Supreme Court

New South Wales

Case Name:	The Owners of Strata Plan No 91349 v Australian Securities and Investments Commission
Medium Neutral Citation:	[2020] NSWSC 685
Hearing Date(s):	13 November 2019, 5 December 2019, 17 February 2020
Date of Orders:	3 June 2020
Decision Date:	3 June 2020
Jurisdiction:	Equity
Before:	Bell P
Decision:	1. Order, pursuant to s 601AH(2) of the Corporations Act 2001 (Cth), that the Australian Securities and Investments Commission reinstate the registration of Beaconsfield Street Pty Ltd. 2. Order that Mr Mark Roufeil be appointed as liquidator of Beaconsfield Street Pty Ltd (in liquidation).
Catchwords:	CORPORATIONS – application for reinstatement of company – company formerly involved in development of home units – wound up and deregistered soon after completion of development – proceeds of sale of apartments transferred prior to winding up to another company – alleged defects in construction – purpose of reinstatement to join company as a defendant in existing Technology and Construction List proceedings – principles relating to reinstatement of a corporation discussed.
Legislation Cited:	Corporations Act 2001 (Cth) ss 588FF(3), 601AH Home Building Act 1989 (NSW) ss 18C, 18D Strata Schemes Management Act 2015 (NSW) s 8

Cases Cited:	Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Limited [2010] NSWSC 1369; (2010) 80 ACSR 670 Australian Competition and Consumer Commission v Australian Securities and Investments Commission (2000) 174 ALR 688; [2000] NSWSC 316 Bell Group Limited (ACN 008 666 993) (in liq) v Australian Securities and Investments Commission (2018) 358 ALR 624; [2018] FCA 884 Blazai Pty Ltd v Gateway Developments (St Marys) Pty Ltd [2009] NSWSC 800 Boys, in the matter of 38 Akuna Pty Ltd (Deregistered) v Australian Securities and Investments Commission [2019] FCA 320 Callagher v Australian Securities and Investments Commission (2007) 218 FCR 81; [2007] FCA 482 Ealing Corporation v Jones [1959] 1 QB 384 Ex parte Sidebotham; Re Sidebotham (1880) 14 Ch D 458 Fiorentino v Australian Securities and Investment Commission (2014) 283 FLR 223; [2014] NSWSC 200 GIS Electrical Pty Ltd v Melsom (2002) 172 FLR 218; [2002] WASCA 302 In the matter of European Metal Recyclers Pty Ltd (in liq) (deregistered) [2018] NSWSC 946 Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd (1989) 19 NSWLR 434; (1989) 1 ACSR 79 Promnitz v Australian Securities and Investments Commission [2004] FCA 22; (2004) 22 ACLC 108 Re Brockweir Pty Ltd [2012] VSC 225 Re Centro Properties Ltd [2011] NSWSC 1171; (2011) 87 ACSR 131 Re GA and RJ Elliot Pty Ltd; Ex parte Mitcham (1978) 3 ACLR 523 The Owners-Strata Plan 91349 v Hallmark Construction Pty Ltd [2019] NSWSC 591
Category:	Principal judgment
Parties:	The Owners of Strata Plan No 91349 (Plaintiff) Australian Securities and Investments Commission (First Defendant) Anthony Bruce Crane (Second Defendant)
Representation:	Counsel: S Golledge SC with P A Horobin (Plaintiff)

No appearance (First Defendant)
M Ashhurst SC with M T Keene (Second Defendant)

Solicitors:
Streeterlaw (Plaintiff)
Ashurst Australia (Second Defendant)

File Number(s): 2019/00271114

Publication Restriction: N/A

JUDGMENT

Introduction

1 By Originating Process filed on 30 August 2019, The Owners of Strata Plan No 91349 (**Owners Corporation**) seek, pursuant to s 601AH(2) of the *Corporations Act 2001* (Cth), to have Beaconsfield Street Pty Ltd (**BSPL**) reinstated by the Australian Securities and Investments Commission (**ASIC**).

2 BSPL was formerly the registered proprietor of certain land (**the Land**) on which an apartment building was developed, comprising both residential home units and commercial strata units (**the Development**) situated on Beaconsfield Street, Silverwater.

3 BSPL was placed into voluntary winding up on 18 February 2016 on the apparent resolution of its purported sole shareholder, Raad Holdings Pty Limited (**RHPL**), although it was submitted in the hearing that, by the time of that resolution, RHPL's shares in BSPL had been cancelled and a newly incorporated entity, ACN 608 338 478 Pty Limited (**HeadCo**), had become the sole shareholder in BSPL. BSPL was subsequently deregistered on 22 November 2016, but not before declaring a dividend in favour of HeadCo in the sum of $21,860,136.57 on 29 January 2016.

4 The Owners Corporation was established pursuant to s 8 of the *Strata Schemes Management Act 2015* (NSW) on 8 July 2015 upon the registration of Strata Plan No 91349 (**the Plan**) in relation to the Development. Accordingly, the Owners Corporation is the registered proprietor of common property the subject of the Plan, being the immediate successor in title to BSPL for the purposes of s 18C of the *Home Building Act 1989* (NSW).

5 As is not uncommon, various issues emerged with respect to aspects of the Development once apartments had been occupied and the common property started to be used. Many of these issues have been addressed, but the Owners Corporation commenced proceedings in 2018 in relation to a number of alleged defects in respect of the Development (**the Defect Proceedings**). The Defect Proceedings were initially only commenced against a company by the name of Hallmark Construction Pty Ltd (**Hallmark**).

6 One of the reasons for the reinstatement application is that the Owners Corporation wishes to make BSPL a defendant in the Defect Proceedings.

7 The application for reinstatement was opposed by Mr Anthony Bruce Crane (**Mr Crane**), who was the sole director of BSPL at the time of its deregistration, and was also the sole director of RHPL at the time of BSPL's winding up and deregistration.

8 Mr Crane is the second defendant in the reinstatement proceedings.

9 ASIC, named as the first defendant in the reinstatement proceedings, has advised that, subject to certain conditions, it does not oppose the reinstatement application. These conditions were as follows:

> "1. The order sought for reinstatement is in the terms of section 601AH(2) of the Corporations Act, requiring ASIC to reinstate the registration of the company;
>
> 2. The previous Liquidator, Daniel Civil, be notified of this application;
>
> 3. The company (if ordered to be reinstated) continues to be in liquidation (section 601AH(5) of the Act) and Mark Roufeil be appointed Liquidator or the Court appoints a new Liquidator;
>
> 4. The Court order is lodged with ASIC… so that the company may be reinstated;
>
> 5. The Liquidator notifies ASIC upon conclusion of the winding up."

10 ASIC did not appear at, or otherwise participate in, the hearing of the reinstatement application. Mr Daniel Civil (**Mr Civil**), the former liquidator of BSPL, did not seek to intervene or participate in the hearing.

11 The application for reinstatement was heard before me over three days spread out over four months. This was partly because the Owners Corporation's case "evolved", to use a neutral term, and both the first and second hearing days

were marked and affected by the late service of material on the part of the Owners Corporation and/or a shift in focus, again to put it neutrally, in the way that the case was presented.

12 As ultimately expressed in a "Summary of Propositions" document filed on the third day of the hearing, it was submitted on behalf of the Owners Corporation that:

> "... the evidence establishes that at a time when the statutory warranties in respect of a very substantial residential building complex had only just begun to run the sole director undertook a strategy that has as its inevitable result that those warranties were rendered entirely nugatory. The direct result of that is that claimants with the benefit of the statutory warranties have no meaningful redress. That is an outcome which is not consistent with the purpose which lies behind the statutory warranty scheme and there is an obvious public interest in ensuring that those protections cannot be outflanked by the simple expedient of moving assets and then bringing about the dissolution of the builder/developer whilst the warranties are still operative.
>
> There is a serious question as to whether a director who causes a company which is subject to existing warranty obligations in respect of building work (where defects can take years to become evident) to dispose of all of its assets (including by declaring a dividend) and then initiates a winding up is acting in breach of duty or has been involved in a causing the company to breach s 254T. In any event there is also reason to believe that if the company is reinstated a liquidator will be entitled to at least investigate the recovery of the unaccounted for value of the 3 units transferred in January 2016 and that transferred to Hanmari in August 2015. Those recoveries will be available for the benefit of creditors."

13 The dividend referred to by the Owners Corporation is that referred to in [3] above. The fact and details of this payment were not known to the Owners Corporation at the outset of this application, but only emerged in the course of the hearing following the filing of certain evidence on behalf of Mr Crane and the issuing of notices to produce consequent upon that evidence.

14 The reference to s 254T in the Owners Corporation's Summary of Propositions was to s 254T of the *Corporations Act*. Section 245T(1) provides that:

> "A company must not pay a dividend unless:
>
> (a) the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend; and
>
> (b) the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and
>
> (c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors."

15 In the context of s 254T, reference was made by both the Owners Corporation and Mr Crane to the decision of Barrett J (as his Honour then was) in *Re Centro Properties Ltd* [2011] NSWSC 1171; (2011) 87 ACSR 131 at [48]-[49], where his Honour observed:

> "Section 254T has been in its present form only since 2010. There do not appear to be any decided cases about it. *There is, however, at least a possibility that the reference in s 254T(1)(c) to a company's 'creditors' is a reference to the persons who would be entitled to prove in a hypothetical winding up*. Since the enactment of the *Corporate Law Review Act* 1992 (Cth), all claims against the company (present or future, certain or contingent, ascertained or sounding only in damages) have been provable in a winding up. The class action claimants in the present case, although claiming only unliquidated damages, would be held to be within this class for the purpose of proving in a winding up, as would PwC: see *Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24; (1994) 13 ACSR 504.
>
> On the other hand, the affording of 'creditor' status, for the purposes of proof in a winding up, to persons having claims merely sounding in damages may not be something that should be taken into account in construing the term 'creditors' in a quite different part of the legislation. The Act contains no general definition of 'creditor', with the result that the meaning of the term in a particular provision will be very much influenced by context." (emphasis added).

Existing Supreme Court proceedings

16 As noted at [5] above, in 2018, the Owners Corporation commenced the Defect Proceedings against Hallmark. These proceedings were originally commenced in the NSW Civil and Administrative Tribunal (**NCAT**) but were transferred to the Technology and Construction List of this Court on 8 March 2018.

17 The Defect Proceedings allege that much of the building and construction work done in relation to the Development was defective. The Defects related to alleged non-compliance with fire safety standards, defective waterproofing and unreinforced blockwork. It is alleged that the building work was carried out in breach of statutory warranties under the *Home Building Act*. Rectification costs have been estimated at between $6 and $7 million.

18 As originally pleaded, it was put that:

> "…
>
> 10. Hallmark carried out residential building work on or in relation to the land for Beaconsfield under a contract.
>
> 11. Alternatively, Hallmark is a corporation that has carried out residential building work on or in relation to the land under a contract.

> 12. The residential building work carried out by Hallmark included the construction of the common property now vested in the Plaintiff.
>
> 13. The statutory warranties set out in s 18B of the *Home Building Act 1989* (the Act) were implied into the contract between Hallmark and Beaconsfield.
>
> 14. Alternatively, by s 18D of the Act, Beaconsfield, as a non-contracting owner is entitled (and is taken to have been always entitled), to the same rights as it would have had if it had contracted with Hallmark to carry out residential building work on the land.
>
> 15. By s 18D of the Act the Plaintiff is entitled to the same rights in respect of the statutory warranties as Beaconsfield as against Hallmark. …"

19 An Amended Technology and Construction List Statement was filed on 15 March 2019 seeking to broaden the claim against Hallmark and adding as defendants a number of other parties who had been contractors on the building project, as well as Mr Crane, Mr Raymond Raad (**Mr Raad**) and RHPL. The claims against sub-contractors included breaches of various statutory warranties under s 18B of the *Home Building Act.* There were also claims introduced for unconscionability, interference with contractual relations and conspiracy.

20 A number of paragraphs of the Amended Technology and Construction List Statement were struck out on 22 May 2019 by Ball J: *The Owners-Strata Plan 91349 v Hallmark Construction Pty Ltd* [2019] NSWSC 591. Ball J found major defects in the pleading of the unconscionability, interference with contractual relations and conspiracy claims.

21 There was before the Court on the hearing of this application an unfiled Further Amended Technology and Construction List Statement, which I was informed the Owners Corporation intended to file. That proposed Further Amended Technology and Construction List Statement includes allegations at paras 272-289 as follows:

> "At the time, of settlement of the off-the-plan sales contracts, Crane and RHPL knew, or ought to have know[n], that as the owner of the Land, and putative developer and builder, BSPL was entitled to the proceeds from the purchasers of the sale of the Land.
>
> From late July 2015 on, Crane directed the net payment of the proceeds of the settlement of the sales of each lot of the Land (**the proceeds**) be paid by cheque to RHPL.
>
> The consequence being that BSPL, despite being the vendor, did not receive or retain any of the proceeds of the sales of the lots.

Crane and RHPL knew, or ought to have known, that this conduct would, and in fact did, have the effect of depriving BSPL of assets available to satisfy any order for rectification or compensation in respect of defects.

Crane and RHPL knew, or ought to have known, that at that time there were claims of defective work and that BSPL would likely need those assets to rectify the defects or compensate the Owners Corporation.

Each of these steps was done by Crane and RHPL with a view to avoiding liability in respect of the Statutory Warranties.

Each of Crane and RHPL's conduct (**the Conduct**) was carried out jointly and severally. Alternatively, it was RHPL's conduct and Crane was knowingly involved in it as the controlling mind of RHPL.

In the period 11 January 2016 to 5 February 2016, Crane and RHPL knew, or ought [to] have know[n], that Raymond, on behalf of BSPL and Hallmark, had been advised by the Building's managers of the existence of 44 defects to the common property.

On 16 February 2016, Crane, in his capacity as BSPL's director, signed a 'Declaration of Solvency' pursuant to ss 494(1) & (2) of the *Corporations Act* in which he declared that BSPL had:

(a) Only $6,600.00 in cash at bank;

(b) $930.00 in cash at hand;

(c) estimated winding up expenses of $6,600.00;

(d) no secured or unsecured creditors;

(e) no contingent liabilities.

Subsequently, on 18 February 2016, Crane as proxy for RHPL, resolved at a General Meeting of the Sole Member that BSPL enter voluntary liquidation (**Voluntary Liquidation**).

In the period February 2016 to November 2016, Raymond continued to receive notification of defects in the Building from the strata managers at the relevant times, Strathfield Strata Management and Civium Strata, who acted on behalf of the Owners Corporation.

Particulars

The notification of defects were emailed to Raymond at ray@hmc.com.au or info@raad.com.au.

Despite the notification of defects being routinely addressed to Hallmark, neither Raymond nor Crane nor any other member of the Raad Group advised the strata managers that:

(a) Hallmark was not the builder or developer and therefore gave no warranties in respect of the rectification of defects to the common property and was under no legal obligation to address them;

(b) BSPL, the alleged builder and developer, was in liquidation and was therefore no longer capable of rectifying the defects;

(c) BSPL had had its contractors' licence cancelled on 13 May 2016.

> Until late August 2016, Raymond continued to respond to notifications of defects by the strata manager, including by arranging for sub-contractors to attend the Building to examine and/or rectify defects.
>
> On 22 November 2016, BSPL was deregistered (**Deregistration**) leading to it having no existence for the purposes of the Corporation Act 2001.
>
> At the time of the Deregistration, the Statutory Warranties had approximately 5½ years for major defects and 1½ years for other defects to run, by virtue of sec 18E read with sec 3C HBA.
>
> In engaging in the Conduct set out above, Crane and RHPL were, jointly and severally, engaged in unconscionable conduct within the meaning of s 21 of the Australian Consumer Law (ACL).
>
> Alternatively, RHPL engaged in the Conduct that was unconscionable conduct within the meaning of s 21 of the Australian Consumer Law (ACL), and Crane was knowingly involved in it as the controlling mind of RHPL.
>
> The Conduct was unconscionable in that it was intended, and had the effect of, depriving BSPL of assets available to satisfy any order for rectification or compensation under the HBA, resulting in the Owners Corporation being burdened with the cost of the repairs of the defects."

22 Obviously enough, BSPL, having been deregistered in 2016, is not currently a party to the Defect Proceedings, although it is referred to extensively both in the Amended and proposed Further Amended Technology and Construction List Statement.

Purpose of the application – the evolving case

23 As originally formulated in an affidavit of the solicitor for the Owners Corporation, Mr Mark Geoffrey Streeter (**Mr Streeter**), in support of the application, it was put that:

> "It is incumbent upon the Plaintiff to bring these proceedings to seek to reinstate BSPL so that the Plaintiff can have the opportunity to seek an assignment of certain of its rights from BSPL to the Owners of SP 91349. This assignment of certain rights would allow the Plaintiff to pursue some of the sub-contractors directly in the Technology and Construction List proceedings."

13 November 2019 hearing

24 On the first day of the hearing, Mr Golledge SC, who appeared for the Owners Corporation, accepted that the paragraph of Mr Streeter's Affidavit extracted at [23] above was "utterly confusing" and "to confuse or to treat that as some sort of notional assignment that Beaconsfield has against its own subcontractors". He candidly stated that he, "too had difficulty understanding what paragraph 32 [of Mr Streeter's affidavit] meant".

25 The Owners Corporation's articulated purpose in bringing the reinstatement proceedings was sought to be broadened in a second affidavit of Mr Streeter dated 7 November 2019. The filing of this affidavit generated procedural difficulties.

26 On 14 October 2019, the Corporations List Judge had directed that the Owners Corporation file and serve any evidence *strictly in reply* by 4 November 2019, with no further evidence to be relied upon without leave. Mr Streeter's second affidavit was not only late but was not strictly in reply.

27 The affidavit sought to introduce, in paras 12-15, material in support of a different basis for the making of the reinstatement orders than that originally articulated, namely so that a liquidator of the reinstated company could explore potential breaches of duty by Mr Crane in relation to the sale of particular units in the Development, the transmission of funds from those sales to a related entity, RHPL, and whether a liquidator may have claims against Mr Crane and/or RHPL in respect of those transactions. The purpose was also stated to be to explore whether these transactions were disclosed to, or investigated by, the previous liquidator in the period prior to the winding up, and whether there was any legitimate explanation as to why monies payable to the company were in fact paid to a different company.

28 This was put in the context, as explained at para 14 of Mr Streeter's second affidavit, that BSPL, Mr Crane and RHPL knew or ought to have known that the Development contained defects identified in a Fire Safety Order issued to BSPL by Fire & Rescue NSW on 14 August 2015, and reports of other defects provided by off-the-plan purchasers between August 2015 and February 2016.

29 When this affidavit was sought to be read in the course of the hearing on 13 November 2019, Mr Ashhurst SC, who appeared for Mr Crane, objected to these paragraphs of the affidavit. Mr Golledge accepted that the matters contained in those paragraphs were not strictly in reply and that he would require leave to rely upon them.

30 The significance of the new evidence contained in Mr Streeter's second affidavit was that it articulated a new and different purpose for the reinstatement orders which was built on factual allegations that had not

previously been foreshadowed and had not been addressed in the written submissions of Mr Crane, or in any evidence.

31 A considerable amount of the time allocated for hearing on 13 November 2019 was, regrettably, occupied in debating whether or not the Owners Corporation should be permitted to significantly change its case so as to add to the purpose for which the reinstatement order was sought. Mr Ashhurst pointed to serious prejudice that accrued to his client, indicating that there were evidentiary matters that would need to be explored if the Owners Corporation were permitted to amend its case in the way sought.

32 Ultimately, I permitted the paragraphs of the second affidavit of Mr Streeter to be read, but on the basis that there would need to be an adjournment, and that the Owners Corporation would pay the costs thrown away by the adjournment. The matter was adjourned, after Mr Golledge made his submissions in chief, until the afternoon of 5 December 2019.

5 December 2019 hearing

33 During the period between the first and second hearing dates, an affidavit was filed on behalf of Mr Crane by an Accounts Clerk employed by the Raad Group of companies, Ms Maria Josephine Cane (**Ms Cane**), which explained that the payment of the proceeds of sale of the particular units that had been referred to in Mr Streeter's second affidavit by BSPL to RHPL had been by way of repayment of a loan account between the two companies. Ms Cane was cross-examined by Mr Golledge, who was constrained to accept that the payment of these sale proceeds had been properly explained.

34 The consequence of this explanation and its acceptance was that any exploration by a liquidator of a reinstated BSPL based upon the transactions referred to in Mr Streeter's second affidavit and Mr Golledge's initial written submissions would not, even on an arguable basis, lead to a recovery of monies by BSPL which would in turn be available to fund the payment of any judgment against it for alleged breach of *Home Building Act* warranties in the Defect Proceedings.

35 Were matters to have rested there, that would have been likely to be the end of the matter, because there would have been little or no utility in reinstating to

the register a company with no assets and no apparent scope for recoveries. The matter did not, however, rest there.

36 Immediately prior to the cross-examination of Ms Cane, Mr Golledge had called upon a Notice to Produce that had been issued by the Owners Corporation. This relevantly led to the production of an account ledger between BSPL and RHPL which showed that, prior to BSPL's winding up, a very substantial sum of money (some $21 million) was shown as owing by RHPL to BSPL, essentially representing the proceeds of sale by BSPL of a large number of units in the Development for which payment had been directed to be made to RHPL.

37 This led Mr Golledge yet again to shift the purpose of the potential inquiry that a liquidator might pursue, which might in turn put BSPL in funds which would be available to meet a successful *Home Building Act* warranty claim. As Mr Golledge put the matter:

> "This is an asset of the company and had it not been for that transaction when this company went into liquidation on a date in February, it would have had an asset, namely, an account receivable to the tune of at least $21 million from its parent. Yet, what's happened, we say, is a transaction the liquidator would plainly wish to ask about, namely, what benefit did that company get from the removal of that credit balance on the loan account in circumstances where Beaconsfield has paid back all of the amounts apparently owed to it by Raad and incurred during the course of the building work… Now, any liquidator worth his salt would ask the director about what's happened to that money and what value did the company receive, what countervailing benefit did the company get from that transaction. That's how we say it's relevant."

He also said:

> "There is 21 million dollars gone. Just looking at it devoid of facts. When money goes out of a company, it is either going to go on a loan account or paid by way of a dividend…".

38 This shift in turn, as a matter of procedural fairness, required the Court to afford Mr Crane a further opportunity to lead evidence to explain the transactions which had led to the transfer of funds and other assets away from BSPL shortly before the appointment of a liquidator and the winding up of the company.

17 February 2020 hearing

39 This resulted in the filing of two substantial affidavits by Mr Crane and Mr Raad, both of whom were cross examined by Mr Golledge on 17 February 2020. The affidavits, especially that of Mr Crane, sought to explain what had

become of BSPL's assets prior to the winding up in response to Mr Golledge's forensic challenge as formulated on the second day of the hearing and as set out above. The essence of the response was that the remainder of the loan balance owing by RHPL to BSPL had been paid by way of a dividend to HeadCo as part of a corporate restructure, in respect of which advice had been received by Ernst & Young.

40 Mr Crane's affidavit evidence was accurately and more fully summarised in Mr Ashhurst's written submissions of 17 February 2020 as follows:

> "…Beaconsfield's sole purpose for existing was to undertake the development of the residential and commercial property owned by Beaconsfield at 79-87 Beaconsfield Street and when that development was completed and the Raad Loan to Beaconsfield had been repaid, the purpose for which Beaconsfield had been established had been completed; and he wished to finalise the affairs of Beaconsfield.
>
> In undertaking the finalisation of Beaconsfield's affairs, Mr Crane sought, and was given, specialist advice from Ernst & Young, which in effect advised Mr Crane to form a Tax Consolidated Group (TCG) so that a new company (HeadCo) would acquire the shares in Beaconsfield and then elect to become the head entity in the TCG.
>
> Mr Crane was further advised that:
>
> a. HeadCo, 'as the sole member of Beaconsfield may elect to wind up Beaconsfield by way of members voluntary liquidations …the majority of directors must make a written declaration that they have made an inquiry into the affairs of the company and…firmed the opinion that the company will be able to pay its debts in full within 12 months after the commencement of the winding up';
>
> b. To retain another member in the Raad Group to manage any outstanding works required to be completed on the Development, and to release any retentions payable to any subcontractors.
>
> The TCG was formed on 21 September 2015, and on 23 November 2015, Mr Crane organised for Beaconsfield and Hallmark to enter into a deed of management, under which Hallmark were to attend to the defect rectification process and the release any retentions payable to any subcontractors (Defect Agreement).
>
> After assuring himself on 29 January 2016, through his discussions with Mr Raymond Raad and Mr Neil Kerz, that there were no outstanding defects in the Development, Mr Crane deposes that the he did not know or otherwise expect that there would be any outstanding issues with the Development and consequently, decided to proceed with the winding up of Beaconsfield.
>
> …
>
> Following his discussion with Mr Kerz and Mr Raad, Mr Crane, as the sole director of Beaconsfield, relevantly:

a. On 29 January 2016, passed a resolution that Beaconsfield pay an unfranked dividend to $21,860,136.57 to HeadCo (First Dividend);

b. Transferred three (3) unsold lots to HeadCo;

c. On 10 February 2016, caused a resolution to be passed that Beaconsfield be would up voluntarily and that Daniel Civil of Jirsch Sutherland be appointed as liquidator of Beaconsfield;

d. On 14 March 2016, passed a resolution, on behalf of HeadCo, in which it was resolved that HeadCo would pay a fully franked dividend of $15,107,333,43 to Milad Raad Holdings and Michael Raad Holdings and on 20 February 2017, Raad Holdings paid the tax liability of $6,746,464.20 on behalf of the Tax Consolidated Group arising from the trading activities of Beaconsfield; and

e. On 24 July 2016, passed a resolution, on behalf of HeadCo, in which it was resolved that HeadCo would pay a fully franked dividend of $1,281,000.00 to Milad Raad Holdings and Michael Raad Holdings for the settlement proceeds of the sale of the (3) unsold lots." (footnotes omitted).

41 The minutes of the meeting of 29 January 2016 referred to the tabling of BSPL's Interim Financial Accounts which indicated that the company had total assets of $22,488,223.39, including land and buildings held for resale to which a value of $627,156.82 was ascribed. This reference was to three then unsold apartments in the Development. The minutes noted that the apartments were to be transferred to HeadCo "through the loan account at there [sic] extended value of $627,156.82".

42 The minutes of this meeting also contained the following notations:

"It is noted that on enquiry that there are no outstanding defects in the Beaconsfield Street development.

It is noted by way of agreement dated 23rd November 2015 that Hallmark Construction P/L will be responsible for unpaid monies owing to contractors in accordance with subcontract agreements. Monies pursuant to the agreement have been paid to Hallmark Construction P/L.

It is noted that in terms of the agreement dated 23 November 2015 that Hallmark has agreed to manage rectification of defects.

It is noted that there are no monies receivable and that all sales have been fully accounted for.

It is noted that with the exclusion of taxation which is payable following lodgement of a taxation return for the income year there are no outstanding liabilities."

43 Under cross-examination, Mr Crane was asked about the Deed of Management with Hallmark, the payment of the dividend to RHPL and the

transfer of the three remaining apartments. This latter topic is discussed in further detail below.

44 Mr Raad gave evidence that, on all of the Raad Group developments, a systematic process for the management of defect rectification is undertaken, and that such a process was undertaken with regard to the Development. He also gave evidence that he reviewed the Defect Reports relied on by the Owners Corporation on the reinstatement application as against the Raad Group's rectification notes, as they related to the Defect Reports, and that the defects, whether notified prior or subsequent to the winding up, were all dealt with in accordance with the defect management process.

45 Under cross-examination, Mr Raad's evidence was less clear. In particular, he was asked about a letter from Fire & Rescue NSW dated 23 September 2015, which included the following:

> "**Determination**
>
> As a result of the deficiencies listed above, FRNSW provide the following comments:
>
> (a) FRNSW are not satisfied that the building complies with the Category 2 fire safety provisions.
>
> (b) FRNSW are not satisfied that the fire hydrants in the fire hydrant system will be accessible for use by FRNSW.
>
> (c) FRNSW are satisfied that the couplings in the fire hydrant system will be compatible with those of the fire appliances and equipment used by FRNSW.
>
> As a result of the defects identified above, FRNSW are of the opinion that the building or part of the building is not suitable for occupation or use in accordance with its classification under the Building Code of Australia (BCA).
>
> In this regard FRNSW recommends addressing the defects in accordance with the relevant recommendations prior to the occupation certificate for the premises being issued in order to satisfy the applicable requirements of Section 109H of the Environmental Planning & Assessment Act 1979. Written advice should be forwarded to FRNSW once the necessary rectification works have been completed and verified by way of inspection by the certifying authority."

46 Under cross examination, the following evidence emerged from Mr Raad:

> "Q. Do you still have the letter of 23 September in front of you, sir?
>
> A. Yes, I do.
>
> Q. Could you just go to p 5 of that letter?
>
> A. Yep.

Q. Could you read to yourself the last paragraph and tell me when you are finished?

A. Yeah.

Q. Are you able to say whether the builder carried out the work recommended in that final paragraph at paragraph 5?

A. Sorry, could repeat that, if we—

Q. Well, are you able to say whether the recommendation made by Fire and Rescue New South Wales in paragraph 5, or, sorry, the final paragraph on p 5 was ever carried out?

A. So this letter discusses, sorry, this paragraph discusses the items in this letter—

Q. Yeah?

A. And no, some of the items under 'Fire Resistance' would not have been carried out.

Q. Would not have been carried out?

A. Correct."

47 Some attempt was made to clarify this response in cross-examination by reference to other correspondence with certifiers and Fire & Rescue NSW, but it cannot be said, in my opinion, that those references greatly clarified matters, although it did seem to be made clear from correspondence relied upon by Mr Ashhurst that an earlier order made by Fire & Rescue NSW, that of 14 August 2015, referred to in Mr Streeter's second affidavit (see at [28] above), had been satisfactorily resolved.

48 In final submissions, Mr Golledge submitted that a number of the extant allegations in the Schedule of Defects in the Technology and Construction List Statement in the Defect Proceedings related to matters that had been raised by the 23 September 2015 letter from Fire & Rescue NSW.

Owners Corporation's ultimate factual contentions

49 In a document I directed to be prepared in order to bring some coherence to the reinstatement application and the material on which it was based, on the third day of the hearing (but prior to the cross-examination of Mr Crane and Mr Raad), the Owners Corporation filed a document entitled "Plaintiff's Statement of Factual Contentions" together with the "Summary of Propositions" from which the submissions extracted at [12] above have been taken.

50 The findings of fact contended for by the Owners Corporation were as follows:

“1. Beaconsfield Street Pty Ltd constructed a home unit building comprising 118 residential and 23 commercial at Silverwater, NSW. The property is a strata development. The plaintiff is the Owners Corporation which owns the common property in the development.

2. The plaintiff claims that it is entitled to damages for breach of statutory warranties arising from defective building work. (T & C List proceedings 2018/73395).

3. But for its deregistration, Beaconsfield Street Pty Ltd would be liable for any damages for defective building work.

4. An Interim Occupation certificate for the development was issued on 22 July 2015. No final Occupation Certificate has ever issued.

5. The warranty period for the bringing of claims in respect of any defective building work at the property was 6 years for major defects and 2 years for all other defects. Both periods were still current as at the date of the appointment of the liquidator in February 2016 and the period in respect of major defects does not expire until mid 2021.

6. By August 2015, the sole director of Beaconsfield (Mr Anthony Crane) had determined that he wished to cause the company to be wound up.

7. Between 17 July 2015 and 19 November 2015, nearly all of the units in the development were sold. The net sale proceeds of those settlements were paid by Beaconsfield to Raad Holdings Pty Ltd (its 100% shareholder).

8. Those payments were credited to a loan account between Beaconsfield and Raad Holdings.

9. On 10 August 2015, Beaconsfield transferred one of the units to a related entity, Hanmari Pty Ltd. The Memorandum of Transfer did not record the payment of any consideration for that transfer. Hanmari remains the owner of that unit.

10. Anthony Crane is the sole director of Hanmari Pty Ltd.

11. On 23 November 2015, Beaconsfield entered a Deed with another related entity, Hallmark Pty Ltd by which Hallmark agreed accept ‘the liability for future amounts due to contractors as retentions and to manage rectification of defects’ at the Silverwater property. Anthony Crane is the sole director of Hallmark.

12. On 10 December 2015, the remaining funds in Beaconsfield's bank account ($169,248.66) were paid to Raad Holdings.

13. As at 10 December 2015, Beaconsfield held the following assets:

(i) a loan account debt owed by Raad Holdings in the sum of $21,860,136.57; and

(ii) units 121,139 and 145 which had a combined estimated value of $1,695,000;

(iii) the amount payable by Hanmari for transfer of the unit in August 2015.

14. By a series of transactions undertaken by Mr Crane in January 2016:

(i) the shares held by Raad Holdings in Beaconsfield were cancelled;

(ii) shares were issued to a newly incorporated entity, A.C.N. 608 338 478 Pty Ltd (of which Mr Crane was sole director) so that by 20 January 2016, that company was the sole shareholder of Beaconsfield. Anthony Crane is the sole director of that company;

(iii) on 29 January 2016, a dividend was declared by Beaconsfield in the amount of $21,860,136.57. That dividend was payable to the new 100% shareholder. That payment was made by Beaconsfield transferring to the new shareholder the debt owed to it by Raad Holdings .The dividend had its source in the profit earned by Beaconsfield on the development. Ultimately those profits have ended up in the hands of the ultimate shareholders;

(iv) the remaining units held by Beaconsfield in the complex (units 121,139 and 145) were transferred to this new company. Although the units had an estimated value of $1.695 million, they were transferred by a book entry in a loan account. The loan account entry was to record a sale consideration of only $627,156.82 although the sale contract showed a sale price of $1,695,000. No evidence has been provided by Mr Crane as to how that loan account liability was satisfied by the date of the appointment of the liquidator in February 2016 (when, according to Mr Crane's declaration of solvency, the company had no assets beyond an amount of $6,600 being a sum of money paid into the company for the purposes of funding the winding up).

15. By January 2016:

(i) a serious problem with water leakage in the basement car parks had emerged and would have been plainly visible upon any inspection of the complex; (the Waterproofing Complaint); and

(ii) Fire & Rescue NSW had inspected the property and had advised that the 'building or parts of the building is not suitable for occupation'. In part that was because of Fire Resistance issues created by the manner of construction (the Fire Resistance complaint);

(iii) the private certifier retained by the Second Defendant had advised that the building did not comply with the terms of the Development Consent.

16. The winding up of Beaconsfield was initiated by a resolution approved by Raad Holdings-a company which was, by that time, no longer a shareholder of the company. That defect was not identified by Mr Civil, the liquidator whilst he was in office. Mr Civil also consented to registration of the transfer of units 121,139 and 145 to the new shareholder on the basis of a fundamental erroneous view that he was in fact giving approval the August 2015 transfer to Hanmari.

17. Both the Waterproofing Complaint and the Fire Resistance Issues form part of the defects complained of by the plaintiff in existing proceedings (2018/73395). Notwithstanding the November 2015 Deed, Hallmark has, in those proceedings, denied any responsibility for those defects (if established) and has asserted that the party responsible is Beaconsfield. Beaconsfield cannot be sued in respect of those claims unless it is reinstated."

51 In the context of the reference in para 13(iii) of the Plaintiff's Statement of Factual Contentions set out at [50] above, and the transfer of three apartments

from BSPL to HeadCo, there was tendered Exhibit 9, a stamped copy of the Transfer in respect of these three apartments, originally dated 13 January 2016 but stamped as having been re-lodged on 30 May 2016. The consideration noted in the Transfer was identified by reference to the Contract dated 13 January 2016. This Contract, also in evidence as Exhibit 8, showed a consideration of $1,695,000.

52 There was attached to the Transfer a letter dated 23 May 2016 from the liquidator of BSPL, Mr Civil, to the Registrar-General of the Office of Land and Property Information. The letter was captioned:

> "**RE: SALE TO HANMARI PTY LTD**
> **FOLIO IDENTIFIERS 121/SP91349, 139/SP91349 & 145/SP91349**
> **REFERENCE: DEALING AK357356**"

53 In his letter, the liquidator stated that the transfer lodged for registration was executed by the company in the normal course of its business prior to it being placed into liquidation and recorded the fact that Mr Civil, as liquidator, had no objection to the registration of the transfer. Mr Golledge pointed out a number of features about this letter.

54 First, the Transfer did not on its face, or on the face of the Contract of Sale, involve a transfer to Hanmari Pty Ltd, despite that reference being made in the caption. This raised an issue about the liquidator's subsequent statements in the letter and whether or not he was confused about the transferee of the property and the circumstances of the transfer when he said that the Transfer was executed by the company in the ordinary course of its business. In this context, Mr Golledge had put the following question and secured the following answer from Mr Crane under cross-examination:

> "Q. Mr Crane, would you describe the transfer of those three units as transfers by the company in the normal course of its business?
>
> A. No, these were purely transferred as part of the corporate reconstruction."

55 Mr Golledge raised a further issue by reference to Mr Crane's evidence, when under cross-examination, namely that the transfer of these three apartments did not occur in the ordinary course of business. The relevant cross-examination was as follows:

> "Q. What is the purpose of having this contractual value of $1,695,000 shown on the contract of land?
>
> A. I could not see the reason behind it, but that is what I was instructed to do, which was the market value in the hands of HeadCo.
>
> Q. HeadCo receives assets valued at $1,695,000, correct?
>
> A. Yes, because the cost base is $697,000—
>
> Q. The asset it receives under the transaction is worth $1,695,000 and it never paid that money to Beaconsfield?
>
> A. No.
>
> Q. That money was never paid?
>
> A. There was no requirement to pay it.
>
> Q. Are you able to any provision of the contract document which absolves the purchaser of the responsibility to pay the purchase price?
>
> A. I cannot."

56 The manner in which this transfer took place and was recorded was not the subject of any of the written advice that Mr Crane had received from Ernst & Young.

57 In closing oral submissions on the third day of the hearing, Mr Golledge accepted as correct my attempt to summarise the Owners Corporation's case as it had evolved over the course of the hearing, which was as follows:

> "So does your case boil down to this, tell me if I am oversimplifying it because it has moved a bit, but you have the benefit of statutory warranties, irrelevant that there may be some other people you can sue under warranties or in negligence, you may or may not sue them, they may or may not be solvent but that's irrelevant, you've got the benefit of statutory warranties against [BSPL]. You have underlying matters of complaint which you say would fall within the subject matter of the warranties relating to common areas touching on sewerage and leaks and fire safety. You say furthermore it wouldn't be futile, even though this company has been wound up, to exercise the discretion in favour reinstatement because notwithstanding what the asset statement said at or around about the time of the winding up, there's at least a basis for thinking that [BSPL] had greater assets than were shown to be the case, and the liquidator to the extent he said anything about the relevant transaction, namely the transfer of the three properties in that letter to the Registrar General, seems to have been confused or mistaken about what he said in two respects; one, he seems to be referring to Hanmari and two, insofar as he said that these were transfers in the ordinary course of business, according to Mr Crane's evidence they weren't.
>
> So there was a basis for thinking that the company might at least have an ability to claw back some money, and there may or may not be potential for some further recoveries by the company against its former director but that would be a matter for any new liquidator if the company was reinstated and a different liquidator is appointed and your clients will have to fund all of that."

58 Against this factual background, it is necessary to turn to the terms of s 601AH of the *Corporations Act* and the case law which has considered it.

Section 601AH of the Corporations Act

59 Section 601AH of the *Corporations Act* relevantly provides:

> "…
>
> (2) The Court may make an order that ASIC reinstate the registration of a company if:
>
> (a) an application for reinstatement is made to the Court by:
>
> (i) a person aggrieved by the deregistration; or
>
> (ii) a former liquidator of the company; and
>
> (b) the Court is satisfied that it is just that the company's registration be reinstated.
>
> (3) If:
>
> (a) ASIC reinstates the registration of a company under subsection (1) or (1A); or
>
> (b) the Court makes an order under subsection (2);
>
> the Court may:
>
> (c) validate anything done during the period:
>
> (i) beginning when the company was deregistered; and
>
> (ii) ending when the company's registration was reinstated; and
>
> (d) make any other order it considers appropriate.
>
> …
>
> (5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim."

60 It follows, therefore, that in order to enliven the Court's discretion to make an order for the reinstatement of the registration of BSPL under s 601AH(2) of the *Corporations Act*, the Owners Corporation must show itself to be a person aggrieved by the deregistration of BSPL, and the Court must be satisfied that it is just that BSPL's registration be reinstated.

Person aggrieved

61 The Owners Corporation correctly submitted that the term "person aggrieved" has a wide import and should be construed liberally, citing *Blazai Pty Ltd v Gateway Developments (St Marys) Pty Ltd* [2009] NSWSC 800 at [22] (**Blazai**); *In the matter of European Metal Recyclers Pty Ltd (in liq) (deregistered)* [2018] NSWSC 946 at [17] (**European Metal**); *GIS Electrical Pty Ltd v Melsom* (2002) 172 FLR 218 at [53]ff; [2002] WASCA 302 (**GIS**). Mr Crane who, as noted above, opposed the application, accepted this starting proposition.

62 The Owners Corporation also referred to the decision of McKerracher J in *Bell Group Limited (ACN 008 666 993) (in liq) v Australian Securities and Investments Commission* (2018) 358 ALR 624; [2018] FCA 884 at [47] (**Bell Group**), where his Honour explained that:

> "The expression 'person aggrieved' in s 601AH should not be construed narrowly: *Yeo v Australian Securities and Investments Commission, in the matter of Ji Woo International Education Centre Pty Ltd (deregistered)* [2017] FCA 1480 per Gleeson J (at [14]–[16] and the authorities therein cited). For a person to be aggrieved for the purposes of s 601AH(2)(a)(i), an applicant for reinstatement must be able to show that the deregistration deprived the applicant of something, or injured or damaged the applicant in a legal sense, or if the applicant became entitled, in a legal sense, to regard the deregistration as a cause of dissatisfaction: *Danich Pty Ltd; Re Cenco Holdings Pty Ltd* (2005) 53 ACSR 484 per Barrett J (at [32])."

63 The Owners Corporation submitted that it is a creditor of BSPL by virtue of its claims for breach of statutory warranties by BSPL under the *Home Building Act* prior to its winding up and de-registration. The Owners Corporation relied on the decision of Barrett J in *Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Limited* [2010] NSWSC 1369; (2010) 80 ACSR 670 (**Arnold**) for the proposition that a creditor of a company which has been deregistered, and who or which has thereby been precluded from bringing its claim against the company, is "a person aggrieved by the deregistration". His Honour in *Arnold* observed (at [43]) that:

> "The question whether an applicant under s 601AH(2) is a 'person aggrieved by the deregistration' is considered by reference to legal rights and legal interests. It must be seen that the applicant has a genuine grievance that the dissolution of the company affected his or her interests because, for example, a right of some value *or potential value* has gone out of existence: *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* [2000] NSWSC 316; (2000) 174 ALR 688 (at [24]-[26]). Under analogous English legislation, the applicant was expected to have

> ‘an interest of a proprietary or pecuniary nature in resuscitating the company’: *Re Wood & Martin (Bricklaying Contractors) Ltd* [1971] 1 WLR 293; and see *Re GA & RJ Elliott Pty Ltd* (1978) 3 ACLR 523.” (emphasis added).

64 *Arnold* was also relied upon by Mr Crane, with Mr Ashhurst submitting that “[t]here is no right of value or potential value if the company has no assets. It can only be the case that the company has some assets or is likely to have some assets before it can be said that you are a person aggrieved.”

65 The Owners Corporation also emphasised that where an applicant claims standing for the purposes of s 601AH(2) of the *Corporations Act*, again accurately and consistent with authority, “it will generally not be appropriate for the [c]ourt to entertain in a detailed way argument as to the merits or otherwise of the claim”, and that the court only need be satisfied that the claim is not hopeless or bound to fail, citing *European Metal* at [20] and *Re Brockweir Pty Ltd* [2012] VSC 225 at [22] (**Brockweir**).

66 In *Brockweir* at [22], Sifris J held that:

> “In order to assess whether the plaintiffs are aggrieved parties, it is not necessary to embark upon a detailed and exhaustive analysis of the facts and the law underpinning the claim. The threshold is low. The assessment needs to be dealt with in a summary way. As long as the claim is not plainly hopeless and bound to fail, it should, subject to other relevant matters, proceed.”

67 *Brockweir* was also relied upon by Mr Ashhurst, who drew attention to part of [36] of that decision as follows:

> “… There is very little added advantage in reinstating the Company and having it as a party without means, simply for the sake of a judgment. The suggested advantage, namely that a liquidator would have the ability to conduct any relevant public examination and further, that the company would be obliged to make discovery, does not constitute a sufficient reason to reinstate the Company. There are other procedures available.”

68 Whilst it was accepted by Mr Crane that the term “person aggrieved” is of wide import and should be construed liberally, he challenged the proposition that the term captured any unsecured creditor and referred to the decision in *GIS*, in which the Western Australian Court of Appeal expressed doubts as to whether an unsecured creditor was capable of being an aggrieved person for the purposes of s 601AH(2) of the *Corporations Act*. It was submitted that “[s]omething more is required”.

69 Mr Crane also cited the following remarks of Donovan J in *Ealing Corporation v Jones* [1959] 1 QB 384 at 392:

> "I think it is true that if one came to the expression without reference to judicial decision one would say that the words 'person aggrieved by a decision' mean no more than a person who had had the decision given against him; but the courts have decided that the words mean more than that, and have held that the word 'aggrieved' is not synonymous in this context with the word 'dissatisfied.' The word 'aggrieved' connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, …"

70 Mr Crane also referred to the tests applied in the Australian decisions of *Re GA and RJ Elliot Pty Ltd; Ex parte Mitcham* (1978) 3 ACLR 523 (***Re GA***) and *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434; (1989) 1 ACSR 79 (***Northbourne Developments***).

71 In *Re GA*, Young CJ said (at 525):

> "The expression 'person aggrieved' and similar expressions are, of course, very familiar. They have given rise to many authorities: see *Strouds Judicial Dictionary* 4th ed Vol 1 pp 89–94. Speaking generally a person aggrieved is I think a person who is injured or damaged in a legal sense or who has suffered a legal grievance: see *Ex parte Sidebotham* (1879) 14 Ch D 458; [1874–80] All ER Rep 588 in the judgment of James LJ at 465, although as the Privy Council said in *A-G of the Gambia v N'Jie* [1961] AC 617 at 634; [1961] 2 All ER 504 at 511 the dictum of James LJ in that case is not to be regarded as exhaustive."

72 In *Northbourne Developments*, McLelland J at 437-438 quoted the remarks of James LJ in *Ex parte Sidebotham; Re Sidebotham* (1880) 14 Ch D 458 at 465, in the context of s 71 of the *Bankruptcy Act 1869* (UK):

> "But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

73 It was thus submitted that the Owners Corporation's loss of an ability to pursue certain claims against a reinstated BSPL in the Defect Proceedings does not render it a "person aggrieved", because it has not been "injured or damaged in a legal sense and/or has not been wrongfully deprived of, or, refused something". It was also submitted that the Owners Corporation had not lost any ability to bring any of its claims against other sub-contractors and under statutory warranties under the *Home Building Act* on account of the deregistration of BSPL.

Just to reinstate

74 The Owners Corporation referred to the decision of Brereton J (as his Honour then was) in *Fiorentino v Australian Securities and Investment Commission* (2014) 283 FLR 223; [2014] NSWSC 200 (**Fiorentino**). His Honour in that case observed that the question as to whether reinstatement would be "just" confers a broad discretionary judgment on the court, and noted that (at [5]):

> "[r]elevant considerations include the circumstances in which the company was de-registered, the purpose in seeking its re-instatement, whether any person is likely to be prejudiced by reinstatement, and the public interest generally [*Australian Competition and Consumer Commission v Australian Securities and Investments Commission* [2000] NSWSC 316, [27]-[28]; (2000) 174 ALR 688, 693; 34 ACSR 232; *Promnitz v ASIC* [2004] FCA 22, [19]-[20]; *JP Morgan Portfolio Services Ltd v Deloitte Touche Tohmatsu* [2008] FCA 433, [4]; (2008) 167 FCR 212; (2008) 65 ACSR 636; *AMP General Insurance Ltd v Victorian Workcover Authority* [2006] VSCA 236]."

Later, at [10], his Honour said that "on an application for reinstatement, the Court is concerned with the justice of reinstating the company — not the justice of any proceedings which it proposed that the reinstated company might institute or resume."

75 In reliance on *Fiorentino*, the Owners Corporation submitted that:

> "the Court need not be satisfied that any future claim by a liquidator arising from the pre-winding up transactions will necessarily or even probably succeed. If there is shown to be a seriously arguable case or a possibility of recovery that can suffice".

76 Likewise, in *Boys, in the matter of 38 Akuna Pty Ltd (Deregistered) v Australian Securities and Investments Commission* [2019] FCA 320 at [28], Lee J observed:

> "…what is involved in determining whether reinstatement is just, is a wide discretion which involves a number of considerations, including the circumstances surrounding the company's deregistration, the use that might be made of the reinstatement, and the prejudice any person may suffer as a result of the reinstatement. Where reinstatement is sought for the purpose of pursuing litigation by a creditor or a potential creditor, it has been said that the applicant must demonstrate that there is an arguable cause of action. It is not, however, appropriate to consider, in any granular detail, the matters which may be the subject of the dispute: *ERB International Pty Limited* at 227-228 [12]-[16]."

77 Mr Crane submitted that the Court should not be satisfied that it would be just to order reinstatement, because there would be no utility in making any order

and because of the delay in the Owners Corporation's bringing of the application for reinstatement.

78 The decision of Goldberg J in *Promnitz v Australian Securities and Investments Commission* [2004] FCA 22; (2004) 22 ACLC 108 at [19] was cited for the proposition that:

> "The requirement that the Court be satisfied that it is just that the company's registration be reinstated is not constrained by any particular criterion. However, the cases make it clear that there are a number of matters which ought to be taken into account, namely the circumstances in which the company came to be deregistered, the future activities of the company if an order be made and also whether any particular person is likely to be prejudiced by the reinstatement."

79 Lander J's decision in *Callagher v Australian Securities and Investments Commission* (2007) 218 FCR 81; [2007] FCA 482 at [55] was also cited:

> "The Court must be satisfied that it would be just to order the reinstatement of the registration. The words of the section give the Court a very wide discretion. In exercising that discretion, which must remain unfettered, the Court will ordinarily have regard to the circumstances in which the company's registration lapsed; the party seeking the order; the reasons for seeking the order; the utility of making any order; the prejudice which any party including the company which is sought to be the subject of the order for reinstatement of the registration might suffer; and any other circumstances which would bear upon the making of an order which in all the circumstances would be just: see *Australian Competition and Consumer Commission v Australian Securities and Investment Commission* (2000) 174 ALR 688. In making the order it must also be steadily borne in mind that the company's registration is not to be reinstated for a particular purpose but the company's registration will be reinstated for all purposes: *Donmastry Pty Ltd v Albarran* (2004) 49 ACSR 745 at 747."

Consideration

80 It was submitted that reinstatement was of no utility for two reasons.

81 First, because BSPL had no substantial assets at the time of deregistration against which the Owners Corporation could claim. Reliance was placed upon BSPL's declaration of solvency dated 17 February 2016 which showed that BSPL had assets of $7,530 immediately prior to its winding up to suggest that, at the time of deregistration, BSPL had no substantial assets from which any successful claim in the Defect Proceedings could be paid out. Reference was also made to Austin J's remarks in *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688; [2000] NSWSC 316 at [54], that the court will not make an order for

reinstatement that would be futile on account of the impecuniosity of the company in respect of which reinstatement is sought.

82 It was also submitted that no evidence had been adduced as to what would constitute BSPL's assets. It was observed that, owing to the time that has elapsed between the winding up of BSPL and the filing of the reinstatement application, the limitation period in s 588FF(3) of the *Corporations Act* had crystallised and prevented the Court from making orders in relation to the putative assets. Section 588FF relevantly provides:

> "(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
>
> [various orders giving effect in substance to the voidable transaction]
>
> …
>
> (3) An application under subsection (1) may only be made:
>
> (a) during the period beginning on the relation-back day and ending:
>
> (i) 3 years after the relation-back day; or
>
> (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
>
> whichever is the later; or
>
> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period. …"

83 Second, Mr Crane argued that a reinstatement order was of no utility, because the original objective of the Owners Corporation to have assigned to it BSPL's rights against certain sub-contractors could be achieved by other means which were already available. Specifically, it was submitted that the Owners Corporation is able to claim directly against those sub-contractors without having assigned to it BSPL's rights against them by relying on s 18D of the *Home Building Act*.

84 Section 18D of the *Home Building Act* provides:

> "(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.
>
> (1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been

> entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.
>
> (1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.
>
> (2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations."

85 It was thus submitted that the Owners Corporation did not require BSPL to be reinstated in order to have assigned to it BSPL's causes of action against those sub-contractors. This submission was correct, but was largely overtaken by events as the Owners Corporation's purpose in pursuing reinstatement was refined and modified.

86 It was further submitted that the delay in bringing the application for reinstatement independently tended against the Court granting the order. BSPL submitted that the delay was substantial and had not been satisfactorily explained. Reliance was also placed on s 588FF(3) of the *Corporations Act* in this context in support of the entitlement of BSPL and Mr Crane to have ordered their own affairs and records on the basis that no claims of this nature were to be brought against them. It was also suggested that memories have faded and relevant documents may now be very difficult to locate, citing *Blazai* in support of this.

87 It is tolerably clear that the Owners Corporation wishes to reinstate BSPL in order to join it as a defendant in the Defect Proceedings, so as to bring statutory warranty claims against it. The fact that the Owners Corporation is able to bring statutory warranty claims against sub-contractors in relation to the Development, and indeed has brought such claims, is not to the point and provides no reason for rejecting the reinstatement application.

88 As to the strength of any statutory warranty claim, the authorities reviewed earlier in this decision dictate that the Court, on a reinstatement application, should not engage in too close a scrutiny of these claims or their strength. That having been said, the claims must be shown to have some level of arguability. That very low threshold is, in my opinion, met in the current case.

89 As noted at [17] above, reliance was placed on behalf of the Owners Corporation on alleged defects concerning fire safety and waterproofing. As to fire safety, Mr Streeter, in para 14 of his second affidavit, referred to the fire safety defects being those which were the subject of a Fire & Rescue NSW notice dated 14 August 2015. Mr Ashhurst was able to demonstrate that the defects the subject of that notice appear to have been addressed prior to the deregistration of BSPL. In reply submissions on the third day of the matter, as has been noted above, Mr Golledge referred to a further piece of correspondence from Fire & Rescue NSW dated 23 September 2015 and related some of the defects recorded in this communication to the defects schedule to the Amended Technology and Construction List Statement.

90 Whilst it was extremely unsatisfactory that the Court was taken to these matters for the first time in reply submissions on the third day of the hearing, these references did appear to suggest the *possibility* of some ground for complaint against BSPL although, for obvious reasons, I did not enter into the merits of those complaints, and it will be for the Owners Corporation to seek to make good those complaints against BSPL in the event that reinstatement is ordered.

91 As regards the waterproofing issues, Mr Golledge took the Court in his submissions to a number of items in the Schedule of Defects annexed to the Technology and Construction List Statement to establish some basis for the complaints as to waterproofing which impact areas of common property. Although these references could only be described as exiguous, they did, in my opinion, together with the reference to fire safety issues emerging from the 23 September 2015 letter from Fire & Rescue NSW, pass the very low threshold required in the context of a reinstatement application.

92 Accepting that the Owners Corporation has some arguable claim against BSPL so as to make it a “person aggrieved” for the purposes of s 601AH(2) of the *Corporations Act*, on my assessment, the discretionary decision whether or not to order reinstatement ultimately turned upon the question of utility, and whether there was any point or purpose in ordering the reinstatement of BSPL in circumstances where it has no assets. That required an assessment as to

whether there could be said to be some prospect, again at a very low threshold, of recovery of funds by a liquidator of a reinstated BSPL which would, in turn, have the capacity to render utile statutory warranty claims under the *Home Building Act* in the event that the Owners Corporation were to succeed in establishing liability against BSPL.

93 It was in this context that attention was focussed on the circumstances by which BSPL's assets, principally as a result of the sale of units in the Development, were transferred to HeadCo in the circumstances described in Mr Crane's evidence, which I have summarised earlier in this judgment.

94 It was Mr Golledge's submission that there were aspects of the corporate rearrangement that a liquidator of a reinstated BSPL would have good cause at least to examine with a view to potential recovery of funds which may, in turn, allow any judgment obtained against BSPL under the *Home Building Act* warranties to be enforced. In particular, Mr Golledge pointed to the transfer of three units from the Development to HeadCo for nil consideration, notwithstanding the fact that the stamped contract for sale identified that they had a value of approximately $1.6M and the minutes of 29 January 2016 and interim financial statements of BSPL referred to at [41] above ascribed to them a value of approximately $627,000.

95 These matters, and their discordance both with the statement as to the state of BSPL's assets as at the time of winding up (see [81] above), and with the then liquidator's description of these transfers as having happened in the ordinary course of BSPL's business in circumstances where Mr Crane candidly accepted that that was not the case, bears out, at the very least, Mr Golledge's submission to the effect that there may be potential recoveries available to a reinstated BSPL, which a liquidator may well wish to explore.

96 As the authorities surveyed earlier in this judgment illustrate, the decision whether or not to reinstate a corporation is, at the end of the day, a discretionary one. The Court need not be satisfied that the proposed claims that a party wishes to make against a reinstated corporation will be successful, nor does it need to show that recovery actions potentially available to a reinstated corporation will succeed.

97 The cost of funding a liquidator if the corporation is reinstated will fall to the Owners Corporation which will bear the risk of its investment not producing any, or any valuable, result. I do not think that there has been any disentitling delay on the part of the Owners Corporation in making the reinstatement application.

98 Another relevant consideration is the question of prejudice. As to prejudice, Brereton J said in *Fiorentino* at [13]:

> "It will be a very rare case that merely reinstating a company will be prejudicial to a potential defendant. That potential defendant still has available all the remedies of summary dismissal and stay in the substantive proceedings, if they are instituted. All he or she is deprived of is the opportunity to prevent the proceedings even being instituted — an issue on which a defendant usually has no say. In my view, a court should not, on a reinstatement application, conclude that reinstatement would be unjust on account of considerations analogous to abuse of process or want of prosecution unless affirmatively satisfied that a fair trial could not be had, or that the proposed proceedings were doomed to fail."

99 No prejudice was identified by Mr Crane other than, of course, the possibility that he could be subject to an examination by the liquidator if the liquidator assessed such an examination as appropriate. In this context it should be noted that both Mr Crane and RHPL are already party to the Defect Proceedings.

100 Although the matter is a finely balanced one and has been made more difficult by the less than satisfactory manner in which the case was originally formulated and presented, dissatisfaction with those matters is not a reason not to accede to the reinstatement application.

101 For all of the reasons given above I consider that the Owners Corporation meets the description of a person aggrieved within the meaning of s 601AH of the *Corporations Act* and that it is just in all the circumstances that BSPL be reinstated to the register.

102 I exercise my discretion accordingly and will make orders for the reinstatement of BSPL.

A new liquidator?

103 The next question is as to whether a new liquidator should be appointed, as the Owners Corporation seeks and as ASIC appeared to favour (see [9] above) or whether the former liquidator, Mr Civil, should remain in office.

104 In *Fiorentino* at [40], Brereton J observed that "reinstatement does not result in the automatic resumption of office by a liquidator who was in office at the time of deregistration." His Honour continued (at [40]):

> "The effect of reinstatement is that the company is taken to have continued in existence as if it had not been deregistered, not that it comes back into existence in the same form. However, upon the reinstatement of a company that was at the time of deregistration in liquidation, it remains in liquidation unless the court otherwise orders. Under s 601AH(3)(b), the court can, when ordering reinstatement, reappoint the former liquidator, or appoint a new liquidator. While, all other things being equal, reappointment of the former liquidator is preferable, it will not be the appropriate course where there are considerations militating against that course."

105 In my view, a new liquidator should be appointed. The criticisms made of and in relation to the letter from Mr Civil to the Registrar General of 23 May 2016 (see [52]-[55] above) may be quite innocently explained; on the other hand, they may bespeak at the least some confusion about matters on his part, and in a number of respects.

106 Either way, in all of the circumstances, I consider it preferable that a new liquidator be appointed. In that context, the ASIC consent referred to an appointment of Mr Mark Roufeil as liquidator and evidence was led to the effect that Mr Roufeil consented to such an appointment.

Conclusion

107 As already noted, I will make orders reinstating BSPL to the register and appoint Mr Mark Roufeil as its liquidator.

108 The Owners Corporation seeks, by order 3 of its Originating Process, an order that its costs be paid out of the assets of BSPL.

109 I am not inclined to make this order because of the less than satisfactory way in which the application was originally formulated and run, to which I have referred in the body of these reasons.

110 Nor would I have been inclined to order that Mr Crane pay the costs of the reinstatement application. As originally put, it was not unreasonable for Mr Crane to take the oppositionist stance he adopted, and the Owners Corporation's case was preceded on both of the first two days of hearing by the late service of evidence or documents.

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