ordered that Mr Weston be formally joined as a party to the proceedings.

23 Following Mr Weston's joinder, his solicitors sent a submission, in the form of a letter, which drew attention to authorities on the "special federal matter" point. They did not participate in the subsequent hearings. Presumably Mr Weston's position on the substantive issues remained as set out in his letter of 31 August.

24 On 21 March I heard argument, as a preliminary question, on whether the proceedings had to be transferred to the Federal Court under the *Jurisdiction of Courts (Cross Vesting)* legislation. Neither Attorney-General sought to be heard. Following the argument, I announced that the proceedings would not be transferred, and I would give my reasons for this conclusion when I delivered my judgment. Counsel for Mr Preston made further submissions at the later hearing on 16 April in support of my conclusion. I set out my reasons for that conclusion in the next section of the judgment.

25 Returning to the substantive issues in the Corporations proceedings, there were in fact two separate ways in which Mr Preston was purportedly reappointed as a director in September 2016. The first was by way of a purported directors' resolution by Paul Robert Greig and David Oliver Barnes Preston. David Preston is Mr Preston's brother. Mr Greig is presumably an associate of Mr Preston. They had purportedly been appointed as directors of Diaspora in January 2016, while Mr Preston was still bankrupt. The other way

in which Mr Preston was purportedly reappointed was by way of a shareholders' resolution passed by Mr Preston himself as sole shareholder. Both resolutions were pleaded in support of Mr Preston's claim that the appointment was valid. In its defence, the Strata Corporation denied that either resolution was effective.

26 When the matter was before me on 21 March, I pointed out to counsel for the Strata Corporation that if its contention was correct that Mr Preston's purported appointment as director was invalid, Mr Preston should not be recorded in the records of Diaspora and ASIC as a director and those records should be corrected. I granted leave to the Strata Corporation to file a cross-claim seeking relief accordingly.

27 The Strata Corporation took advantage of this leave to file a cross-claim. The cross-claim named Mr Preston, Diaspora and ASIC as cross-defendants. The relief sought was a declaration that Mr Preston was not validly appointed; an order that Mr Preston cause Diaspora's register of directors to be corrected; and an order that Mr Preston cause all necessary forms to be lodged with ASIC to reflect this. Finally, the Strata Corporation sought orders that if the necessary forms were not lodged by Mr Preston, ASIC rectify its registers so as to remove reference to Mr Preston's purported appointment.

28 The Strata Corporation sought equivalent orders for the correction of Diaspora's register of directors and the lodgement of ASIC forms so as to remove references to Mr Greig and Mr David Preston having been directors between January and September 2016. But no declaratory relief was sought, and Mr Greig and Mr David Preston were not joined as parties.

29 In response, ASIC wrote to the solicitors for the Strata Corporation setting out ASIC's position. ASIC did not seek to be heard in the proceedings and confined its comments to stating that it would be unable to register any form which had the effect of the company having no director.

30 The final hearing of the proceedings took place before me on 16 April. The argument was not completed on that date; further written submissions were lodged and the oral argument was completed on 3 May. Counsel for Mr

Preston lodged supplementary submissions but was unable to attend the 3 May hearing.

31 In summary, there are two substantive areas of dispute in the Corporations proceedings. The first concerns the purported appointment of Mr Preston as director of Diaspora. I must decide whether the appointment was valid, and if not, whether the Court's power under s 1322(4) should be exercised so as to validate it.

32 If the appointment of Mr Preston was invalid, and is not to be validated, it becomes necessary to consider the validity of Clarke Kann's retainer in the Tribunal proceedings. Again I must decide whether the retainer was valid and, if not, whether s 1322(4) relief should be granted.

Appeal proceedings

33 The plaintiffs (appellants) in the Appeal Proceedings are named as Diaspora and Clarke Kann. The Strata Corporation is the defendant (respondent). The proceedings have effectively been conducted by Clarke Kann; Diaspora has not been represented.

34 The appeal is brought under the *Civil and Administrative Tribunal Act 2013* (NSW), s 83(1) ("CATA"). As such, it is limited to an appeal on a question of law. Clarke Kann have advanced nine grounds of appeal. Those grounds raise contentions, which parallel those made on behalf of Mr Preston in the Corporations proceedings, that Mr Preston was validly appointed as a director of Diaspora or that, if he was not, the retainer of Clarke Kann was validly ratified on behalf of Diaspora. Counsel for the Strata Corporation accepted that these grounds, at least to the extent that they do not involve any factual dispute, raise questions of law.

35 There are additional grounds of appeal. Counsel for the Strata Corporation submitted that those additional grounds did not raise questions of law. Counsel also contested the grounds on the merits. I will deal with the Appeal proceedings after having dealt with the Corporations proceedings.

Corporations proceedings: transfer to Federal Court

36 The Corporations proceedings are in Federal jurisdiction. Accordingly it is the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) ("CVA") which applies.

37 CVA 6 provides a special regime for proceedings involving a "special federal matter". The section relevantly provides:

> **6 Special federal matters: general rules**
>
> (1) If:
>
> (a) a matter for determination in a proceeding that is pending in the Supreme Court of a State or Territory is a special federal matter; and
>
> (b) the court does not make an order under subsection (3) in respect of the matter;
>
> the court must transfer the proceeding in accordance with this section to the Federal Court …
>
> (3) The Supreme Court may order that the proceeding be determined by that court if it is satisfied that there are special reasons for doing so in the particular circumstances of the proceeding other than reasons relevant to the convenience of the parties.
>
> (4) Before making an order under subsection (3), the court must be satisfied that:
>
> (a) a written notice specifying the nature of the special federal matter has been given to the Attorney-General of the Commonwealth and the Attorney-General of the State or Territory where the proceeding is pending; and
>
> (b) a reasonable time has elapsed since the giving of the notice for the Attorneys-General to consider whether submissions to the court should be made in relation to the proceeding.
>
> …
>
> (6) In considering whether there are special reasons for the purposes of subsection (3), the court must:
>
> (a) have regard to the general rule that special federal matters should be heard by the Federal Court …; and
>
> (b) take into account any submission made in relation to the proceeding by an Attorney-General mentioned in subsection (4).
>
> …

38 A "special federal matter" is relevantly defined by s 3 in the following way:

> ***special federal matter*** means:
>
> …
>
> (e) a matter that is within the original jurisdiction of the Federal Court by virtue of section 39B of the *Judiciary Act 1903*;

> being a matter in respect of which the Supreme Court of a State or Territory would not, apart from this Act, have jurisdiction.

39 No party sought the transfer of the Corporations proceedings to the Federal Court under s 6. Nevertheless, transfer is compulsory, subject to sub-section (3). The parties recognised that the Court had an obligation to consider the question.

40 Two issues arose. First, did the Corporations proceedings involve a special federal matter. Second, if so, could and should the Court retain the proceedings under sub-section (3).

Special federal matter

41 The possibility that the Corporations proceedings involve a special federal matter arose from the fact that the argument for the Strata Corporation relies on provisions of the *Bankruptcy Act 1966* (Cth). The Strata Corporation contends that upon Mr Preston's bankruptcy title to his share in Diaspora vested in his bankruptcy trustee; that it remained so vested despite Mr Preston's discharge from bankruptcy; and that in the circumstances Mr Preston could not validly exercise the power he would otherwise have as sole shareholder to appoint himself as the director of Diaspora.

42 The point the Court had to consider was whether the proceedings raise an issue involving the bankruptcy trustee's title to the share in Diaspora and therefore constitute proceedings "in bankruptcy" under the *Bankruptcy Act*, s 27. That section provides that such proceedings are exclusive to federal courts exercising bankruptcy jurisdiction. This is qualified by the CVA, s 4(1) which operates to confer bankruptcy jurisdiction, along with other Federal Court jurisdiction, on this Court. That means that for the purposes of the definition of "special federal matter" a bankruptcy matter is not one in respect of which this Court has jurisdiction apart from the CVA.

43 In *Tonbul Baykal v Terry Van Der Velde as trustee for bankrupt estate of Hakan Tandogan* [2017] NSWSC 36, White J (as his Honour then was) said (at [23]-[27]):

> [23] When the was enacted in 1987, the definition of "special federal matter" in s 3 included para (e) in the same terms as now appears, being a matter that is *Jurisdiction of Courts (Cross-Vesting) Act* within

> the original jurisdiction of the Federal Court by virtue of s 39B. At that time, the jurisdiction conferred on the Federal Court by s 39B was less expansive. In substance, s 39B as it then stood conferred jurisdiction on the Federal Court in relation to the issue of prerogative writs or an injunction against an officer of the Commonwealth.
>
> [24] In 1997, s 39B was amended to confer original jurisdiction on the Federal Court in any matter arising under any laws made by the Parliament. It is not at all clear to me that it was then Parliament's intention that by enlarging the jurisdiction of the Federal Court in the way provided for by s 39B there would be an expansion of the scope of what is a special federal matter under the *Jurisdiction of Courts (Cross-Vesting)* Act to encompass bankruptcy jurisdiction.
>
> [25] There have been many cases in which questions of title of the trustee in bankruptcy to property that arise under the general law have been determined in State courts. However, it is now I think fairly clearly established that jurisdiction in bankruptcy is a special federal matter pursuant to para (e) of the definition of "special federal matter" in s 3. That was held to be the case by the Court of Appeal in Victoria in *Turner v Gorkowki*, and that decision on the same legislation is binding on me.
>
> [26] The Full Court of the Federal Court came to the same conclusion albeit without reference to the earlier decision of the Court of Appeal, of the Victorian Court of Appeal in *Truthful Endeavour Pty Ltd v Condon* at [50]–[61]. The Full Court observed that "by virtue of" in para (e) did not mean "only by virtue of" (see at [52]).
>
> [27] Were the matter free from authority, that may be an arguable question, particularly if a further consideration of the legislative history indicated that the inclusion of bankruptcy matters within special federal matters may have been an unintended consequence of the amendment of s 39B. However, the matter is governed by authority by which I am bound. The question has been alluded to by the Court of Appeal recently in *Mateljan v HTT Huntley Heritage Pty Ltd* [2016] NSWCA 20 ; (2016) 111 ACSR 277 in terms that did not cast doubt on the conclusions in *Truthful Endeavour* (see at [27]).

44 His Honour went on to point out how unsatisfactory it is for questions of the trustee's title to property that arise in general law proceedings to be excluded from determination by State courts, and suggested that it should be corrected by Parliament (at [28]-[29]). But no action has yet been taken. If these proceedings are proceedings "in bankruptcy" I had to treat them as constituting a "special federal matter".

45 Proceedings "in bankruptcy" for the purposes of the *Bankruptcy Act,* s 27, are proceedings "under or by virtue of" that Act: s 5. It is well established that a claim where the Court is asked in effect to declare for or against the title of a trustee in bankruptcy falls within the scope of s 27: *Scott v Bagshaw* (2000) 99 FCR 573; [2000] FCA 816. But there is a distinction between exercising

jurisdiction “in bankruptcy” on the one hand and simply recognising the effect of provisions of the *Bankruptcy Act* on the other. This distinction can be seen in *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* (2008) 171 FCR 380; [2008] FCAFC 172 at [7]-[8], [18]; *Ritchie v Woodward (Executor of the Estate of the late Brian Patrick Woodward)* [2016] NSWSC 1715 at [458]-[459] and *Re Galtari Ltd* [2018] NSWSC 917 at [62]-[65].

46 In the present case, the trustee in bankruptcy had not, although joined as a party, made any claim. The Court was not asked to exercise any statutory power conferred on Federal bankruptcy courts under the *Bankruptcy Act*. No order was sought by any party declaring for or against the title of the trustee in bankruptcy to the share in Diaspora.

47 The issue in these proceedings concerned the validity of the purported appointment of Mr Preston as a director of Diaspora. The issue arose under the *Corporations Act* and involved the interpretation of the provisions of that Act, in particular s 201F(3). True it is that these provisions came into play as a result of Mr Preston’s bankruptcy and there was a debate about what the effect of that bankruptcy was for the purpose of applying them. But in my view the resolution of this debate simply involved, at most, the recognition of the effect of the *Bankruptcy Act*. It did not involve the exercise of jurisdiction “in bankruptcy”.

48 For these reasons, I did not think that these proceedings constituted a special federal matter for the purposes of the CVA. There was no requirement to transfer them under s 6(1).

Retention of proceedings

49 For completeness I will address whether, if I had considered the proceedings involved a special federal matter, I would have been justified in retaining them under CVA s 6(3). As I have said, none of the parties to the Corporations proceedings sought their transfer to the Federal Court. Clearly such a transfer would have resulted in unnecessary delay and expense. The question was whether the Court was required to ignore this because it was only a matter of “convenience to the parties”.

50 In *James v James (No 2)* [2019] NSWSC 116, Slattery J said (at [97], [102]):

> [97] Cross-Vesting Act, s 6(3) presents something of a puzzle. Its qualification that the retention of the proceedings in this Court must be justified by "special reasons" that are "other than the convenience of the parties" does not suggest that the parties' convenience is wholly irrelevant. Rather, the provision suggests that there must be some decisive factor telling against the transfer to federal jurisdiction, which is not the convenience of the parties. But a decision not to transfer may still be compatible with the convenience of the parties, provided that is not the sole basis for the decision not to transfer.
>
> …
>
> [102] Upon the proper construction of s 6(3), the "convenience of the parties" is not excluded from the Court's consideration provided it is not the determining factor. In my view, a determination by this Court not to transfer these proceedings to federal jurisdiction before the apportionment issues are decided overwhelmingly serves the better administration of justice. The convenience of the parties is to a degree also served by this decision. But the decision is wholly justified by promoting the better administration of justice; the reasons for this are elaborated below.

51 His Honour went on to explain how the resolution of the issues in the proceedings (which concerned the apportionment of proceeds between co-owners following an order under the *Conveyancing Act 1919* (NSW), s 66G, where one of the co-owners had become bankrupt after the order was made) would be assisted by his familiarity, from earlier stages of the proceedings, with the parties and the factual background. Transfer to the Federal Court or the Federal Circuit Court would invariably result in a delay. His Honour concluded that retaining the proceedings in this Court would be in the interests of all affected parties, not least the bankrupt's creditors.

52 On this issue, I considered that I should follow the approach of Slattery J, with which I respectfully agree. Retention of the proceedings in this Court appeared likely to result in a faster and more efficient determination of the dispute. But there was an additional factor. Clearly it was in the interests of all concerned that the Appeal proceedings, which raised parallel issues to those raised in the Corporations proceedings, should be decided by the same court at the same time. But the Federal Court has no jurisdiction to entertain appeals from the Tribunal. The two proceedings could only be dealt with together if they were dealt with by this Court.

53 In these circumstances, retention of the proceedings in this Court, where they could be promptly disposed of together with the Appeal proceedings, was not

just convenient to the parties. As Slattery J said in *James*, it promoted the better administration of justice.

54 For these reasons, even if I had concluded that the proceedings involved a special federal matter, I would have ordered that they remain in this Court rather than be transferred to the Federal Court.

Corporations proceedings: summary and analysis of evidence

55 Diaspora was incorporated in November 2005. Its initial shareholder and director was Peter John Dulson, whose involvement is not explained in the evidence. In September 2006 Mr Dulson was replaced as director by Mr Preston and the sole share in the company was transferred to him. Then in July 2011 the share was transferred to Jeffery Warwick Persson, who appears to have been an associate of Mr Preston.

56 In July 2013, Mr Persson executed a transfer of the share in Diaspora back to Mr Preston. The transfer from Mr Persson to Mr Preston recorded Mr Preston as receiving the transfer in his capacity as trustee of the Diaspora Trust No 2 ("the Trust") and it is common ground that the share thereby became an asset of the Trust.

57 The trust deed for the Trust was in evidence. The Trust is a discretionary trust for the benefit of members of Mr Preston's family. It was settled in November 2005.

58 Under the trust deed, the settlor was Mr David Preston and the Trustee was Mr Preston. The deed provided for an Appointor to have the power, among other things, to appoint or remove the Trustee. Mr Preston was the Appointor.

59 Mr Preston said quite candidly that the transfer of the share back to himself as Trustee was motivated by his impending bankruptcy. The transfer was recorded in Diaspora's share register as from 13 July 2013. It was not notified to ASIC until November 2013 but no point was taken about this. Counsel for the Strata Corporation did not challenge the validity of the transfer.

60 Mr Preston became bankrupt on 18 September 2013. As a result, he ceased to be a director of Diaspora. This was notified to ASIC, although the evidence does not reveal when. The result was that Diaspora ceased to have any

directors. Mr Preston's trustee in bankruptcy took no steps to assert any control over the company. Mr Preston remained on the register as the sole shareholder.

61 In evidence are minutes of two resolutions from January 2016 which purported to fill Diaspora's directorship vacuum. The first records a shareholders' resolution on 5 January 2016 purporting to appoint Mr Greig as a director. The minute stated:

> Record of Resolution of a meeting of the Members of Diaspora Holdings Pty Ltd ACN 117 328 499 (the "Company") at UNIT 4317, 10 PORTER STREET, RYDE, NSW 2112.
>
> I, being the Sole Member of the Company, am in favour of the resolution set out below:
>
> Appointment of officers:
>
> NOTED that PAUL ROBERT GREIG has provided a written signed consent to act as Director of the Company, which has been tabled.
>
> RESOLVED, by ordinary resolution, to appointment PAUL ROBERT GREIG as Director of the Company, effective immediately.

62 The name of the sole member of the company (who would at the time have been Mr Preston, at least according to the company's share register) was left blank. The resolution was signed, not by Mr Preston, but by Mr Greig.

63 The second minute recorded a directors' meeting on 14 January 2016, at which Mr Greig, purporting to act as sole director, appointed Mr David Preston as an additional director. Both of these purported appointments were notified to, and recorded by, ASIC shortly after the relevant meetings.

64 In February 2016 Clarke Kann commenced proceedings in this Court in Diaspora's name seeking orders that the Strata Corporation not impede Diaspora's access to and use of the common property, and its operation of the car parking business. This led to correspondence from solicitors for the Strata Corporation objecting to the validity of Clarke Kann's retainer. The Corporation's solicitors argued that instructions provided on behalf of Diaspora had not been given with the consent of the trustee in bankruptcy. In response, Clarke Kann discontinued the proceedings.

65 Mr Preston was discharged automatically from bankruptcy after three years. This happened on 19 September 2016. The two resolutions which are the subject of these proceedings were passed the following day.

66 The directors' resolution is recorded in a minute dated 20 September 2016. According to the minute the directors (that is, Mr Greig and Mr David Preston) resolved unanimously to appoint Mr John Preston as a director of the company and then noted the resignations of Mr Greig and Mr David Preston.

67 The shareholders' resolution is also recorded in a minute dated 20 September 2016. The minute states:

> Record of Resolution of a meeting of the Members of Diaspora Holdings Pty Ltd ACN 117 328 499 (the "Company") at UNIT 4317, 10 PORTER STREET, RYDE, NSW 2112.
>
> I, JOHN ROBERT PRESTON, being the Sole Member of the Company, am in favour of the resolution set out below:
>
> Appointment of officers:
>
> NOTED that JOHN ROBERT PRESTON has provided a written signed consent to act as Director of the Company, which has been tabled.
>
> RESOLVED, by ordinary resolution, to appointment JOHN ROBERT PRESTON as Director of the Company, effective immediately.

68 The resolution was signed by Mr Preston. There was no challenge to the accuracy of this minute, or of the minute of the same date recording the purported directors' resolution.

69 The Injunction Application which marked the beginning of the proceedings in the Tribunal was begun shortly afterwards, in October 2016. Mr Levingston delivered his adjudication in February 2017. The Review Application was begun in March 2017. The Consent Application was then begun in August 2017.

70 It is clear that from 20 September 2016, if not before, Mr Preston managed the business of Diaspora and, for practical purposes controlled its affairs. In particular, it was Mr Preston who gave all relevant instructions to Clarke Kann, purportedly on Diaspora's behalf, concerning the conduct of the Tribunal proceedings.

71 Shortly after the Consent Application began, the solicitors for the Strata Corporation wrote a letter to Clarke Kann asserting that both the Review Application and the Consent Application could not proceed, as Mr Preston was not appointed by the trustee in bankruptcy and therefore there was no valid retainer. The letter contended that the retainer could not be ratified by a retrospective appointment of Mr Preston.

72 Following further correspondence with the Tribunal, the Consent and Review Applications were adjourned for the filing of submissions and evidence with respect to the representation issue.

73 In September 2017, Chris Kintis, the partner of Clarke Kann acting for Diaspora in the Tribunal proceedings, filed an affidavit for the purpose of the then upcoming hearing on the representation issue. “Without prejudice to the submissions made by Diaspora, and to assist” the Tribunal, Mr Kintis annexed copies of the trust deed, an ASIC search of Diaspora and the ASIC Form 484 notifying the transfer of the share in Diaspora from Mr Persson to Mr Preston in July 2013. (Presumably copies of the September 2016 resolutions were already before the Tribunal in some other way).

74 A few weeks later, in October 2017, Mr Kintis filed a further affidavit. The affidavit referred to an affidavit and submissions filed in the meantime for the Strata Corporation. The affidavit then annexed copies of a series of minutes and other instruments purportedly dated August 2013 and September 2016 concerning the Trust.

75 The minutes in question purportedly recorded the appointment of Mr David Preston as Trustee and Appointor of the Trust in August 2013, shortly before the then existing Trustee and Appointor Mr Preston became bankrupt and vacated his office under the terms of the trust deed. Then the documents purportedly recorded in September 2016 Mr David Preston’s resignation, and Mr Preston’s reappointment, as Trustee and Appointor.

76 At the hearing before me counsel emphasised that the first occasion on which these documents were produced for the purposes of the proceedings concerning the representation issue were when they were attached to Mr Kintis’ October 2017 affidavit. Counsel noted that they had not been attached

to Mr Kintis' September 2017 affidavit. The suggestion was that, had the documents then existed, they would have been. Counsel also described the type face and other features of the purported trust minute of August 2013 as "remarkably similar" to the September 2016 trust minute.

77 Counsel for the Strata Corporation submitted, in the course of closing argument, that I should find that the minutes were not genuine. The suggestion was that they were produced after the event, presumably between September and October 2017.

78 It is difficult to evaluate this submission, having regard to the evidence before me and the way the case was conducted. There was no evidence about the way in which minutes of the Trustee's decisions were created and kept, or about where and how Mr Kintis had obtained the documents to annex copies of them to his affidavit. Still less was there any expert evidence on the genuineness of the documents. Counsel did put to Mr Preston in cross-examination that they had been produced after the event, which Mr Preston denied, but the proposition was put perfunctorily, and the denial was unilluminating.

79 The circumstances in which the documents emerged do, to my mind, raise some questions. If Mr Preston did indeed take steps to have Mr David Preston replace him as Trustee and Appointor of the trust in August 2013 he showed a level of knowledge of the trust deed and a degree of prescience which might be thought unusual in a lay person. On the other hand, it is accepted that the other steps taken by Mr Preston to move the ownership of the share around did indeed take place in July 2013; and they were recorded a few months later in a notification to ASIC. Quite properly, the parties did not use the proceedings to indulge in a general exploration of Mr Preston's credit.

80 In these circumstances, I am not satisfied on the evidence that it has been established that the documents were created after the event. Whatever questions may surround their execution, they retain their status as business records which are presumptively accurate. As it happens, the resolution of this factual issue is not relevant for the purposes of my decision and I will therefore not discuss it any further.

81 In evidence was a minute of a further resolution of Diaspora dated 11 January 2018. The accuracy of this minute was not disputed. The resolution stated:

> RESOLVED:
>
> 1. That the Company confirms and to the extent necessary, ratifies the following:
>
> a. The defence of the [Injunction Application] by and/or on behalf of the Company;
>
> b. The lodging and prosecution by and/or on behalf of the Company of the [Counter Injunction Application];
>
> c. The lodging and prosecution by and/or on behalf of the Company of the [Review Application], along with the associated stay application;
>
> d. The lodging and prosecution by and/or on behalf of the Company of the [Consent Application]; and
>
> e. The representation of the Company in each of (a) to (d) above by Clarke Kann Lawyers of Level 4, 9 Castlereagh Street, Sydney, NSW, 2000 and the retainer of Clarke Kann Lawyers to represent and advise the Company in each of (a) to (d) above.
>
> Signed
>
> John Robert Preston
>
> Sole Director
>
> Diaspora Holdings Pty Ltd ACN 117 328 498
>
> Dated 11/1/18

82 The Tribunal conducted a hearing on the representation issue which began on 16 January 2018. There was a second day of hearing in March. The Tribunal reserved its decision. About three months later, on 4 July, the Corporations proceedings were commenced in this Court. After the Corporations proceedings were commenced, Clarke Kann, on behalf of Diaspora, then sought to have the resolution by the Tribunal of the representation issue adjourned until after the Corporations proceedings had been dealt with by this Court. This was opposed by the Strata Corporation. Written submissions on this question were lodged in August.

83 On 4 September the Tribunal delivered its decision. The Tribunal refused the adjournment and decided the representation issue in favour of the Strata Corporation. The Tribunal ordered both Diaspora and Clarke Kann to pay the Strata Corporation's costs of both Applications from 1 September 2017 (being a date shortly after the representation issue was raised) on an indemnity basis.

Validity of appointment of Mr Preston as director

84 Counsel for Mr Preston relied primarily on the shareholders' resolution of 20 September 2016 to support the validity of Mr Preston's appointment as the director of Diaspora. Power to pass such a resolution came from *Corporations Act*, s 201G. That provides:

> **Company may appoint a director**
>
> A company may appoint a person as a director by resolution passed in general meeting.

85 In a single shareholder company, a resolution of the company may be passed under s 249B(1) which provides:

> **Resolutions of 1 member companies**
>
> A company that has only 1 member may pass a resolution by the member recording it and signing the record.

86 Counsel for Mr Preston also relied on the resolution of January 2018, to the extent that it purported to confirm Mr Preston's appointment as director. I discuss that resolution further in connection with ratification, below. In my opinion, it does not assist for present purposes. The resolution was in the same terms as the September 2016 resolution. There was no relevant change of circumstances between the two dates. If the 2016 resolution was valid, the January 2018 resolution adds nothing to it. If the September 2016 resolution was invalid, the January 2018 resolution would likewise have been invalid.

87 Counsel for Mr Preston also referred to the residual power which, so counsel submitted, Diaspora's shareholders had to appoint directors when other means of appointment were unavailable: *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1988) 13 ACLR 110 at 115-116. But I do not think this adds anything to the present case. As I explain below, the resolution under consideration is the single member equivalent of a resolution in general meeting. If that resolution was insufficient, then I cannot see that appealing to a residual power to act in general meeting (if there is any outside s 201G) could make any difference.

88 Mr Preston's pleadings relied, as an alternative to his purported appointment as a director of Diaspora by shareholder's resolution, upon his purported appointment by Mr David Preston and Mr Greig as directors' resolution on 20

September 2016. In preparation for the hearing, counsel for the Strata Corporation in his oral submissions argued that the purported appointments of Mr David Preston and Mr Greig were invalid for various reasons. At the hearing neither counsel for Mr Preston nor counsel for Clarke Kann sought to support the purported appointment by Mr David Preston and Mr Greig. In effect, reliance on the purported directors' resolution was abandoned. Mr Preston was not asked about the relevant minutes in cross-examination. This is all rather strange and unsatisfactory on a factual level, but as no point was made about it on behalf of the Strata Corporation I do not think I should pay any attention to it.

89 Returning to the September 2016 shareholders' resolution, there was no challenge to the accuracy of the minute and there was no suggestion that it did not comply with s 249B(1). Counsel for the Strata Corporation contended, however, that s 201G did not apply. Counsel submitted, as I understood him, that a written resolution under s 249B(1) was not a resolution by the company in general meeting for the purpose of s 201G.

90 I do not accept this submission. If a resolution under s 249B does not have the effect of a resolution in general meeting, what use would it be? Counsel relied upon the discussion by Lindgren AJA in *Sheahan v Londish* (2010) 80 ACSR 337; [2010] NSWCA 270 at [181]-[214] of the history and purpose of 249B. I see nothing in that discussion which supports counsel's submissions. Indeed at [211] Lindgren AJA appears to assume that s 201G can be satisfied by a resolution under 249A.

91 Counsel for the Strata Corporation next contended that even if s 201G was satisfied, the resolution was ineffective. The contention was ineffective and was based on three different arguments. First, counsel submitted that the single share in Diaspora was not, in September 2016, Mr Preston's property; it had vested in his trustee in bankruptcy. It followed, according to counsel's submission, that Mr Preston had no right to exercise any power attached to that share to appoint a director. Second, counsel argued that if the first contention was incorrect and Mr Preston was the owner of the share, he held it as "bare trustee" and his powers as bare trustee did not extend to exercising

the power of appointment. Counsel's third argument relied on *Corporations Act*, s 201F(3). The argument was that, in the circumstances, this provision gave Mr Preston's bankruptcy trustee sole and exclusive power to appoint a new director.

Effect of bankruptcy on legal title to Diaspora share

92 The Strata Corporation's first argument is based on the *Bankruptcy Act 1966* (Cth), s 58(1). The enactment as a general rule, vests the bankrupt's property in the trustee in bankruptcy.

93 Initially, counsel for Mr Preston contended that the share in Diaspora fell within the exception created by s 116(2)(a), which provides:

> **Property divisible among creditors**
>
> (2) Subsection (1) does not extend to the following property:
>
> (a) property held by the bankrupt in trust for another person;

94 Counsel relied upon what Brereton J (as his Honour then was) said in *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17; [2014] NSWSC 1484; at [16]:

> It would be extraordinary, in the context of insolvency law, if "property of the company" included property of which it was a trustee and in which it had no beneficial interest. It is of course well-established, in the field of bankruptcy, that property held by the bankrupt on trust does not vest in the trustee-in-bankruptcy: *Bankruptcy Act 1966* (Cth), s 116(2)(a), (which excludes from the property divisible among creditors property that is held by the bankrupt in trust for another person); *Scott v Surman* (1742) Willes 400 at 402; 125 ER 1235 at 1236-1237; *Morgan v Swansea Authority* (1878) 9 Ch D 582, 585; *St Thomas's Hospital v Richardson* [1910] 1 KB 271, 277.

95 But in argument on 16 April, counsel for the Strata Corporation referred to what Leeming JA (with whom McColl JA and Sackville AJA agreed) said in *Lewis v Condon* [2013] NSWCA 204. That case concerned a property vested in an individual and subject to a trust. The individual became bankrupt. Leeming JA said (at [91]-[92]):

> [91] Upon the making of the sequestration order on 14 May 2012, s 58 of the *Bankruptcy Act 1966* (Cth) applied. That had the effect that such interest as Colleen [the bankrupt individual] had in the Property vested forthwith in equity in Mr Condon [the trustee in bankruptcy]. Legal title did not vest forthwith in Mr Condon. (Section 90 of the *Real Property Act 1900* (NSW) establishes a procedure whereby a trustee in bankruptcy can obtain registration as proprietor of land pursuant to the vesting effected by s 58(2) of the *Bankruptcy*

> *Act*). Mr Condon ultimately took advantage of that procedure to become registered proprietor of the Property and thereby acquire legal title.
>
> [92] But it is clear law that those statutory vestings do not destroy any trust of which the bankrupt was a trustee. Section 116(2)(a) of the *Bankruptcy Act* excludes from the vesting property held by the bankrupt in trust for another person, and s 82 of the *Real Property Act* excludes notice of trusts on the register. It follows that neither the vesting effected by s 58(1) nor the title created by registration of a transfer of an "estate in fee simple" to Mr Condon on which he relied destroyed any trusts in respect of the Property.

This reasoning has since been followed by the Full Federal Court: *Boensch (As Trustee of Boensch Trust) v Pascoe* (2018) 133 ACSR 268; [2018] FCAFC 234 (at [106]).

96 Counsel for Clarke Kann (who conducted this aspect of the argument in the absence of counsel for Mr Preston on 3 May) accepted that I would follow these authorities, although counsel maintained, formally, that they were wrong. Counsel accepted that the effect of the authorities was that, in general, the legal title to property held on trust passes to the trustee in bankruptcy, albeit that the trustee takes that legal title subject to the terms of any trust affecting the property in the bankrupt's hands.

97 But counsel contended that there was an exception in the present case. Counsel relied on *Bankruptcy Act*, s 58(2). (Counsel also relied on s 132(3), which is in the same terms, but this does not add to the case and I say no more about it). Sub-section 58(2) provides:

> Where a law of the Commonwealth or of a State or *Territory of the Commonwealth* requires the transmission of *property* to be registered, and enables *the trustee* to be registered as the owner of any such property that is part of the property of the bankrupt, that property, notwithstanding that it vests in equity in the trustee by virtue of this section, does not vest in the trustee at law until the requirements of that law have been complied with.

98 Counsel submitted that, although Mr Preston's bankruptcy trustee might have been entitled to cause the share to be registered in his name, until and unless he did so the legal title remained with Mr Preston. Counsel relied for this submission on various provisions of the *Corporations Act*.

99 The question is whether, in light of these provisions, the *Corporations Act* "requires" that the transmission of the share in Diaspora be registered, so that, under *Bankruptcy Act,* s 58(2), the share only vested "in equity" in Mr Preston's trustee.

100 Under *Corporations* Act, s 201G, the right to appoint a director is conferred on a company in general meeting. That means the members (or in a single member company, the member) are entitled to vote. The *Corporations Act* relevantly defines "member" in s 231 in the following way:

> A person is a member of a company if they:
>
> (a) are a member of the company on its registration; or
>
> (b) agree to become a member of the company after its registration and their name is entered on the register of members

101 This definition reflects the well-recognised principle that registration is necessary to constitute membership of a company, and beneficial ownership without registration does not make a person a shareholder: *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1976) 140 CLR 247 at 295; at 295 per Gibbs J; see also *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16.

102 Part 7.11 of the *Corporations Act*, (ss 1070A-1075A), deals with title to, and transfer of, shares. A share is transferable or transmissible as provided by the company's constitution (s 1070A(1)(b)(i)). It is capable of devolution by will or by operation of law (s 1070A(1)(c)), but this is subject, among other things, to the terms of the company's constitution (s 1070A(2)).

103 Section 1072F deals with the registration of share transfers. It relevantly provides:

> **Registration of transfers**
>
> (1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.
>
> (2) The directors are not required to register a transfer of shares in the company unless:
>
> > (a) the transfer and any share certificate have been lodged at the company's registered office; and
> >
> > (b) any fee payable on registration of the transfer has been paid; and
> >
> > (c) the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.

104 Division 2 Subdivision B makes special provision for the registration of shares held by a bankrupt in the name of a trustee. Section 1072B provides:

Transmission of shares on bankruptcy

(1) If a person entitled to shares because of the bankruptcy of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as holder of the shares, the person may:

(a) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or

(b) by giving a completed transfer form to the company, transfer the shares to another person.

(2) On receiving an election under paragraph (1)(a), the company must register the person as the holder of the shares.

(3) A transfer under paragraph (1)(b) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

(4) This section has effect subject to the *Bankruptcy Act 1966*.

105 Section 1072C relevantly provides:

Rights of trustee of estate of bankrupt shareholder

(1) If:

(a) because of the *Bankruptcy Act 1966*, a share in a company, being part of the property of a bankrupt, vests in the trustee of the bankrupt's estate; and

(b) the bankrupt is the registered holder of that share;

this section applies whether or not the trustee has been registered as the holder of the share.

(2) On producing such information as the company's directors properly require, the trustee is entitled to:

(a) the same dividends and other benefits; and

(b) the same rights, for example, but without limitation, rights in relation to:

(i) meetings of the company; or

(ii) documents, including notices of such meetings; or

(iii) voting; or

(iv) inspection of the company's records;

as the bankrupt would be entitled to if he or she were not a bankrupt.

(3) The trustee has the same rights:

(a) to transfer the share; and

(b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the share;

as the bankrupt would have if he or she were not a bankrupt.

(4) If the trustee transfers the share, the transfer is as valid as if the trustee had been registered as the holder of the share when the trustee executed the instrument of transfer.

(5) A person or body whose consent or approval is required for the transfer of shares in the company must not unreasonably withhold consent or approval for the transfer of the share by the trustee.

(6) If:

(a) the company's constitution requires:

(i) the share to be offered for purchase to a member of the company; or

(ii) an invitation to buy the share to be issued to such a member; and

(b) as at the end of a reasonable period after the trustee so offers the share, or so issues such an invitation, no such member has agreed to buy the share from the trustee at a reasonable price;

the trustee may sell and transfer the share to a person other than such a member.

(7) A provision of the company's constitution is void as against the trustee in so far as, apart from this section, it would affect rights attached to the share:

(a) because the bankrupt is a bankrupt; or

(b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or

(c) for reasons including a reason referred to in paragraph (a) or (b).

(8) Nothing in this section limits the generality of anything else in it.

(9) This section has effect despite anything in the company's constitution.

106 A trustee in bankruptcy seeking to realise shares held by the bankrupt in a company may face obstacles at a number of levels. Section 1072B and s 1072F are replaceable rules. This means they can be displaced by contrary provisions of the company's constitution. It is common for the constitution of a proprietary company to provide that directors shall have an absolute discretion as to whether to register a transfer of shares or not. In such a case, where the directors of the company are hostile to the trustee, it may be difficult for the trustee to achieve registration.

107 More fundamentally, the company's constitution may contain provisions which reduce the value of the shares themselves if their owner becomes bankrupt. Clearly s 1072C, which prevails over any contrary provision in the constitution, is designed to ensure that the trustee in bankruptcy can realise the share for

the benefit of the bankrupt's creditors without any such impediment or discrimination.

108 These provisions do not "require" a share to be transferred in the sense that they create an enforceable obligation to lodge a transfer. But they do "require" transfer in the broader sense that, without registration, there can be no effective transfer. I think the latter sense must be intended. Sub-section 58(2) was clearly intended to cover real property held under Torrens Title systems of registration. Such systems of registration do not, typically, impose any obligation to register a transfer; but they do operate so that, without registration there can be no effective transfer at law. In my opinion, the scheme of the *Corporations Act* is relevantly the same.

109 I think this conclusion is reinforced by the fact that the *Corporations Act* (which post-dates the *Bankruptcy Act*) makes specific provision for transfer of shares. If the contention for the Strata Corporation were correct, those provisions would be unnecessary.

110 For these reasons, I reject the Strata Corporation's first contention. Mr Preston retained in September 2016 ownership of the legal title to the share in Diaspora. While he did so he was entitled to exercise associated rights of membership, which included the exercise of power under s 201G.

111 This view is consistent with another point made by Leeming JA in *Lewis v Condon*. The bankrupt individual in the case was, at the time of her bankruptcy, the director of a company ("Truthful Endeavour"). After the bankruptcy the individual's daughter was appointed as a director of the company. His Honour said (at [93]):

> Also upon the making of the sequestration order, Colleen [the bankrupt] became a person disqualified from managing corporations by *Corporations Act 2001* (Cth), s 206B(3), and immediately ceased to be a director by reason of s 206A(2). As it happened, Colleen was the sole director of Truthful Endeavour. However, despite a submission made on behalf of Mr Condon [the bankruptcy trustee] to the contrary, Colleen's bankruptcy did not prevent the sole member of Truthful Endeavour from appointing Louise [the daughter] as a director. A company may act either by its board, or by a resolution of its members, and where as here a company has a single member, a resolution may be passed by the member recording it and signing the record: s 249B; see *Sheahan v Londish* [2010] NSWCA 270; 80 ACSR 337.

Effect of holding Diaspora share subject to equitable interests

112 It was common ground between the parties that when Mr Preston received a transfer of the share in Diaspora from Mr Persson in July 2013, he held the share under the terms of the Trust. But counsel for the Strata Corporation pointed to cl 15.6 of the trust deed which provided that a Trustee (and Appointor) should "be disqualified from holding office" on becoming bankrupt. It was apparently common ground that this clause had the effect that upon bankruptcy Mr Preston automatically ceased to hold office as Trustee.

113 Clause 15.2 of the trust deed provided for the appointment of an additional Appointor in the lifetime of the Appointor or Appointors and gave the Appointor power to appoint a new Trustee. Counsel for Clarke Kann relied upon the disputed trust minutes as having the effect of getting around the operation of cl 15.6. It will be recalled that under these minutes, Mr David Preston was purportedly appointed as a Trustee and Appointor of the trust in August 2013 by Mr Preston and that on 20 September 2016 David Preston purportedly re-appointed Mr Preston as Trustee.

114 Counsel for Clarke Kann submitted that as Trustee of the trust, Mr John Preston had a better right to hold the trust property than his trustee in bankruptcy, who would hold it subject to the beneficial interests embodied in the Trust. Counsel argued that should the trustee in bankruptcy become the legal owner of the share, he would be obliged to act in accordance with the terms of the Trust. This would require him to transfer the legal title to Mr Preston as Trustee. Accordingly, Mr Preston could not be required to transfer the share to the trustee in bankruptcy.

115 I acknowledge the logic of this submission. But it seems to me that its outcome contradicts the approach in *Lewis v Condon* which accepted that the legal title to property held on trust was nonetheless property which vested in the bankruptcy trustee and which the trustee could call for.

116 Counsel for Clarke Kann also pointed to the bankruptcy's trustee's obligations under the *Bankruptcy Act* to conduct the realisation of the bankrupt's property in an efficient way. Counsel submitted that even if the trustee could in theory call for the legal title, in practice that would not happen. This was because the

bankruptcy trustee would take subject to the terms of the Trust. For this reason, calling for the legal title would not be in furtherance of, and might in fact breach, the trustee's duty to administer the estate efficiently and to perform his functions in a "commercially sound way": s19(1)(j), s 19(1)(k).

117 I think this goes too far. It may be that the existence or terms of a purported trust over a bankrupt's property are disputed. In such a situation, the trustee in bankruptcy may well wish to take the legal title for the trust property so as to protect the property in the event that the trust claim fails. I think I should proceed on the basis that, whatever the conceptual complexities, Mr Weston was entitled to require transfer of the legal ownership of the share in Diaspora.

118 It is convenient to refer to this entitlement as an "equitable interest", just as s 58(2) refers to property vesting "in equity", even though, if the Trust is valid, the bankruptcy trustee's interest would be subject to the rights of the beneficiaries. In that sense it may only be a "bare" equitable interest.

119 Counsel for the Strata Corporation submitted that, at all times after his bankruptcy in September 2013, Mr Preston held the share in Diaspora, in effect, to the order of Mr Weston as trustee in bankruptcy. Counsel characterised this as holding the share as "bare trustee". Counsel submitted that, even after Mr Preston was discharged from bankruptcy in September 2013, the position was unaltered. This was because discharge from bankruptcy does not effect a re-vesting of property which has not been realised by the trustee in bankruptcy. The trustee remains the owner of that property until and unless it is realised or re-vests under the Act: s 154(1).

120 By s 129AA, property which has been disclosed in the bankrupt's statement of affairs re-vests six years after the commencement of the bankruptcy. This would mean that the earliest date on which the equitable interest in the share would re-vest in Mr Preston would be July this year. But counsel pointed out that the share had not been disclosed in Mr Preston's report as to affairs, and accordingly the period could be a longer one, perhaps as much as a further eight years: see s 149(4), s 149D(1), s 149A(2).

121 Counsel for the Strata Corporation argued:

> …Mr Preston could no more than hold and transfer the share when required to do so … That is all he could do. And if he was just a bare trustee, he didn't have power to appoint, he didn't have power to appoint himself a director.

122 Statute aside, the term “bare trustee” is not a term of art. In trust law, the term usually refers to a trustee who has no active duties to perform. But this is a somewhat imprecise description, because few if any trustees have no obligations whatever: J D Heydon, M D Leeming, *Jacobs’ Law of Trusts in Australia* (8th ed, 2016, LexisNexis Butterworths) at [3-15].

123 In my view it is unnecessary to decide whether, upon his bankruptcy, Mr Preston was properly characterised as a “bare trustee” of the share in Diaspora. Even if it were appropriate to characterise Mr Preston’s holding of the legal title to the share in this way, to ask whether he had active duties to perform, and what they were, says nothing of present relevance. The real question is whether his status had the effect of restricting his power to exercise rights associated with his legal title.

124 A fundamental aspect of equitable jurisprudence is the duality of interests and remedies which it creates. In a trust, the legal title to the relevant property is held by the trustee who can exercise legal rights incidental to that property. Equity acts in personam by compelling the trustee to exercise those legal rights in the interests of the beneficiaries. Or equity may award compensation against the trustee for an action taken in breach of the trustee’s obligations to the beneficiaries. But in such cases equitable intervention does not in some way invalidate the trustee’s action at law. Rather, it presupposes the validity of such action.

125 For this purpose, it does not matter what the terms of the trust are. Equity operates in the same way whether the trust is an express one or a constructive one. Even if Mr Preston were correctly characterised as a “bare trustee” of the legal title after his bankruptcy, that would have no effect on the validity on his actions at law.

126 For these reasons, I reject the second contention on behalf of the Strata Corporation. If Mr Preston’s action in appointing himself as a trustee was a valid legal exercise of the power under s 201G, then it was valid irrespective of any equitable interest his trustee in bankruptcy had in the share.

Application of s 201F(3)

127 The third argument for the Strata Corporation was based on *Corporations Act*, s 201F(3). Section 201F relevantly provides:

> **Special rules for the appointment of directors for single director/single shareholder proprietary companies**
>
> (1) The director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record.
>
> …
>
> (3) If:
>
> (a) the office of the director of a proprietary company is vacated under subsection 206B(3) or (4) because of the bankruptcy of the director; and
>
> (b) the person is the only director and the only shareholder of the company; and
>
> (c) a trustee in bankruptcy is appointed to the person's property;
>
> the trustee may appoint a person as the director of the company.
>
> (4) A person who has a power of appointment under subsection…(3) may appoint themselves as director.
>
> (5) A person appointed as a director of a company under subsection…(3) or (4) holds office as if they had been appointed in the usual way.

128 Clearly the conditions in sub-paragraphs (a), (b) and (c) of sub-section (3) were satisfied when Mr Preston became bankrupt in September 2013. The contrary was not suggested. The dispute between the parties concerns whether, where the power was not exercised, its existence excluded the later appointment of a new director in some other way, and in particular, in this case, under s 201G.

129 Counsel for the Strata Corporation characterised s 201F(3) as creating a right in the trustee upon the bankruptcy of a person who was the sole shareholder and director of a company, thereafter to appoint a director to manage the company's affairs. In counsel's language, this right "vested" in the trustee at the moment of bankruptcy and was not divested thereafter except in accordance with the provisions of the *Bankruptcy Act* relating to the divestiture of property following the bankrupt's discharge from bankruptcy.

130 Counsel relied on authorities which have recognised that for certain purposes a power to appoint property to oneself is equivalent to ownership: *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011]

UKPC 17; [2012] 1 WLR 1721; cf *Re Burton, Willy v Burton* (1994) 126 ALR 557. But the situation under s 201F(3) is completely different. The power to nominate a director to the company does not compare with ownership of shares in the company and still less with ownership of the company's assets. It is an entitlement to appoint someone to an office under the constitution of the company, which results in that person managing the business of the company in accordance with the relevant provisions of the Act and the constitution.

131 Furthermore, the idea of the right created by s 201(F)(3) "vesting" is problematical and "re-vesting" is even more problematical. In whom would the right re-vest after the expiry of the statutory period? Would it really be necessary to disclose the right in the bankrupt's report as to affairs as property distinct from ownership of the share itself? These questions only underline how inapposite a proprietary analysis of s 201F(3) is.

132 In *Ex Parte Gilchrist; Re Armstrong* (1886) 17 QBD 521, Fry LJ said (at 530-531):

> "The question is, whether the general power of appointment given to the bankrupt is her 'separate property' within the meaning of sub-s. 5 of s. 1 of the Act of 1882. To my mind the question is one of the most elementary description, and, if it had not been argued as it has, I should have thought it unarguable. No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. ... A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. ... Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar."

133 This passage was described by Leeming JA in *Lewis v Condon* at [94] as the starting point in determining whether a right is properly described as property. In my view, applying this distinction, what s 201F(3) creates is a power, not some form of proprietary right.

134 Even so, it is still possible that as a matter of construction the section excludes powers that would otherwise be available. In this connection, counsel for the Strata Corporation relied on the decision of Campbell J (as his Honour then was) in *Official Trustee in Bankruptcy v Buffier* (2005) 54 ACSR 767; [2005] NSWSC 839.

135 In that case the Official Trustee in Bankruptcy sought the winding up of a company on the just and equitable ground as part of its realisation of the assets of the bankrupt estate of the company's sole director and secretary. A question arose as to the validity of the bankrupt's acts as a director which resulted in the appointment of two further directors of the company. It was argued that the bankrupt had been a de facto director within the definition in s 9(b)(i), and could thus appoint further directors under s 201F(1).

136 Campbell J said:

> [34] In deciding whether para (b)(i) of the definition of "director" applies, the relevant context includes s 201F(3). Section 201F(3) sets out a procedure which applies in the situation where a person is the only director and only shareholder of the company, and becomes disqualified from managing corporations through being an undischarged bankrupt, when a trustee in bankruptcy is appointed to that person's property. In that situation, the trustee may appoint a person as the director of the company. I cannot conceive that in that situation parliament intended that, not only would the trustee have power to appoint a replacement director, but as well the person who had become bankrupt could, by flouting the disqualification in s 206B(3) come to acquire the capacity also to appoint his own replacement. I conclude that, even if the bankrupt had purported to appoint Mr Laughlin by recording the appointment and signing the record, under s 201F, that appointment would not have been effective.

137 It is, with respect, easy to see why his Honour considered that it would make nonsense of s 201F to read the provision in sub-section (i) as including a de facto director. No equivalent issue arises in this case. The argument in favour of the validity of the resolution is based on Mr Preston's powers and entitlements as legal owner of the share, not on any status of de facto director.

138 For these reasons, Campbell J's decision in *Buffier* does not assist the Strata Corporation's argument. Campbell J actually went on to say at [35]:

> [35] An alternative route Mr Angyal [counsel] pointed to as the means by which Mr Laughlin [one of the purported directors] may have been appointed as director is by a meeting of shareholders. He submits that until the recent vesting in the official trustee of the shares in the second defendant, the bankrupt was the sole shareholder in the second defendant, that any rights of the official trustee to vote at meetings, under s 1091A, arose only upon the production of such information to the directors as the directors required, and that there is no evidence that the official trustee had ever found out what that information was, or provided it. However, when there is no evidence produced to the court that there ever was a purported meeting of shareholders to appoint Mr Laughlin as a director, the factual basis for this argument is not established. In the absence of evidence I am not prepared to infer that there was a purported meeting of shareholders, rather than, for example, a simple lodging

> of a form with ASIC that stated that Mr Laughlin had replaced the bankrupt as a director.

139 In this passage his Honour rejects the submission on the evidence. He appears to accept that if in fact there had been a shareholders' meeting the appointment might have been effective. His Honour does not mention s 201F(3) as presenting an obstacle. That may not have been argued, but what his Honour says emphasises that the judgment is in no way an authority in support of counsel's present argument.

140 Where a bankrupt is the sole director and shareholder of a company, the trustee in bankruptcy will have a right under s 1072B (if it has not been replaced), and, in any event, a right under s 1072C, to obtain a transfer of the share. There would usually be a difficulty in exercising that right in practice because there will be no one who can receive the necessary information to process the transfer and give effect to it. In such circumstances it may be necessary for the trustee to be able to appoint a director, thereby allowing the company to function again. That is plainly the purpose of s 201F(3). But is there anything which necessarily requires that that should be the only way in which a director can be appointed?

141 As a matter of general principle the appointment of company directors is governed by the company's constitution; the members of the company may, through the constitution, adopt any procedures they wish for the appointing and removing of directors so long as those procedures are consistent with the requirements of the *Corporations Act*. Section 201F(3) must be construed with this principle in mind. In circumstances such as the present, the company's constitution could itself provide a procedure for the appointment of a new director to replace a bankrupt sole director. The trustee in bankruptcy might be satisfied with the person so appointed. And if that person proved unacceptable to the trustee, the trustee could simply use s 1072C (which prevails over any provisions of the constitution) to register himself or herself as sole shareholder. Once that was done, it would be open to the trustee, at will, to use his or her power as sole shareholder to appoint a replacement director or directors. There would be little if any prejudice to the trustee, and thus nothing in the statutory purpose requiring the trustee to have sole power to appoint a new director.

142 In my view, analysis of the text of s 201F(3) leads to the same conclusion. The provision is expressed in a facultive way (the trustee "may"). Nothing in the express language is necessarily exclusive.

143 It might be argued that the reference to the trustee appointing "the" director, seen on its own, implies that any director is to be appointed by the trustee and by no one else. But such a construction of the section would give rise to great practical difficulties. If the power, once it has arisen, is exclusive, when does it end? I asked counsel for the Strata Corporation whether, if the trustee exercised his or her power to sell the share to a third party, the trustee would nevertheless retain the power, to the exclusion of the purchaser, to appoint the sole director of the company. Counsel replied in the negative. But I think this is inconsistent with the logic of counsel's submission. There is nothing in s 201F(3) which places any express limit on the time within which the power can be exercised. The section does not even provide that the power ceases when the underlying share re-vests.

144 An alternative construction of s 201F(3) is that the power for which it provides can only be exercised if, at the time that the trustee in bankruptcy seeks to do so, the conditions in sub-paragraphs (a), (b) and (c) are still satisfied. But of course, on that approach, if a director was appointed by some other mechanism then the section would cease to apply: cf *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1988) 13 ACLR 110 at 116 ("there would be no competition in filling the office as the first in order of time to act would act with effect"). Counsel for Mr Preston submitted, along similar lines, that on the true construction of s 201F(3) the power could not be exercised after the bankrupt was discharged or where the share was held in trust. For obvious reasons, these interpretations were resisted by counsel for the Strata Corporation.

145 I do not think it is necessary for the purposes of this judgment to consider the temporal and other limits of the power under s 201F(3). It is enough to say that I do not think that the power is exclusive in the sense contended for by counsel for the Strata Corporation.

146 For these reasons, I reject the third contention for the Strata Corporation. Section 201F(3) is not an obstacle to the exercise of the power under s 201M.

Conclusion on validity of Mr Preston's appointment

147 I have rejected each of the contentions for the Strata Corporation concerning the validity of the appointment under s 201G. The attack on the validity of Mr Preston's re-appointment as director of Diaspora on 20 September 2016 fails.

Validation of Mr Preston's appointment

148 In case I am wrong in this view, I will consider whether Mr Preston's appointment, if invalid, should have been validated under *Corporations Act* s 1322(4)(a). Section 1322 relevantly provides:

> **Irregularities**
>
> (1) In this section, unless the contrary intention appears:
>
> (a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not;
>
> (a) …
>
> (4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
>
> (b) an order directing the rectification of any register kept by ASIC under this Act;
>
> (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
>
> (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding; and may make such consequential or ancillary orders as the Court thinks fit.
>
> (5) An order may be made under paragraph (4)(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.
>
> (6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) in the case of an order referred to in paragraph (4)(c)--that the person subject to the civil liability concerned acted honestly; and

(c) in every case--that no substantial injustice has been or is likely to be caused to any person.

149 In applying s 1322(4)(a) in the present case, I found a great deal of guidance in the *Beck v Weinstock* litigation. That case concerned the affairs of a family company. In an attempt to avoid the impact of income tax and estate duty, the shares in the company were issued in classes which had no voting rights. In an omission which later led to the scheme going badly wrong, no voting shares were ever issued.

150 In 1973, Amiram Weinstock, the son of the founding directors and shareholders, was appointed as a director of the company by the other directors. Thereafter he continued to act as a director alongside his parents. In 2003, his mother had lost mental capacity and his father died, leaving him as the (apparent) sole director. He purported to exercise a power under the articles to appoint his wife as another director. For the next seven years the two of them continued to act as the directors of the company. But it was later found that, on the proper construction of the articles, he had ceased to be a director at the company's annual general meeting following his appointment. His purported appointment of his wife was therefore invalid. Furthermore, because there were no voting shares issued, the company in general meeting was powerless to appoint any directors.

151 At first instance, the proceedings came before Barrett J (as his Honour then was): *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235. His Honour made an order under s 1322(4)(a) validating the purported appointment of Mrs Weinstock.

152 The plaintiff, Mrs Beck, who was Mr Weinstock's sister, appealed. By majority, the Court of Appeal allowed the appeal and set aside the s 1322(4)(a) order:

Beck v LW Furniture Consolidated (Aust) Pty Ltd (2012) 265 FLR 60; [2012] NSWCA 76. Both the majority judges, Young JA and Sackville AJA, thought that s 1322(4)(a) was not available to validate Mrs Weinstock's appointment. As put by Young JA at [223], the power under s 1322(4)(a) could not be used to validate something which the company had no power lawfully to do.

153 A further appeal to the High Court was allowed and the decision of Barrett J was restored: *Weinstock v Beck* (2013) 251 CLR 396; [2013] HCA 14. The High Court rejected the limitation placed on the operation of s 1322(4)(a) by the majority of the Court of Appeal. The Court held that it is sufficient that there is a contravention of a provision of the Act or the constitution (in the sense that the relevant provision does not permit a purported step to be taken effectively).

154 Counsel for the Strata Corporation submitted that the power in s 1322(4)(a) was not wide enough to cure an invalidity created by s 201F(3). But in light of the High Court decision in *Beck*, Diaspora's inability to appoint a director would not take the case outside the scope of the power. If s 201F(3) had an exclusive effect, which prevented an otherwise valid resolution being made under s 201G, the purported appointment under s 201G would appropriately be described as being invalid because of a "contravention" of the Act. In my view, had s 201F(3) had the effect contended for it, the dispensing power under s 1322(4)(a) would have been available in the present case.

155 The next question is whether an order under s 1322(4)(a) validating Mr Preston's appointment would satisfy the requirements of s 1322(6). The first requirement is that it would be "essentially of a procedural nature" within the meaning of that term in s 1322(4)(a).

156 In my opinion, the test applied by the Court of Appeal majority in *Beck*, although inappropriate as a limitation on the court's power under s 1322(4)(a), is useful in determining what is "essentially of a procedural nature". That was a case where no organ of the company was capable of making the appointment. If there is no lawful procedure for doing something, then the failure to do it can hardly be described as "procedural": see also *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185; (2005) 23 ACLC 1859; [2005] NSWSC 1005 at [103] per Palmer J.

157 In *Beck*, Barrett J considered that the invalid appointment of Mrs Weinstock was not a matter which was "essentially of a procedural nature". I think the same conclusion would apply here, on the hypothesis I am considering.

158 But this is not the end of the enquiry. As Campbell JA confirmed in *Beck* on appeal (at 83 [103]), s 1322(6)(a) can still be satisfied by satisfying sub-paragraphs (ii) or (iii). In *Beck*, there was no evidence which affirmatively established (ii) (the honesty of the appointing director) but there remained for consideration (iii), which is satisfied where it is "just and equitable" to make the validating order. Barrett J was satisfied, in view of the long period of time where Mrs Weinstock had acted as a director, and in circumstances where there was no other means of a director being appointed, that validation was "just and equitable" in this sense.

159 If I am wrong in my interpretation of s 201F(3), then at all times after September 2013 Diaspora lacked a director, and the problem could not be fixed except by the bankruptcy trustee taking action. Indeed, on the argument by counsel for the Strata Corporation remains the case and it may remain the case perhaps for another fourteen years. The trustee could be asked to exercise the power under s 201F(3) but has so far shown no desire to take control of the company. He has had almost six years to act.

160 It would be in no one's interest for Diaspora to drift around like an abandoned ship with no one other than an unwilling trustee in bankruptcy able to go on board and take control of it. Whatever suspicions the Court might feel about the way in which the office of director was purportedly shunted around between Mr Preston and his associates, at this point any director is better than none. Mr Preston is the only person who seems to have any interest in the company and this is hardly surprising because no one has challenged (or at least yet challenged) the validity of the Trust. In my view that would make it "just and equitable" to validate his appointment.

161 The remaining question is whether validation of Mr Preston's appointment would cause, or be likely to cause, "substantial injustice" to any person.

162 For reasons given by Barrett J in *Beck* at [170], the relevant prejudice must flow from the appointment itself. Prejudice based on a supposition as to how

the director, once appointed, may act, is not relevant. In my view, there is no prejudice to Diaspora or to those who hold a beneficial interest in it. The only question is whether there is relevant prejudice to the Strata Corporation.

163 The Strata Corporation has no interest in the internal management of Diaspora as such. Its only interest in the question of the validity of Mr Preston's appointment is that if the appointment is valid, that will deprive the Strata Corporation of a point which it has so far successfully been able to take in answer to Diaspora's claims in the Tribunal proceedings. In my opinion, this is not a "substantial injustice" in the relevant sense.

164 I consider the relevant circumstances in more detail below when considering s 1322(4) in its application to the retainer of Clarke Kann. If I am wrong in my view that the Strata Corporation has no standing to complain of "substantial injustice" then, for the reasons I give below, I do not think there is any substantial injustice on the facts of this case.

165 In these circumstances I would, in the exercise of my discretion under s 1322(4), have made an order validating Mr Preston's appointment on and from 20 September 2016.

Validity of retainer

166 In case I am wrong about the validity of Mr Preston's appointment I now consider whether the retainer of Clarke Kann was otherwise effective.

167 Counsel for Mr Preston and Clarke Kann relied on three contentions. The first was that the retainer was saved by the *Corporations Act*, s 201M. The second was that the retainer was validly ratified by means of the resolution in January 2018. Counsel's third contention was that the Court should make an order validating the retainer under s 1322(4).

Section 201M

168 Section 201M provides:

> **Effectiveness of acts by directors**
>
> (1) An act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this Act.

> (2) Subsection (1) does not deal with the question whether an effective act by a director:
>
> (a) binds the company in its dealings with other people; or
>
> (b) makes the company liable to another person.
>
> Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a director (for example, calling a meeting of the company's members or signing a document to be lodged with ASIC or minutes of a meeting). Sections 128-130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

169 The enactment can be traced back to earlier provisions of companies legislation in Australia and the UK. Provisions in similar terms also commonly appeared in company articles.

170 In *Morris v Kanssen* [1946] AC 459 the House of Lords considered the effect of one of these predecessor provisions. This was s 143 of the *Companies Act 1929* (UK) which provided:

> The acts of a director or manager shall be valid notwithstanding any defect that may afterward be discovered in his appointment or qualification.

171 In *Morris v Kanssen*, the term of office of the relevant directors (they were in fact purported directors, not having been previously validly appointed) expired. After that date they continued to act as directors without making any attempt to appoint, or reappoint, themselves. They then conducted the purported share issue which was an issue in the case.

172 Lord Simonds, who gave the leading judgment in the House of Lords, drew a distinction between an appointment in which there is a defect, and a situation where there is no appointment at all. His Lordship held that the case fell into the latter class, and s 143 did not apply.

173 To similar effect is the decision of the High Court in *Grant v John Grant & Sons Ltd* (1950) 82 CLR 1; (1950) 24 ALJR 374. The enactment under consideration in that case was the *Companies Act 1936* (NSW), s 124. That section was in the same terms as s 143 of the UK Act considered in *Morris v Kanssen*. Kitto J said (at [53]):

> The section and the article presuppose an appointment in fact made by a person or body having power to appoint, and they refer to a slip in the making of a particular appointment in question.

174 Counsel for the Strata Corporation argued that on these authorities, s 201M only applies where the director's appointment is irregular and does not apply where there is no appointment at all. Counsel submitted that the present case was in the latter category.

175 The question for me is whether the limited approach seen in *Morris v Kanssen* and *Grant* continues to apply under s 201M. In particular this question needs to be asked in the light of the differences in wording between the predecessor provision and s 201M, and the broad approach adopted by the High Court to the construction of s 1322(4)(a).

176 There are two main differences between the wording of s 201M(1) and the predecessor provision considered in *Morris v Kanssen* and *Grant*. The first is that s 201M(1) refers not only to the invalidity of the initial appointment, but to the "continuance of the appointment". Clearly enough this was designed to reverse the outcome on the facts of *Morris v Kanssen,* where the putative directors simply continued to act without appreciating that their appointments had expired (the facts in *Beck* were similar in this regard). But for present purposes, I think that change is neutral.

177 The second change is that the previous provision applied where there was a "defect" (or, to use the term used by Kitto J, a "slip") in the relevant appointment, whereas s 201M(1) applies where the appointment is "invalid because the company or director did not comply" with the company's constitution or provision of the Act. This may be compared with the language in s 1322(4)(a) which speaks of invalidity "by reason of any contravention of" a provision of the constitution or the Act.

178 Despite this change, I think there are still reasons to carry the interpretation of the predecessor provision forward in s 201M(1). One is that s 201M(1) retains the reference to "appointment" which was the textual basis for the restrictive interpretation of its predecessors. This seems to have been the view of Lindgren AJA in *Sheahan v Londish* (see at [222], but cf Hodgson JA at [31] and Young JA at [118]-[121]). The other is one of principle. The width of s 1322(4) is counter-balanced by the safeguards imposed by s 1322(6). Those safeguards ensure that a validating order cannot be made unless one or other

of sub-paragraphs (a)(i) to (iii) is satisfied, and also provide a backstop (sub-paragraph (c) which prevents an order being made if that would result in any substantial injustice). The validation effected by s 201M is automatic; it applies in every case whether or not the outcome is "just and equitable", whether or not the persons concerned have acted honestly and whether or not it results in substantial injustice. There is every reason to read such a provision more narrowly than section 1322(4)(a).

179 I do not need to pursue this question further in the present case. If s 201M(1) is to apply, there must be an invalidity because "the company or director" did not comply with the constitution or a provision of the Act. If the Strata Corporation's argument were correct, Diaspora would have been unable, because of the provisions of the Act, to make the appointment. The invalidity would not have been the result of any act or omission of Diaspora or Mr Preston: *Calabretta v Redpen Developments Pty Ltd* (2010) 183 FCR 47; [2010] FCA 81 at 53 [31-[32]; *cf Re Colorbus Pty Ltd* (2004) 51 ACSR 677; [2004] VSC 486 at [22].

180 For these reasons, had I reached the conclusion that Mr Preston's appointment as a director was invalid, his actions in retaining Clarke Kann would not have been validated by s 201M(1). It is not necessary to consider separately the difficult question of whether, and to what extent, s 201M(1) is down by s 201M(2).

Ratification

181 Counsel for Mr Preston and Clarke Kann relied on the resolution of January 2018 for ratification. As I understood then, counsel relied on the resolution as a shareholders' resolution. In fact, in signing the resolution, Mr Preston described himself as sole director, rather than sole shareholder. But that is not an obstacle; as Mr Preston was in fact the sole shareholder at the time, his powers in that capacity can be used to support the resolution: see Barrett J at first instance in *Beck* at [56]-[68].

182 The requirements of a valid ratification were stated by Wright J in *Firth v Staines* [1897] 2 QB 70 at 75 as follows:

> …To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a

> competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself.

183 Counsel for the Strata Corporation contended that the second of these requirements was not satisfied. Counsel relied on *Kuenigl v Donnersmarck* [1955] 1 QB 515; [1955] 1 All ER 46 and *Boston Deep Sea Fishing and Ice Co Ltd v Farnham* [1957] 1 WLR 1051.

184 In *Kuenigl* the plaintiff sought to recover monies owing under a settlement agreement from a company which was one of the defendants. The company was incorporated in England but controlled from Germany. The company set up, in answer to the claim against it, a further settlement agreement made in German-occupied territory in 1940. McNair J found the 1940 agreement of no effect as the authority of the defendant company's directors, then resident in Germany, was suspended by virtue of the *Trading with the Enemy Act 1939* (UK). It was argued, however, that there had been a ratification.

185 McNair J said:

> As to the contention that after the end of the war the defendant company ratified the 1940 agreement and adopted the payments made thereunder, the short answer in my judgment is that no one can ratify an agreement or adopt an act which could not lawfully have been made or done at the time when the agreement was purported to be made or the act to be done on behalf of the person ratifying.

186 In *Boston*, a trawler owned by a French company was brought to England after the fall of France in 1940. For the rest of the war it was operated by an English trawler company (the two companies were related). The operations were profitable. At the end of 1945 the trawler was returned to the French company whose representatives approved the English company's conduct and the accounts which had been kept of the profits which had been made. The English company was then assessed for tax on the profits on the basis that it had been the French company's agent. The English company's liability depended upon whether there had been an "authorised person" carrying on business as agent for the French company. The actions of the English company in taking control of, and operating, the trawler were not in fact approved by the French company at the time. But the Revenue contended that the French company had afterwards ratified those actions, and the ratification had retro-active effect.

187 After referring to the conditions set out in *Firth v Staines*, Harman J said:

> The first condition is satisfied: the appellants did hold themselves out as agents for the French company; so is the third. At the time of the ratification the French company was capable of doing the kind of acts which they were purported to ratify. But I cannot think that the second condition is met. At the time the acts were done the French company was an alien enemy at common law. It was therefore not a competent principal because it could not have done the act itself. Moreover, to have accepted the mandate would have been an offence on the part of the appellants constituting trading with the enemy within the mischief of the *Trading with the Enemy Ac*t, 1939.

188 In each of these cases the company was, at the time of the purported transaction, disabled by statute from taking the action in question. That is not so in the present case. Diaspora has, and had, all the powers of a natural person (*Corporations Act,* s 124(1)). It is just that on the hypothesis I am considering, it had no appointed director to manage its affairs. In my view the cases do not assist the Strata Corporation.

189 There is also United Kingdom authority which expressly supports the proposition that the bringing of proceedings may be ratified by the company in general meeting. In *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680; [1951] 1 All ER 925 the managing director of the plaintiff company caused the proceedings to be brought in the company's name without approval by the company in general meeting or by the board. A winding up order was made and the liquidator adopted the action. The defendants then applied to have the proceedings struck out for want of authority.

190 The application was rejected, on the ground that the proceedings were not a nullity when commenced without authority, and were retroactively validated when ratified by the liquidator. Jenkins LJ (as his Lordship then was) quoted the following passage from *Buckley on the Companies Acts* (12th Ed) page 169:

> "(6) If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of the adverse party will not necessarily preclude the intending plaintiffs from using the company's name. Neither will it be necessary to obtain the resolution of a general meeting in favour of the action before the writ is issued. In many cases the delay might amount to a denial of justice. In a case of urgency, the intending plaintiffs may use the company's name at their peril, and subject to their being able to show that they have the support of the majority. In an action so constituted, the court may give interlocutory relief, taking care that a meeting be called at the earliest possible

> date to determine whether the action really has the support of the majority or not".

191 His Lordship said:

> That passage, where it refers to the calling of a meeting, accords with the well-settled practice of the court in case in which, in proceedings brought by a company, a dispute arises as to the authority with which the company's name has been used as plaintiff. It is common practice in such cases to adjourn any motion brought to strike out the company's name, with a view to a meeting being called to see whether the company desires the action to be brought or not.

192 In *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424; [1975] 1 WLR 673 two individuals brought debt recovery proceedings on behalf of a company against the defendant. The defendant alleged that the proceedings were not authorised by the company. The company then went into liquidation; the liquidator was added as a party and ratified, on behalf of the company, the bringing of the proceedings. The defendants' plea that the proceedings should be dismissed for want of authority (made before ratification but heard afterwards) was overruled. Lord Kilbrandon, with whom Lord Cross of Chelsea and Lord Salmon agreed, said (at 683):

> I must say I have the gravest doubts as to the soundness of the proposition pleaded. I am not at all convinced that, the management of a company having been confided to the directors, and the instructing of actions at law being an act of management, then, if the company has for the time no directors, it cannot during that time take steps to recover its debts. I think the article probably means no more than this, that the directors, and no one else, are responsible for the management of the company, except in the matters specifically allotted to the company in general meeting. This is a term of the contract between the shareholders and the company. But it does not mean that no act of management, such as instructing the company's solicitor, can validly be performed without the personal and explicit authority of the directors themselves. In any case I have even graver doubts whether the validity of the company's act, resting as it must on a construction of the contract with the shareholders, can in such a matter be challenged by someone whose only relationship with the company is one of indebtedness. The point, however, does not seem to have been taken in this form in the Court of Session, and I will therefore say no more about it.

193 Lord Hailsham of St Marylebone said (at 678-679):

> The appellants' counsel relied, however, basically on the contention that none of these acts can be ratified by the company as, he urged, the second of the three conditions laid down by Wright J. in *Firth v. Staines* [1897] 2 Q.B. 70, 75, viz. that "at the time the act was done the agent must have had a competent principal" had not been fulfilled, because the respondent company had neither appointed directors nor held a general meeting and so was incapable of instructing solicitors or other agents to do the acts alleged to have been

> ratified. Thus, it was contended, the company was not a competent principal within the meaning of the requirement.
>
> With respect, however this argument is a non sequitur which would only become cogent if one adopted a false and question-begging meaning to the word "competent." In my opinion, at the relevant time the 679 company was fully competent either to lay arrestments or to raise proceedings in the Scottish courts. The company could have done so either by appointing directors, or, as I think, by authorising proceedings in general meeting, which in the absence of an effective board, has a residual authority to use the company's powers. It had not taken, and did not take, the steps necessary to give authority to perform the necessary actions. But it was competent to have done so, and in my view it was therefore a competent principal within the meaning of the second of Wright J's. three conditions.

194 On the face of it, the course of authority seems strongly against the Strata Corporation's contention in these proceedings. But the United Kingdom authorities to which I have just referred were considered and read down by the Court of Appeal in *Massey v Wales* (2003) 57 NSWLR 718; [2003] NSWCA 212. Hodgson JA, who gave the judgment of the Court, pointed out that in general where the articles of a company provide that the business of the company is to be managed by the directors, there is no power in the general meeting to make management decisions or to control or direct the board of directors in the management of the company. He added (at 730 [46]):

> Furthermore, there is reason to see this as a significant aspect of the contract between the members constituted by the memorandum and articles of the company. It is of significance that management of the company should be by a body of persons who each have a fiduciary duty to act in the interests of the company as a whole, rather than a body where the majority is free to favour its own interests over those of the minority. The general meeting does have power to approve transactions undertaken by directors which might otherwise be a breach of fiduciary duty; but this requires that there be full disclosure by the board to the general meeting, and it is also subject to the requirement that there not be "fraud on the minority" or oppression. Despite this power in the general meeting, it is reasonable to see the entrusting of management to a body of persons subject to fiduciary duties to act in the interests of the company, as a whole, as giving greater protection to minority shareholders than they would have if the general meeting could simply make majority decisions on management matters.

195 His Honour went on to say that the statements quoted above from *Danish Mercantile* and *Alexander Ward* about adjourning the proceedings until a meeting can be convened did not compel the conclusion that ratification could take place by way of general meeting. In his Honour's view, the meeting could be a meeting of directors, or, where there was a difficulty with the functioning of the board but the general meeting had power to appoint further directors, it

could be a meeting for that purpose, and the decision as to whether or not to ratify the proceedings would then be made by the board in the ordinary way. On the facts in *Massey v Wales*, it would have been possible for the company to appoint further directors by way of resolution in general meeting. His Honour therefore concluded that the purported ratification was invalid.

196 In general, therefore, where the directors have power to manage the company's business, there is no room for ratification of legal proceedings brought without authority in the company's name by a majority of the general meeting.

197 There are two potential points of distinction in the present case. One is that, on the hypothesis I am considering in this case, neither the general meeting nor any other organ of the company had power to appoint a director or directors. The second is that the decision in the present case was not merely a decision by a majority of the company in general resolution, but was unanimous. This potentially brings into play the doctrine of unanimous shareholder assent: Robert P Austin, Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018, LexisNexis Butterworths) at [7.590].

198 Whether either of these factors is a ground on which *Massey v Wales* should be distinguished raises difficult and complex questions. Having regard to my conclusions on s 1322(4) below it is not necessary to go into them. I will proceed on the assumption that the purported ratification was invalid.

Validation under s 1322(4)

199 In my view, s 1322(4)(a) is clearly wide enough to enable the Court to make an order that the retainer of Clarke Kann was not invalid by reason of any invalidity in Mr Preston's appointment as a director. The question is whether they are, and if so, whether the Court should exercise the power.

200 I have already referred to factors surrounding the appointment of Mr Preston as a director, which, in my view, support the making of a s 1322(4) order validating that appointment, and which establish that it would be "just and equitable" to do so. Those factors would equally be factors in favour of making an order validating the retainer.

201 I think that if it became necessary to consider whether to make a validation order specific to the retainer, the case would be even stronger. There is every reason why the company should be represented so that its rights can be determined. The alternative is that the company will be forever unrepresented.

202 There are also factors which further weaken any suggestion of "substantial injustice". Clarke Kann's retainer in the proceedings in the Tribunal began as early as October 2016. The Strata Corporation was seemingly content for Clarke Kann to act for Diaspora in defending the Injunction Application. The point was only pressed when Clarke Kann sought to exercise Diaspora's right of review.

203 The raising of this point on behalf of the Strata Corporation was entirely unmeritorious. The Strata Corporation has suffered no prejudice whatever from Clarke Kann acting. If anything, Clarke Kann's involvement can be assumed to have made the proceedings more efficient than they would otherwise have been.

204 In these circumstances, if the retainer were otherwise invalid because of some deficiency in Mr Preston's appointment, I would have made a s 1322(4)(a) order validating it.

Validity of appointment of Mr Greig and Mr David Preston as directors

205 As already noted, counsel for Mr Preston did not seek to defend the validity of Mr Preston's purported appointment as director of Diaspora by means of the directors' resolution passed by Mr Greig and Mr David Preston on 20 September 2016. The validity of that purported appointment depended on the validity of the purported appointments of Mr Greig and then Mr David Preston in January 2016, and counsel did not seek to defend those appointments either. Counsel thus appeared to accept that the appointments were invalid.

206 Although I have upheld the validity of Mr Preston's appointment under the shareholders' resolution of 20 September 2016, the question arises whether I should make orders for correction of Diaspora's register of directors and of ASIC's records, so as to remove the references to Mr Greig's and Mr David Preston's purported directorships. I have concluded that I should not. As already noted, neither Mr Greig nor Mr David Preston was joined as a party to

the proceedings and no declaratory relief concerning their directorships was sought. As both of their purported directorships were terminated by resignation in September 2016, and those resignations were notified to ASIC, the validity of the appointments is of purely historical interest. In these circumstances, the question should be left to be resolved, if it ever has to be, in properly constituted proceedings in the future.

207 It is open to question whether the orders sought in the cross-claim, which would have required Mr Preston to correct the register, and lodge correcting forms with ASIC, were appropriate. If, as the Strata Corporation contended, Mr Preston had not been validly appointed as a director, he would have had no power to act for Diaspora in that regard. Arguably the Strata Corporation should have sought orders directly rectifying Diaspora's and ASIC's registers. In view of my conclusions it is not necessary to consider the question further.

Appeal proceedings

208 There was no opposition to the grant of leave to appeal. Having regard to the issues raised in the Appeal proceedings, the grant of leave is appropriate.

Refusal of adjournment

209 It will be recalled that after the Corporations proceedings had been commenced in this Court, and the Strata Corporation had made its interlocutory application to have the Corporations proceedings dismissed or stayed, submissions were made to the Tribunal on behalf of Clarke Kann seeking to have the Tribunal proceedings adjourned; and that the Tribunal refused this application when giving its decision on the representation issue. One of Clarke Kann's grounds of appeal challenged this aspect of the decision. Counsel for Clarke Kann submitted that the Tribunal's discretion miscarried. The contention was that the Tribunal should have left the issue to be resolved by this Court in the Corporations proceedings.

210 Clarke Kann did not question the Tribunal's power to entertain the challenge to Diaspora's representation. Nevertheless it is important to understand the nature of proceedings in which there is a challenge to authority, and the scope and limits of the Tribunal's powers in dealing with such a challenge.

211 In *London & Blackwall Railway Co v Cross* (1886) 31 Ch D 354 the English Court of Appeal explained the basis for the court's intervention in cases where authority is challenged. Lindley LJ said that the court acts (at 370):

> Upon the principle that the Court can control the proceedings before itself, and if the person with that authority is bringing an action in the name of another it is an abuse of the process of the Court and the Court can stop it.

212 Fry LJ said (at 371):

> The Court stays the proceedings because it finds there has been abuse of its own process, and because it has a duty to keep its records truthful and prevent proceedings taken before it from being other than what they are represented to be.

213 In cases involving individual litigants, determining whether proceedings have been brought with authority is usually a simple matter, at least if no issue of capacity arises. But litigation in the name of companies can make the question more complex and indirect.

214 The present case is an example. Clarke Kann were acting on the instructions of a person (Mr Preston) who was in uncontested practical control of the affairs of Diaspora. Mr Preston claimed to be the sole director of the company and was recorded as such in the records of ASIC. The contention that the proceedings were not properly authorised by Diaspora was not based on a challenge to the retainer of Clarke Kann as such, but on a challenge to the antecedent validity of Mr Preston's appointment. It involved a complicated argument which (to put it at its lowest) was not immediately and obviously correct.

215 In a case where a plaintiff's name has been used in litigation without authority and the plaintiff seeks to intervene to have its name taken off the proceedings, no elaborate justification for the Court's intervention is necessary. But it is not nearly so obvious that the defendant should have a right to bring the proceedings against it to a halt by raising a contestable assertion of lack of corporate authority. Especially is this so when, if the defendant is able to raise the issue, the plaintiff will then usually bear an evidentiary onus to establish that authority: *Hawksford v Hawksford* (2005) 191 FLR 173; [2005] NSWSC 463 at 190 [54]-[55].

216 Lord Kilbrandon's reservation, quoted above, about whether a person, whose only relationship with the company that he or she is being sued as a debtor of the company, should be entitled to raise an issue of internal management was no doubt influenced by considerations such as these. No doubt it is desirable that the Tribunal's records be accurate in the sense mentioned by Fry LJ in *London & Blackwell Railway Co v Cross*. But that seems a slender justification for what has happened in the present case.

217 In *Hawkins Hill Gold Mining Co v Briscoe* (1887) 8 NSWR 123 [(1887) 8 LR (NSW) Eq 123], the defendant sought to challenge the solicitor's retainer where the solicitor was purporting to act for an English company as plaintiff. The solicitor acknowledged that it was open to the plaintiff to require him to produce evidence of his authority. The question was whether the defendant ought to be able to do so. Stephen J, giving the judgment of the Full Court said (at 130-131):

> I think the answer to this question may be most readily found in the answer to the question whether, where a suit is brought without authority, the plaintiff on the record would, in the event of the success of the defendant, be liable for costs. It has not been seriously contended that the plaintiff in such a case would be liable, and if that is so, why should the defendant not be permitted to challenge the authority of the solicitor? Must he allow the suit to proceed, and in the event of his success look to the solicitor, and to him alone, for his costs? … the Primary Judge appears to have held that until the plaintiff himself interferes, the solicitor must be assumed to have the necessary authority, but from this decision I feel constrained respectfully to dissent. In this very case indeed the plaintiff company might never have known of the institution of this suit, and consequently never have interfered, and in that event what would have been the position of the defendants? If the plaintiff does know of the institution of the suit, and yet takes no steps to stop the proceedings, it would prove conclusively that he recognised the authority of the solicitor; but where he has no such knowledge, the defendant, unless he is permitted to interfere, has only the solicitor on the record to look to for his costs instead of the plaintiff.

218 This analysis provides an answer to Lord Kilbrandon's reservation. The Court is justified in entertaining a challenge made by the defendant because if there is no authority in fact, the defendant if successful will only have recourse to the solicitor personally for the costs. The law takes the view that the defendant is entitled, where proceedings are brought in the name of the plaintiff, to insist that the plaintiff itself will be amenable for costs if the proceedings are unsuccessful.

219 An important consequence of the fact that the Court's intervention is based on restraining the proceedings as an abuse of process is that lack of authority is not a substantive defence to the plaintiff's claim. As Campbell JA, speaking for the Court of Appeal, said in *Doulaveras v Daher* (2009) 253 ALR 627; [2009] NSWCA 58 at [150]:

> It is a clear abuse of the process of the court for someone to bring litigation, supposedly in the name of a particular person, when there is no authority from that particular person to bring the litigation. A court will deal with an abuse of process of that kind once it is established that a supposed plaintiff has not given authority for the litigation to be brought. The appropriate way of bringing that sort of abuse of process to the attention of the court, and establishing the facts underlying it, if there is any doubt about them, is usually by a notice of motion seeking to strike out the statement of claim or to stay the action. However, if in the course of litigation it becomes clear to the court that its process is being abused in this way, it will act of its own motion to bring the abuse to an end. It may be that the abuse comes to the attention of the court only in the course of a final hearing, either incidentally as evidence emerges, or as a result of the counsel appearing before the judge agreeing either expressly or by their conduct to litigate the question of whether the action is authorised, and the judge not intervening to require that issue to be decided before the rest of the case proceeds. What is in substance happening then, though, is the argument of a motion challenging the retainer, not the deciding of an issue that can properly be raised by a defence in an action.

220 Another consequence of the abuse of process analysis, and the fact that lack of authority is not a substantive defence, is that the Court has a discretion about whether to make the order sought. The Court may refuse to entertain the application, or decline to grant relief, on procedural grounds such as delay.

221 This analysis is entirely consistent with the rule of practice stated in *Buckley* which was approved by Jenkins LJ in *Danish Mercantile*, concerning the adjournment of the proceedings. The circumstances which gave rise to the rule continue to exist today, and in one respect operate more strongly. As we have seen, s 1322(4) now gives the court wide powers of validation of purported corporate acts, and is not limited to acts and transactions which could be ratified by the company. The logic of *Buckley's* rule of practice would require that the adjournment be sufficient not only for any ratification to occur but also for any application for a validating order under s 1322(4) to be made and dealt with.

222 In *Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker* (1982) 44 NSWLR 421, Powell J (as his Honour then was) said (at 430-431) that where a

retainer is found to be invalid, the proceedings can either be stayed or dismissed. His Honour said that dismissal is the more modern practice. But if the court is to dismiss the proceedings on the grounds of lack of authority, it should only do so in circumstances where the lack of authority has been finally established (as it had been in the cases to which his Honour referred). It must also be borne in mind that the dismissal is a summary one which does not involve determination of the claims in the proceedings on their merits. As Campbell JA said in *Doulaveras v Daher* at [152]:

> The important difference between what can be raised as a defence, and what can be raised by a motion challenging retainer, is shown by the consequences of a defendant succeeding in what is alleged in those two different forms of process. Success in a defence entitles the defendant to a judgment against the plaintiff, that gives rise to an estoppel by judgment preventing the plaintiff thereafter denying the truth of the defence so established. Success in a motion challenging retainer results in the action being struck out or stayed. It creates no estoppel against the nominal plaintiff, because the nominal plaintiff was not a party to the litigation. It is unthinkable that a court's processes could operate to raise an estoppel by judgment against someone who the court has itself decided was not a party to the litigation from which the estoppel arose.

223 The nature of proceedings in which authority is challenged is also illustrated by the special rules as to costs. The pre-Judicature practice was described by Jessell MR in *Newbiggin-by-the-Sea Gas Co v Armstrong* (1879) 13 Ch D 310. In that case a solicitor brought proceedings in the name of the plaintiff and the plaintiff made a successful application for the proceedings to be dismissed on the ground that the solicitor had acted without authority. Jessell MR said (at 311):

> The order [under appeal] follows the old practice of the Court of Chancery in such cases, by which the defendant was not served with notice of the application, but was left to get his costs from the person named as plaintiff, who had afterwards to get those costs over from the solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of the solicitor. On the other hand, according to the practice of the Common Law Courts, the defendant was served with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant.

224 Jessell MR was of the view that the Common Law practice was the better one as being "founded in natural justice" and ought to be followed in the post-Judicature system. The other members of the Court of Appeal agreed. The award of costs against the solicitor, however, remains discretionary and the

court is not obliged to make such an award: *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147.

225 The previous Chancery practice seems to have been based on the assumption that where a person's name was improperly used so as to make that person plaintiff, even though it was without the person's knowledge or approval, that person was liable to the defendant for the costs. This was explicitly recognised by Jessell MR in *Nurse v Durnford* (1879) 13 Ch D 764, decided in the Rolls Court only a month before the *Newbiggin* case. His Lordship quoted the following statement of Lord Justice Wood in *Palmer v Walesby* (1868) LR 3 Ch 732 (at 735):

> The very circumstance of a solicitor using the name of a person as plaintiff involves the person whose name is so used in liability to the defendants, since they are not bound to look to the authority of the solicitor.

226 There is an apparent similarity between this approach and the "indoor management rule" in *Royal British Bank v Turquand* (1856) 6 E & B 327; (1856) 119 ER 886. But before the indoor management rule can apply, there must be some conduct by the company which holds a person out as an agent of the company. The putative agent cannot hold himself or herself out: *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising Co* (1975) 133 CLR 72. In a case where proceedings are brought in a person's name but without any authority, there is no holding out. The Chancery approach cannot be justified on this basis.

227 In *Hawkins Hill*, Stephen J said only that it had "not been seriously contended" that the person named as plaintiff in a case brought without authority would be liable for the defendant's costs. But the Full Court seems to have proceeded on the basis that any such contention would have been unsustainable. See also *Fricker v Van Grutten* [1896] 2 Ch 649 where orders had been made against a party before the want of proper authority was revealed; all enforcement proceedings were stayed against that party and the solicitor responsible was ordered to pay the costs which had been ordered against him (at 658-659). It would seem that under the modern practice not only would proceedings on any judgment be stayed, but the judgment itself would be set aside: *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290.

228 On this basis, the Strata Corporation's contentions, if correct, would have been somewhat self-defeating. The effect of finding that Clarke Kann lacked authority to represent Diaspora would have been that none of the prior proceedings would validly have been made against Diaspora. The orders made by Adjudicator Levingston in determining the Injunction Application and the Counter Injunction Application would have been unenforceable. So too would the Strata Corporation's entitlement to costs on the discontinuance of the earlier Supreme Court proceedings.

229 The same would also have been true of the order made against Diaspora by the Tribunal concerning the costs of the proceedings. Indeed it is hard to see how the order that Diaspora pay the costs could properly have been made in the first place. On the conclusion reached by the Tribunal, Diaspora was a stranger to the proceedings. The only party against whom a costs order could properly have been made was Clarke Kann.

230 The principles which I have discussed concerning the nature of proceedings to challenge a party's representation have been worked out in decisions of the superior courts, generally being courts of unlimited jurisdiction and having extensive inherent powers. In constituting how such a challenge could, or should, operate in the Tribunal, it is necessary to consider the specific statutory context. I think there are five points which are significant.

231 The first is that the Tribunal is, in general, a non-costs jurisdiction. The general rule is that each party to proceedings in the Tribunal must bear its own costs and the Tribunal may only award costs if there are "special circumstances": see CATA s 60(1), (2). If I am right in my analysis of the rationale for the Court's intervention on behalf of a defendant, namely that it is the defendant's inability to recover costs from the plaintiff, then this is critical. If a respondent in the Tribunal will not be liable for the applicant's costs, the whole basis for intervention falls away.

232 The second point concerns the Tribunal's power to make the order that the solicitor pay the costs of the proceedings which usually follows a successful challenge. This was considered by the Tribunal in the judgment under appeal (at 36-37 [108]-[113]). The Tribunal considered that the power to award costs

in s 60(4)(a) is wide enough. The Tribunal's conclusion was that, on the analogy with the curial power to award costs (*Civil Procedure Act 2005* (NSW), s 98), the Tribunal could make a costs order against Clarke Kann as a third party.

233 I have, with respect, some reservations about this. As the Tribunal noted, the two sections are not precisely the same. More importantly, there is a difference in context. Section 60 is expressed to be subject to a general rule that each party bear that party's own costs. The relevant factors in determining whether to make a costs order as an exception to that general rule are all concerned with the nature of the proceedings and the conduct of the parties. This suggests that the Parliament may only have been contemplating costs orders against parties. In my view there is room for further debate on the question.

234 The third point is that the rules in curial proceedings which generally require proceedings by a corporation to be conducted through a solicitor or authorised director (see Uniform Civil Procedure Rules 2005, r 7.1(2) and (3)) do not apply. CATA s 45(1), provides that in proceedings in the Tribunal a party "has the carriage of the party's own case and is not entitled to be represented by any person"; representation is only permissible if the Tribunal grants leave. A company as an artificial person, cannot of course represent itself. It would seem that the consequence of s 45, therefore, is that in every case where a company is made a party to proceedings in the Tribunal leave must be obtained for someone (who may or may not be a solicitor) to represent it.

235 In deciding whether to authorise a person to represent a party, the Tribunal must specifically consider the question of authority: Civil and Administrative Tribunal Rules 2014 (NSW), r 32(1)(a)(iii). The Tribunal may grant leave to a person to represent a party at any time: r 31(1). But in the ordinary course, if the Tribunal is to consider a dispute about representation of a company at all, that will be raised and dealt with at the outset when the Tribunal has to give the necessary leave for the company to be represented: r 31(1).

236 The fourth point is that the Tribunal has a limited jurisdiction and restricted inherent powers. In the present case, the Tribunal considered that it had power, on two bases, to make the orders sought by the Strata Corporation. The

first was the Tribunal's jurisdiction to make "ancillary decisions" (*Civil and Administrative Tribunal Act 2013*, ss 29(2)(a), 31(2)(a)). The term "ancillary decision" is defined (CATA s 4) as meaning:

> a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including:
>
> (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter;
>
> (b) a decision concerning the awarding of costs in proceedings.

237 With respect, I have some difficulty in seeing how a decision on a challenge to authority can be an "ancillary decision" for this purpose. Such a decision must be one "under legislation" and it is not easy to characterise the decision on such a challenge in that way, especially when it must be something other than an "interlocutory decision of the Tribunal". It is also unclear how any such decision can be seen as relevantly being "preliminary" a decision determining proceedings. Such a decision is one determining the substantive application before the Tribunal and a decision on a challenge for representation does not seem to be accurately described as being "preliminary" to such a substantive decision. It is quite independent of it.

238 In my view, the Tribunal did have power to deal with the point taken by the Strata Corporation but the relevant power was that given by CATA s 55(1)(b) which enables the Tribunal to dismiss proceedings if they are "frivolous or vexatious or otherwise misconceived or lacking in substance". This was the alternative ground relied upon by the Tribunal.

239 This reinforces the point that in dealing with the representation issue the Tribunal was not dealing with a substantive defence to the Review Application. It was dealing with a procedural challenge involving an allegation of abuse of process.

240 The fifth point is related. Even though the Tribunal has power to stay or dismiss proceedings which are an abuse of process, that is not the only way in which an allegation of abuse of the Tribunal's process may be dealt with. This Court has power to make a stay order to protect the Tribunal from abuse of its procedure: *Herron v McGregor* (1986) 6 NSWLR 246 at 250-251. It is always

open to the Tribunal, faced with a challenge to authority, to decline to act on it and to leave this Court to take any action which may be required. One advantage of this course is that, if there is any dispute about whether authority exists or not that question can be dealt with in the proceedings in this Court.

241 In *McEvoy v Body Corporate for No. 9 Port Douglas Road* [2013] QCA 168, certain proceedings by a strata body in the Queensland Civil and Administrative Tribunal ("QCAT") required authorisation by resolution of the owners (the NSW equivalent is the *Strata Schemes Management Act* 1996, s 80D: see *2 Elizabeth Bay Road Pty Ltd v The Owners Strata Plan 73943* (2014) 88 NSWLR 488). The Queensland Court of Appeal referred to QCAT's obligation under its constituting statute to deal with matters in a "accessible, fair, just, economical, informal and quick way" (the equivalent of CATA, s 3(d)). The Court said (at [42]) that if the issue of authority had been raised it would have been appropriate for the Tribunal to adjourn the hearing to allow the necessary vote of the body corporate in general meeting to be taken. In a case where a company is a litigant before the Tribunal and an authority point is taken, I think the logic is similar: the Tribunal should not be dismissing proceedings (as opposed to adjourning or staying them) if there is any realistic possibility of ratification or validation. Indeed, there may be a real question as to whether the Tribunal should entertain the point at all.

242 In the present case, the Tribunal does not appear to have appreciated that the representation point was not a substantive defence. One of the points taken in the Tribunal by Mr Preston (inconsistently with the position taken here) was that the Tribunal could not deal with the proceedings because they raised a "special federal matter". The Tribunal rejected that argument, as I have so far as it applied to the proceedings in this Court. But the very fact that this point was raised and debated shows the problem. In reality the Tribunal was only ever considering a procedural application based on an alleged abuse of its process. It was not dealing, and could not deal, with the substantive legal issues raised by the Strata Corporation's contention that Mr Preston's appointment was invalid.

243 In refusing the application for an adjournment the Tribunal said:

> 47. The Tribunal may adjourn proceedings to any time and place (s 51, *NCAT Act*). When considering whether to adjourn proceedings, the Tribunal has regard to the guiding principle of the NCAT Act: which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 36(1)).
>
> 48. I determine that an adjournment of both proceedings pending the outcome of the (later commenced) Supreme Court proceedings, as sought by Diaspora in the written submissions dated 20 August 2018, is not consistent with the Tribunal's guiding principle. As indicated, the said Supreme Court proceedings brought by Mr Preston's Originating Process and the Interlocutory Process filed for the Owners Corporation in response to the Originating Process [see [16] above] are listed for directions only in the Supreme Court on 28 September 2018. It is not known when the Supreme Court proceedings, including the substantive issues in the Owners Corporation's Interlocutory Process, will be heard.
>
> 49. It is trite but nonetheless true to say that courts and tribunals should strive to avoid a multiplicity of proceedings addressing the same issues. In my opinion, there is no good reason for the proceedings commenced later not to give way to proceedings commenced earlier particularly as the Tribunal proceedings are well advanced. There is no doubt that the appeal and the application before the Tribunal fall within the Tribunal's jurisdiction. I am not persuaded that there is any reason in the public interest or otherwise for the Tribunal to stay its hand. I consider that the Tribunal should exercise its special jurisdiction under the [Strata Schemes Management Act] and proceed to determine the appeal and the application that are presently before it.
>
> 50. In any event, even if the Interlocutory Process in the Supreme Court proceedings was to be dismissed, any decision of the Supreme Court could not bind Diaspora because that company is not a party to the Supreme Court proceedings brought by Mr Preston.
>
> 51. The Supreme Court proceedings brought by Mr Preston are incapable of remedying any defect in Diaspora's authority. Proceedings under s 1322 of the *Corporations Act* necessarily need to involve the corporation to be affected by any order under that section. This is another reason for the Tribunal determining the appeal and the application as the appeal and the application affect Diaspora and the Owners Corporation but not Mr Preston, by reason of Mr Preston not being a party to the Tribunal proceedings.

244 This reasoning did not mention the limitations on any decision the Tribunal might make on the representation issue. The decision would not even give rise to an issue estoppel for the purpose of future proceedings in the Tribunal. And, the ramifications of the Strata Corporations challenge went far beyond the question of representation in the Tribunal proceedings.

245 If, as the Strata Corporation contended, Mr Preston's appointment was invalid, then all of the actions taken by Mr Preston, after 20 September 2016, purportedly on Diaspora's behalf, were under a cloud. Moreover, if the argument were correct, then the problem could not be solved except through the intervention of Mr Preston's trustee in bankruptcy, which showed no sign of

happening. The ASIC registrations recording Mr Preston as the director of the company would also have been incorrect and a trap for a person dealing in good faith with Mr Preston as apparent director of Diaspora (such a person would probably not get the benefit of the indoor management rule: see *Wood v Inglis* (2008) 68 ACSR 420; [2008] NSWSC 1147 at [90]-[95]).

246 The circumstances clearly called for consideration, at least, of the dispensing power under s 1322(4). Thus the representation issue could only be fully and completely resolved by a court which could make binding declarations of right or validation orders if called for, and which could order any consequential corrections to the registers maintained by Diaspora and by ASIC. The Tribunal could not make such orders. They required the intervention of a superior court exercising *Corporations Act* jurisdiction.

247 It is true, as the Tribunal pointed out, that its proceedings were further advanced than the proceedings in this Court. Mr Preston should have acted earlier in bringing the Corporations proceedings. But this had to be weighed against the fact that the Corporations proceedings were a vehicle for resolving the issue fully and finally, whereas the Tribunal proceedings were not. The Tribunal does not appear to have given this any real consideration. In my view, it was a critical factor. There was no point in proliferation of interlocutory proceedings in the Tribunal when this Court would have to deal finally with the issue anyway.

248 The Tribunal was correct to point out that when the Corporations proceedings were commenced in this Court, all potentially relevant parties were not joined. But, with respect, that was not a matter for the Tribunal. It was something to be considered and dealt with by this Court, as in fact it has been.

249 The Tribunal relied for its decision on the overriding objective in the *Civil and Administrative Tribunal Act 2013* (NSW), s 36(1), to facilitate the just, quick and cheap resolution of the real issues in the proceedings. But in my view, the “real issues” were the substantive questions raised by the Review Application and the Consent Application: *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, at [72]. At most the question of representation was an incidental procedural question.

Paradoxically, the effect of the Tribunal's decision was to *decline* to deal with what were truly the "real issues" before the Tribunal.

250 The Tribunal's decision was a discretionary one dealing with a matter of practice and procedure, with which the Court is generally reluctant to interfere. The Court is limited to *House v The King* (1936) 55 CLR 499; [1936] HCA 40 grounds of intervention. In the present case the scope for intervention is narrower. Any *House v The King* ground for challenge to the Tribunal's decision must involve a question of law, not merely one of fact.

251 In my opinion however the Tribunal's reliance on the overriding objective in CATA involved a misconstruction of the legislation and a consequent miscarriage of the Tribunal's discretion. The Tribunal incorrectly identified the "real issues" for the purposes of s 36(1). That was an error of law. The Tribunal also lacked jurisdiction to resolve the representation issue in a full and final way. Failure to take that consideration into account was also, in my view, an error of law.

Other grounds of appeal

252 The argument before the Tribunal on the validity of Mr Preston's appointment appears to have focused mainly on s 201F(3). I have rejected that argument as unsound. Accordingly, I conclude that the Tribunal's decision involved error of law on this point also.

253 It is unnecessary to consider the further grounds of appeal. The appeal succeeds.

Conclusions and orders

254 I have concluded that:

(1) the shareholders' resolution of September 2016 appointing Mr Preston as director of Diaspora was valid;

(2) if the resolution had not been valid, a validation order under s 1322(4) would have been called for;

(3) if Mr Preston had not been validly appointed, the retainer of Clarke Kann to represent Diaspora in the Tribunal proceedings would not have been

sustained by s 201M and may not have been sustained by the January 2018 ratification resolution;

(4) but in any event, an order validating Clarke Kann's retainer would have been called for under s 1322(4).

255 It follows that Mr Preston is entitled to succeed in the Corporations proceedings and the Court should grant declaratory relief in his favour. The Strata Corporation's cross-claim must be dismissed.

256 The appeal against the Tribunal's decision on the representation issue in the Review Application also succeeds. The decision must be set aside. The Review Application will be remitted to the Tribunal so that the substance of the appeal against Mr Levingston's decision as adjudicator can be determined.

257 There appears to be no reason why the costs of the proceedings in this Court should not follow the event. I will make costs orders in favour of Mr Preston and Clarke Kann. Any application for any variation of those orders can be made in accordance with the Rules. I will leave it to the Tribunal to deal with the costs associated with the representation point in the Tribunal.

258 The orders of the Court in the Corporations proceedings (matter number 2018/206261) are:

1. Declare that the plaintiff was validly appointed as a director of the first defendant on 20 September 2016.

2. Order that the cross-claim be dismissed.

3. Order that the second defendant pay the costs of the plaintiff and of the third to thirteenth defendants of the proceedings.

259 The orders of the Court in the Appeal proceedings (matter number 2018/300151) are:

1. Grant leave to the plaintiffs to appeal against the orders of the NSW Civil and Administrative Tribunal in proceedings numbers SC 17/24808 on 4 September 2018.

2. Appeal allowed.

3. Order that those orders be set aside and lieu thereof the proceedings be remitted to the Tribunal for final determination on the merits.

4. Order that the defendant pay the plaintiffs' costs of the proceedings.

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Amendments

14 June 2019 - Corrected order to September date.