Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) - [2003] NSWSC 702

Reported Decision : 47 ACSR 155
(2004) 22 ACLC 822

New South Wales

Supreme Court

CITATION:	**John Vouris Re; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq) [2003] NSWSC 702**
HEARING DATE(S):	21-22 July 2003
JUDGMENT DATE:	1 September 2003
JURISDICTION:	Equity
JUDGMENT OF:	Campbell J
DECISION:	Late convening of second creditors' meeting validated under section 1322(4) and section 447A. Plaintiff relieved from civil liability in respect of late convening of meeting, on proviso that that order did not prevent Companies Auditors and Liquidators Disciplinary Board from taking such action, if any, as it thought fit concerning that contravention. Declaration that plaintiff not in breach of section 439A(4) Corporations Law by not expressing an opinion concerning Deed of Company Arrangement which he was informed about only after convening second creditors' meeting
CATCHWORDS:	CORPORATIONS - voluntary administration - procedure for convening of second creditors' meeting - curing late convening of

second creditors' meeting under section 1322(4) Corporations Act - curing late convening of second creditors' meeting under section 447A Corporations Law and Corporations Act - ability of order under section 447A to cure past defects - powers of chairperson of second creditors' meeting to adjourn - inappropriateness of Court making declarations concerning matter involving judgment or discretion which has been entrusted to Companies Auditors and Liquidators Disciplinary Board - excusing breaches under section 1318 Corporations Act 2001 - what types of breaches can be excused - relieving from civil liability under section 1322(4)(c) Corporations Act 2001 - what counts as "civil liability" - whether declaration should be made about admissibility or relevance of evidence in proceedings in Companies Auditors and Liquidators Disciplinary Board

LEGISLATION CITED:

Administrative Appeals Tribunal Act 1975
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Australian Securites and Investments Commission Act 2001 (Cth)
Conveyancing Act 1919 (NSW)
Corporations Act 2001 (Cth)
Corporations Law
Corporations Regulations
Fair Trading Act 1987
Judicial Trustees Act 1896
Service and Execution Process Act 1901 (Cth)
Trade Practices Act 1974 (Cth)

CASES CITED:

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Alliance Petroleum Australia (NL) v Australian Gaslight Co Ltd (1983) 48 CLR 69
ACS v Anderson [1974] 2 NSWLR 482
Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270
AWA Ltd v Daniels (1992) 7 ACSR 759
Bell Resources Ltd v Turnbridge Pty Ltd (1988) 13 ACLR 429
Bourke v Hamilton [1977] 1 NSWLR 470
Re Brashs Pty Ltd (1994) 15 ACSR 477
Byng v London Life Association Ltd [1989] BCLC 400
Cawthorn v Keira Constructions Pty Ltd (1994) 33 NSWLR 607
Re Caysand No 64 Pty Ltd (1993) 12 ACSR 291
Cheney v Spooner (1929) 41 CLR 532
In Re Chillington Iron Company (1885) 29 ChD 159
Colorado Constructions Pty Ltd v Platus [1966] 2 NSWR 598
Dean-Willcocks (Administrators of Powerline GES Pty Ltd) v Powerline GES Pty Limited (Joint Admins Appointed) [2002] NSWSC 40; (2002) 40 ACSR 516
Deputy Commissioner of Taxation v Portinex Pty Ltd [2000] NSWSC 99; (2000) 34 ACSR 391; (2000) 156 FLR 453
Doran Constructions Pty Ltd (in liq) v Beresfield Aluminium Pty Ltd (2002) 54 NSWLR 416

Re Double V Marketing Pty Ltd (in admin) (1995) 16 ACSR 498
Flynn v The University of Sydney [1971] 1 NSWLR 857
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Hehir v Smith [2002] QSC 136
Ibeneweka v Egbuna [1964] 1 WLR 219
John v Rees [1970] 1 Ch 345
Lawson v Mitchell [1975] VR 579
Re LOCM Pty Ltd (1997) 15 ACLC 1576
McPherson v Mansell (1994) 16 ACSR 261
Re Macquarie Medical Holdings Pty Ltd [2003] NSWSC 277
Re Nardell Coal Corporation (In Liq) v Hunter Valley Coal Processing [2003] NSWSC 642
National Dwelling Society v Sykes [1894] 3 Ch 159
Re Old Papa's Holdings Ltd (under administration); ex parte Wallman (plaintiff) [2001] WASC 188; (2001) 24 WAR 229
Panasystems Pty Ltd v Voodoo Tech Pty Ltd [2003] FCA 428
Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 26 ALR 247
R v D'Oyly (1840) 12 Ad & El 139; 113 ER 763
Reynolds v Australian Stock Exchange Ltd [2003] NSWSC 33; (2003) 44 ACSR 612
Re Ricon Constructions Pty Ltd (in liq); ex parte McDonald (1997) 43 NSWLR 174; (1997) 26 ACSR 655
Rodriguez v Telstra Corp Ltd [2002] FCA 30
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438
Shirlaw v Graham [2001] NSWSC 612
Smith Paringa Mines Ltd (1906) 2 Ch 193
Re Supreme Imports Pty Ltd (In liquidation); Re DeVries [2001] NSWSC 1209
TNT Bulkships Ltd v Interstate Construction Pty Ltd (1985) 35 NTR 15
Re Vanfox Pty Ltd (1994) 13 ACSR 209
Re Vassal Pty Ltd (1983) 8 ACLR 683
Re Williams Bros Ltd (1928) 46 WN (NSW) 39
Wishart v Henneberry (1962) 3 FLR 171
Re Wood Parsons Pty Ltd (in liq) [2002] NSWSC 1058; (2002) 43 ACSR 257

PARTIES : John Vouris - Plaintiff

FILE NUMBER (S): SC 3177/03

COUNSEL: B Coles QC; K Eassie - Plaintiff
G McNally - ASIC
Ms N Wood, solicitor - Rickland P/L, Cryson P/L, Kosinar

SOLICITORS: Coudert Brothers - Plaintiff
M Burnett - ASIC

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
EQUITY LIST

CAMPBELL J

1 SEPTEMBER 2003

3177/03 JOHN VOURIS RE: EPROMOTIONS AUSTRALIA PTY LIMITED AND RELECTRONIC-REMECH PTY LIMITED (IN LIQUIDATION)

JUDGMENT

HIS HONOUR:

Nature of the Application

1 This application is brought by Mr Vouris, a registered liquidator, who was appointed as administrator of Epromotions Australia Pty Limited ("the Company"). He was a day late in sending to creditors notice of the second meeting of creditors. He seeks to have that breach cured.

2 As well, at the second meeting of creditors there was a resolution for the Company to execute a Deed of Company Arrangement. The proposal for such a Deed had only emerged with any specificity, so far as Mr Vouris was aware, after creditors were given notice of the meeting. ASIC contends that Mr Vouris should have taken steps aimed at having the meeting of creditors adjourned; Mr Vouris seeks declarations the broad thrust of which is that he had no such obligation. He also seeks to be excused for any liability he has for breaches or failures relating to the administration of the Company. He seeks these declarations in circumstances where ASIC has brought disciplinary proceedings against him concerning how he conducted the administration of the Company. A final declaration he seeks relates to the admissibility and relevance of certain evidence in those disciplinary proceedings.

Background to the Administration

3 The Company at all relevant times had only one director, Mr Ronald Shulkin. It had four shareholders – Meron Australia Pty Limited ("Meron") (a company associated with Mr

Shulkin) as to 42.5% of the shares which could receive a dividend, Rikland Pty Ltd ("Rikland") (a company associated with Ms Veronica Kosinar and Mr Fred Sarkis) as to 42.5% of the shares which could receive a dividend, Mr Craig Katz or a company connected with him, as to 10% of the shares which could receive a dividend, and Mr Sevag Chalabian or a company associated with him as to 5% of the shares which could receive a dividend. The shares which gave a say in management were held as to 50% by Meron, and as to the other 50% by Rikland.

4 The Company had acted as the promoter of an art union which was intended to raise money for a charity, the AIDS Trust of Australia. By the beginning of July 2000 it was clear that nothing like as much money as the Company had hoped had been raised by that art union. The Company had spent large sums of money, much of it in advertising the art union. Ms Kosinar, though not a director of the company, had carried out various activities, of a kind which a company executive carries out, on behalf of the Company.

5 In early July 2000 Mr Michael O'Neil, solicitor, of Nash O'Neill Tomko ("NOT"), received instructions from Ms Kosinar to advise her, Mr Sarkis, Rikland, and another company in which she and Mr Sarkis were associated called Cryson Pty Limited ("Cryson"), concerning the affairs of the Company. To enable a potential investor in the company to consider whether to make an investment, Mr O'Neill instructed Mr Murray Godfrey, an accountant employed by Vouris & Bell, accountants, to prepare management accounts for the Company. Those accounts were prepared, showing that the Company was quite clearly insolvent. By late July 2000 the potential investor had lost interest. Mr Godfrey recommended to Mr Shulkin and Ms Kosinar that an administrator should be appointed. At that time, a consent was prepared and signed by Mr Vouris, together with a Deed of Appointment which provided that Ms Kosinar would indemnify the administrator for his fees up to a limit of $10,000.

6 On 29 September 2000 Mr Shulkin appointed Mr Manfred Holzman as administrator of the Company, and also as administrator of Meron. The first meeting of creditors of the Company was called for 6 October 2000. On 4 October 2000 Mr O'Neill telephoned Mr Godfrey, told him about the first meeting of creditors of the Company being held on 6 October, and said that his client wanted to nominate Mr Vouris as administrator.

7 At the first meeting of creditors of the Company the creditors resolved to remove Mr Holzman as administrator, and to appoint Mr Vouris. This vote was one which passed by a very narrow majority, and following a poll. The resolution to remove Mr Holzman as administrator, and replace him with Mr Vouris, was one moved by Ms Kosinar and seconded by Mr O'Neill.

8 At that first meeting of creditors mention was made that the Company and Meron had sought funding, from a litigation funder, for the purpose of taking proceedings against Ms Kosinar, Mr Sarkis and Rikland arising out of an undated, and incompletely executed, Shareholders Agreement. That Shareholders Agreement contained a Clause 2.6.1, which on its face obliged Rikland to loan to the Company *"the amount determined from time to time by the Board for the proper management of the Company"*.

9 Mr Vouris was absent from his office on vacation on 19 and 20 October 2000 (a Thursday and Friday). At the time he left the office on 18 October 2000 his understanding was that

interests associated with Ms Kosinar intended proposing a Deed of Company Arrangement, and that information concerning the proposed proceedings to be brought by the Company and Meron against Ms Kosinar, Mr Sarkis and Rikland would be made available to him, together with confirmation from Litigation Lending Services that litigation lending in respect of those proceedings had been approved. He also understood that information concerning both those matters would be made available in time for the report and recommendation which section 439A of the ***Corporations Law*** required to be sent to creditors with a Notice of Meeting, and that that information would be available within the convening period.

10 The last day of the convening period was 19 October 2000 (why is explained in para [42] -[43] below). In fact, the Notice of Meeting and Recommendation was not posted to creditors until Friday, 20 October 2000. At the time those documents were sent out, detail concerning any proposed Deed of Company Arrangement had still not been received from Ms Kosinar, nor had information concerning the proposed proceedings which the Company and Meron might take, been received at Mr Vouris' office.

The Notice of Meeting and Report

11 The Notice of Meeting which was sent to creditors identified the time and place of the meeting of creditors, and said:

> "2. The purpose of the meeting is for creditors to resolve: ...
> (b) that the meeting of creditors be adjourned to Thursday 17 November 2000, or
> (c) that the Company execute a Deed of Company Arrangement; or
> (d) that the Administration should end; or
> (e) that the Company be wound up ..."

Other items on the agenda related to the administrator's remuneration, appointment of a committee of inspection, and authorising destruction of the company's books. As well, a form of proxy was enclosed. It offered two alternatives. One was to appoint a person as a proxy, with power to vote generally as he or she determined. The other was to appoint a proxy who was to vote in accordance with specific instructions. There was provision for the giving of those specific instructions, taking the form of the listing of each resolution on the Notice of Meeting, and, in relation to each resolution, directing whether the proxy was to vote in favour, or against, that resolution. There was also a Form 535 under the ***Corporations Law*** , which is the general form of Proof of Debt or Claim.

12 The Administrator's Report contained the following:

> "Although I am aware the shareholders have considered a proposal for a Deed of Company Arrangement ("DOCA") I am yet to receive one. Should a proposal be received it may be in the interests of creditors to adjourn the decision meeting until such time as a DOCA can be fully evaluated"

The Report set out the history of the failed art union, and referred to the Shareholders' Agreement, stating:

> "A term of the shareholders agreement was that Rikland Pty Ltd must provide loans to the Company for the amount determined from time to time by the Board for the proper management of the Company. ...
> In July 2000 Vouris & Bell were requested to prepare financial accounts for the Company as none had previously been prepared. These accounts recorded a loss of $532,356 as at 30 June 2000. In addition the Company nor the shareholders appeared to have the necessary resources to fund a further marketing campaign. As a result it was recommended that the director appoint an Administrator to the Company ...
> Creditors will be aware that the former Administrator advised that he had received a draft funding agreement from Litigation Funding. In order to obtain details of this funding I wrote to Mr Holzman, Mr Peter Alter of Morgan Lewis Alter, Mr Ronny Shulkin and Michelle Silvers of Litigation Funding. Mr Alter has verbally advised that funding has been approved in principle and has advised that details of same will be forwarded to me before the decision meeting of creditors.
> I have however written to Mrs Veronica Kosinar concerning the action and attach a copy of my letter dated 19 October 2000 and the reply from her solicitor dated 20 October 2000 as annexure "C". Clearly more investigation of this matter is required."

13 The section of the Report which gave a summary of the Company's financial position, showed unsecured creditors as $659,625 and assets available to them as *"Nil"*. It also recorded contingent assets as *"unknown"*. Concerning that entry, the Report stated:

> "The director, Mr Ronny Shulkin, has stated that the Company has a claim against Rikland Pty Ltd for breach of contract and opportunity loss. This matter is discussed in more detail in section 1 of this report."

14 Under the heading *"Investigation"* the Report gave some consideration to whether an action might lie against directors for insolvent trading. It included the following passage:

> "It appears that the Company was operated on the premise that the lottery would be a success and the commission from the sale of tickets would be available within the time period allowed by creditors for payment of their accounts. On this basis the only funding the Company would require is for office set up and administration costs.
> Given the very small success of the marketing campaign and the tight timeframe for the lottery, the director would have suspected

> in at least May 2000 that the lottery would fail. Continuing to trade after say 1 May 2000 may therefore give rise to an action against the director for trading whilst insolvent.
> In addition, Mr Shulkin has claimed that Mrs Veronica Kosinar acted as a director from about May 2000. An action against Mrs Kosinar as a deemed director may also be available to a liquidator or creditors should the Company go into liquidation."

15 Concerning the possibility of there being voidable transactions which could be recovered by a liquidator, the Report said:

> "I have reviewed payments in the previous six (6) months and am of the opinion that there exist possible preference payments. Due to the short period of trading of the Company and the uncertainty as to when the Company became insolvent, the amount of preference payments is uncertain.
> It is my intention, should I be appointed Liquidator, to investigate more closely the possibility of proving the Company's insolvency and then initiate recover proceedings to collect these monies."

16 Concerning the interests of creditors and dividend likelihood, the Report said:

> "As detailed above, I have not received a formal proposal for a Deed of Company Arrangement ("DOCA") from the directors. Consequently, as the Company is hopelessly insolvent, creditors should resolve that the Company be wound up.
> As the Company has no assets the only prospect for a return to creditors will arise from the proposed funding of actions against Rikland Pty Ltd and Mrs Kosinar. At this time I have no basis to predict the likely success of any such action or the possible outcome for creditors."

17 The Report concluded with the administrator's statement of opinions about the matters required by section 439A(4)(b) of the ***Corporations Law*** .

> "Section 439A(4) of the Corporations Law requires me to make available to creditors my opinion as to the following possible outcomes of the administration process:
> **i. Execution of a Deed of Company Arrangement.**
> As stated, a proposal for a DOCA has not been received. As such I am unable to recommend this option.
> **ii. Whether the Administration should end.**
> The Company is clearly insolvent and as such I am unable to recommend that the control and stewardship of the Company be returned to the directors.
> **iii. Whether the Company should be wound up**
> Due to the fact that the directors have not proposed a DOCA, I am of the opinion that the Company should be wound up at this time.

> As stated above, I am of the opinion that the creditors should resolve to wind up the Company. However, should a DOCA be proposed it may be in creditors interest to adjourn the decision meeting for a period in order to fully consider the proposal."

18 Annexed to the report was a letter which Mr Vouris wrote to Ms Kosinar on 19 October 2000. That letter stated his understanding of the basis for a claim against Rikland and her personally, as arising from Clause 2.6.1 of the Shareholders Agreement, a claim against her personally concerning representations she had made about providing support for the Company when it was applying to extend the closing date of the lottery from 29 May 2000 to 30 September 2000, and her action as a quasi director of the Company. Those bases of action had been outlined in a letter which Phillips Fox, former solicitors for the Company, had written to her on 21 June 2000. A copy of Phillips Fox's letter dated 21 June 2000 was sent to Ms Kosinar enclosed with the letter of 19 October 2000. Mr Vouris sought her response to the allegations. Also annexed to the Administrator's Report was a reply, dated 20 October 2000, from Ms Kosinar's solicitors NOT. That reply stated that Rikland had no assets, and in any event had no liability. While that letter was fairly vague about Ms Kosinar's defences, it made clear that she would vigorously defend any claim brought against her. It denied that she had ever been appointed a director, or acted in the position of a director, and said that Mr Shulkin (the sole director of the Company) was not accustomed to act in accordance with the wishes of Ms Kosinar.

Between the Administrator's Report and the Second Creditors' Meeting

19 On 19 October 2000 Mr O'Neill sent to Mr Alter, the solicitor for Mr Shulkin, a *"Without Prejudice"* letter saying that Ms Kosinar was thinking of proposing a Deed of Company Arrangement. In broad terms, it involved Ms Kosinar making available $30,000, to constitute a Deed Fund, which would be used first to pay the expenses of the administration and deed administration, then distributed among creditors. It provided for the claims of Rikland, Cryson and Ms Kosinar being deferred, claims of Mr Shulkin and Mr Katz and certain other of their associates being forever discharged, the Deed Fund being distributed amongst other creditors, and the Company then reverting to the ownership and control of Ms Kosinar. As well, the Company, Mr Shulkin and all his associated entities, and all other shareholders were to release Rikland, Ms Kosinar and their associates from claims under the Shareholders Agreement.

20 On either 20 or 23 October, Mr O'Neill heard from Mr Alter that Mr Shulkin would not agree to the Company reverting to Ms Kosinar's control, or to the release of rights under the Shareholders Agreement. Late in the evening of 23 October Mr O'Neill received instructions from Ms Kosinar to reformulate the proposal for a Deed. On 24 October NOT sent to Mr Vouris a proposal for a Deed of Company Arrangement which provided for Ms Kosinar to pay $30,000, but differed from the earlier proposal (which Mr Vouris had not seen) by providing for releases of claims under the Shareholders Agreement, or for insolvent trading, to be given only by the Company, the administrator, and all creditors.

21 Someone in Mr Vouris' office provided a list of creditors of the Company to Mr O'Neill. On 25 October 2000 Mr O'Neill sent a circular letter, by facsimile, to some but not all of the creditors. It stated that Ms Kosinar had proposed a Deed of Company Arrangement, and enclosed a copy of Mr O'Neill's letter to Mr Vouris making that proposal. It said that, if the

Deed proposal went ahead, creditors could receive about eight cents in the dollar, and receive it within six months. It urged the recipients to vote in favour of the Deed. It also referred to the intention of Ms Kosinar and Rikland to defend any action brought against them, said that such action would be likely to drag on for years, and that NOT's clients had taken *"the commercial view"* in relation to the litigation, and had decided to offer the amount which they would need to spend in defending the litigation as the Deed Fund.

22 On 25 October 2000 NOT wrote to Mr Vouris putting a new proposal for a Deed of Company Arrangement. The substantial difference from the immediately previous proposal was that the amount paid to constitute the Deed Fund was now $40,000.

23 On 23 October 2003 Morgan Lewis Alter wrote to Mr Vouris a letter consisting of four and one half pages of close typing, which presented in considerable detail what they said was the basis of the proposed actions against Rikland and Ms Kosinar. The causes of action were for breach of the Shareholders Agreement, misrepresentation under the ***Trade Practices Act 1974*** (Cth) or ***Fair Trading Act 1987*** , misrepresentation at common law, and possibly for breach of fiduciary duty. The letter asserted that the damages would include substantial consequential damages, for loss of the prospect of the Company becoming a successful marketer of art unions on the Internet.

24 On 19 October 2000 Ms Michelle Silvers, of Litigation Lending Management Pty Limited, wrote a letter to Mr Vouris which confirmed that counsel's advice had supported an offer for funding of proceedings against the potential defendants by both the Company, and Meron. A draft agreement for funding was enclosed. It related to funding in the sum of $150,000, and proceeded on the basis that Mr Holzman was the liquidator of Meron, and Mr Vouris was the liquidator of the Company. While the agreement was clear about the amounts which the funder would receive (ranging from 18% of the gross amount received by way of settlement, order or judgment in the proceedings, to 30% of that amount, depending upon whether the proceedings were concluded within four months of the date of the agreement, or after 12 months) it did not deal with how any remaining proceeds might be divided between Meron and the Company, or how any disputes or conflicts of interest between Meron and the Company concerning the running of the litigation might be resolved. Notwithstanding the date of the letter from Litigation Lending Services, it was not received at Mr Vouris' office until late in the afternoon of 23 October 2000.

The Second Creditors' Meeting

25 Nine creditors attended the meeting on 26 October 2000. Mr Shulkin and Ms Kosinar were amongst them. There were various proxies, some general, some specific. The minutes of the meeting record the following:

> "The Chairman advised that the decision meeting of creditors had several options available for creditors being:
> 1. To approve the proposal for a Deed of Company Arrangement;
> 2. To cease the administration and hand the Company back to its directors;
> 3. To appoint a Liquidator; or
> 4. Adjourn the meeting.

The Chairman suggested that the Company was hopelessly insolvent and it was therefore not appropriate that the Company be returned to its directors.
The Chairman advised that voting at the meeting would be by those creditors allowed to vote as per the Chairman's determination. Should any creditor object to the Chairman's determination on the ability of creditors to vote then they have 14 days within which to raise that objection with the Supreme Court of New South Wales.
The Chairman circulated a letter of advice dated 23 October 2000 received from Morgan Lewis Alter with respect to the background of a claim by the Company against its shareholders and Veronica Kossinar.
Murray Godfrey provided an outline of the action in accordance with the advice of Morgan Lewis Alter.
Mr Godfrey stated that the action related to:
1. Obligations on Rickland Pty Limited, a shareholder of Epromotions controlled by Veronica Kossinar and Fred Sarkis.
2. Action under the trade practices act relating to alleged misleading and deceptive conduct by Rickland Pty Limited and the directors of Rickland Pty Limited personally being, Veronica Kossinar and Fred Sarkis.
The benefit to creditors of these actions would be in obtaining orders that Veronica Kossinar, Fred Sarkis and Rickland Pty Limited:
1. Make good their obligation under the shareholders agreement.
2. Account to the shareholders for loss of future profits of the business.
The Chairman asked Mr Shulkin what was the financial position of Meron Pty Limited.
Ronnie Shulkin advised that Meron had a deficiency of approximately $20,000. In this regard Meron had no assets.
Mr Terry Trethowan of the Aids Trust advised after reading the Morgan Lewis Alter advice that he would express a different view to what was stated in the advice.
Mr Trethowan suggested that the arguments put in the advice would not stand up to cross examination. He was also concerned that he was unaware that Sevag Chalabian was a shareholder as well as being the solicitor for the Company. He was also concerned that Ernst & Young and Phillips Fox logos were represented on the initial website.
Ronnie Shulkin advised that he had documented evidence of every point raised in the Morgan Lewis Alter advice. He also advised that Ernst & Young's logo was on the test site and this was changed to Grant Thornton later.
The Chairman asked Mr Shulkin to clarify the position with Sevag Chalabian.

Ronnie Shulkin advised that pursuant to the agreement if approval was given for the lottery then Sevag would become a shareholder in respect of legal services provided.
Glen Horton of the Aids Trust expressed that further evidence would need to be obtained to substantiate the allegations in the Morgan Lewis Alter Advice.
Michael O'Neill asked the Chairman whether he had received a further letter from Nash O'Neill Tomko ("NOT") Lawyers.
The Chairman advised that he would be availing all available information on hand to creditors for their consideration. The Chairman distributed to the creditors copies of the letter from NOT Lawyers dated 25 October 2000. The Chairman also tabled for creditors inspection accounts prepared for Rickland Pty Limited as at 30 June 1999 which confirmed that it was a $2 Company.
Michael O'Neill advised that the only changes since the date of those accounts was to represent the loans made by shareholders to Rickland which were then onlent by Rickland to Epromotions. ...
The Chairman referred to the Report to Creditors and the fact that he was only appointed on 6 October 2000.
The Chairman advised that a full and thorough investigation had not been completed yet due to time constraints.
The Chairman circulated a proposed Deed of Company Arrangement and advised that his report recommended the meeting be adjourned, however it was up to creditors to decide on the proposed Deed of Company Arrangement, adjourn the meeting or to appoint a Liquidator. If creditors accept the proposed Deed of Company Arrangement then the Company must execute the Deed within 21 days.
The Chairman advised that if creditors do resolve to accept the Deed of Company Arrangement and the director does not execute the Deed then he will demand the director sign the Deed or remove the director from office.
Michael O'Neill explained the terms of the proposed Deed in that Rickland were to deposit to the Deed fund $40,000 from which it was expected $25,000 would be distributed to participating creditors.
In this regard Veronica Kossinar and associated interests would be excluded from the Deed of Company Arrangement as would Craig Katz.
Mr O'Neill estimated the dividend at approximately 8 cents in the dollar. Mr O'Neill advised that the amount of $40,000 had been estimated with reference to the estimated costs of defending an action that could be brought by a Liquidator. He confirmed however that the litigation is the subject of disputed facts as evidenced by the unsolicited comments of Terry Trethowan of the Aids Trust and his client believed they would prevail in any action.
The Chairman advised that the Deed sum needed to be increased, as fees were already in excess of $15,000.

The Chairman asked Mr Shulkin if he would sign a Deed if resolved by creditors, subject to his own legal advice.
Ronnie Shulkin advised that he would sign a Deed of Company Arrangement if accepted by creditors subject to his own legal advice.
The Chairman advised that he would follow with the wishes of creditors. In this regard if the creditors resolve to wind up the Company he would pursue the litigation funding and if this was withdrawn he would call a meeting of creditors to discuss creditor funding. In this regard if the litigation is successful then it is estimated that the return to creditors would be between 100 cents in the dollar and nothing.
Ronnie Shulkin confirmed that the shares in Epromotions were held 10% to Katz; 5% Sevag Chalabian; 42.5% Ronnie Shulkin and 42.5% Rickland.
Mr Shulkin made the comment that the shareholding of Rickland was out of proportion with the shareholding for Katz and Chalabian should it be determined that the only contribution to be made by Rickland was approximately $150,000 for office set up. He also stated that he disputed the letter from Michael O'Neill which disputed the facts.
Mr Shulkin advised that if creditors want a Deed of Company Arrangement then he would sign it as he was not simply here to make money. The purpose of the litigation funding is to get as much money back to creditors as possible.
Mr Shulkin advised that with respect to his personal position AMEX will probably bankrupt him. However he did advise that if Epromotions does not pursue the litigation then Meron would.
The Chairman confirmed that the Deed of Company Arrangement would not release personal guarantees given by the director to certain creditors.
Glen Rush of Inhouse asked why a litigation funder would advance money if it did not perceive the action to be a good case.
Terry Trethowan asked for clarification with respect to any release of Ronnie Shulkin on signing of a Deed of Company Arrangement.
The Chairman confirmed that litigation funders took on actions that they believed would be successful however it was always a gamble and they are by nature punters. He also advised that Mr Shulkin would not be released in relation to personal actions against him by creditors.
Mr Shulkin advised that he had informed the Department of Gaming and Racing of the action and that they were happy with the case.
Shane Murray requested clarification of the percentage commission that would be earnt by the litigation funder.
Murray Godfrey referred to the summary of the commission charges circulated to creditors. Commission increased with time.
Michael O'Neill also referred to the litigation funding and advised that in his opinion $150,000 would not be enough should it go to

appeal. It was his experience that should further funds be required the litigation funder would require an increased percentage of any successful action.
Ronnie Shulkin advised that it had taken him 2 months to convince the litigation funder to take on the action. The proposed funding was therefore not entered into lightly.
The Chairman confirmed that the litigation funder has a product similar to many other companies supporting Liquidator's with funding. Liquidators think its great and although he had never used this litigation funder he had no issue using them. In other liquidations he has used other funders and had been very successful in several actions.
Trevor Trethowan asked to confirm what amount of the proposed Deed fund would be paid to creditors.
The Chairman advised that with respect to his fees that he would be prepared to conduct the Deed of Company Arrangement for $10,000.
At 11.15am Veronica Kossinar, Michael O'Neill and Fred Sarkis left the room to consider the Deed proposal.
Paul Trevor asked about the likelihood of recovery of preferences.
The Chairman advised that he would need funding to chase any preferences and at this stage had not made a final determination with respect to same.
Ronnie Shulkin advised that up until June 2000 the Company was seeking bank funding and therefore in his opinion could not be deemed to be insolvent.
The Chairman stated that the opinion of a Liquidator would be different. In this regard the Company had no assets and incurred liabilities from startup. A determination of insolvency could therefore be made prior to June 2000.
Michael O'Neill, Veronica Kossinar and Fred Sarkis returned to the room.
Michael O'Neill advised that the proposed Deed would be increased by $5,000 to $45,000 in order to cover additional fees. The Deed would therefore provide $25,000 for creditors and $20,000 for fees.
Mr O'Neill said that he had not provided to pay Mr Holzman's fees as these had been paid by Mr Shulkin.
Ronnie Shulkin confirmed that he had made a payment to Mr Holzman with respect to fees on the Meron administration.
The Chairman read out the bill from Manfred Holzman with respect to the first week of the administration.
The Chairman advised that with respect to the monies payable under the Deed he would require personal guarantees for $45,000 from Veronica Kossinar and Frank Sarkis. This payment would have to be received within 6 months and NOT Lawyers should prepare the Deed of Company Arrangement at no cost to the Administrator. ...

The terms for the Deed of Company Arrangement were clarified as being per the letter dated 25 October 2000 with the following alterations.

1. The amount to be paid to be $45,000.
2. The amount to be paid within 6 months of execution of the Deed of Company Arrangement.
3. The administration fees to be increased from $15,000 to $20,000.
4. 5(d) to be deleted, new sub-paragraph 5(d) to read "in the event that Ronnie Shulkin after taking legal advice seeks to become a participating creditor then his claim shall be that of a participating creditor".
5. Delete the current clause 10. The new clause 10 to read "Veronica Kossinar and Fred Sarkis personally guarantee the payment of $45,000 referred to in paragraph 1".

The Chairman advised that if a creditor is not happy with any resolution at today's meeting then they can apply to court within 14 days to overturn the resolution. He also confirmed that it was up to Ronnie Shulkin whether to pursue a claim or not.

It was resolved that the Company execute a Deed of Company Arrangement.

Moved by Veronica Kossinar.

Seconded by Keith Mackenzie of BMC Media.

In Favour

Creditor	**Amount**	**Proxy**
	$	
Courier Newspapers	28,700.00	Specific
Australian Posters	39,000.00	Specific
Nash O'Neill Tomko	10,000.00	In Person
BMC Media	92,000.00	In Person
Mark Byrne Management	3,580.00	General
M & M Style Pty Limited	3,200.00	General
Grant Thornton Services	917.48	General
Majigo Pty Limited	675.20	Specific
Management & Media P/L	5,000.00	General
Kwikroll Pty Limited	593.00	General
Australian Chinese Publications	4,118.26	General
David Ratner	788.00	Specific
Cryson Pty Limited	2,400.00	General
Rickland Pty Limited	130,000.00	General

Aids Trust of Australia	18,843.78	In Person
TOTAL IN FAVOUR	**339,815.72**	**15**

Against

Creditor	**Amount**	**Proxy**
	$	
Ronnie Shulkin	40,000	In Person
Joy Melbourne Inc.	2,895.00	Specific
Inhouse Support Mgt	25,140.00	In Person
John Fairfax	56,746.00	General
The Age	16,000.00	General
TOTAL AGAINST	**140,781.00**	**5**

Not Voted general proxies in favour of the Chairman

Creditor	**Amount**	**Proxy**
	$	
The Connoisseurs Gallery	2,800.00	General
Datcom Computers	212.50	General
NLD Australia	40,860.00	General
TOTAL NOT VOTED	**43,872.50**	**3**

The Chairman asked if any creditor required a poll to be taken.
No poll was demanded.
The Chairman declared the motion carried on the voices.
It was resolved that the Deed Administrator's fees be approved on a time basis at the rates prescribed by Vouris & Bell for liquidation services up to $10,000.00."

Complaint about the Second Creditors' Meeting

26 On 30 October 2000 Morgan Lewis Alter wrote to Mr Vouris, setting out some of the history of the matter which I have referred to above. The letter also set out a file note of Mr Alter's telephone discussion with Mr Godfrey on 26 October 2000, as follows:

· “Discussed the Notice of Meeting issued by his office.

· Godfrey confirmed that the only issues on the agenda for the meeting were those referred to in paragraph 2a. to h.

· I refer to the Deed of Company Arrangement which, I understand, had already been proposed on 19 October 2000.

· Godfrey advises that the proposal had been “withdrawn”, as Shulkin had already rejected it.

· I specifically referred to, amongst other items, paragraph 9 of the Deed, which I noted would clearly be unacceptable to Shulkin.

· Godfrey advises that there may be a further Deed of Company Arrangement to be proposed.

· I advised that I have not seen any such further Deed – to which Godfrey makes no further comment (obviously, with the benefit of hindsight, Godfrey well knew of the Deed to be tabled, but refrained from commenting).

· We nevertheless discussed whether, if such a deed is presented at the meeting, the creditors would have enough time to consider?

· Godfrey agrees that if the Deed is proposed, creditors ought to have time to consider (still silent however, as to whether or not such a Deed had in fact been presented).

· Godfrey then enquires into the threatened action against Kosinar etc, noting that the Shareholders Agreement referred to the company, Rickland Pty Limited.

· I spend considerable time explaining that both by virtue of the terms of the contract entered into and/or under the Trade Practices Act , there may well be merit in proceeding against Kosinar personally.

· I mention also that this issue was specifically considered by Counsel, Mr Stephen Rushton, as well as the litigation funder, Michelle Silvers (who is herself, a solicitor ex Phillips Fox).

· I also mentioned to Godfrey that I would be happy to discuss the matter further with creditors and answer questions on the proposed cause of action, provided this was not done in the presence of Kosinar. Godfrey specifically agrees that it would be inappropriate to discuss a proposed claim in Kosinar’s presence, but queries if she can be excluded from any such meeting. Godfrey however, is once again silent as to **the fact** that a proposal had been received, thereby leading me to believe that I will be afforded an opportunity, **if and when necessary**, to address creditors.

· Godfrey states that the best way to proceed at this point, is to adjourn the meeting.

· I specifically state that as the only items before the meeting will be either the liquidation of the Company or an adjournment of the meeting, I would not therefore attend today’s meeting.

· Godfrey makes no further comment and the conversation ends."

> (It is fair to observe that this file note appears to not be an immediately contemporaneous one, as it records comments which Mr Alter made when he knew the outcome of the creditors' meeting, and had developed suspicions about Mr Vouris' conduct.)

27 The letter went on to make charges that the introduction and acceptance of the Deed of Company Arrangement at the second creditors' meeting was, in the circumstances, a breach of the ***Corporations Law*** and a violation of the duties which Mr Vouris owed to the creditors and members of the Company. It also charged that Mr Vouris was biased in favour of Ms Kosinar. A copy of that letter was sent to ASIC.

28 By another letter of 11½ closely typed pages dated 31 October 2000, Morgan Lewis Alter urged Mr Vouris to resign as administrator, and threatened to take court proceedings to remove him if he did not resign as administrator by 5.00pm on the next day. That deadline was later extended to 5.00pm 3 November 2000. On 3 November 2000 Mr Vouris' solicitor wrote to Morgan Lewis Alter, denying the various allegations which had been made against him, and saying he would proceed with the administration of the Company. On 16 November 2000 a Deed of Company Arrangement, of the type approved by the creditors at the second creditors' meeting, was entered into. Ms Kosinar has paid the money she was required to pay under that Deed, and it has been distributed in accordance with the Deed.

The Disciplinary Proceedings

29 ASIC has brought disciplinary proceedings against Mr Vouris in the Companies Auditors and Liquidators Disciplinary Board ("CALDB"), concerning his handling of the administration of the Company.

30 Section 1279 ***Corporations Law*** permitted a natural person to make application to ASIC for registration as a liquidator. Section 1282 set out the circumstances in which ASIC must grant such an application, and the circumstances in which ASIC must refuse such an application. Section 448B ***Corporations Law*** had the effect that only a registered liquidator can consent to be appointed, or to act, as administrator of a company or of a deed of company arrangement. Mr Vouris has at all material times been a registered liquidator.

31 Section 203 of the *Australian Securities and Investments Commission Act 2001* (Cth) establishes a Companies Auditors and Liquidators Disciplinary Board, consisting of a Chairperson (who must, broadly, be a lawyer of at least five years standing), one person selected by the Minister from a list of five nominated by the Institute of Chartered Accountants, and another person selected by the Minister from a list of five nominated by the Australian Society of Certified Practicing Accountants.

32 Section 1292(2) of the *Corporations Act 2001* (Cth) says:

> "(2) The Board may, if it is satisfied on an application by ASIC for a person who is registered as a liquidator to be dealt with under this section that, before at or after the commencement of this section:
> ...

(d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly: ...

(ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;

or is otherwise not a fit and proper person to remain registered as a liquidator;

by order, cancel, or suspend for a specified period, the registration of the person as a liquidator.

(9) Where, on an application by ASIC ... for a person who is registered ... as a liquidator ... to be dealt with under this section, the Board is satisfied that the person has failed to carry out or perform adequately or properly any of the duties or functions mentioned in paragraph ... (2)(d) ... or is otherwise not a fit and proper person to remain registered as [a] ... liquidator ... the Board may deal with the person in one or more of the following ways:

(a) by admonishing or reprimanding the person;

(b) by requiring the person to give an undertaking to engage in, or to refrain from engaging in, specified conduct;

(c) by requiring the person to give an undertaking to refrain from engaging in specified conduct except on specified conditions;

and, if a person fails to give an undertaking when required to do so under paragraph (b) or (c), or contravenes an undertaking given pursuant to a requirement under that paragraph, the Board may, by order, cancel, or suspend for a specified period, the registration of the person ... as a liquidator ... .

(11) The Board may exercise any of its powers under this Division in relation to a person as a result of conduct engaged in by the person whether or not that conduct constitutes or might have constituted an offence, and whether or not any proceedings have been brought or are to be brought in relation to that conduct.

(12) This section has effect subject to section 1294.

Section 1294 says:

(1) The Board must not:

(a) cancel or suspend the registration of a person as an auditor, as a liquidator or as a liquidator of a specified body corporate; or

(b) deal with a person in any of the ways mentioned in subsection 1292(9);

unless the Board has given the person an opportunity to appear at a hearing held by the Board and to make submissions to, and adduce evidence before, the Board in relation to the matter.

(2) Where subsection (1) requires the Board to give a person an opportunity to appear at a hearing and to make submissions to,

> and bring evidence before, the Board in relation to a matter, the Board must give ASIC and APRA an opportunity to appear at the hearing and to make submissions to, and bring evidence before, the Board in relation to the matter."

33 Additional provisions governing the conduct of hearings by CALDB are found in section 215 to 223 inclusive of the *ASIC Act* . Section 218(1) provides:

> "At a hearing:
> (a) the proceedings must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before the Disciplinary Board permit; and
> (b) the Disciplinary Board is not bound by the rules of evidence; and
> (c) the Disciplinary Board may, on such conditions as it thinks fit, permit a person to intervene in the proceedings."

> However, there are some aspects in which a hearing before CALDB is a formal one - there is power in Board members to summon a person to give evidence or produce documents (section 217(1)), to take evidence on oath or affirmation (section 217(2)) and to make orders for costs (section 223). Any person appearing before the Board may be represented by a barrister or solicitor (section 218(3)(e), as well as by certain other people connected with that person (section 218(3)(a)-(d)). It is a criminal offence to fail to attend the Board when summoned, to refuse to take an oath or make an affirmation, or to fail to answer a question when required to do so by the Chairperson, or to refuse or fail to produce a document required to be produced (section 219), and there is a criminal offence of contempt of the Board (section 220).

34 A decision of CALDB can be reviewed by the Administrative Appeals Tribunal: section 1317B *Corporations Act 2001* (Cth) . As well, a decision of CALDB about whether to impose any penalty on Mr Vouris, and if so of what kind, would be a decision of an administrative character, made under an enactment of the Commonwealth, and not a decision within any of the classes set out in Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) . Thus, any decision of CALDB would be open to judicial review on any of the grounds laid down in section 5(1) *Administrative Decisions (Judicial Review) Act 1977* (Cth) . Those grounds include that the decision involved an error of law.

35 On 20 December 2002 ASIC applied to CALDB pursuant to paragraph 1292(2)(d)(ii) of the *Corporations Act 2001* (Cth) to have Mr Vouris dealt with under section 1292 of the Act . While the conduct about which ASIC makes complaint occurred prior to the coming into effect of the *ASIC Act* 2001, that Act has extensive transitional provisions designed to effect a smooth transition from the regime of company administration which existed before it was enacted (section 253 to 285 inclusive). It is not submitted that the application is not within the jurisdiction of CALDB (cf *Reynolds v Australian Stock Exchange Ltd* [2003] NSWSC 33; (2003) 44 ACSR 612).

The Charge

36 The allegations which ASIC makes against Mr Vouris in the disciplinary proceedings are set out in a Statement of Facts and Contentions ("SOFAC"). The SOFAC has undergone various amendments, and in the course of the hearing before me it became apparent that further amendments are proposed. The latest manifestation of the SOFAC, dated 24 June 2003, makes the following allegation so far as Mr Vouris' activities as administrator of the Company are concerned:

> "ASIC contends that Mr Vouris failed within the meaning of section 1292(2)(d)(ii) of the Law, to carry out or perform adequately and properly the duties or functions required by an Australian law to be carried out or performed by a registered liquidator in relation to the administration of Epromotions in that he:
> (1) failed pursuant to regulation 5.6.18 of the Corporations Regulations, to seek the consent of the meeting to adjourn the meeting in circumstances that warranted him seeking the consent of the meeting to so adjourn the meeting;
> (2) acted and continued to act as Administrator when the administration of the company had ended;
> (3) (i) failed to adequately and properly investigate and report to creditors on an allegation that Ms Kosinar was a "shadow" director and the possibility of her being liable under section 588G(3) of the Law for insolvent trading in the event that Epromotions proceeds to liquidation;
>
> (ii) and further and in the alternative, failed to exercise due care and diligence as required by section 232(4) of the Law by his failure to so adequately and properly investigate and report;
>
> (4) (i) failed to adequately and properly reflect in his files that s439A (3)(b) of the Law requiring publication of the Notice to Creditors had been complied with;
>
> (ii) and further and in the alternative, failed to exercise due care and diligence as required by section 232(4) of the Law by his failure to adequately and properly reflect in his files that he so complied;
>
> (5) did not disclose the fact that his appointment as Administrator was the result of an approach by Ms Kosinar and that his appointment was on the basis that his costs would be indemnified to a limit of $10,000 by her;
> (6) (i) failed to adequately and properly reflect in his files that he complied with the requirements of regulation 5.6.13;
>
> (ii) and further and in the alternative, failed to exercise due care and diligence as required by section 232(4) of the Law by his failure to adequately and properly reflect in his files that he so complied;
>
> (7) (i) failed to inform the creditors' meeting held on 26 October 2000 of possible rights of set off in respect of the claim of Rikland Pty Limited (Rikland) as a creditor for $130,000;

(ii) failed to consider the requirements of regulation 5.6.26 of the Corporations Regulations in the adjudication of the proof of debt of Rikland.
(iii) and further and in the alternative he failed to exercise due care and diligence as required by section 232(4) of the Law in so failing to inform the creditors' meeting and considering the requirements of regulation 5.6.26; and

(8) (i) acted in a manner which favour the interests of Mrs Kosinar and/or compromised his professional independence in breach of APS 7 Statement of Insolvency Standards;

(ii) and further and in the alternative he failed to exercise due care and diligence as required by section 232(4) of the Law by so acting."

37 In 2000, the definition, in section 9 of the ***Corporations Law*** , of *"Officer"* of a corporation, included an administrator of the corporation. Before amendments made by the 1999 amendments to the ***Corporations Law*** came into effect, section 232(4) ***Corporations Law*** provi ded:

> "In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances."

It was that provision to which reference was intended to be made in paragraphs 3(ii), 4(ii), 6(ii), 7(iii) and 8(ii) of the charge. It has now become common ground that that section 232 was replaced by the 1999 legislation, which came into effect on 13 March 2000. It has likewise become common ground that the topic previously dealt with by section 232(4) was, after 13 March 2000, dealt with by a new section 180. All the conduct of Mr Vouris that the charge refers to occurred after 13 March 2000. ASIC proposes to amend the SOFAC to replace the references to section 232(4) of the Law by a reference to section 180 of the Law.

38 Of the eight different respects in which ASIC alleges Mr Vouris breached section 1292(2)(d)(ii) of the Law, it is the first which is of particular importance in this litigation. Concerning that first respect, the SOFAC identifies what are said to be the *"circumstances that warranted him seeking the consent of the meeting to so adjourn the meeting"*, and gives particulars of each of those circumstances. The SOFAC identifies the circumstances as being,

> "that Mr Vouris had:
> (i) breached s439A(1) of the Law in relation to the convening period for the creditors' meeting held on 26 October 2000;
> (ii) been informed on 24 October 2000 of the details of Ms Kosinar's proposed DCA;

(iii) in the absence of taking the opportunity to adjourn the meeting, Mr Vouris was unable to circularise Epromotions' 45 creditors with a further Report to Creditors;
(iv) in the absence of taking the opportunity to adjourn the meeting, Mr Vouris was unable to issue a statement in compliance with the requirements of section 439A(4)(b)(i), (ii) and (iii) of the Law;
(v) in the absence of taking the opportunity to adjourn the meeting, Mr Vouris was unable to provide a statement setting out details of the proposed deed as required by section 439A(4)(c) of the Law;
(vi) as a result of the matters referred to in paragraph (iii), (iv) and (v) above, creditors were not sufficiently informed to enable them to make an informed decision as to how to vote;
(vii) made a suggestion in the creditors' report that it may be in the creditors' best interests to adjourn the meeting should a DCA proposal be received;
(viii) denied creditors the opportunity to adjourn the meeting by putting forward the motion in support of a DCA (which was carried) prior to allowing them to consider a motion to adjourn the meeting; and
(ix) denied certain creditors the opportunity of knowing a DCA was to be discussed and therefore disenfranchised them."

These Proceedings

39 The Originating Process in these proceedings was filed on 5 June 2003. At that time, the hearing before CALDB was set down for 28, 29 and 30 July 2003. That hearing date has since been vacated.

40 The orders and declarations which Mr Vouris seeks and which are now matters of live contention, are contained in an Amended Originating Process. They are as follows:

"1. AN ORDER pursuant to S. 1322 of the Corporations Act 2001 ("The Act") declaring that the meeting of creditors of Epromotions Australia Pty Ltd ("the Company") held on 26th October 2000 ("the Meeting"), was not invalid by reason of any defect in the giving of notice in respect of it;
2. AN ORDER that Part 5.3A of the Act is to operate, and has at all relevant times operated, in relation to the Company as though the Meeting was not invalid by reason of any such defect; ...
4. A DECLARATION that:
(a) unless directed to do so by the creditors at the Meeting, the Plaintiff was not entitled, by force of the operation of S.439B(2) or S.442A(d) of the Law, to adjourn the Meeting, alternatively
(b) there were no circumstances warranting such adjournment; alternatively

(c) there were no circumstances warranting the Plaintiff seeking the consent of the creditors to adjourn the Meeting.
(d) in performing his duties or functions while presiding at meetings of creditors convened pursuant to Part 5.3A of the Act the administrator is not obliged to seek pursuant to Regulation 5.6.18, the consent of the meeting to adjourn that meeting or was not in the circumstances of the present case so obliged.
(e) in any determination under Section 1292 of the Act as to whether a registered liquidator has adequately and properly carried out his duties and functions, the Companies Auditors Liquidators Disciplinary Board is required by law to consider, and give full force and effect to, issues raised by a registered liquidator under Section 180(2) as a defence to any allegation by ASIC of breach of Section 180(1) of the Act .

5. A DECLARATION that the Plaintiff was not in breach of S.439A (4) of the Law by not expressing an opinion about the matters set forth in that section in relation to the proposed deed of company arrangement presented at the Meeting.
6. A DECLARATION that the Plaintiff was justified in proceeding with the Meeting, and in executing the Deed of Company Arrangement dated 16th November 2000; ...
7. A DECLARATION pursuant to s. 1318 of the Act that the plaintiff acted honestly, and ought fairly to be excused, for any breaches, failures or omissions, relating to the administration of the Company, referred to in paragraphs (1) to (6) inclusive.
10. A DECLARATION that **EXHIBIT NH3** in these proceedings, is not admissible as evidence, or is otherwise relevant to prove, the existence of any alleged duty of the Plaintiff, to adjourn the creditors' meeting of 26 October 2000 or to seek their consent to any such adjournment, and is not otherwise capable of establishing any contravention of any such duty."

Of these orders, 4(d) and (e), and 10, were not included in the Originating Process.

41 Paragraph 3 of the Originating Process sought a declaration *"that the plaintiff was not in breach of Regulation 5.6.13 by failing to prepare a Notice in, or substantially in, the form of Form 530 in relation to the convening of the Meeting."* Regulation 5.6.13 provided, at the relevant time:

"A statement in writing in accordance with Form 530 by:
(a) the person convening the meeting; or
(b) a person acting on his or her behalf;
that notice of the meeting was sent by prepaid post is, in the absence of evidence to the contrary, sufficient proof of the notice having been sent to a person at the address specified for that person in that notice."

It was the reference to Regulation 5.6.13, in the sixth of the respects in which Mr Vouris was contended to have breached section 1292(2)(d)(ii) of the Law, which led to the inclusion of that prayer for relief in the Originating Process. It is now common ground that Regulation 5.6.13 is a provision which merely facilitates proof, and does not impose any obligation. Hence, that declaration is no longer sought.

The Obligation to Convene the Second Creditors' Meeting

42 Section 439A of the ***Corporations Law*** provided:

> "(1) The administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by subsection (5) or extended under subsection (6).
> (2) The meeting must be held within 5 business days after the end of the convening period.
> (5) The convening period is:
> (a) if the administration begins on a day that is in December, or is less than 28 days before Good Friday – the period of 28 days beginning on that day; or
> (b) otherwise – the period of 21 days beginning on the day when the administration begins.
> (6) the Court may extend the convening period on an application made within the period referred to in paragraph (5)(a) or (b), as the case requires."

43 Pursuant to section 435C(1) the administration of a company begins when an administrator is appointed. In the present case, the administration began when Mr Holzman was appointed administrator on 29 September 2000. The period of 21 days beginning on 29 September 2000 ends on 19 October 2000. Thus, pursuant to section 439A (5)(b), the convening period ended on 19 October 2000.

44 What counts as convening the meeting is defined by section 439A(3):

> "The administrator must convene the meeting by:
> (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
> (b) causing notice of the meeting to be published:
> (i) in a national newspaper; or
> (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;
> at least 5 business days before the meeting."

45 Part 5.6.12 of the ***Corporations Regulations*** , as in effect in October 2000 provided:

(1) The convenor of a meeting must give notice in writing of the meeting to every person appearing on the company's books or otherwise to be:

(a) in the case of a [meeting of members, creditors or contributory of a company] – a member, creditor or contributory of the company ...

(1A) The notice must be given to a person

(a) by delivering it personally; or

(b) by sending it to the person by prepaid post; or

(c) if the person has a facsimile transmission number to which notices may be sent to the person — by faxing it to the person at that number; or

(d) if the person has a document exchange number to which notices may be sent to the person — by lodging it with the exchange at, or for delivery to, the person's receiving facilities identified by that number. ...

(2) The notice referred to in sub-regulation (1) must be: ...

(b) in any other case – in accordance with Form 529. ...

(4) A notice to a creditor must be sent by the person convening the meeting:

(a) to the address given by the creditor in his or her proof of debt or claim; or

(b) if the creditor has not lodged a proof, to the address given in the report on the affairs of the company; or

(c) to any other address known to the person.

(5) A notice of a meeting must be sent by the convenor of the meeting:

(a) to the address given in the company's books as the address of that person; or

(b) to any other address known to the person convening the meeting."

Following paragraph cited by:

Viscariello v Macks (09 December 2014) (Judgment of the Honourable Chief Justice Kourakis)

61. A s 439A report can only be sent when the second meeting of creditors is convened. [24] Notice may be given by prepaid post or fax. [25] The notice is given when it is put in the post. [26] In the ordinary course a voluntary administration will result either in the execution of a DOCA or in a resolution by the creditors that the administration should end or, alternatively, that the company be wound up. [27]

via

[26] *Re Vouras* (2003) 47 ACSR 155 at [46].

46 There is no provision in any of these regulations, of a kind commonly found in statutes or contractual provisions designed to facilitate service, which deems service to have been effected a certain number of days after the document has been put in the post, or at the time the document would be received in the ordinary course of post. That omission is no oversight – such a provision, while often appropriate in a situation where there is a single person, or fixed group of people required to be served, would not be appropriate under section 439A. The correct construction of section 439A(3)(a) and Regulation 5.6.12(1A)(b) is that written notice of the meeting is given at the time it is put in the post, for the purpose of sending it to the person by prepaid post. When section 439A sets out a strictly limited set of times, any construction which required the time of convening of the meeting to depend upon when some individual creditor received notice, or the last of the creditors had received notice, would make it very difficult to administer. Further, section 439A(3)(a) requires written notice to be given only to *"as many of the company's creditors as reasonably practicable",* and an administrator is often someone who has had no connection with the company before being appointed, and so does not necessarily have experience of communicating with the particular creditors that the company has – it is a more achievable task for the administrator to decide concerning which of the company's creditors it is reasonably practicable to put a notice into the post, than to decide concerning which of the company's creditors it is reasonably practicable to actually have a notice put into the post reach them. This construction of Regulation 5.6.12(1A)(b) is also consistent with the words of Regulation 5.6.12(1A)(c) and (d), each of which proceeds on the basis that a notice has been given when the administrator has done what lies in his power to achieve, to communicate with the creditor by fax, or through the document exchange.

47 Hence, the second meeting of creditors' in the present case was convened on 20 October 2000, when the notices were put into the post. And hence the convening was one day late.

Orders 1 and 2 in the Amended Originating Process – Curing the Late Convening of the Meeting

Section 1322 as a Basis for a Curing Order

Following paragraph cited by:

Re Chinese Cultural Club Ltd (24 May 2004) (Campbell J)

> 15 For the reasons which I gave in ***Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq)*** [2003] NSWSC 702; (2003) 47 ACSR 155 at [48] section 1322 ***Corporations Act*** can be used to validate irregularities in the administration of a corporation which occurred at a time when the activities of that corporation were governed by the ***Corporations Law*** . The manner of operation of section 1322 is explained in ***Re Vouris*** at [50]–[56]; I will not set out again the authorities there collected.

48 The Amended Originating Process in this case sought an order under section 1322 ***Corporations Act 2001*** . Though that section repeatedly makes reference to *"this Act"*, section 1405 ***Co***

rporations Act 2001 extends the reference to *"this Act"* to include a reference to the ***Corporations Law*** . Thus, even though the event concerning which the applicant seeks a validating order occurred at a time when it was the ***Corporations Law*** which was in force, it is possible to make an order under section 1322 *Corporations Act 2001* in relation to that event. There was no argument before me which disputed the correctness of looking to section 1322 *Corporations Act 2001* , rather than section 1322 ***Corporations Law*** , for the source of power of the Court to validate irregularities. I shall act in accordance with the position both parties adopted, and treat section 1322 *Corporations Act 2001* as the relevant source of power to validate any irregularities which occurred in October 2000.

49 Section 1322 *Corporations Act 2001* provides:

> (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; and
>
> (b) a reference to a procedural irregularity includes a reference to :
>
> (i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and
>
> (ii) a defect, irregularity or deficiency of notice or time.
>
> (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid. ...
>
> (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 shall 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;
(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."

50 In *Re Caysand No 64 Pty Ltd* (1993) 12 ACSR 291 Thomas J explained the operation of section 1322 of the ***Corporations Law*** (which was in terms not materially different to section 1322 of the *Corporations Act*), at 296-297:

"It seems to me that s. 1322 has two streams, the first essentially under subs (1), (2) and (3), and the second essentially under subs (4), (5) and (6). They are not entirely separate, but they envisage two different types of application. The first three subsections postulate the prima facie validity of any "proceeding under this Law" despite procedural irregularity. Any such proceeding "is not invalidated unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court" (s.1322(2)). The following three sections (subs (4), (5) and (6)) provide a wider base for remedial action, in that they give the Court power to cure "any act, matter or thing purporting to have been done ... under this Law or in relation to a corporation" (s.1322(4)(a)). ...
The essential distinction is that subs (1), (2) and (3) primarily contemplate a declaration of invalidity by the Court, for which the onus lies upon the party attacking the validity of a proceeding to satisfy the court of substantial injustice that cannot be remedied by the court: ***Broadway Motors Holdings Pty Ltd (in liq)*** (1986) 6

> NSWLR 45 at 57 ; ***Re Pembury Pty Ltd*** (1991) 9 ACLC 937 at 939 – 40 ; ***Mamouney v Soliman*** (1992) 10 ACLR 1674 at 1681 . In short, s. 1322(2) gives an initial presumption of validity to any "proceeding under this Law", and that is only displaced by an actual declaration of invalidity.
> On the other hand applications under subs (4), (5) and (6) give a wider coverage of matters that may be remedied, but, where a declaration of non-invalidity is sought, (which in practical terms I am prepared to regard as a declaration of validity), the onus is on those who seek such an order to satisfy the court of the matters mentioned in subs (6), as the court is expressly required not to make an order unless satisfied of those matters: ***Elderslie Finance Corp Ltd v ASC*** (1993) 11 ACLR 787 at 790 ."

51 In ***Re Vanfox Pty Ltd*** (1994) 13 ACSR 209, at 216 Thomas J dealt with an application to validate, under section 1322 , various deficiencies in an administrator's calling of a first meeting of creditors. His Honour said, at 216:

> "The considerable difference between applications under s 1322(2) a nd s 1322(4) has previously been noted (re ***Caysand No 64 Pty Ltd*** (19 93) 12 ACSR 291; 11 ACLC 1197, 1201-1202). The older authorities that draw a distinction between imperative and permissive language and which formulated tests of substantial compliance may continue to be of assistance in considering applications for directions of validity under subs 2. In the present case, the fact that Mr Irving on a number of occasions failed to do things that the Corporations Law said he "must" do, would make it difficult to uphold the consequences of his actions as valid. That is to say an application under s 1322(2) would almost certainly fail. However a declaration under subs 4 permits effect to be given to acts and proceedings notwithstanding their prima facie legal invalidity. For those who do not regularly practise in the courts it may be difficult to grasp the notion that an invalid act should in some circumstances be treated as if it were valid (or not invalid), but it is an essential power long exercised by the courts to prevent senseless results, mindless inefficiency, and in a word injustice. Plainly there has been a conscientious attempt to paraphrase the basis of its exercise in s 1322 ."

52 Consistently with that decision, Mr Vouris invokes section 1322(4) as a source of power which can validate the late calling of the creditors' meeting.

53 Mr Vouris is clearly a person who counts as *"any interested person"*, and therefore has the standing to make an application under section 1322(4) . His interest arises from his having occupied the position of administrator, and also from his conduct in that position now being the subject of question.

54 I now turn to whether the requirements of section 1322(6) , for the making of an order under section 1322(4) are met.

55 In *Re Vanfox Pty Ltd* (1994) 13 ACSR 209 at 216-127 Thomas J said:

> "A wide view of matters capable of being viewed as irregularities in procedure has been taken in *Australian Hydrocarbons NL v Green* (19 85) 10 ACLR 72; 3 ACLC 779; *Re Broadway Motors Holdings Pty Ltd (in liq)* (1986) 11 ACLR 495; 4 ACLC 598; *Re Testro Brothers Consolidated; Ex parte Attorney-General* [1969] VR 199; *Bell Resources v Turnbridge Pty Ltd (No 2)* (1988) 13 ACLR 762; 6 ACLC 970,972; *Mamo uney v Solimon* (1992) 9 ACLR 63; 10 ACLC 1674 In the *Broadway Motors* case, a total failure to give notice of a general meeting to a shareholder was regarded as an irregularity in procedure and to be curable under the predecessor of this section (namely s 539 of the Companies Code). The present situation is quite unlike that in *Re Compaction Systems Pty Ltd* (1976) 2 NSWLR 477; 2 ACLR 135, where the court was unable to find that any meeting had occurred or that any resolution had been carried where it was decided that the relevant appointment should be applied for. In those circumstances there was no "proceeding" to attract the discretion of the court. Similarly the enforcement of a charge within the first six months of its creation without leave of the court under s 267 was held by Ryan J in *Re The Twenty-First Century Sign Company Pty Ltd* (1993) 9 ACSR 77; 11 ACLC 161 to be more than an act of an essentially procedural nature. That however is distinguishable from the activity in focus in the present matter, which is mainly concerned with steps in the calling and advertising of meetings of creditors. The weight of authority regards steps of this kind as essentially of a procedural nature (cf *Broadway Motors Holdings* and the other cases cited with it above; and Re John Plunkett Consolidated (No 2) (1977) 3 ACLR 285 ; CLC 40-406, which involved the calling of a meeting of creditors under the Companies Act (1961) s 260, a forerunner of the present s 497).
> In my view the substantial requirements for the creation of a deed of company arrangement have been satisfied in the present case notwithstanding that a number of defective steps were taken along the way. The steps in question are principally the giving of notices within a prescribed time, the extent of their publication, and whether an ambiguity may have misled creditors or caused them not to attend. These may all be characterised as matters essentially of a procedural nature."

Following paragraph cited by:

Transtaff Pty Limited ACN 094 353 090 (22 February 2005) (Einstein J)

> 3 It is to be noted that in *Re Vouris; Epromotions Australia Pty Limited v Relectronic – Remech Pty Limited (in liq)* (2003) 47ACSR 155 Campbell J set out the scheme of the relevant legislation and importantly at paragraph 56, p 177 followed *Ricon Constructions Pty Limited*.

56 In *Re Ricon Constructions Pty Ltd (In liq)* (1997) 26 ACSR 655, at 661 (a case where, like the present one, an administrator was one day late in convening the second meeting of creditors) Santow J said, at 661 :

> "... the failure to convene a meeting and to hold a meeting as prescribed by section 439A is of a "procedural nature" (see for example, *Re Vanfox Pty Ltd* , supra, at 362 and *Re Broadway Motors Holdings Pty Ltd (in liq)* (1986) 6 NSWLR 45; 11 ACLR 495; 4 ACLC 598."

I agree with, and follow, that statement.

57 The lateness in sending out the notice of meeting was partly the product of Mr Vouris' absence from the office, and partly the product of hoped for information, relevant to the administrator's report, not arriving. Mr Vouris has given evidence, on which he was not cross-examined, that upon discovering, on 23 October 2000, that the notice had not been sent to creditors in time, he decided to go ahead with the meeting which was to take place on 26 October 2000 in the belief that:

> "(a) it was in the best interests of creditors for the meeting to be held;
> (b) the time had expired for an immediate application to extend the convening period and it was therefore no longer possible to make such an application;
> (c) an application could be made in the Court for such other orders as may be necessary to "validate" the meeting and either a winding up or a deed of company arrangement as the case may be. In addition it was my view at the time that if such an application became necessary it would involve a procedural matter and would be most likely to succeed;
> (d) such an application could be made before or after the meeting was held;
> (e) there was authority for the proposition that failing to convene a meeting within the convening period could be cured as a procedural irregularity;
> (f) my general obligation as administrator was to proceed as speedily as I could with the administration and I could see no prejudice to any party should the meeting be held; and
> (g) I had a general power as administrator to do whatever was necessary to execute and carry out my duties and functions as administrator if, when the meeting was held, a problem arose or if I though it was otherwise necessary to do so as a result of any development at the meeting. In addition I had a casting vote which I could exercise if no result was reached at the meeting as between the creditors."

58 Mr Godfrey, the person to whom Mr Vouris had delegated the task of finalising and sending out the notice and report, gave evidence, on which he was not cross-examined, that he had drafted a report to creditors on the basis that a proposal for a Deed of Company Arrangement would be forthcoming on 19 October 2000, which would involve the payment of a lump sum to a deed administrator. He had drafted that report in the expectation that such a proposal would be received, but it was not received. As well, he was expecting information concerning the litigation lending proposal. He says that, despite assurances to the contrary, neither class of information was provided until it became too late in the afternoon of 19 October 2000 to amend the report and have it posted.

59 In all these circumstances, I am satisfied that each of the persons who were concerned in or party to the contravention, acted honestly. As each of subparagraphs (i), (ii), and (iii) of section 1322(6)(a) is an alternative basis for the making of an order, it is not necessary for me to consider whether it is in the public interest that the order be made.

60 It is, however, necessary to be satisfied, pursuant to section 1322(6)(c) that no substantial injustice has been, or is likely to be caused to any person. I am so satisfied. There was nothing critical in the timing, which made one day's lateness in the date on which the creditors received the notice of particular importance. The meeting was still held within five business days after the end of the convening period, as required by section 439A(2). A total of 23 creditors, owed debts totalling $524,469.22, were represented at the creditors' meeting, either personally or by proxy. Out of total creditors of $659,625, this is 79.5% by value – a high proportion.

61 No creditor complained at the meeting of any inadequacy in notice. (While complaint has been made about Mr Vouris' conduct at the meeting, this complaint does not relate to lateness of notice.) Mr Vouris' files relating to this administration have been handed over to ASIC, and ASIC does not tender any evidence of a complaint about shortness of notice made other than at the meeting, or by anyone who was not at the meeting. No application has been made to the Court to set aside the Deed of Company Arrangement resolved upon at the meeting, whether on the ground of shortness of notice of the meeting, or any other ground.

62 As well, efforts have been made to notify creditors of this application. The Company had a total of 54 creditors. One of these, Fuss Promotions, has an unknown address. It is a creditor for $340. Notification of the making of this present application was posted to each creditor apart from Fuss Promotions. That notification included a copy of the Originating Process. Envelopes addressed to six of those creditors were returned marked *"return to sender"*. The solicitor for the plaintiff has been able to find an alternative address for four of those creditors, and has posted the notification to the creditors at that alternative address. The two creditors for whom no alternative address could be found were the Connoisseurs Gallery Magazine (a creditor for $2,800) and Satellite Media (a creditor for $6,825). No creditor has objected to the making of any of the orders sought in the Originating Process.

63 As well, ASIC has appeared at the hearing, and has raised no objection to the Court making Orders 1 and 2. And finally, there is nothing in the circumstances which leads me to suspect that any creditor might have suffered injustice by reason of the notice being sent a day late.

64 In these circumstances, it is appropriate to make an order under section 1322(4)(a) declaring that the meeting of creditors of the Company held on 26 October 2000 was not invalid by reason of any defect in the giving of notice in respect to it.

Section 447A as the Basis for a Curing Order

65 The second order which Mr Vouris seeks, is one which modifies the operation of Part 5.3 of the Act to cure any breaches involved in or arising from the late calling of the second meeting. As the Law was current at the time of the meeting, and the Act has effect now, it would be prudent to consider the position under both the Law and the Act . Section 447A of both the ***Corporations Law*** and the *Corporations Act 2001 (Cth)* provides that:

> "The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company."

> The *"Part"* to which it refers is Part 5.3A, *"Administration of a company's affairs with a view to executing a deed of company arrangement,"* which runs from section 435A to 451D.

66 It is now established that section 447A empowers the Court to make an order which alters the manner of operation of any provision in Part 5.3A , including a provision which is expressed in apparently mandatory terms. Section 447A enables the Court to dispense with the apparently mandatory requirement of section 450E(2) that a company subject to a Deed of Arrangement *"must set out"* in certain documents which it issues, after its name, the expression *"(subject to deed of company arrangement)"*: *Re: Brashs Pty Ltd* (1994) 15 ACSR 477. Section 447A can enable the Court to alter the operation of the provision in section 439B(2) which says that a meeting *"cannot be adjourned"* to a day more than 60 days after the first day on which the meeting was held: *Cawthorn v Keira Constructions Pty Ltd* (1994) 33 NSWLR 607 ; *Re Double V Marketing Pty Ltd (in admin)* (1995) 16 ACSR 498; *Re LOCM Pty Ltd* (1997) 15 ACLC 1576; *Dean-Willcocks (Administrators of Powerline GES Pty Ltd) v Powerline GES Pty Limited (Joint Admins Appointed)* [2002] NSWSC 40; (2002) 40 ACSR 516; *Re Macquarie Medical Holdings Pty Ltd* [2003] NSWSC 277. Previous authority to the contrary is now recognised, in the light of the decision of the High Court in *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 as incorrect: *Re Old Papa's Holdings Ltd (under administration); ex parte Wallman (plaintiff)* [2001] WASC 188; (2001) 24 WAR 229.

67 In the present case, Mr Vouris seeks, in addition to the order under section 1322(4) , an order under section 447A which extends the convening period laid down in section 439A(5). In *Re Ricon Constructions Pty Ltd (in liq); ex parte McDonald* (1997) 43 NSWLR 174; (1997) 26 ACSR 655 Santow J held that section 447A can be the basis for an order extending the convening period. Further, his Honour held that it can be the basis for such an order even when the order is sought after the convening period has expired (NSWLR at 179 ; ACSR at 660).

68 The decision in ***Re Ricon Constructions*** was given before the High Court's decision in *Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270. In *Australasian Memory* , at 282 Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ said:

> "It may be accepted that the expression "how this Part *is to* operate" is an expression that looks to the future, not the past. But this temporal requirement is satisfied if orders made under s 447A are orders that have effect only from the time of their making. It does not preclude the making of an order with future effect, but in respect of past matters or events. Such an order would be an order about how Pt 5.3A "is to operate" (that is, is to operate thereafter) in relation to the subject company."

69 Following that decision, Austin J said, in ***Deputy Commissioner of Taxation v Portinex Pty Ltd*** [2000] NSWSC 99; (2000) 34 ACSR 391 at [30], 399, *"The view that s 447A permits orders having retrospective effect must now be taken to have been overruled by the High Court."* His Honour also noted, at [42], 402:

> "It appears from the High Court's judgment in that case that unlike s 447A, subs 1322(4) may be used to make an order which validates past conduct, rather than declaring how a provision of the Corporations Law is to operate in future."

Following paragraph cited by:

Re Lime Gourmet Pizza Bar (Charlestown) Pty Ltd (Formerly Under Administration) (18 March 2015) (Black J)

> An order made under this section may have retrospective effect so that, as and from the date of the order, no-one can assert that a previous transaction is invalid: *Panasystems Pty Ltd v Voodoo Tech Pty Ltd* [2003] FCA 428; (2003) 21 ACLC 842; *Re Vouris*; *Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 47 ACSR 155 at [70] .

Correa v Whittingham (No 3) (21 May 2012) (Black J)

> 74. In *Calabretta v Redpen Developments Pty Ltd (in liq)* above at [37] , Yates J observed that:
>
> "The discretion whether to exercise the power is undoubtedly a plenary one, to be exercised having regard to all the circumstances of the case that have been brought to the Court's attention by the applicant for relief and by those who have an interest in the matter and who may be affected by the granting of that relief. One relevant consideration is whether substantial injustice would be caused by effectively validating an otherwise invalid appointment: *McIntosh* 56 ACSR 283 at [32] ".
>
> His Honour held at [41] that substantial injustice was not established (albeit in circumstances where an administrator's right of indemnity would depend on the extent of recoveries by the liquidator) by validating an administrator's appointment and thereby establishing his right to remuneration under the Act, where he had carried out the work required of an administrator and that work had been of value. An order made under this section may have retrospective effect so that, as and from the date of the order, no-one can

assert that a previous transaction is invalid: *Re Panasystems Pty Ltd v Voodoo Tech Pty Ltd* above; *Re Vouris*; *Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 47 ACSR 155 at [70] .

Re Australian Property Custodian Holdings Limited (Administrators Appointed) (Receivers And Managers Appointed) (29 October 2010) (Sifris J)

34. In *Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* [11] , Campbell J agreed with the form of the order proposed by Merkel J in *Panasystems* and after reference to *Shirlaw* said as follows: [12]

"An order can be one about how Pt 5.3A 'is to operate' even if its effect is that, as and from the date of the order, no one can assert that some past transaction is invalid. Such an order is for practical purposes no different to an order *nunc pro tunc*. Recognising that s 447A permits the making of such an order will enable the intention of parliament in enacting s 447A to be effectuated." [13] .

via

[13] *Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2004) 47 ACSR 155 at [70] .

70 However, in ***Shirlaw v Graham*** [2001] NSWSC 612 Young CJ in Eq expressed the view that, notwithstanding the observations of the High Court in ***Australasian Memory*** , *"in my view the Court can make an order under s 447A which has some effect in the past in the same way as the Court can make an order nunc pro tunc"* [at 14]. I followed that view in ***Re Supreme Imports Pty Ltd (In liquidation)*** ; ***Re DeVries*** [2001] NSWSC 1209. An order can be one about how Part 5.3A *"is to operate"* even if its effect is that, as from the date of the order, no one can assert that some past transaction is invalid. Such an order is for practical purposes no different to an order *nunc pro tunc*. Recognising that section 447A permits the making of such an order will enable the intention of the Parliament in enacting section 447A to be effectuated. It also avoids the need to make complicated distinctions, like that which Young CJ in Eq referred in ***Shirlaw*** at [17] , when considering the sort of order which would be made if his view, that section 447A enabled the making of an order to validate for all purposes a past transaction were not correct, of needing to make *"an order under s.447A for the future and an order under s.1322(4) validating the past"*.

71 The form of order which Merkel J made in ***Panasystems Pty Ltd v Voodoo Tech Pty Ltd*** [2003] FCA 428, that,

"Part 5.3A of the Corporations Act 2001 (Cth) ("the Act") is to operate in relation to Voodoo Tech Pty Ltd ACN 088 693 893 ("the Company") as if the resolution passed at the meeting of directors held on 2 April 2003 to appoint Peter Ngan as administrator of the company was a valid resolution of the board of directors for the

> purposes of s 436A, notwithstanding the failure of the board of directors to pass a resolution to the effect of that set out in s 436A(1)(a) of the Act ."

> is one which adheres closely to the wording of section 447A, yet has the effect that, as from the date of the order, it cannot be contended that the resolution in question was invalid. The desirable course, when making an order under section 447A, is to make it in the form used by Merkel J, even though its effect is as I have described.

72 Thus, the form of order sought in paragraph 2 of the Amended Originating Process is, because of the inclusion of the words *"and has at all relevant times operated"*, not an appropriate one.

73 Until any doubts concerning how section 447A entitles a court to make orders validating past events are clarified by an appellate court, or the development of a clear practice of first instance judges, it would be prudent to adopt the course proposed by Austin J in ***Re Wood Parsons Pty Ltd (in liq)*** [2002] NSWSC 1058; (2002) 43 ACSR 257 at 267 :

> "... if I am persuaded on discretionary grounds (as I am) that the orders should be made, I should invoke s 447A as a source of jurisdiction in case it is available, but I should also rely on s 1322(4) which appears to be more clearly available to permit an order nunc pro tunc."

> The practical effect of that invocation of section 1322(4) will be that the Court will need to be satisfied of the various elements in section 1322(6) .

74 There are no discretionary factors which are relevant to the making of an order under section 447A which I have not already considered in relation to section 1322(4) . Therefore, such an order will be made.

Declarations 4(a)(b)(c) and (d), 5 and 6 in the Amended Originating Process – Failure to Adjourn the Meeting

Overview of Provisions for Administration of a Company

75 While the focus of the argument concerning Declarations 4, 5 and 6 was on section 439A and 439B of the ***Corporations Law*** , and Regulation 5.6.18 of the ***Corporations Regulations*** , other provisions of Part 5.3A of the ***Law*** are relevant. Section 435A said:

> "The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
> (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

76 Section 435C(2) said:

> "(2) The normal outcome of the administration of a company is that:
>
> (a) a deed of company arrangement is executed by both the company and the deed's administrator; or
> (b) the company's creditors resolve under paragraph 439C(b) that the administration should end; or
> (c) the company's creditors resolve under paragraph 439C(c) that the company be wound up."

77 Section 436A, 436B and 436C permitted the board of a company, a liquidator or provisional liquidator of a company, or a person entitled to enforce a charge on the whole or substantially the whole of a company's property to appoint an administrator. Section 436E required the administrator to convene a meeting of the company's creditors within five business days after the administration begins, to decide whether there should be a committee of creditors (and if so, who are to be the committee's members), and to decide whether the administrator should be removed from office (and if so, who should be appointed in his or her place). The functions of a committee of creditors were to consult with the administrator about matters relating to the administration, and to receive and consider reports by the administrator (section 536F).

78 The administrator had very wide powers concerning the company's affairs. Section 437A provided that:

> "(1) While a company is under administration, the administrator:
>
> (a) has control of the company's business, property and affairs; and
> (b) may carry on that business and manage that property and those affairs; and
> (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
> (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration."

79 The extensiveness of the administrator's powers was underlined by section 442A:

> "Without limiting section 437A, the administrator of a company under administration has power to do any of the following:
> (a) remove from office a director of the company;
> (b) appoint a person as such a director, whether to fill a vacancy or not;
> (c) execute a document, bring or defend proceedings, or do anything else, in the company's name and on its behalf;
> (d) whatever else is necessary for the purposes of this Part."

Section 437B provided:

> "When performing a function, or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company's agent."

80 While the company was under administration no one other than the administrator, or someone to whom the administrator gave written approval, could perform or exercise any function or power as an officer of the company (section 437C).

81 Section 438A imposed a duty on the administrator:

> "As soon as practicable after the administration of a company begins, the administrator must:
> (a) investigate the company's business, property, affairs and financial circumstances; and
> (b) form an opinion about each of the following matters:
> (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
> (ii) whether it would be in the creditors' interests for the administration to end;
> (iii) whether it would be in the creditors' interests for the company to be wound up."

82 Each director of the company was obliged to hand over the company's books to the administrator, and provide information which the administrator reasonably requires (section 438B). This was obviously intended to facilitate the administrator's performance of the tasks under section 438A. The administrator was required to report to ASIC any misconduct concerning the company's affairs which appears to him or her to have occurred (section 438D). Section 439A (much of which is quoted in paras 42 and 44 above) required the administrator to call a second meeting of creditors. This meeting was one intended by the legislation to be, at least usually, one where the creditors dealt with the outcome of the administrator's investigation, and opinion formation, required by section 438A. To that end, section 439A(4) required:

> "The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
> (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and
> (b) a statement setting out the administrator's opinion about each of the following matters:
> (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;
> (ii) whether it would be in the creditors' interests for the administration to end;
> (iii) whether it would be in the creditors' interests for the company to be wound up;
> and his or her reasons for those opinions; and

(c) if a deed of company arrangement is proposed — a statement setting out details of the proposed deed."

83 As well, the statement under section 439A(b) *"must specify whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the Act "*: Corporations Regulation 5.3A.02.

84 The manner of conduct of the second creditors' meeting was dealt with by the following provisions:

"439B
(1) At a meeting convened under section 439A, the administrator is to preside.
(2) A meeting convened under section 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held, even if no resolution under section 439C has been passed at the meeting.
439C At a meeting convened under section 439A, the creditors may resolve:
(a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting); or
(b) that the administration should end; or
(c) that the company be wound up."

85 To give the administrator time to carry out his investigations, part of the purpose of which is that the creditors be put in a position to make a decision of the kind set out in section 439C, significant restrictions were placed on winding up a company while it was in administration (section 440A), on enforcing a charge on the company's property (section 440B), on the owner or lessor of property that was used or occupied by the company taking possession of that property (section 440C), on litigation being begun or proceeded with against the company (section 440D) and on carrying out any enforcement process in relation to the property of the company (section 440F and 440G). The ability of the company to deal with its own land was inhibited by section 440H, which deemed that, during an administration, an application to wind up the company was taken to be pending, and that application was taken to constitute a *lis pendens* (cf section 469 ***Corporations Law*** , McPherson, *The Law of Company Liquidation*, 4th edition page 141, section 186-194, 201 ***Conveyancing Act 1919*** (NSW) .) Enforcement of some guarantees of the company's debts during the period of administration was also restricted (section 440J).

86 While the administrator was obliged to pay for benefits for which he or she incurred the liability (section 443A), or, in certain circumstances, for rent or other amounts payable by the company under a lease (section 443B; cf ***Re Nardell Coal Corporation (In Liq) v Hunter Valley Coal Processing*** [2003] NSWSC 642), and certain taxation liabilities (section 443BA), the administrator was not otherwise liable for the company's debts (section 443C).

87 A Deed of Company Arrangement, if adopted, had to include certain provisions spelled out in section 444A. As soon as the company's creditors resolved that the company should execute a Deed of Arrangement, anyone who would be bound by the Deed if it had been executed could not do anything inconsistent with the Deed except with the leave of the court, and could not wind the company up, sue it, or carry out an enforcement process (subject to the last two activities being possible if the court gave leave) (section 444C, 444E). The Deed bound all creditors (section 444D). There was power in the court to terminate a deed, on specified grounds (section 445D).

Specific Regulations Governing Meetings

88 The ***Corporations Regulations*** , as in force October 2000, contained the following provisions:

> "5.6.11
>
> (2) Subject to subregulation (3), regulations 5.6.12 to 5.6.36A apply to the convening and conduct of, and voting at:
>
> (a) a meeting convened under Part 5.3A ... of the Corporations Law that is:
>
> (i) a meeting of ... creditors ... of a company ...
>
> (3) Regulations 5.6.12 to 5.6.36A do not apply to: ...
>
> (c) if those regulations are inconsistent with a particular requirement of the Corporations Law, these Regulations or the rules – a meeting mentioned in paragraph (2)(a) ...
>
> 5.6.17
>
> (1) If a meeting is convened by: ...
>
> (c) an administrator of the company under administration ...
>
> that person, or a person nominated by that person, must chair the meeting.
>
> 5.6.18
>
> (1) The chairperson of a meeting:
>
> (a) if so directed by the meeting — must; or
>
> (b) with the consent of the meeting — may;
>
> adjourn the meeting from time to time and from place to place.
>
> (1A) A meeting convened under section 439A of the Corporations Law must not be adjourned to a day that is more than 60 days after the first day on which the meeting was held.
>
> (2) An adjourned meeting must be held at the place of the original meeting unless:
>
> (a) the resolution for adjournment specifies another place; or
>
> (b) the Court otherwise orders; or

(c) the liquidator or provisional liquidator, or the administrator of a company under administration or of a deed of company arrangement, otherwise orders; or
(d) the place of the original meeting is unavailable, in which case the chairperson may appoint another place."

The Chairperson's Power to Adjourn a Meeting

89 The plaintiff submits that while section 439B(2) makes clear that a second creditors' meeting could be adjourned, Regulation 5.6.18 means that the chairperson of the meeting had no unilateral power to adjourn the meeting.

90 The general law background against which these statutory provisions must be read is that:

> "It is an indispensable part of any meeting that a chairman should be appointed and occupy the chair. In the absence of some person (by whatever title he be described) exercising procedural control over a meeting, the meeting is unable to proceed to business. This may perhaps require some qualification if all present are unanimous. And, in a small meeting, procedural control may pass from person to person according to who for the time being is allowed by the acquiescence of those present to have such control. But there must be some person expressly or by acquiescence permitted by those present to put motions to the meeting so as to enable the wish or decision of the meeting to be ascertained."

(*Colorado Constructions Pty Ltd v Platus* [1966] 2 NSWR 598 at 600 per Street J)

91 Adjournment of a meeting is a process whereby, once the time and place for a meeting have been arrived at, the meeting is put off to some other time. It is to be distinguished from postponement of a meeting, where, once a meeting has been initially called, it is, prior to the time when the meeting is due to commence, put off to some other time: *Smith v Paringa Mines Ltd* (1906) 2 Ch 193; *Bell Resources Ltd v Turnbridge Pty Ltd* (1988) 13 ACLR 429 at 435-439 ; *McPherson v Mansell* (1994) 16 ACSR 261 at 263-264 .

92 The chairperson of a meeting has an inherent power to adjourn a meeting if there is significant disorder at the meeting (*John v Rees* [1970] 1 Ch 345 at 382 ; *Flynn v The University of Sydney* [1971] 1 NSWLR 857), if the place or places where the meeting is held are not such as to allow all the people who are entitled and wish to attend, to follow and participate in the debate (including possibly by the use of audio-visual links), and to vote (*Byng v London Life Association Ltd* [1989] BCLC 400) or for the purpose of taking a poll if it is not practical to take the poll as soon as it has been demanded (***R v D'Oyly*** (1840) 12 Ad & El 139 at 159; 113 ER 763 at 771 ; *In Re Chillington Iron Company* (1885) 29 ChD 159). Otherwise a chairperson has no power to adjourn the meeting unless that power is conferred upon him or her by some specific rule. In *National Dwelling Society v Sykes* [1894] 3 Ch 159 at 162 Chitty J said:

> "Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting. But, in my opinion, the power which has been contended for is not within the scope of the authority of the chairman – namely, to stop the meeting at his own will and pleasure. The meeting is called for the particular purposes of the company. According to the constitution of the company, a certain officer has to preside. He presides with reference to the business which is there to be transacted. In my opinion, he cannot say, after that business has been opened, 'I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair.' In my opinion that is not within his power. The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like."

93 In ***Wishart v Henneberry*** (1962) 3 FLR 171 Spicer CJ, Dunphey and Joske JJ said, at 173 :

> "Authority to preside over a meeting does not give dictatorial power. It merely makes the chairman 'first among equals', and imposes on him certain duties, including taking the chair and carrying on the meeting so that the business of the body in question before the meeting is disposed of as the meeting desires, and also preserving order at the meeting. The preservation of order includes not only the prevention of disorder but also the conduct of the meeting in accordance with the rules of the body which is meeting."

And at 174:

> "Apart from provisions in the rules of a body conferring on the chairman of a meeting power to adjourn, the position in general is that it is for a meeting to decide whether or not to adjourn and that the vote of the majority of those present decides the matter, so that the chairman in leaving the chair or adjourning the meeting, without the approval of a majority, in the absence of power under the rules enabling him to adjourn of his own initiative, does not bring about an adjournment or termination of the meeting. (***Shaw v Thompson*** (1876) 3 Ch D 233 at p 249)."

94 No question arises of whether a chairperson's exercise of a power to adjourn is invalid only if there is lack of good faith, or whether any of the common law grounds of administrative review can be invoked to challenge it (cf ***Byng v London Life Association*** [1989] BCLC 400).

Declaration 4(a)

95 There is no dispute between the plaintiff and ASIC about whether Mr Vouris, as chairman of the second creditors' meeting, had a power unilaterally to adjourn that meeting, regardless of the wishes of the creditors who were there. He had no such power. If the creditors passed a resolution requiring that the meeting be adjourned, then in accordance with Regulation 5.6.18(1)(a) Mr Vouris would have had no alternative but to adjourn the meeting. In the absence of such a resolution or some other type of direction from the meeting, he could adjourn the meeting only with its consent. All this is common ground.

96 Declaration 4(a) as it stands would never be made because it is simply inaccurate to say that it is *only* with the direction of the creditors that an administrator has power to adjourn a creditors' meeting. As well, he has power to adjourn it without any such direction, but with the consent of the meeting. But even if declaration 4(a) were to be amended to reflect that possibility, I would not make it. A fundamental requirement for the Court to make a declaration of right is that there be real controversy about it between at least some of the parties to the proceedings: ***Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*** [1921] 2 AC 438 at 448 ; ***Ibeneweka v Egbuna*** [1964] 1 WLR 219 at 224 - 225 ; ***Forster v Jododex Australia Pty Ltd*** (1972) 127 CLR 421 at 437 – 438 per Gibbs J, 448 per Stephen J, 450 per Mason J; ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564 at 582 . That requirement is not met by Declaration 4(a) as so amended.

Declarations 4(b)(c)(d) and 5

97 Mr Vouris' Administrator's Report had referred to the possibility of the creditors adjourning the meting if a proposal for a Deed of Company Arrangement was received after the date of that Report, but before the meeting (paras [12] and [17] above). Further, it is apparent from the minutes of the meeting that at the time Mr Vouris circulated the proposed Deed of Arrangement he:

> "... advised that his report recommend the meeting be adjourned, however it was up to creditors to decide on the proposed Deed of Company Arrangement, adjourn the meeting or to appoint a liquidator."

98 The charge which ASIC makes against Mr Vouris is that in making that statement to the meeting (and in everything else he said to the meeting) he did not go far enough – the ASIC charges proceed on the basis that Mr Vouris did not in substance seek the consent of the meeting to adjourn, and that he should have sought the consent of the meeting to adjourn.

Following paragraph cited by:

Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (08 November 2006) (Tamberlin J)

28. The interpretation of s 1292(2)(d)(ii) is subject of authority adverse to the applicant's case. In *Re Vouris* at [99] , Campbell J considered that the duties or functions required by an Australian law to be carried out

or performed by a registered liquidator within s 1292 were intended to be those duties and functions connected with being an administrator. At [100], his Honour said:

> *'It is possible for someone to fail to carry out or perform adequately and properly the duties and functions of being an administrator, even if it is not possible to point to some particular statutory provision which has been breached.'*

99 As I read the charge, the *"duties or functions required by an Australian law to be carried out or performed by a registered liquidator"* referred to in the charge are intended to be the duties and functions connected with being an administrator. The charge alleges that in eight respects those duties or functions were not adequately and properly carried out or performed.

100 It is possible for someone to fail to carry out or perform adequately and properly the duties and functions of being an administrator, even if it is not possible to point to some particular statutory provision which has been breached. For example, if an administrator had sent to creditors a report which dealt with each of the topics listed in section 439A(4), but which expressed opinions which were based upon an investigation or a process of reasoning which fell below proper professional standards, a charge of breach of section 1292(2)(d)(ii) of the ***Corporations Law*** could be made out. It would be a breach of section 1292(2)(d)(ii) if an administrator had taken a bribe for making a particular recommendation, even though nothing in Part 5.3A said administrators were not to take bribes. Whether the duties and functions of being an administrator have been performed adequately and properly can depend to some extent on having an intelligent understanding of the purposes which the administration provisions of the ***Corporations Law*** were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved. It is for that reason that I have set out the overview of the provisions for administration of a company earlier in this judgment. In particular, sometimes proper practice might have called for the provision of information or advice to creditors even if no specific provision of the ***Corporations Law*** said so.

Following paragraph cited by:

Gould v Companies Auditors and Liquidators Disciplinary Board (12 May 2009) (Lindgren J)

> 253. Mr Gould submits that in the absence of expert evidence, it was not permissible for the Tribunal to find that he had not carried out or performed his duties as liquidator of Popwing "adequately and properly". Mr Gould submits that this question is one of judgment, not a pure question of law, and that the answer must be informed by evidence of accepted proper practice: Mr Gould refers to *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 47 ACSR 155 at [101] and [103] *Goodman v Australian Securities and*

Investments Commission (2004) 50 ACSR 1 at [26] ; *Dean-Willcocks* at [24] -[26] ; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2 007) 231 CLR 350 at [18], [20] and [24] .

101 But the appreciation of the overall purpose and scope of the administration provisions needs to be brought to bear on the question along with the specific provisions of Part 5.3A a bout what is or is not required, and what is or is not possible, in an administration. Relevantly for present purposes, the administrator had a duty under section 438A to form an opinion about whether it would be in the interests of the company's creditors to execute a Deed of Company Arrangement. That duty was one which he had to exercise *"as soon as practicable after the administration of a company begins"*. In the present case, when Ms Kosinar was the only person interested in proposing a Deed of Company Arrangement, and when she had not put any firm proposal to the administrator before he convened the second creditors' meeting, Mr Vouris could not have performed that duty under section 438A prior to the time the meeting was convened.

102 Section 439C(a) expressly contemplated that at the second creditors' meeting the creditors could resolve to execute a Deed of Company Arrangement even if it differed from a Deed which was proposed at the time the notice of the meeting was given. Further, because of the appearance of the words *"if any"* in section 439C(a), it was open to the creditors at the second creditors' meeting to resolve that the company should execute a Deed of Company Arrangement even if no Deed *at all* had been proposed at the time of the notice which convened the second creditors' meeting. Hence it cannot be the case that, in absolutely all circumstances, the obligation of the administrator under section 438A to form an opinion about whether it would be in the interests of the company's creditors for the company to execute a Deed of Company Arrangement was going to result in an opinion that was communicated to all creditors. That is because, if a proposal for a Deed of Company Arrangement emerges only after the notice of the second creditors' meeting was sent, and if that meeting did not direct the administrator to adjourn, or consent to an adjournment to enable the administrator to investigate the proposal and report on it to all the creditors, those creditors who were present had the power to resolve to adopt the Deed, notwithstanding the absence of a report on it by the administrator, and notwithstanding that creditors who did not attend the meeting might never have known about the terms of the Deed before it became binding on them. In that circumstance, it only became *"practicabl e"* for the administrator to form his opinion about the desirability of the Deed in circumstances where there was no opportunity for him to report on it to all creditors. That this result could arise is consistent with the overall objectives of Part 5.3A as set out in section 435A, in that if a deed which was a clear benefit to all creditors was proposed at a late stage, it might have been a waste of time and money to require an adjournment, further reporting, and a further meeting; if a deed was adopted when it has not been reported on to all creditors, and it had serious deficiencies or unfairness, the Court might have terminated it under section 445D. That is not to say that in some circumstances the appropriate course for an administrator might be to seek to persuade the meeting to adjourn so that all creditors could be informed about the proposal for a Deed, and the administrator's views concerning it.

Following paragraph cited by:

Goodman v Australian Securities and Investments Commission (07 July 2004) (Branson J)

> 26. For present purposes I am willing to assume, as the applicant contends, that in reviewing TSG's halfyear financial report under s 309(4) of the Act , the applicant was not carrying out or performing the duties of an auditor but rather he was carrying out or performing a duty or function required by subs 309(4) to be carried out or performed by a registered company auditor. The question of whether the applicant failed to carry out or perform adequately and properly that duty or function is not a pure question of law. The words *'adequately'* and *'properly'* incorporate notions of judgment. The relevant judgments call for consideration to be given to accepted professional standards (see *John Vouris, Re; Epromotions Pty Ltd and RelectronicRemech Pty Ltd (in Liq)* [2003] NSWSC 702 at [103]). The task of determining the relevant accepted professional standards is a task within the expertise of the Board. The accepted professional standards may be found by the Board to be set by, or alternatively reflected in, published Auditing Standards – notwithstanding that the Auditing Standards have no direct statutory significance.

103 Whether Mr Vouris fell below acceptable professional standards in not seeking the consent of the meeting to adjourn (assuming, without deciding, that the proper way of viewing his behaviour is that he did not in substance seek the consent of the meeting to adjourn) is not solely a matter of law. It is a question the answer to which is influenced by evidence about appropriate professional standards. If this Court were to seek to answer the question, it would undermine the exercise by CALDB, a specialist tribunal, of the functions which Parliament has conferred upon CALDB. The conducting of an administration sometimes requires the administrator to weigh up the relative advantages of speed, efficiency and cheapness, on the one hand, and thoroughness on the other – a time when an administrator has to decide how hard he should urge creditors to adjourn a meeting is such an occasion. And questions of professional standards, as well as the *"business judgment"* test for breach of duty now contained in section 180(2), are relevant to whether the balance has been struck within the range of responsible professional decision-making. Registration as a liquidator confers certain rights and obligations, under the ***Corporations Act*** ; the ***Corporations Act*** also provides the mechanism, by a hearing before CALDB, through which those rights and obligations can be taken away, qualified or make subject to conditions. In the exercise of its discretion this Court ought not make a declaration on a topic concerning which there is room for the exercise of judgment or discretion, when the statutory scheme is that any such judgment or discretion should be exercised by CALDB. Further, if CALDB were to make an error, there is a full appeal on the merits open to the Administrative Appeals Tribunal, and a right to have the decision reviewed under the ***Administrative Decisions (Judicial Review) Act 1977*** , on the grounds open under that Act, which would include correction of any error of law. Making a declaration of the kind sought in paragraph 4(b)(c) and (d) would not remove the need for a hearing by CALDB, even if otherwise appropriate, because the charge makes many allegations not covered by those

claimed declarations. For these reasons, it is not appropriate for the Court to make declarations, or to refuse on the merits to make declarations, of the type sought in paragraph 4(b)(c) and (d) of the Amended Originating Process.

104 The plaintiff points out, correctly, that the obligation on the administrator under section 439A(4) to send a report to creditors had to be performed *at the time* that the notice of creditors' meeting is sent out. Hence, the report required by section 439A(4) could not possibly deal with a proposal for a Deed of Company Arrangement which only came to the attention of the administrator after the notice convening the meeting had been sent out. This means that the fourth and fifth of the circumstances listed in the SOFAC as ones which warranted Mr Vouris seeking the consent of the meeting to adjourn are mistaken in law – a statement *in compliance with* the requirements of section 439A(4)(b)(i)(ii) and (iii) of the Law, and a statement setting out details of a proposed Deed *as required by* section 439A (4)(c) of the Law could have been issued on one occasion only, namely when the notice of the second creditors' meeting was sent out. That fact does not mean, however, that the groundwork for declarations 4(b), (c) and (d) has necessarily been laid.

105 It does, however, justify the making of a declaration of the type sought in paragraph 5 of the Amended Originating Process. That declaration is one which is a pure question of law, not dependent on any understanding of proper professional practice, and not influenced by any exercise of judgment or discretion of a type which the statutory scheme entrusts to CALDB.

Declaration 6

106 The declaration sought in paragraph 6 of the Amended Originating Process is one which I would not make in the exercise of discretion, for the same reasons as concerns paragraphs 4(b), (c) and (d). In addition, it is too broad, in that it goes well beyond any matters which are in controversy between the plaintiff and ASIC.

107 The controversy between the plaintiff and ASIC relates to the plaintiff proceeding with the meeting, *in the particular circumstances* which are identified in the SOFAC. When Declaration 6 seeks a declaration that *"the Plaintiff was justified in proceeding with the meeting"*, the text of the asked-for declaration is not limited to those circumstances – rather, it involves saying that in no conceivable respect, whatever, can criticism be made of Mr Vouris for proceeding with the meeting.

108 Declaration 6 also seeks a declaration that Mr Vouris was justified in executing the Deed. The only allegation which the SOFAC makes about Mr Vouris *executing* the Deed of Company Arrangement dated 16 November 2000 is in one of the particulars of the eighth respect in which it is alleged Mr Vouris breached section 1292(2)(d)(ii) of the Law. Those particulars are:

> "In ***Central Data Networks Pty Ltd v Global Diagnostics Ltd & Anor (1998) 84 FCR 304*** (Annexure 24), the Court held that the DCA signed by Deed Administrator and on behalf of the company to be valid (page 2, paragraph 2). Having regard to that authority ASIC does not dispute the right of the Administrator to execute a deed

in his capacity as Deed Administrator as well as on behalf of a company. However, the execution by Mr Vouris of the DCA in such manner in the present circumstances where:
(i) if the DCA being proposed was not signed Epromotions would be placed into liquidation pursuant to section 446A(2)(a) of the Law and a creditor legal action against Ms Kosinar and Rikland Pty Ltd, through a litigation funder could be instituted;
(ii) a director of Epromotions refused to sign the DCA because he wanted a creditors' legal action through a litigation funder to proceed; and
(iii) it facilitated and completed the placement of Epromotions into a DCA;
when considered in conjunction with the matters referred to in paragraphs 2.8.3 (i) to (vii), 2.8.9 and 2.8.10 clearly indicate that Mr Vouris preferred the interests of Ms Kosinar and/or compromised his independence."

109 Insofar as paragraph 6 of the Amended Originating Process seeks a declaration that the plaintiff was justified in *executing* the Deed of Company Arrangement dated 16 November 2000, it goes well beyond any controversy raised by that paragraph of the SOFAC.

Amended Originating Process – Paragraph 4(e) – Availability of Defences Under Section 180(2)

110 This paragraph was added to the Amended Originating Process in the course of the hearing. It arose from the realisation that the version of section 232 of the ***Corporations Law*** which the SOFAC invoked had been repealed by the time of the actions of Mr Vouris which are the subject of the charge, and replaced by a new section 180 of the ***Corporations Law*** . The new section 180 provided:

"(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
(a) were a director or officer of a corporation in the corporation's circumstances; and
(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
(a) make the judgment in good faith for a proper purpose; and
(b) do not have a material personal interest in the subject matter of the judgment; and
(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

(3) In this section:

"business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation."

111 ASIC has stated that it will amend the SOFAC to replace the references to section 232(4) with references to section 180(1) , and make any consequential amendments. I will leave to one side whether that circumstance means that Declaration 4(e) should not be made on the basis that it is premature.

112 I decline to make the Declaration on the ground that there is no real dispute about it. ASIC says (in a written submission delivered, with leave, after the conclusion of the oral hearing, the leave being granted so that ASIC had time properly to consider the amendments to the Originating Process made in the course of the hearing) that:

> "It is clear on a reading of section 180 that if a person is charged with a failure to exercise care and diligence pursuant to section 180 (1) then the defence afforded pursuant to section 180(2) is available."

Amended Originating Process – Paragraph 7 – Excusing Breaches Under Section 1318

113 Section 1318 of the *Corporations Act 2001* (Cth) provides:

> "(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.
>
> (2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it

had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought. ...

(4) This section applies to a person who is:

(a) an officer of a corporation; or ...

(5) For the purposes of this section *"officer"* in relation to a corporation means: ...

(c) an administrator of the corporation ..."

114 It is to be observed that section 1318(1) uses the word *"court"* with a small "c", while section 1318(2) refers to *"the Court"*, with a capital "C". The difference is explained by section 58AA of the ***Corporations Act 2001*** (Cth) :

(1) Subject to subsection (2), in this Act:

"**court**" means any court.

"**Court**" means any of the following courts:

(a) the Federal Court;

(b) the Supreme Court of a State or Territory;

(c) the Family Court of Australia;

(d) a court to which section 41 of the ***Family Law Act 1975*** applies because of a Proclamation made under subsection 41(2) of that Act.

(2) Except where there is a clear expression of a contrary intention (for example, by use of the expression "the Court"), proceedings in relation to a matter under this Act may, subject to Part 9.7, be brought in any court."

115 It is a precondition for the operation of section 1318(1) that there be a civil proceeding, in a court, against a person who occupies one of the roles identified in section 1318(4) in a corporation, and that those proceedings be *"for negligence, default, breach of trust or breach of duty in a capacity as such a person"*. There are no proceedings of that kind against Mr Vouris. Further, the power to relieve which is conferred by section 1318(1) is one which can only be exercised by *"the court before which the proceedings are taken"*. Thus, section 1318(1) cannot be availed of by Mr Vouris in the present case.

Following paragraph cited by:

Amirbeaggi, in the Matter Of Simpkiss Pty Ltd (in Liq) (20 April 2018) (Markovic J)

48. In *Suncoast* Reeves J noted that the nature of the apprehension that a claim might be made was that there "must be an objective basis for believing that the claim will or might be made against that person": at [31] quoting *Re Vouris* (2003) 177 FLR 289 at [116] per Campbell J .

Re Suncoast Restoration Pty Ltd (in liq) (18 April 2013) (Reeves J)

> 31. As to the nature of the apprehension, I agree with the observations of Campbell J in *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 47 ACSR 155; [2003] NSWSC 702 at [116] that:
>
> > The requirement [in s 1318(2)] that that person "has reason to apprehend" that a claim will or might be made against him or her means that **there must be an objective basis for believing that the claim will or might be made against that person.**
> >
> > (Emphasis added)

116 Section 1318(2) enables any of the specific courts which count as a *"Court"* to grant relief. The person to whom relief is granted must be someone who has one of the types of connection to a corporation identified in section 1318(4). The requirement that that person "*has reason to apprehend*" that a claim will or might be made against him or her means that there must be an objective basis for believing that the claim will or might be made against that person. Further, the claim must be one *"in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person"*.

117 The way the argument was put is that it was the proceedings before CALDB which were the relevant proceedings in which the claim of negligence, default, breach of trust or breach of duty was made against Mr Vouris. I will assume (without deciding) in his favour that the fact that those proceedings have already been brought does not put him outside the scope of section 1318(2), on the ground that 1318(2) applies only in a situation where there is *"reason to apprehend"* that the claim *"will or might be made"*, and hence does not apply to claims already made.

118 Even making that assumption, section 1318 does not enable this Court to grant that relief to Mr Vouris. The power which the Court has to grant relief, is the same as the power that a small-c court would have had under section 1318(1) if it had been a court before which proceedings against that person for negligence, default, breach of trust or breach of duty had been brought. The power of a small-c court under section 1318(1) is one which can be exercised only in a *"civil proceeding"*, *"for negligence, default breach of trust or breach of duty"*. It follows that the capacity of a Court under section 1318(2) to grant relief is limited to relief against the type of claim which can be brought, in a court, in a *"civil proceeding"*, *"for negligence, default breach of trust or breach of duty"*.

119 Thus, even if it were the case that the disciplinary proceedings against Mr Vouris amounted to *"any claim ... in respect of any negligence, default, breach of trust or breach of duty"*, within the meaning of section 1318(2), section 1318(2) does not confer on this Court the power to relieve him from liability. This Court has no power to relieve against it, because those professional disciplinary proceedings are not the type of proceedings which could be brought in a court, and hence are not the type of proceedings to which section 1318(1) could possibly apply.

120 This conclusion, derived from analysis of the text of section 1318, is consistent with its legislative history. Section 1318 has a lineage which starts with section 3 of the ***Judicial***

Trustees Act 1896 of England, and can be traced through section 32 of the ***Companies Act 1907*** of England, section 279 of the ***Companies (Consolidation) Act 1908*** of England, section 288 of the ***Companies Act 1910*** (Vic) section 288 ***Companies Act 1915*** (Vic), section 288 ***Companies Act 1928*** (Vic), and section 365 ***Companies Act 1961*** (Vic): ***Lawson v Mitchell*** [1975] VR 579 at 585 . After tracing the history of the provision, Young CJ and Newton J said, in ***Lawson v Mitchell*** at 586 :

> "The expression in s.32 of the ***English Companies Act 1907*** "any proceeding against a director of a company for negligence or breach of trust" thus naturally referred to civil proceedings only, *na mely the principal proceedings then available in which a director could be held civilly liable to his company for loss which he had caused to it.* Prior to 1907 there had been several decisions in England where a director had been held to be civilly liable to compensate his company for loss caused by technical misconduct (ie "breach of trust") on his part, notwithstanding that the director had acted honestly, or even if reliance upon legal advice: see, for example, ***Hir sche v Simms*** [1894] AC 654; ***Re Faure Electric Accumulator Co*** (1889) 40 ChD 141; [1886-90] All ER Rep 607 and ***Young v Naval and Military Co-operative Society*** [1905] 1 KB 687; see too the observations of Lindley LJ in ***Cullerne v London & Suburban General Permanent Building Society*** (1890) 25 QBD 485 at p. 490 . In our opinion the purpose of s.32 of the ***English Companies Act 1907*** w as to provide some amelioration of the strict approach laid down by such decisions in relation to civil liability of directors ..." (emphasis added)

121 In ***AWA Ltd v Daniels*** (1992) 7 ACSR 759 at 855 Rogers CJ Com Div referred to the English committee whose report led to the enactment of the 1907 provision. Rogers CJ Com Div quotes that report's recommendation that power to relieve from breach of duty be granted to the Court,

> "provided that the breach has been occasioned by honest oversight, inadvertence, or error of judgment on his part, and *in an action for negligence or breach of trust* against a director to relieve him from his liability on such terms as the court may consider proper if the court is satisfied that he has acted honestly and reasonably". (emphasis added)

122 There is another, though less powerful, reason for concluding that section 1318 cannot be used to relieve Mr Vouris from any liability which CALDB might impose on him. In ***Laws on v Mitchell*** Young CJ and Newton J said, at 595 :

> "The use of the expression in sub-s (1) "relieve him either wholly or partly from his liability" is difficult to apply to criminal proceedings. A person charged with an offence against a provision of the ***Companies Act*** may be exposed to twofold liability, namely, to a conviction and to a penalty, either by way of fine or imprisonment or both. To relieve a person so charged wholly of

> liability would necessitate a dismissal of the information. But it is not clear how a court could relieve a defendant partly from his liability for his conviction and punishment. Furthermore the exercise of power to relieve a person wholly or partly in respect of prospective liability for conviction and punishment would create great problems. It might require a Court to make findings of fact upon an information for an offence – perhaps in advance of its formulation – and an adjudication that the person at risk should not be convicted, or if convicted not punished. But apart from procedural problems of this type, relief from liability is not an expression used in connection with a criminal offence. The procedure followed to absolve a person from risk of conviction is to grant him either a pardon or an indemnity or immunity from prosecution – In addition the Crown might enter a *nolle prosequi* for this purpose."

123 While those difficulties of applying section 1318 to criminal proceedings do not all apply to administrative proceedings seeking a disciplinary sanction, there is still considerable awkwardness in describing a process of saying that no such sanction shall be applied as one of *"relieving ... from liability"*.

Additional Claim to Relief Under Section 1322(4)(c) – Relief from Liability for Late Convening of Meeting

124 I should mention here a claim which was dealt with in argument, although not within the scope of the Amended Originating Process. It concerns the admitted breach of the Act in volved in convening the second creditors' meeting one day late. One of the orders which is possible under section 1322(4)(c) is *"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)."* In ***Re Ricon Constructions Pty Ltd (in liq); ex parte McDonald*** , Santow J not only made an order under section 447A(1) and section 1322 validating a second creditors' meeting which had been convened one day late, but also made an order under section 1322(4)(c) . Pursuant to section 1322(6)(b) and (c), an order under section 1322(4)(c) cannot be made unless the Court is satisfied that the person subject to the civil liability concerned acted honestly, and that no substantial injustice has been or is likely to be caused to any person. I have already held that those factual elements are satisfied, so far as the meeting being convened one day late is concerned.

125 Though section 1322(6) sets out necessary preconditions for the making of an order under 1322(4), the making of the order is still discretionary. To decide whether it should be granted, one needs to consider what is the extent of relief which would result from the making of an order. That depends on turn as what counts as *"any civil liability"*, within the meaning of section 1322(4)(c) .

126 The ***Corporations Act 2001*** (Cth) contains no definition of the expression *"civil liability"*. Section 9 contains a definition that *"civil matter"* means *"a matter other than a criminal matter"*. Clearly a *"civil liability"* would include any liability which could be enforced in the courts by a non-criminal procedure. An arbitration has been held to be a *"civil proceedings"* within the meaning of the provision which prohibited the commencing or proceeding with a *"action or*

other civil proceeding" against a company in liquidation except by leave of the court (***Re Vassal Pty Ltd*** (1983) 8 ACLR 683; ***Doran Constructions Pty Ltd (in liq) v Beresfield Aluminium Pty Ltd*** (2002) 54 NSWLR 416 at 418), and within the meaning of section 16 of the ***Service and Execution of Process Act 1901*** (Cth) (***Alliance Petroleum Australia (NL) v Australian Gaslight Co Ltd*** (1983) 48 CLR 69 ; ***TNT Bulkships Ltd v Interstate Construction Pty Ltd*** (1985) 35 NTR 15.) A *"civil proceeding"* includes an examination in a company liquidation: ***Cheney v Spooner*** (1929) 41 CLR 532; ***Re Williams Bros Ltd*** (1928) 46 WN (NSW) 39).

127 Whether or not the proceedings before CALDB count as a *"civil proceeding"*, I have some doubt whether any penalty which CALDB could impose would count as *"any civil liability"* within the meaning of section 1322(4)(c) . The range of remedies open to CALDB are cancellation or suspension of registration, admonishing or reprimanding, and requiring undertakings. There is the same awkwardness in treating those sanctions as *"any civil liability"* for the purpose of section 1322(4)(c) , as there is in treating them as a liability which can be relieved against under section 1318 .

128 However, I shall not decide this point on that basis. Even if the liability which CALDB could impose counted as a *"civil liability"* within the meaning of section 1322 , I would not as a matter of discretion relieve Mr Vouris from any such liability. That view is not based on any opinion about whether Mr Vouris does, or does not, deserve to have any punishment imposed on him – it is based solely on the view that, when the jurisdiction of CALDB has been validly attracted, and the decision of CALDB is influenced by questions of proper professional practice, this Court ought not make an order which has the effect of preventing CALDB from performing the task Parliament intended it to perform. Even if making such an order were within the words of section 1322(4) , and in that sense within power, it is not, it seems to me, within the proper scope for the exercise of discretion under section 1322 . Hence, while it seems to me that it would be appropriate to make an order under section 1322(4)(c) concerning the late convening of the meeting, I would except from that order any penalty which CALDB might think fit to impose. That exception is one I make for the sake of clarity about the scope of the order, and even though I have doubts about whether there would be power under section 1322(4)(c) for this Court to relieve Mr Vouris from the type of penalties which CALDB can impose.

Declaration 10 – Admissibility or Relevance of Evidence before CALDB

129 Exhibit NH3 is a collection of minutes of the second meeting of creditors, of various companies which were in administration. They were all minutes where a proposal for a deed of company arrangement, or an amendment of a proposal for a deed of company arrangement, was received after the notice of meeting and its accompanying report were sent. There were seven sets of minutes in total. By written submission filed, with leave, after conclusion of the oral hearing, ASIC acknowledged that two of them were no longer relevant, and would not be used before CALDB.

130 I have set out in para [33] above the provisions of section 218(1) of the ***ASIC Act*** . Concerning a similar provision in section 33(1) ***Administrative Appeals Tribunal Act 1975*** , which freed that Tribunal from the rules of evidence, Brennan J said in ***Re Pochi and Minister for Immigration and Ethnic Affairs*** (1979) 26 ALR 247 at 256-7,

> "To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J pointed out, though in a dissenting judgment, in *R v War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 : "Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'." That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. ...
> The majority judgments in ***Bott's*** *case,* supra, show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not. Starke J said at 249, 250: "The Appeal Tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent medical opinion, for instance, upon oath, and whether cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence, and is authorized to act according to substantial justice and the merits of the case."

That approach continues to be applied: *Rodriguez v Telstra Corp Ltd* [2002] FCA 30 at [25] per Kiefel J; *Hehir v Smith* [2002] QSC 136 at [18] per Wilson J.

131 Whether the particular documents in exhibit NH3 which ASIC continues to intend to tender at the hearing are rationally probative of anything will depend upon, amongst other things, the purposes for which they are sought to be tendered, and whether there is other evidence to which those sets of minutes can be linked. It is not, in my view, possible to decide, without knowing the forensic and evidentiary contexts in which they will be deployed, whether those documents will be rationally probative of anything.

132 As well, the same principles as lead a court to be reluctant to make a declaration that a Magistrate has erred in rejecting evidence in a committal proceedings, (*ACS v Anderson* [1974] 2 NSWLR 482; *Bourke v Hamilton* [1977] 1 NSWLR 470) also apply here. I decline to make declaration number 10

1. Declare that the meeting of creditors of Epromotions Australia

Pty Ltd ("the Company") held on 26 October 2000 ("the Meeting") was not invalid by reason of any defect in the giving of notice in respect of it.

2. Order that Part 5.3A of the ***Corporations Law*** and Part 5.3A of the ***Corporations Act 2001*** are each to operate in relation to the Company as if the Meeting was not invalid by reason of any such defect.

3. Order that the plaintiff is relieved in whole from any civil liability in respect of a contravention of the ***Corporations Law*** arisin g from the Meeting being convened on 20 October 2000, rather than on or before 19 October 2000, PROVIDED THAT this Order does not prevent the Companies Auditors and Liquidators Disciplinary Board from taking such action, if any, as it thinks fit concerning that contravention.

4. Declare that the plaintiff was not in breach of s.439A(4) of the ***Cor porations Law*** by not expressing an opinion about the matters set forth in that section in relation to the Proposed Deed of Company Arrangement presented at the Meeting.

5. Direct the parties, that if either party wishes to apply for any other order, that party make, within 28 days of the delivery of these reasons, an appointment with my Associate for the argument of the application for such order.

6. In the event that no such appointment is made, the Amended Originating Process is otherwise dismissed.

****

Last Modified: 09/05/2003

Cited by:

Amirbeaggi, in the Matter Of Simpkiss Pty Ltd (in Liq) [2018] FCA 2121 (20 April 2018) (Markovic J)

48. In *Suncoast* Reeves J noted that the nature of the apprehension that a claim might be made was that there "must be an objective basis for believing that the claim will or might be made against that person": at [31] quoting *Re Vouris* (2003) 177 FLR 289 at [116] per Campbell J .

Re Keystone Group Holdings Pty Ltd (Receivers & Managers Appointed) (Administrators Appointed) [2017] NSWSC 454 (21 April 2017) (Gleeson JA)

14. In *Re PriceRight Construction Pty Ltd (Admin Apptd)* (2006) 57 ACSR 206; [2006] NSWSC 324 Barrett J explained that an order under s 477A can not only vary the operation of s 439B(2) (a provision, at that time, within Pt 5.3A) but also state that Pt 5.3A is to operate on the basis that reg 5.6.18(2) does not apply. His Honour said at [7]-[9]:

[7] The order the plaintiffs seek is one empowering them to adjourn to a date not later than 31 May 2006. But it is clear from reg 5.6.18 that adjournment is a matter for the meeting itself and is implemented by the chairperson who must adjourn the meeting "from time to time and from place to place" if so directed by the meeting and may do so with the consent of the meeting. The chairperson cannot, consistently with reg 5.6.18, act unilaterally, that is to say, without either a direction or the consent of the meeting (see Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) (2003) 177 FLR 289 ; 47 ACSR 155 ; [2003] NSWSC 702), although it may well be that emergency powers of unilateral adjournment of the kind considered in cases such as Byng v London Life Assn Ltd [1990] Ch 170 are available: see Re Vouris, above; Selim v McGrath (2003) 177 FLR 85 ; 47 ACSR 537; [2003] NSWSC 927 .

[8] Regulation 5.6.18(2) is in terms which reinforce s 439B(2) . This raises a point that requires brief discussion. Under s 447A , the court may make any order it thinks appropriate about how "this part" — that is, Pt 5.3A of the Act — is to operate in relation to a particular company. As is testified by the decision of the High Court in Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270 ; 172 ALR 28; 34 ACSR 250; [2000] HCA 30 , the jurisdiction under s 447A is very broad. It is now well recognised, for example, that the power may be used to extend the convening period in a way that s 439A itself does not allow. In addition, it was held by Lindgren J in Re Double v Marketing Pty Ltd (1995) 16 ACSR 498 that s 447A may be employed in a case such as the present to extend the s 439B(2) deadline: see also Re Open Telecommunications Ltd; ex parte Whitton [2002] NSWSC 930 .

[9] There is not, I think, in Lindgren J's judgment any reference to the separately imposed version of the s 439B(2) deadline arising from reg 5.6.18(2) . But it is my opinion that an order under s 447A can not only vary the operation of s 439B(2) (a provision within Pt 5.3A) but also state that Pt 5.3A is to operate on the basis that reg 5.6.18(2) does not apply. Even with that added element, the order is still one about how Pt 5.3A is to operate in relation to the particular company.

Re Lime Gourmet Pizza Bar (Charlestown) Pty Ltd (Formerly Under Administration) [2015] NSWSC 244 (18 March 2015) (Black J)

An order made under this section may have retrospective effect so that, as and from the date of the order, no-one can assert that a previous transaction is invalid: *Panasystems Pty Ltd v Voodoo Tech Pty Ltd* [2003] FCA 428; (2003) 21 ACLC 842; *Re Vouris*; *Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 47 ACSR 155 at [70] .

Re Lime Gourmet Pizza Bar (Charlestown) Pty Ltd (Formerly Under Administration) [2015] NSWSC 244 (18 March 2015) (Black J)

- Re Vouris; Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq) [2003] NSWSC 702 ; (2003) 47 ACSR 155

Viscariello v Macks [2014] SASC 189 (09 December 2014) (Judgment of the Honourable Chief Justice Kourakis)

Brovis v Lenleys Pty Ltd & Wily (2003) 45 ACSR 612; *Smarter Way (Aust) Pty Ltd v D'Aloia* (2000) 35 ACSR 595; *Cusson v Signature Resorts Pty Ltd* (2000) 18 ACLC 341; *Re Eisa Ltd* (2000) 34 ACSR 394; *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1999) 30 ACSR 38; *Supervac Australia Pty Ltd v Australasian Memory Pty Ltd* (unreported) FCA 6 June 2007; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270; *Re Vouras* (2003) 47 ACSR 155 ; *McVeigh v Linen House Pty Ltd* [2000] 1 VR 31; *Deputy Commission of Taxation v Portinex* (2000) 156 FLR 453; *Hagenvale Pty Ltd v Depela Pty Ltd* (1995) 17 ACSR 139; *Hill v David Hill Electrical Discounts Pty Ltd* (2001) 37 ACSR 617; *Commission for Corporate Affairs v Harvey* [1980] VR 669; *Central Springworks Australia Pty Ltd v McClellan* (2000) 34 ACSR 169; *Commonwealth v Irving* (1996) 65 FCR 291; *Citric Systems Inc v Telesystems Learning Pty Ltd (In Liq)* (1998) 28 ACSR 529; *Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Yates v Whitlam* [1999] NSWSC 976; *NRMA Ltd v Yates* [1999] NSWSC 859; *Cleary v Australian Cooperative Foods (No 2)* [1999] NSWC 991; *Cap Reinsurance Corporation Ltd v Daya* [2008] NSWSC 64; *Rozenblit v Vainer* [2014] VCS 510; *Baxter v Hamilton* [2005] TASSC 64; *Nominees Ltd v McGoldrick* [2014] VSC 152; *Mills v*

Sheahan (2007) 99 SASR 357; *Yango Pastoral Co Pty Ltd v First Chicago (Australia) Limited* (1978) 139 CLR 410; *Brownbill v Kenworth Trucks Sales (NSW) Pty Ltd* (1982) 39 ALR 191 ; *Alexander v Rayson* [1936] 1 KB 169; *McCarthy Rose (Milk Vendors) Pty Ltd v Dairy Farmers Coop Milk Co Ltd* (1945) 45 SR(NSW) 266; *Mason v Clarke* [1955] AC 778; *Re Chevron Furnishers Pty Ltd (in Liq)* (1993) 12 ACSR 565; *National Safety Council of Australia* [1990] VR 29 ; *Deputy Commissioner of Taxation v ACN 080122587 Pty Ltd* [20 05] NSWSC 1247; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434; *N aumoski v Parbery* (2002) 171 FLR 332; *Re Edennote Ltd* [1996] 2 BCLC 389; *Yeomans v Walker* (1986) 5 NSWLR 378; *Westpac Banking Corp v Totterdell* (1998) 20 WAR 150; *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [1997] 1 VR 667; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; *Ibeneweka v Egbuna* [1964] 1 WLR 219; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; *Taly lor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432; *Law Society (NSW) v Weaver* [1974] 1 NSWLR 271; *Hall v Poolman* (2009) 75 NSWLR 99; *Kennards Hire Pty Ltd v RMGA Pty Ltd* [2010] NSWSC 1387; *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494, considered.

Viscariello v Macks [2014] SASC 189 (09 December 2014) (Judgment of the Honourable Chief Justice Kourakis)

61. A s 439A report can only be sent when the second meeting of creditors is convened. [24] Noti ce may be given by prepaid post or fax. [25] The notice is given when it is put in the post. [26] In the ordinary course a voluntary administration will result either in the execution of a DOCA or in a resolution by the creditors that the administration should end or, alternatively, that the company be wound up. [27]

via

[24] *Re Vouras* (2003) 47 ACSR 155 at 174, [104] ; [2003] NSWSC 702 .

Viscariello v Macks [2014] SASC 189 (09 December 2014) (Judgment of the Honourable Chief Justice Kourakis)

61. A s 439A report can only be sent when the second meeting of creditors is convened. [24] Noti ce may be given by prepaid post or fax. [25] The notice is given when it is put in the post. [26] In the ordinary course a voluntary administration will result either in the execution of a DOCA or in a resolution by the creditors that the administration should end or, alternatively, that the company be wound up. [27]

via

[26] *Re Vouras* (2003) 47 ACSR 155 at [46] .

Re Suncoast Restoration Pty Ltd (in liq) [2013] FCA 355 (18 April 2013) (Reeves J)
Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) (2003) 47 ACSR 155; [2003] NSWSC 702
Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties

Re Suncoast Restoration Pty Ltd (in liq) [2013] FCA 355 (18 April 2013) (Reeves J)

31. As to the nature of the apprehension, I agree with the observations of Campbell J in *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 47 ACSR 155; [2003] NSWSC 702 at [116] that:

> The requirement [in s 1318(2)] that that person "has reason to apprehend" that a claim will or might be made against him or her means that **there must be an objective basis for believing that the claim will or might be made against that person.**

(Emphasis added)

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)
- Re Vouris; Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq) [2003] NSWSC 702 ; (2003) 47 ACSR 155

Correa v Whittingham (No 3) [2012] NSWSC 526 (21 May 2012) (Black J)

74. In *Calabretta v Redpen Developments Pty Ltd (in liq)* above at [37] , Yates J observed that:

> "The discretion whether to exercise the power is undoubtedly a plenary one, to be exercised having regard to all the circumstances of the case that have been brought to the Court's attention by the applicant for relief and by those who have an interest in the matter and who may be affected by the granting of that relief. One relevant consideration is whether substantial injustice would be caused by effectively validating an otherwise invalid appointment: *McIntosh* 56 ACSR 283 at [32] ".

His Honour held at [41] that substantial injustice was not established (albeit in circumstances where an administrator's right of indemnity would depend on the extent of recoveries by the liquidator) by validating an administrator's appointment and thereby establishing his right to remuneration under the Act, where he had carried out the work required of an administrator and that work had been of value. An order made under this section may have retrospective effect so that, as and from the date of the order, no-one can assert that a previous transaction is invalid: *Re Panasystems Pty Ltd v Voodoo Tech Pty Ltd* above; *Re Vouris*; *Epromotions Australia Pty Ltd & Relectronic-Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 47 ACSR 155 at [70] .

Le Meilleur Pty Ltd v Jin Heung Mutual Savings Bank Co Ltd [2011] NSWSC 1115 (15 September 2011) (Ward J)

It follows that the effect of the administrator failing properly to inform creditors prior to the second creditors' meeting would be to enliven the jurisdiction in s 445D(1) and the issue of whether the deed of company arrangement should be terminated is a matter of discretion. Thus it seems to me that there was a material omission for the purposes of s 445D(1)(c) and this was not something that could be treated as a 'procedural irregularity' in the conduct of the meeting curable under s 1322 (having regard to the discussion in *Ford's* at [26.205]; *Re Vanfox Pty Ltd* [1995] 2 Qd R 445; (1994) 13 ACSR 209; *Re Ricon Constructions Pty Ltd (in liq)* (1997) 43 NSWLR 174; 26 ACSR 655; *Re Vouris; EPromotions Australia Pty Ltd v Relectronic - Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 47 ACSR 155) and *Deputy Commissioner of Taxation v Comcorp Australia* (1996) 21 ACSR 590.)

Le Meilleur Pty Ltd v Jin Heung Mutual Savings Bank Co Ltd [2011] NSWSC 1115 (15 September 2011) (Ward J)
Re Vouris; EPromotions Australia Pty Ltd v Relectronic - Remech Pty Ltd (in liq) [2003] NSWSC 702 ; (2003) 47 ACSR 155

Re Australian Property Custodian Holdings Limited (Administrators Appointed) (Receivers And Managers Appointed) [2010] VSC 492 (29 October 2010) (Sifris J)

34. In *Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* [11] , Campbell J agreed with the form of the order proposed by Merkel J in *Panasystems* and after reference to *Shirlaw* said as follows: [12]

> "An order can be one about how Pt 5.3A 'is to operate' even if its effect is that, as and from the date of the order, no one can assert that some past transaction is invalid. Such an order is for practical purposes no different to an order *nunc pro tunc*. Recognising that s 447A permits the making of such an order will enable the intention of parliament in enacting s 447A to be effectuated." [13]

via

[11] (2004) 47 ACSR 155 .

Re Australian Property Custodian Holdings Limited (Administrators Appointed) (Receivers And Managers Appointed) [2010] VSC 492 (29 October 2010) (Sifris J)

34. In *Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* [11] , Campbell J agreed with the form of the order proposed by Merkel J in *Panasystems* and after reference to *Shirlaw* said as follows: [12]

> "An order can be one about how Pt 5.3A 'is to operate' even if its effect is that, as and from the date of the order, no one can assert that some past transaction is invalid. Such an order is for practical purposes no different to an order *nunc pro tunc*. Recognising that s 447A permits the making of such an order will enable the intention of parliament in enacting s 447A to be effectuated." [13]

via

[13] *Re Vouris; EPromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2004) 47 ACSR 155 at [70] .

Vero Insurance Ltd v Kassem [2010] NSWSC 838 (30 July 2010) (Barrett J)
Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd [2003] NSWSC 702 ; (2003) 177 FLR 289
Salisbury Gold Mining Co Ltd v Hathorn

Vero Insurance Ltd v Kassem [2010] NSWSC 838 (30 July 2010) (Barrett J)

> 42 These provisions of the Act are silent on the question of how and by whom any decision to adjourn is to be made. It cannot, I think, be doubted that, if the provisions governing a meeting do not deal with that question, any decision to adjourn can only be made by the meeting itself which is master of its own procedure (see, for example, *St oughton v Reynolds* (1735) 2 Stra 1045; 93 ER 1023 ; *Re Bosnjak Holdings Pty* Ltd [2005] NSWSC 527; (2005) 23 ACLC 1285 at [5]) – unless the case comes within the extraordinary and limited power of the chairperson to adjourn unilaterally, which power is related exclusively to disruption and disorder and exists solely "to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible": *Byng v London Life Association Ltd* [1990] Ch 170; and see *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd* [2003] NSWSC 702; (2003) 177 FLR 289 at [92]-[94] per Campbell J .

Gould v Companies Auditors and Liquidators Disciplinary Board [2009] FCA 475 (12 May 2009) (Lindgren J)
Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq) (2003) 47 ACSR 155 cited

Gould v Companies Auditors and Liquidators Disciplinary Board [2009] FCA 475 (12 May 2009) (Lindgren J)

253. Mr Gould submits that in the absence of expert evidence, it was not permissible for the Tribunal to find that he had not carried out or performed his duties as liquidator of Popwing "adequately and properly". Mr Gould submits that this question is one of judgment, not a pure question of law, and that the answer must be informed by evidence of accepted proper

practice: Mr Gould refers to *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 47 ACSR 155 at [101] and [103] *Goodman v Australian Securities and Investments Commission* (2004) 50 ACSR 1 at [26] ; *Dean-Willcocks* at [24]-[26] ; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at [18], [20] and [24] .

Re Porter and Another as joint administrators of Priceright Construction Pty Limited [2006] NSWSC 324 (04 September 2007) (Barrett J)

Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (2003) 177 FLR 289
Selim v McGrath

Re Porter and Another as joint administrators of Priceright Construction Pty Limited [2006] NSWSC 324 (04 September 2007) (Barrett J)

7 The order the plaintiffs seek is one empowering them to adjourn to a date not later than 31 May 2006. But it is clear from regulation 5.6.18 that adjournment is a matter for the meeting itself and is implemented by the chairperson who must adjourn the meeting "from time to time and from place to place" if so directed by the meeting and may do so with the consent of the meeting. The chairperson cannot, consistently with regulation 5.6.18, act unilaterally, that is to say, without either a direction or the consent of the meeting (see Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (2003) 177 FLR 289), although it may well be that emergency powers of unilateral adjournment of the kind considered in cases such as Byng v London Life Association Ltd [1990] Ch 170 are available: cf Re Vouris (above); Selim v McGrath (2003) 177 FLR 85 .

Complex Pty Ltd v Austar Properties Macquarie Waters Pty Ltd [2007] NSWSC 435 (23 April 2007) (Einstein J)

John Vouris Re; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (In Liq) [2003] NSWSC 702
Oceanic Life Ltd v Insurance and Retirement Planning Services Pty Ltd (in liq)

Complex Pty Ltd v Austar Properties Macquarie Waters Pty Ltd [2007] NSWSC 435 (23 April 2007) (Einstein J)

15 Likewise there was no serious issue taken at the Bar table in relation to the authorities which informed the proper approach to the policy of the *Corporations Act* insofar as administrators are concerned. Those authorities include the following.

· In *Auburn Council v Austin Australia Pty Ltd* (Administrators Appointed) [2004] NSWSC 141, Bergin J observed at paragraph [24] that "the policy of the *Corporations Act (C'th) 2001* is to provide administrators with an immediate breathing space by the imposition of a stay on proceedings on foot at the time of the administration until leave is sought and possibly granted."

· In *John Vouris Re; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (In Liq)* [2003] NSWSC 702 , at paragraphs [75] to [87] Campbell J set out an overview of the administration of a company under part 5.3A of the *Corporations Law*, which provisions are substantially replicated under the *Corporations Act (C'th) 2001*.

At paragraph [85], Campbell J stated that it was "[t]o give the administrator time to carry out his investigations, part of the purpose of which is

that the creditors be put in a position to make a decision of the kind set out in section 439C", that significant restrictions are placed on:

> (a) winding up a company while it was in administration (section 440A);
>
> (b) enforcing a charge on the company's property (section 440B);
>
> (c) the owner or lessor of property that was used or occupied by the company taking possession of that property (section 440C); and
>
> (d) litigation being begun or proceeded with against the company (section 440D); and

(e) on carrying out any enforcement process in relation to the property of the company (section 440F and 440G).

· The principles as to leave were recently adumbrated in *Auburn Council v Austin Australia Pty Limited (in liquidation)* [2007] NSWSC 130, at paragraph [128] per Einstein J, where it was stated:

> "Generally the principles which apply are to be found set out in *Ford's Principles of Corporations Law* co-authored by Professor HAJ Ford, Justice RP Austin and Professor IM Ramsay at [27.126]. The treatment of that subject includes the following propositions:
>
> i. in circumstances where administrators/liquidators are appointed claimants lose the right to litigate in any court and receive instead a right to make a claim to be paid out of the estate;
>
> ii. a stay is imposed to prevent harassment of the company in liquidation and to prevent its assets being wasted by unnecessary litigation;
>
> iii. the court when granting leave to proceed against a company in administration/liquidation may impose conditions on the grant of such leave;

iv. leave can be granted nunc pro tunc;

v. the term "proceeding" covers claims in both superior and inferior courts and will also include an arbitration;

vi. an applicant for leave to seek a remedy against the company who has a provable claim must persuade the court that there is some good reason on the balance of convenience why his or her claim against the company should be pursued by court action to judgment rather than by lodging a proof of debt with the liquidator;

vii. it is really a matter of which of two alternative procedures is more appropriate. In the circumstances Court action will normally carry the risk that the fund of company assets available to the creditors will be depleted by costs;

viii. on an application for leave the Court considers whether the claimant has a case involving a real dispute which is not futile and involve serious questions whether the action will impede orderly winding up and whether it will cause prejudice to the other creditors;

ix. the requirement that the case involve a real dispute is less strict than that the applicant should demonstrate a prima facie case;

x. there are many factors that the Court might consider, including the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and importantly, the stage to which the proceedings, if already commenced, may have progressed [cf *Ogilvie-Grant v East* (1983) 7 ACLR 669 at 672]. [see generally *Oceanic Life Ltd v Insurance and Retirement Planning Services Pty Ltd* (in liq) (1993) 11 ACSR 516 at 522].

Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board [2006] FCA 1438 (08 November 2006) (Tamberlin J)

Re Vouris (2003) 47 ACSR 155 , referred to

Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board [2006] FCA 1438 (08 November 2006) (Tamberlin J)

13. The Board observed that in s 1292(2)(d)(i) , the term "duties" is not confined by reference to Australian law. The Board referred to decisions in *Re Wylie and CALDB* (1998) 54 ALD 523; *Re Vouris* (2003) 47 ACSR 155 and *Goodman v ASIC* [2004] FCA 1000. After considering these decisions, the Board concluded that it is permissible to have regard to professional standards in deciding whether the office has been "adequately and properly" carried out or performed. The Board considered it is artificial to confine "duties" to matters required by an Australian law because there exist a large number of matters governing proper professional practice which are not dealt with by specific statutory prescriptions. Therefore, guidance can be obtained from relevant material published by professional bodies and other evidence, including expert evidence, in determining the terms, nature and content of the relevant duties to assess whether there has been an adequate and proper performance. Moreover, the expressions "adequate" and "proper" call for an evaluation of the way in which, and the extent to which, the functions have been performed. This indicates that it may be appropriate to consider professional standards or guidelines.

Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board [2006] FCA 1438 (08 November 2006) (Tamberlin J)

28. The interpretation of s 1292(2)(d)(ii) is subject of authority adverse to the applicant's case. In *Re Vouris* at [99] , Campbell J considered that the duties or functions required by an Australian law to be carried out or performed by a registered liquidator within s 1292 were intended to be those duties and functions connected with being an administrator. At [100], his Honour said:

> *'It is possible for someone to fail to carry out or perform adequately and properly the duties and functions of being an administrator, even if it is not possible to point to some particular statutory provision which has been breached.'*

Re Yates [2006] FCA 370 (23 March 2006) (Emmett J)

7. This question has been considered by the Supreme Court of New South Wales in *Re Vouris; Epromotions Australia Pty Limited v Relectronic-Remech Pty Limited (in liquidation)* 47 ACSR 155 . Campbell J observed that there is no provision in any of the regulations of a kind commonly found in statutes or contractual provisions designed to facilitate service that deems service to have been effected a certain number of days after the document has been put in the post, or at the time the document would be received in the ordinary course of post. His Honour observed that that omission is no oversight. His Honour suggests that the correct construction of s 439A(3)(a) is that written notice of a meeting is given at the time it is put in the post for the purpose of sending it to the person by prepaid post as required by Regulation 5.6.12(2)(b). When s 439A sets out a strictly limited set of times, any construction that required the time of convening of a meeting to depend upon when some individual creditor received notice or the last of the creditors had received notice, would make it very difficult to administer.

Deputy Commissioner of Taxation v ACN 080 122 587 Pty Ltd [2005] NSWSC 1247 (05 December 2005) (Young CJ in Eq)

Re Vouris (2003) 47 ACSR 155

Deputy Commissioner of Taxation v ACN 080 122 587 Pty Ltd [2005] NSWSC 1247 (05 December 2005) (Young CJ in Eq)

8 Administration is dealt with under Part 5.3A of the Corporations Act . That Part to my mind forms a code for dealing with administration. Section 447A allows the court to make such order as it thinks appropriate about how the Part is to operate. That section is given a very wide application; see eg Re Vouris (2003) 47 ACSR 155 at 179 .

Re Pentacle Pty Ltd [2005] NSWSC 919 (12 September 2005) (Campbell J)

Re Vouris; EPromotions Pty Ltd and Relectronic-Remech (In Liq) (2003) 47 ACSR 155

Re Pentacle Pty Ltd [2005] NSWSC 919 (12 September 2005) (Campbell J)

8 As well, following the procedure to which I referred in ***Re Vouris; EPromotions Pty Ltd and Relectronic-Remech (In Liq)*** (2003) 47 ACSR 155, at 181 [73] , it seems prudent to also make an order under section 1322(4) .

Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd & Ors (No 3) [2005] ACopyT 1 (21 April 2005) (Lindgren J (President), Professor Dennis Pearce)

6. A statutory provision that an administrative tribunal is not bound by the rules of evidence does not signify that the tribunal must, over objection, supinely receive any evidence that is tendered before it: cf *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 ('*Pochi* ') at 492-493. Indeed, if the tribunal concludes that certain evidence tendered is not 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding', the tribunal will not be at liberty to reach a decision in reliance on that evidence, and, therefore, objection to it having been taken, the tribunal should not admit it; cf *Pochi* at 492-493, and cases which Brennan J's statement of principle *Pochi* has been followed or cited with approval, such as *Rodriguez v Telstra Corp Ltd* [2002] FCA 30 at [25] ; *Hehir v Financial Advisers Australia Pty Ltd* [2002] QSC 092 at [18] ; *Vouris, Re; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289 at [129]-[131] . The words quoted in the last sentence constitute the familiar definition of 'evidence that is relevant in a proceeding' found in s 55(1) of the Evidence Act . (We acknowledge that, because of the absence of pleadings, it may sometimes, particularly at an early stage of a hearing, be less clear before an administrative tribunal than before a court, what the 'facts in issue' are.)

Battenberg v Union Club [2005] NSWSC 242 (30 March 2005) (Campbell J)
John Vouris Re; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq) [2003] NSWSC 702 ; (2003) 47 ACSR 155
In re Weibking; ex parte Ward

Battenberg v Union Club [2005] NSWSC 242 (30 March 2005) (Campbell J)

68 Treating an act in the law as having a retrospective effect is a familiar legal occurrence. Quite apart from the circumstances involved in the cases mentioned earlier in this judgment concerning setting aside judgments and convictions, and annulment of bankruptcies and marriages, it occurs whenever a court order is made which has effect *nunc pro tunc*. In the operation of section 447A ***Corporations Act 2001*** (Cth) when the Court makes an order about how Part 5.3A of the Act *"is to operate"*, by saying that henceforth the past will be treated as being different in some way to the way it actually occurred, the court makes orders with a retrospective effect: ***John Vouris Re; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq)*** [2003] NSWSC 702 ; (2003) 47 ACSR 155 at [68] - [72] . The doctrine of relation back in bankruptcy provides another familiar example. So does recision of a contract *ab initio*.

Transtaff Pty Limited ACN 094 353 090 [2005] NSWSC 197 (22 February 2005) (Einstein J)

Vouris Re; Epromotions Australia Pty Limited v Relectronic - Remech Pty Limited (in liq) (2003) 47 ACSR 155

Transtaff Pty Limited ACN 094 353 090 [2005] NSWSC 197 (22 February 2005) (Einstein J)

3 It is to be noted that in *Re Vouris; Epromotions Australia Pty Limited v Relectronic – Remech Pty Limited (in liq)* (2003) 47ACSR 155 Campbell J set out the scheme of the relevant legislation and importantly at paragraph 56, p 177 followed *Ricon Constructions Pty Limited*.

Edwards v Attorney-General [2004] NSWCA 272 (06 August 2004) (Spigelman CJ at 1; Mason P at 30; Young CJ in Eq at 35)

Re Vouris (2003) 47 ACSR 155

Reynolds v Katomba RSL All Services Club Ltd

Edwards v Attorney-General [2004] NSWCA 272 (06 August 2004) (Spigelman CJ at 1; Mason P at 30; Young CJ in Eq at 35)

127 In Re Vouris (2003) 47 ACSR 155 , Campbell, J applied Lawson v Mitchell in an entirely different factual situation. In that case, Mr Vouris, as administrator of a company was one day late in convening a meeting of creditors. A creditor complained that Mr Vouris had breached his duty and ASIC commenced disciplinary proceedings against him before the Companies, Auditors and Liquidators Disciplinary Board (CALDB). Mr Vouris sought from Campbell J relief under s 1318 . His Honour declined to give that relief because he said at para [118] at 192 the power of a court under s 1318(1) is one which can be exercised only in a "civil proceeding", "for negligence, default, breach of trust or breach of duty". It follows that the capacity of a Court under s 1318(2) to grant relief is limited to relief against the type of claim which can be brought, in a court, in a "civil proceeding", "for negligence, default, breach of trust or breach of duty". Accordingly there was no power under 1318 to make an order which could relieve against the consequences of disciplinary proceedings.

ACN 101 445 916 Pty Limited [2004] NSWSC 710 (23 July 2004) (Hamilton J)

Re Vouris (2003) 177 FLR 289; 47 ACSR 155

ACN 101 445 916 Pty Limited [2004] NSWSC 710 (23 July 2004) (Hamilton J)

3 Mr Eassie, of counsel for the plaintiff, asked me for relief primarily under s 1322 of the Corporation s Act 2001 (Cth) ("the CA"). He did ask alternatively for relief under ss 447A and 447C of the CA . In my view it is better to grant the primary relief solving this problem under s 447A. The width of the power under that section has been made plain by the High Court of Australia in Australasian Memory Pty Limited v Brien (2000) 200 CLR 270 . Furthermore, it has been made plain that it can be used as the means of correcting errors or defects in relation to creditors' meetings: see the judgment of Santow J (as he then was) in Re Ricon Constructions Pty Ltd (In Liq); Ex parte McDonald (1997) 43 NSWLR 174; 26 ACSR 655. In my view, the primary relief which best solves the problem is an order under s 447A that Part 5.3A of the CA operate in relation to the administration as if the company were correctly named in the relevant documents. The documents which particularly require remedying are the original minute of the resolution appointing the administrator, the notice of appointment of administrator and the notice convening the meeting: see generally the judgment of Campbell J in Re Vouris (2003) 177 FLR 289; 47 ACSR 155 .

Goodman v Australian Securities and Investments Commission [2004] FCA 1000 (07 July 2004) (Branson J)

John Vouris, Re; Epromotions Pty Ltd and RelectronicRemech Pty Ltd (in Liq) [2003] NSWSC 702 approved

Goodman v Australian Securities and Investments Commission [2004] FCA 1000 (07 July 2004) (Branson J)

26. For present purposes I am willing to assume, as the applicant contends, that in reviewing TSG's halfyear financial report under s 309(4) of the Act , the applicant was not carrying out

or performing the duties of an auditor but rather he was carrying out or performing a duty or function required by subs 309(4) to be carried out or performed by a registered company auditor. The question of whether the applicant failed to carry out or perform adequately and properly that duty or function is not a pure question of law. The words *'adequately'* and *'proper ly'* incorporate notions of judgment. The relevant judgments call for consideration to be given to accepted professional standards (see *John Vouris, Re; Epromotions Pty Ltd and RelectronicRemech Pty Ltd (in Liq)* [2003] NSWSC 702 at [103]). The task of determining the relevant accepted professional standards is a task within the expertise of the Board. The accepted professional standards may be found by the Board to be set by, or alternatively reflected in, published Auditing Standards – notwithstanding that the Auditing Standards have no direct statutory significance.

Re Chinese Cultural Club Ltd [2004] NSWSC 432 (24 May 2004) (Campbell J)
Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq) [2003] NSWSC 702 ; (2003) 47 ACSR 155

Re Chinese Cultural Club Ltd [2004] NSWSC 432 (24 May 2004) (Campbell J)

15 For the reasons which I gave in ***Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq)*** [2003] NSWSC 702; (2003) 47 ACSR 155 at [48] sectio n 1322 ***Corporations Act*** can be used to validate irregularities in the administration of a corporation which occurred at a time when the activities of that corporation were governed by the ***Corporations Law*** . The manner of operation of section 1322 is explained in ***Re Vouris*** at [50]–[56]; I will not set out again the authorities there collected.

Re Guerra Transport Pty Ltd [2004] NSWSC 245 (31 March 2004) (Austin J)
Re Vouris; ex parte Epromotions Australia Pty Ltd (2003) 47 ACSR 155
Re Western National Earthmoving Corporation Pty Ltd

Re Guerra Transport Pty Ltd [2004] NSWSC 245 (31 March 2004) (Austin J)

22 More fundamentally, the Court contrasted s 1322, a general power standing apart from the statutory scheme of Part 5.3A, with s 447A , which it described (at 281) as "an integral part of the legislative scheme provided for by Part 5.3A". This implies a legislative intention that s 447A is available to permit alterations to the way in which Part 5.3A is to operate, even where the provision in question would be construed as absolute if read in isolation from s 447A : see *Re Vouris; ex parte Epromotions Australia Pty Ltd* (2003) 47 ACSR 155, 179 per Campbell J .

Re Glowbind Pty Ltd (in Liq); Takchi v Parbery [2003] NSWSC 1190 (15 December 2003) (Burchett AJ at 1)
John Vouris; Re Epromotions Australia Pty Ltd [2003] NSWSC 702
JW Murphy & PC Allen; Re BPTC Ltd (in liq), Re

Re Glowbind Pty Ltd (in Liq); Takchi v Parbery [2003] NSWSC 1190 (15 December 2003) (Burchett AJ at 1)

29 Counsel for the applicants put a subsidiary argument that the liquidator, on receiving the two proofs of debt so late, and in view of the questions they raised, should have adjourned the meeting. But if this course, which he was not actually asked to pursue, was open to be taken, the existence of such an alternative would not convert an otherwise correct decision to reject the proofs of debt into a wrong decision. In any case, it has been held that the powers he could exercise in that regard as chairperson were quite limited: *John Vouris*; *Re Epromotions Australia Pty Ltd* [2003] NSWSC 702 .

Blacktown City Council v Macarthur Telecommunications Pty Ltd [2003] NSWSC 852 (10 September 2003) (Campbell J)
John Vouris Re; Epromotions Australia Pty Limited and Relectronic-Remech Pty Limited (in Liq) [2 003] NSWSC 702

26 The situation is complicated by the fact that at a meeting of creditors, there is power to adjourn the meeting under s 439B(2), but that power of adjournment is one which is regulated by reg 5.6.18 of the ***Corporations Regulations*** , so that an administrator does not have an unfettered power to adjourn the meeting as he thinks fit - see generally ***John Vouris Re; Epromotions Australia Pty Limited and Relectronic-Remech Pty Limited (in Liq)*** [2003] NSWSC 702 . The effect of this is that the question of whether the meeting should be adjourned tomorrow is not one which lies in the hands of the administrator alone.