IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M203 of 2018

BETWEEN

CONNECTIVE SERVICES PTY LTD (ACN 107 366 496)
First Appellant

CONNECTIVE OSN PTY LTD (ACN 106 761 326)
Second Appellant

AND

SLEA PTY LTD (ACN 106 752 434)
First Respondent

MINERVA FINANCIAL GROUP PTY LTD (ACN 124 171 759)
Second Respondent

MILLSAVE HOLDINGS PTY LTD (ACN 115 160 097)
Third Respondent

MARK SEAMUS HARON
Fourth Respondent

APPELLANTS' SUBMISSIONS IN REPLY

1. *Re: Respondents' Submissions [4] – [22] and [44] – [50].* Many of the matters in RS[4] – [22] were not raised or emphasised by the respondents before the Court of Appeal. Further, they were not facts relied on by the Court of Appeal or found by Almond J.[1] Some are, in fact, incorrect.

2. At CA [75]-[77], AB 100 is set out the case as advanced by the respondents in the Court of Appeal:

   (a) the conduct complained of was the institution of the Pre-emptive Rights Proceeding itself – no further or other facts were relied on by the respondents in asserting a breach of s 260A of the *Corporations Act 2001* (Cth);[2] and

   (b) the conduct relied on as constituting "financial assistance" was the appellants' liability for the costs of conducting the Pre-emptive Rights Proceeding, and the potential liability to the respondents.[3]

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[1] As to the facts as found by the Court of Appeal see CA [4]-[11], AB 82 and 83.
[2] CA [75], AB 100.
[3] CA [77], AB 101.

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3. There is no reason to justify any departure in this Court from the matters relied on in the Court of Appeal so as to raise the matters in RS[4]-[22].[4]

4. Even if permitted to raise them, several of the matters are incorrect – which further justifies why they ought not be entertained at this late juncture.

5. As to RS[5], during the relevant events alleged in the Pre-emotive Rights Proceeding, only the first and third respondents were shareholders in the appellants.[5] Haron's interests were acquired later.

6. RS[8] only partly reveals the appellants' contentions in the Pre-emptive Rights Proceeding. Further and alternatively to the allegation that Slea intends to transfer its shares without complying with the rights of pre-emption, it is also alleged that Slea has triggered the rights of pre-emption by reason of the Accommodation Agreement as Slea has transferred to Liberty its absolute right to sell, transfer, dispose of or other deal with its shares without first obtaining Liberty's written consent.[6]

7. RS[10] appears to imply that the Pre-emptive Rights Proceeding was commenced one day before the expiry of a limitation period. That is incorrect. The Accommodation Agreement was not revealed until 15 December 2011, thus extending any limitation period in which to apply for relief.[7]

8. RS[16] and [17] carry the implication that the costs of the Pre-emptive Rights Proceeding are a substantial burden on the appellants' cash resources, yet that submission (which is as to a fact that was not part of their case below) sits inconsistently with the fact as found by the Court of Appeal that the business is a successful business.[8]

9. The respondents assert facts at RS[9], [18] to [20] to support inferences at RS[46] – [50] and [68], that the object of the Pre-emptive Rights Proceeding as manifested by some purpose of Millsave and Haron (for which no case was made below) is that Millsave and Haron wish to and will acquire Slea's shares. Again, the evidence below did not establish the matters at RS[9] and [18] to [20]. In the absence of such evidence, the inferences that the respondents invite the Court to draw at RS[46] to [50] cannot be sustained.[9]

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[4] See *Coulton v Holcombe* (1986) 162 CLR 1 at pp.7 to 9 (Gibbs CJ, Wilson, Brennan & Dawson JJ); *University of Wollongong v Metwally (No.2)* [1985] 59 ALJR 481 at p.483G (Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ).

[5] See Appellants' Statement of Claim at [7], [8], [10] and [11], at Respondents' Further Materials, 21 and 22, which are admitted by the Respondents.

[6] See [36] to [38] of the Appellants' Statement of Claim in the Pre-emptive Rights Proceeding at Respondents' Materials, 31 and 32.

[7] See [2017] VSC 706 at [60] (Judd J), AB 67; see also s 27 of the *Limitations of Actions Act 1958* (Vic).

[8] See CA [2], AB 80.

[9] See *Luxton v Vines* (1952) 85 CLR 352 at p.358 (Dixon, Fullagar & Kitto JJ); *Holloway v McFeeters* (1956) 94 CLR 470 at pp.480 to 481 (Williams, Webb & Taylor JJ); *Naxakis v Western General Hospital* (1998) 197 CLR 269 at [45] (McHugh J); *Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd* [2017] VSCA 88 at [100] to [102] (Santamaria, Ferguson & Kaye JJA).

10. A possible result following on from the Pre-emptive Rights Proceeding is that Millsave and/or Haron may ultimately acquire more shares.[10] The reality, however, is that the Pre-emptive Rights Proceedings simply seeks to enforce the terms of the pre-emption provisions in cl.77 of each of the appellants' respective constitutions so that any transfer occurs according to the orderly process set out in cl. 77.[11]

11. Clause 77 is set out at AB 81. It is plain from its terms that an existing shareholder has an *option* to acquire a proportion of the shares if the clause is triggered – but it does not *require* the shares to be transferred and does not compel an existing shareholder to acquire *any* of the shares. If the offer is not taken up, in part or in full, then the member wishing to transfer to another person may do so, subject to the terms of cl. 77.6.

12. ***Re: RS [23] – [25] and [78]***: *Trevor v Whitworth*[12] is cited by the respondents as being apt to describe Slea as the troublesome shareholder who the others wish to be rid of. Slea is "troublesome" not because it seeks to actively participate in the management of the appellants, but because it has done a deal, as embodied in the Accommodation Agreement,[13] whereby it will only exert itself in securing shares for Liberty and do what it can to avoid its obligations under cl. 77.[14]

13. ***Re: RS [26] – [32], [37] and [43]***: As correctly identified at RS[29], s 260A of the Act was rewritten by the *Company Law Review Act 1998* (Cth). But the revision is more than a simplification as the Respondents contend. *First*, s 260A is expressed in permissive terms unlike its predecessors which were expressed as absolute prohibitions. *Secondly*, it introduced the concept of "material prejudice" so that any dealing would not contravene the section unless (as they case may be) it caused material prejudice to the company. *Thirdly*, unlike its predecessors, there was no definition included within Part 2J.3 of the Act as to what constitutes financial assistance.

14. Under predecessor provisions, a loan made by a company for the purpose of enabling an acquisition of its shares fell within the prohibition. Under s 260A, that loan would only contravene s 260A if it materially prejudiced the interests of the company, its members (unless they approved it) or creditors. The change in language from s 205 of the *Corporations Law* to s 260A of the Act matters, and has had a real effect on the intended operation of s 260A.[15]

15. As to RS[37], the appellants have not conceded at AS[60] that s 260A contains an implied prohibition. It is plain from the text of s 260A that a contravention may be made out where

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[10] Subject to the resolution of any rights of priority asserted by one or both them to any offer of shares.
[11] See CA [12] to [16], AB 83.
[12] (1887) 12 App Cas 409 at pp.435 to 436 (Lord Macnaghten).
[13] Respondents' Further Materials, 13 to 18.
[14] See cll. 1.4, 7.2 and 8.6 of the Accommodation Agreement at Respondents' Further Materials, 14 and 16.
[15] see AS[19] to [32].

there is found, in the first instance, something that amounts to "financial assistance" and if so, that one of the exceptions in 260A(1)(a) to (c) is not made out by the other party. Accepting at AS[60] that the appellants had the onus of proof on the question of material prejudice *if* the 2 respondents established that there was financial assistance in the first place does not alter the text of s 260A.[16]

16. ***Re: RS [39] and [66]:*** There is a substantial difference between the parties as to the meaning of the compound term "financial assistance" despite what is said at RS[39] and fn.48 thereto. Without expressly saying it, the respondents cast aside the concept of "transaction"[17] from the meaning of financial assistance. Though the word "transaction" is not in the text of s 260A, it is embedded within the meaning given to "financial assistance" as that composite expression has been judicially determined.[18] And, as is plain from the basis upon which the respondents advanced their case below, the only matter relied on was that the appellants had unilaterally instituted the Pre-emptive Rights Proceeding. That unilateral conduct, of itself, is no "transaction" for the purpose of the meaning of "financial assistance".[19]

17. That is the error at CA[77], which is identified at AS[56] – the Court of Appeal did not apply the meaning of "financial assistance" correctly by identifying a "transaction" involving the Appellants, but instead parsed the expression "financial assistance" by holding that *"[t]he 'assistance' is properly characterised as 'financial assistance' because the assistance given to Millsave and Haron comes as a financial cost."* The analysis at CA [77] is devoid of any analysis of whether there was a "transaction."

18. ***Re: RS [51] – [62].*** RS[52] to [58] present an impossible situation. Dealing specifically with the common form rights of pre-emption in cl.77 of the appellants' respective constitutions, if the respondents' submissions are correct, then in every case brought by a company to ensure compliance with such rights, the outcome will almost always assist others to acquire shares by leading to the making of an offer in accordance with those rights of pre-emption. According to RS[58], that will amount to a contravention of s 260A of the Act, for the same reason identified at CA [77], namely that paying lawyers and being exposed to an adverse costs order is assistance that comes at a financial cost. In respect of RS[59] to [61], the same analysis applies.[20]

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[16] Further, for the same reason, s 1324(1B) of the Act does not assist in the proper approach to the construction of s 260A as the Respondents submit at RS[35].

[17] The *Shorter Oxford English Dictionary*, sixth edition, provides several meanings of transaction including '3. The action of transacting or fact of being transacted ... 4. That which is or has been transacted, esp. a piece of business; a deal. A physical operation, action, or process.'

[18] See AS[49], [53] and [54] and fn.28 thereto; Almond J at [93] to [94], AB 37 to 38.

[19] See *Grimwade v Federal Commission of Taxation* (1949) 78 CLR 199 at p.220 (Latham CJ & Webb J) and p.222 (Rich J); *R v Difort* (1987) 89 FLR 427 at p.435 (Finlay J) (NSWSC); see also *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at pp.666 to 669 (Sheller JA) and fn.75 of the Respondents' Submissions.

[20] see also AS[39] to [41.

19. *Re: RS [67] – [68], [69] – [76] and [77] to [81].* RS[68] illuminates Slea's attitude, as aided by Liberty – it will not abide by its contractual obligations in cl. 77 unless a Court intervenes. That the Pre-emptive Rights Proceeding may have the effect of securing Slea's compliance and the effect identified at [10] and [11], *supra* (assuming that instituting the Pre-emptive Rights Proceeding amounts to "financial assistance" within the meaning of s 260A(1)), that does not mean that the commercial reality was that there has been a net transfer of value from the Appellants to Millsave and Haron to enable them to acquire shares.[21] Accordingly, it follows that there is no material prejudice.

20. That the appellants had the burden of proof on material prejudice, did not mean they had themselves to call any evidence, especially in light of the way in which the respondents put their case - that the only conduct complained of was the institution of the Pre-emptive Rights Proceeding. The respondents do not challenge the appellants' rights to vindicate the terms of their respective constitutions (and nor could they)[22] – all that they say at RS[80] is that s. 260A is contravened because the appellants' have to pay their lawyers for services they provide and potentially, a portion of Slea and Liberty's costs.

21. RS[75] further propounds the error at CA [77] that all that is required for a contravention of s 260A of the Act is to identify something that "assists" others to acquire shares and to see whether what is said to be of assistance comes, or could come, at a financial cost to the company.

22. *Re: RS [82] – [85].* The Respondents treat a company's role in the enforcement of its constitution as in effect that of a mere by-stander. That is erroneous.[23]

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[21] See *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at p.254 (Fullagar J).
[22] See for example, *Lyle & Scott Ltd v Scott's Trustees* [1959] AC 763 at pp.777 to 778 (Lord Reid); *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at pp.28 to 29 (Williams J).
[23] Ibid; see also *Trojan Equity Ltd v CMI Ltd* (2011) 87 ACSR 144 at [28] (McMurdo J).