HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S208/2006

SONS OF GWALIA LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) APPELLANT

AND

LUKA MARGARETIC & ANOR RESPONDENTS

Matter No S209/2006

ING INVESTMENT MANAGEMENT LLC APPELLANT

AND

LUKA MARGARETIC & ANOR RESPONDENTS

Sons of Gwalia Ltd v Margaretic
ING Investment Management LLC v Margaretic
[2007] HCA 1
31 January 2007
S208/2006 & S209/2006

ORDER

In each matter, the appeal is dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with K J Mony De Kerloy for the appellant in Matter No S208/2006 and the second respondent in Matter No S209/2006 (instructed by Freehills)

T F Bathurst QC with P D Crutchfield for the appellant in Matter No S209/2006 and for the second respondent in Matter No S208/2006 (instructed by Arnold Bloch Liebler)

B A J Coles QC with K M Richardson for the first respondent in both matters (instructed by Jackson McDonald)

CATCHWORDS

Sons of Gwalia Ltd v Margaretic
ING Investment Management LLC v Margaretic

Companies – Winding-up – Proof and ranking of claims – Claim by member against company for damages for misleading or deceptive conduct inducing purchase of shares – Relevance of *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 ("*Houldsworth*") – Whether *Houldsworth* established a principle of common law precluding a member from proving in the winding-up of a company for damages for misrepresentation inducing the acquisition of shares where the member has not rescinded the contract pursuant to which the shares were purchased and where rescission is no longer available by reason of the company's insolvency – Whether any such common law principle is part of Australian law.

Companies – Winding-up – Proof and ranking of claims – Claim by member against company for damages for misleading or deceptive conduct inducing purchase of shares – Whether claim admissible to proof under s 553(1) of the *Corporations Act* 2001 (Cth) ("the Act") – Whether circumstances giving rise to claim occurred before the "relevant date".

Companies – Winding-up – Proof and ranking of claims – Claim by member against company for damages for misleading or deceptive conduct inducing purchase of shares – Whether claim postponed by s 563A of the Act as a debt owed by the company to the member in that person's "capacity as a member".

Statutes – Construction – Section 563A of the Act – Whether claim postponed as a debt owed by the company to a member in that person's "capacity as a member" – Relevance of history of previous statutory provisions – Relevance of apparent purpose and policy of the Act – Relevance of context of contested provision – Relevance of alternative and foreign statutory provisions – Relevance of coherent approach to construction of corporate insolvency provisions.

Words and phrases – "capacity as a member".

Corporations Act 2001 (Cth), ss 553(1), 563A.

1 GLEESON CJ. These appeals raise an issue concerning the subordination of what are sometimes called "shareholder claims" to claims of other creditors in the application of the insolvency provisions of the *Corporations Act* 2001 (Cth) ("the Act"). The resolution of the issue turns upon the meaning and effect of s 563A of the Act, which is in Div 6 (concerning proof and ranking of claims) of Pt 5.6 (concerning winding-up). That section provides:

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

2 Section 553, which is also contained in Div 6 of Pt 5.6, provides that, subject to the Division, in every winding-up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages) are admissible to proof against the company. It is obvious that there are debts that may be owed by a company to a person who is a member of the company which are not owed to the person in the person's capacity as a member. It is equally obvious that, whatever be the precise test according to which the distinction is to be drawn, the subordination effected by s 563A is limited to debts owed to a member as a member, and does not apply to debts owed to a person otherwise than as a member. Debts owed by way of dividends, profits or otherwise to a person in the person's capacity as a member are contrasted with debts owed to, or claims made by, a person otherwise than as a member.

3 The language of s 563A has a long history; a history that goes back before the decision in *Salomon v Salomon & Co Ltd*[1], to a time when the separateness of a corporation from its members had not been fully recognised, and when the difference between corporations and partnerships was not as distinct as it later became. Subject to certain exceptions, it was an established rule of partnership law that a partner in a bankrupt firm could not prove in competition with the debts of outside creditors upon a dissolution[2]. Lord Lindley explained the rule as follows[3]:

> "[The creditors of the firm] are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. If, therefore, a

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1 [1897] AC 22.

2 *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 at 308.

3 Quoted in *Lindley & Banks on Partnership*, 18th ed (2002) at 818.

> partner is a creditor of the firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate."

4 Once it became accepted that a company formed under the applicable companies legislation is a corporate entity with a legal existence distinct from that of its members, it followed that the creditors of a company were not also creditors of the members either collectively or individually. That is an essential aspect of the difference between an ordinary trading company formed with limited liability, and a partnership.

5 There was another, more enduring, influence in company law, reflected in certain decisions said to apply to the present case. It concerns the law relating to the raising and maintenance of share capital. Companies Acts, in a variety of ways, have given effect to the principle, also established before *Salomon v Salomon & Co Ltd*, that the creditors of a company which is being wound up have a right to look to the paid-up capital as the fund out of which their debts are to be discharged[4]. Statutory manifestations of that principle have been modified over the years, and it may be doubted that it reflects the reality of modern commercial conditions, where assets and liabilities usually are more significant for creditors than paid-up capital. As Lord Browne-Wilkinson said in *Soden v British & Commonwealth Holdings Plc*[5], it is "wholly irrelevant" to the position of a member who has acquired fully paid shares on the market.

6 To return to s 563A, it assumes that a person's claim, constituting a debt, is admissible to proof against the company. The existence of a liability is the hypothesis upon which the section proceeds. It subordinates that claim if, but only if, the debt is owed to the person in the person's capacity as a member of the company.

7 The principal issue in these appeals is whether the (assumed) liability of the appellant in the first appeal ("the first appellant") to the first respondent in both matters, Mr Margaretic ("the respondent"), is a liability to him in his capacity as a member of that appellant. The appellant in the second appeal ("the second appellant") is a general creditor of the first appellant. Both appellants argued that the liability to the respondent is a liability to him in his capacity as a member of the first appellant. That issue was resolved adversely to the appellants by Emmett J at first instance in the Federal Court of Australia[6], and by the Full Court of the Federal Court (Finkelstein, Gyles and Jacobson JJ) on

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4 *Trevor v Whitworth* (1887) 12 App Cas 409 at 414.

5 [1998] AC 298 at 326.

6 (2005) 55 ACSR 365; (2006) 24 ACLC 244.

appeal[7]. Substantially the same issue, arising under a similar statutory provision, was resolved in the same way in the United Kingdom by Robert Walker J[8], the Court of Appeal, and the House of Lords[9], in *Soden*.

The respondent's claim

8 Sons of Gwalia Ltd, the first appellant, was a publicly listed gold mining company. On 29 August 2004, administrators were appointed pursuant to s 436A of the Act. It now appears that, at the time, the shares in the company were worthless. On 18 August 2004, the respondent had bought 20,000 shares in the first appellant at a cost of $26,200. The respondent alleges that, in breach of the stock exchange listing rules, the first appellant had failed to notify the Australian Stock Exchange that its gold reserves were insufficient to meet its gold delivery contracts and that it could not continue as a going concern. The respondent says that he was a victim of misleading and deceptive conduct and that the first appellant contravened s 52 of the *Trade Practices Act* 1974 (Cth), s 1041H of the Act and s 12DA of the *Australian Securities and Investments Commission Act* 2001 (Cth). He claims to be entitled to compensation, his claim being for the difference between the cost of his shares and their value (nil). There are many other shareholders with similar claims.

9 The proceedings have been brought to test the entitlement of shareholders in the position of the respondent to claim, in competition with other creditors, under a deed of arrangement under Div 10 of Pt 5.3A of the Act which includes a provision which, by reference, incorporates s 563A. The case has been argued on the assumption that the respondent can show one or more of the alleged contraventions of statute, and the consequential damage asserted.

10 Section 563A, like some other provisions of the Act, uses the expressions "debt" and "claim" interchangeably, and argument proceeded upon the basis that a liability for unliquidated damages may be a debt within the meaning of the section. This is a topic that was dealt with in some detail by Emmett J, but it is unnecessary to pursue the matter. Three aspects of the respondent's claim should be noted. First, the amount of the claim is not based on the amount of capital paid up on the shares which the respondent purchased. It is based on the market price of the shares. The company's capital structure, and the paid-up value of its shares, may have had some indirect bearing on the market value of the shares, but

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7 (2006) 149 FCR 227.

8 *Soden v British and Commonwealth Holdings plc* [1995] 1 BCLC 686; [1995] BCC 531.

9 [1998] AC 298.

the amount paid up on the shares is not an integer in his claim for damages. Secondly, there was no contract between the first appellant and the respondent concerning the purchase of the shares. The claim arises out of harm suffered by reason of conduct of the company that was in contravention of certain statutory norms of behaviour. Thirdly, while the appellants acknowledge that the fact that the respondent was a member of the first appellant at the time he made his claim is essential to their argument concerning the suggested operation of s 563A, that fact is not essential to his claim. His claim would have been the same if he had sold his shares (for example, to crystallise his loss for tax purposes) before he made the claim, or if for some reason his name had never been entered on the company's register of members. The appellants accept that if the respondent had sold his shares before he made his claim, the first appellant's debt would not be owed to him in his capacity as a member. In other words, they accept that s 563A has a temporal aspect.

A preliminary question

11 Both appellants submitted that principles reflected in the decision of the House of Lords in *Houldsworth v City of Glasgow Bank*[10] supported their construction of s 563A, but the second appellant also relied upon an argument said to be independent of that section. If the argument is correct, s 563A would have no application to the case, for it only applies where there is a debt owed by a company to a person, and then requires a decision as to whether the debt is owed to the person in the person's capacity as a member.

12 The history of s 563A is set out in the reasons of Hayne J. The section had its origins in s 38(7) of the *Companies Act* 1862 (UK). In that Act, and in subsequent United Kingdom and Australian legislation, until relatively recently, it took the form of a qualification (or, perhaps, a qualification upon a qualification) to a general provision concerning the liability of members to contribute in a winding-up. Broadly stated, the 1862 Act provided that in the event of a winding-up members were liable to contribute to the assets in order to meet the company's liabilities. In the case of a limited company, no contribution was required beyond the amount, if any, unpaid on the shares. However, no sum due to any member, in his character of a member, by way of dividends, profits, or otherwise, would be deemed to be a debt of the company payable in competition with general creditors, but such sum might be taken into account in making adjustments as between contributories. That was still the general scheme of s 360(1) of the *Companies (Victoria) Code* that was considered and applied by this Court in *Webb Distributors (Aust) Pty Ltd v Victoria*[11], and of the United

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10 (1880) 5 App Cas 317.

11 (1993) 179 CLR 15.

Kingdom legislation considered by the House of Lords in *Soden*. In the Act, s 563A appears in a somewhat different context, and its effect of subordination rather than denial is clearer, but its origins are unmistakable. Section 360(1)(k) provided that "a sum due to a member in his capacity as a member by way of dividends, profits or otherwise shall not be treated as a debt of the company payable to that member in a case of competition between himself and any other creditor who is not a member" but may be taken into account in a final adjustment of rights among contributions. The provision that a sum due was not to be treated as a debt in a case of competition between the member-creditor and other creditors might account for some elision of the issue whether a debt is provable and the issue of its ranking in terms of priorities. However that may be, s 563A clearly distinguishes those issues. It assumes that a certain debt is provable in a winding-up, and postpones it to certain other claims.

13 According to the second appellant's argument, there is a principle of common law, emerging from *Houldsworth*, which precludes a shareholder from proving in a winding-up (or under a deed of company arrangement) for damages for misrepresentation inducing any acquisition of shares unless the shareholder has first rescinded "the membership contract". Once the company has become insolvent or has gone into liquidation or voluntary administration, rescission is not available. If that argument were correct, s 563A could not apply, because it assumes, and subordinates, a liability of the kind which, according to this argument, does not exist. The submission did not make clear what was said to be involved in the notion of the rescission of the membership contract. The respondent in the present case was not a party to any contract with the first appellant providing for the acquisition of the shares in question.

14 The principle in *Houldsworth* is famously elusive[12]. For present purposes, it is sufficient to observe that, in *Webb Distributors*, this Court referred to a "proposition which the House of Lords distilled ... from the provisions of the *Companies Act* 1862" and held that it had "received statutory recognition in s 360(1) of the Code"[13]. There is a chronological curiosity here. The language of s 360 of the Victorian Code reflected the language of s 38(7) of the 1862 Act. *Houldsworth* did not apply that statutory language (of subordination) but turned on a wider principle, and produced a different result, although one that also was unfavourable to the claimant. *Houldsworth* was decided in 1880. The statutory language can hardly be said to reflect the decision in *Houldsworth*. It is older than the decision, and it produces a different result.

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12 See *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 32-33.

13 (1993) 179 CLR 15 at 33.

15 The difference between denial and postponement or subordination of a claim is not merely technical. At first sight it may appear puzzling that the majority in *Webb Distributors* held that s 360(1)(k) of the Victorian Code applied[14], and yet approved a holding "that the shareholders could not prove in the liquidation because they were precluded both from rescinding their contracts and from maintaining actions for damages in respect of their acquisition of the shares"[15]. If there were such a preclusion, then s 360(1)(k) would not have applied. Presumably, "prove" was taken to mean "prove in competition", but it is not easy to explain the concept of preclusion in the application of s 360(1)(k).

16 Some of the reasoning in *Webb Distributors* may have prompted the second appellant's preliminary point. The majority were not disposed to decide "whether *Houldsworth* is right or wrong"[16], identifying the critical question as being "whether the proposition which the House of Lords distilled in the case from the provisions of the *Companies Act* 1862 [was] incorporated in the provisions of the Code"[17]. They answered that question: yes, in part[18]. The scheme of the Act in relation to raising and maintenance of share capital is somewhat different from that of earlier legislation, and very different from that of the 1862 Act. As will appear, *Houldsworth* was never authority for a principle as wide as that asserted by the second appellant. The refusal of the majority in *Webb Distributors* to consider whether the decision in *Houldsworth* was right or wrong shows that they decided that case by applying s 360(1)(k) of the Code. They regarded some of the considerations underlying *Houldsworth* as relevant to the interpretation of s 360(1)(k), operating in addition to the Code. The issue in this case is to be decided upon the true construction of the provisions of the Act and, in particular, s 563A.

Section 563A

17 The appellants submit that the respondent's claim is for a debt owed to him in his capacity as a member of the first appellant. In support of that submission they rely both upon arguments of policy related to modern circumstances and upon arguments of historical context. They also submit that this Court's decision in *Webb Distributors* requires, or at least supports, that conclusion.

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14 (1993) 179 CLR 15 at 35.

15 (1993) 179 CLR 15 at 18, 39.

16 (1993) 179 CLR 15 at 33.

17 (1993) 179 CLR 15 at 33.

18 (1993) 179 CLR 15 at 33.

18 As to the first matter, modern legislation, such as that invoked by the respondent in this case, has extended greatly the scope for "shareholder claims" against corporations, with consequences for ordinary creditors who may find themselves, in an insolvency, proving in competition with members now armed with statutory rights. Corporate regulation has become more intensive, and legislatures have imposed on companies and their officers obligations, breach of which may sound in damages, for the protection of members of the public who deal in shares and other securities. This raises issues of legislative policy. On the one hand, extending the range of claims by shareholders is likely to be at the expense of ordinary creditors. The spectre of insolvency stands behind corporate regulation. Legislation that confers rights of damages upon shareholders necessarily increases the number of potential creditors in a winding-up. Such an increase normally will be at the expense of those who previously would have shared in the available assets. On the other hand, since the need for protection of investors often arises only in the event of insolvency, such protection may be illusory if the claims of those who are given the apparent benefit of the protection are subordinated to the claims of ordinary creditors. There is ample precedent for legislative resolution of this policy issue in a manner different from s 563A. For example, in the United States, §510(b) of the *Bankruptcy Code* provides:

> "510 Subordination
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> ...
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> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, *for damages arising from the purchase or sale of such a security*, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock." (emphasis added)

19 No such provision is to be found in the Act. The contrast between §510(b) and s 563A is obvious. If Parliament were to introduce such a provision, it would need to consider what would be the practical effect upon the rights conferred upon people who deal in shares and securities by legislation of the kind relied upon by the respondent. One thing is clear. Section 563A does not embody a general policy that, in an insolvency, "members come last". On the contrary, by distinguishing between debts owed to a member in the capacity as a member and debts owed to a member otherwise than in such a capacity, it rejects such a general policy. If there ought to be such a rule, it is not to be found in s 563A.

20 The construction argument based on history, and, in particular, "the principle in *Houldsworth*", overstates the width of that decision, and of others that have followed. At the commencement of these reasons, reference was made to two possible sources of influence, one relating to partnership law, the other relating to the raising and maintenance of share capital, that might have been at work in *Houldsworth*. The case was brought by an investor who acquired from a bank, which was an unlimited company registered under the 1862 Act, an amount of its stock. The company went into liquidation. Since it was an unlimited company, the investor became liable to pay calls as a contributory, and the liability was unlimited. The investor claimed he had been induced by fraud to take up the stock. Because the winding-up had commenced, he could not claim rescission of the contract of allotment. He claimed damages against the company for fraud, the damages including his liability on past and future calls. The claim failed. It is to be noted that what the investor was attempting to do was, in effect, to obtain from the company reimbursement in respect of his liability to pay calls in the winding-up of the company, in circumstances where he could no longer obtain rescission of the contract of allotment pursuant to which he acquired the shares which exposed him to the liability to pay calls. In *In re Addlestone Linoleum Co*[19], Lindley LJ said:

> "The principle on which the House of Lords decided *Houldsworth v City of Glasgow Bank* was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money – he must not directly or indirectly receive back any part of it".

21 In *Addlestone*, a company issued, as fully paid, shares which were in truth not fully paid, and a liquidator made a call for the unpaid balance. The shareholders sought to prove in the winding-up for damages measured by their liability on the call. Kay J held that the statutory equivalent of s 563A applied because the shareholders were making their claims in the character of members of the company. Their contracts of subscription for the shares obliged them to pay the money the subject of the call, and they were seeking to neutralise their obligations under those contracts. The Court of Appeal upheld the decision of Kay J adverse to the shareholders, but on the basis of the *Houldsworth* principle, as explained by Lindley LJ. That explanation turned upon the inconsistency between the contract of subscription (which could not now be rescinded) and the claim to recover capital which, under the contract of subscription, the claimant remained liable to pay. It is not fruitful to speculate about the extent to which that perception of inconsistency was affected by either or both of the influences mentioned at the commencement of these reasons.

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19 (1887) 37 Ch D 191 at 205-206.

22 *Webb Distributors* concerned non-withdrawable shares in a building society which were issued by the building society with certain representations as to the rights attaching to them. The building society was being wound up. The people to whom the shares were issued claimed that they were entitled to damages for misrepresentation, their claims being based on s 52 of the *Trade Practices Act* 1974 (Cth). For reasons explained by the Court, provisions of the *Companies (Victoria) Code* were imported into the winding-up. The Court treated the non-withdrawable shares as though they were shares in a limited company, and the holders as though they had subscribed for such shares. The damages claimed were based upon the amounts subscribed for the shares. Section 360(1) of the Code provided that on the winding-up of a company members were liable to contribute to the company's debt, subject to certain qualifications including:

> "(e) in the case of a company limited by shares, no contribution is required from a member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member;
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> ...
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> (k) a sum due to a member in his capacity as a member by way of dividends, profits or otherwise shall not be treated as a debt of the company payable to that member in a case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

23 Paragraph (k) is the counterpart of s 563A of the Act, although s 563A uses the language of subordination more clearly.

24 The majority in *Webb Distributors* treated the rationale of *Houldsworth*, as identified by Lindley LJ in *Addlestone*, as relevant to the interpretation of s 360(1)(k). They considered that the claim in the case before them was covered by s 360(1)(k) for the same reasons as Kay J had concluded in *Addlestone* that the claimants there were subordinated by the corresponding statutory provision[20]. Mason CJ, Deane, Dawson and Toohey JJ said[21]:

> "Paragraph (k) of s 360(1) will not prevent claims by members for damages flowing from a breach of a contract separate from the contract to subscribe for the shares. But, in the present case, the members seek to

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20 (1993) 179 CLR 15 at 34.

21 (1993) 179 CLR 15 at 35.

> prove in the liquidation damages which amount to the purchase price of their shares, which is a sum directly related to their shareholding. Moreover, they sue as members, retaining the shares to which they were entitled by virtue of entry into the agreement and they seek to recover damages because the shares are not what they were represented to be. Accordingly, the claim falls within the area which s 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company."

25 The first sentence in the above paragraph is relied upon by the respondent. He says it covers the present case. As to the second sentence, it is important to bear in mind that what was referred to as "the purchase price" of the shares was money paid to the building society which issued the non-withdrawable shares as the consideration for the issue: in effect, the subscription price.

26 The hypothesis of s 360(1)(k) was that there was a sum due to a member. The issue was whether the sum was due to the member in his capacity as a member. It is difficult to reconcile the acceptance of the hypothesis with a proposition that there was a fatal inconsistency between the nature of the claims being made in *Webb Distributors* and the claimants' position as shareholders. The approval given by the majority in *Webb Distributors* to the reasoning of Kay J in *Addlestone* suggests that, on the issue of the capacity in which sums were due to the claimants, the conclusion that the sums were due to them in their capacity as shareholders was regarded as being reinforced by the idea that they were in substance seeking to recover capital they had subscribed, which was comparable to the attempt by the claimants in *Addlestone* to avoid paying capital they were liable to contribute.

27 In *Soden*[22] the House of Lords treated *Addlestone* and *Webb Distributors* as standing "on exactly the same footing", that is to say, the protection of creditors from indirect reductions of capital, a consideration relevant to cases of subscription for shares but irrelevant to purchases from third parties of previously issued shares.

28 *Soden* raised the same problem as the present case, and the House of Lords reached the same conclusion as the Federal Court in this case. It is argued for the appellants that, in the application of s 563A of the Act, no valid distinction can be made between the position of a shareholder who claims to have subscribed for shares in a company in consequence of the misleading or deceptive conduct of the company, and that of a shareholder who claims to have purchased shares on the market (or, perhaps, retained shares) in consequence of such conduct. The appellants, it has been noted, accept as valid a distinction

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22 [1998] AC 298 at 326.

between a purchaser who buys shares on the market and then sells them before making a claim against the company, and a purchaser who retains them and makes a shareholder claim. That shows that what is or is not a valid distinction is not to be decided in terms of broad economic equivalence, but must be founded on the terms of the statute. From an economic point of view, there is little difference between the distinction which the appellants accept and the distinction which they reject. However, s 563A requires a line to be drawn between a shareholder claiming in the capacity of a member and a shareholder claiming otherwise than in the capacity of a member. To draw that line it is necessary to analyse the nature of a claim; it is not sufficient to describe its effect on other creditors.

29 In a passage from *Webb Distributors* quoted above, the majority said that s 360(1)(k) would not prevent claims by members for damages flowing from a breach of a contract separate from the contract to subscribe for shares. In a footnote, they gave two examples. The first, *In re Dale and Plant Ltd*[23], concerned a claim by a managing director, who was obliged by the company's articles of association to be a shareholder, for arrears of salary and breach of his contract of employment. Kay J thought it "very clear" that s 38(7) of the 1862 Act did not apply[24]. He rejected an argument that s 38(7) was intended to introduce into company law the principle of partnership law referred to at the commencement of these reasons. The second, *In re Harlou Pty Ltd*[25], concerned a contract of service which required an employee to purchase shares in a company, and required the company to find a purchaser for the shares on termination of service. In both of those cases, a member of a company was claiming damages for breach of contract by the company. In the second case, the contract related to the member's shares in the company.

30 Debts owed to a member by way of dividends or profits are given in s 563A, as in its predecessors, as examples of debts owed by a company to a person in the person's capacity as a member. The claim made in *Addlestone* has been treated as an example of what is embraced by the term "otherwise". In *Soden*, Lord Browne-Wilkinson referred to "the statutory contract" by which he meant the rights and obligations flowing from the United Kingdom counterpart of s 140 of the Act, together with the rights and liabilities conferred and imposed by other provisions of the Act. Section 140 provides that a company's constitution has effect as a contract between the company and each member and between a member and each other member. The concept of statutory contract

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23 (1889) 43 Ch D 255.

24 (1889) 43 Ch D 255 at 257.

25 [1950] VLR 449.

was discussed by McHugh and Gummow JJ in *Bailey v New South Wales Medical Defence Union Ltd*[26]. Lord Browne-Wilkinson concluded that an amount owing to a member in the character (capacity) of a member was an amount falling due under and by virtue of what he described as the statutory contract. To that his Lordship added "claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract"[27]. He appears also to have had in mind claims based upon liabilities incurred (even if not discharged) under the statutory contract, and claims (when capable of giving rise to debts within s 563A) advanced by way of relief from obligations imposed by the statutory contract.

31 What determines the present case is that the claim made by the respondent is not founded upon any rights he obtained or any obligations he incurred by virtue of his membership of the first appellant. He does not seek to recover any paid-up capital, or to avoid any liability to make a contribution to the company's capital. His claim would be no different if he had ceased to be a member at the time it was made, or if his name had never been entered on the register of members. The respondent's membership of the company was not definitive of the capacity in which he made his claim. The obligations he sought to enforce arose, by virtue of the first appellant's conduct, under one or more of the statutes mentioned in the earlier description of the respondent's claim.

32 The decision in *Webb Distributors* neither requires nor supports any different outcome. Principles concerning the raising and maintenance of share capital led this Court to conclude that, on the true construction of s 360(1)(k) of the Victorian Code, the claims in that case should be treated as claims for sums due to members in their capacity as members. For the reasons already given it would be wrong to conclude that, on the true construction of s 563A of the Act, the debt owed to the respondent is owed to him in his capacity as a member of the first appellant.

Conclusion

33 Each appeal should be dismissed with costs.

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26 (1995) 184 CLR 399 at 433-440.

27 [1998] AC 298 at 325.

34 GUMMOW J. The resolution of the issues in these appeals turns upon the construction of certain provisions of the *Corporations Act* 2001 (Cth) ("the Act") incorporated in a Deed of Arrangement to which Sons of Gwalia Ltd ("Gwalia") is subject. There is a dispute respecting the application of those provisions to "shareholder claims" by Mr Margaretic, the first respondent. The expression "shareholder claims" is used here to identify claims for damages against a company by a subscriber for, or purchaser of, its shares, where the claimant asserts reliance upon misleading or deceptive conduct of the company or other wrongful act or omission on its part which was causative of that shareholder's loss. ING Investment Management LLC ("ING") is a creditor of Gwalia which is not a shareholder and its interests are adverse to those of Mr Margaretic.

35 The apparently seamless continuity in the reception and development of the common law in Australia is apt to distract attention from the supreme importance of statute law. In this vein, the submissions presented on these appeals to varying degrees proceeded from an implicit premise which is false.

36 There are no "general principles of company law" applicable in a winding up and to which there must be reconciled those provisions of the Act and its predecessors (beginning with the *Companies Act* 1862 (UK) ("the 1862 UK Act")[28]) which stipulate a particular system of proof of debts and the ranking of debts and the placement of "shareholder claims" in that system.

37 Further, in any quest to locate such general principles, the older case law is not always a satisfactory guide. Excessive significance should not be attributed to statements in nineteenth century British cases, decided at a time of endeavours to "flesh out" the developing body of statute law[29] by use of principles derived from a range of sources in the general law. These sources included the law of agency, partnership, bankruptcy, and trusts. It later was recognised that some of those endeavours miscarried. One was the attribution to directors of the character of trustees of the assets of the company, and another the treatment of a company in liquidation as trustee of its assets for distribution among creditors[30].

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28 25 & 26 Vict c 89.

29 See *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 609-611 [39]-[49]; *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 72-77 [96]-[124]; 231 ALR 1 at 34-41.

30 See, respectively, *Clay v Clay* (2001) 202 CLR 410 at 430-431 [41]; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 611 [48]-[49].

38 In his elaborate judgment in *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe*[31], Isaacs J referred both to the gradual development, culminating in *Salomon v Salomon & Co*[32], of the doctrine that the corporation has a distinct legal personality, and to various arguments which had rested upon the want in a corporation of physical personality. Isaacs J noted[33] that as counsel Willes J had argued (unsuccessfully) in 1851 that an action for trespass for assault and battery did not lie against a corporation aggregate because a corporation could neither beat nor be beaten in its body politic[34] but that, in 1867, as Willes J he had held in *Barwick v English Joint Stock Bank*[35] that the fraud of the agent of a corporation was properly described in law as the fraud of the corporation.

Differing legislative schemes

39 Legislative schemes may vary in the allocation of risk between investors and creditors and the priorities between them upon insolvency. Two contrasting examples with respect to "shareholder claims" may be given. First, the Federal Bankruptcy Code of the United States implements a policy which subordinates claims made by shareholders which arise from the purchase of shares. It provides (11 USC §510(b)):

> "For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security ... shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock."

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31 (1922) 31 CLR 290 at 308-312. Isaacs J concluded, in dissent, that a corporation might be a "resident" of a State for s 75(iv) of the Constitution: (1922) 31 CLR 290 at 325.

32 [1897] AC 22. See Rubin, "Aron Salomon And His Circle", in Adams (ed), *Essays for Clive Schmitthoff*, (1983) 99 at 99.

33 (1922) 31 CLR 290 at 311.

34 *The Eastern Counties Railway Company v Broom* (1851) 6 Ex 314 at 320 [155 ER 562 at 564]. The Court of Exchequer Chamber disagreed ((1851) 6 Ex 314 at 325 [155 ER 562 at 566-567]) but held that the action failed for want of evidence of prior direction or subsequent ratification of the acts of the servants of the railway company of which the plaintiff passenger complained.

35 (1867) LR 2 Ex 259.

40 In *In re Telegroup, Inc*[36], the Court of Appeals for the Third Circuit said that, in enacting this provision in 1978, the Congress adjudged that, as between shareholders and general unsecured creditors, it is the former who should bear the risk of any illegality in the issue of their stock, should the corporation enter bankruptcy, and that disappointed shareholders should not be able to use fraud and other such claims "to bootstrap their way to parity with general unsecured creditors"[37]. The Court accepted the proposition that[38]:

> "because equity owners stand to gain the most when a business succeeds, they should absorb the costs of the business's collapse – up to the full amount of their investment".

Hence §510(b) "effectively precludes an equity holder with a securities fraud claim from recovering damages from the debtor's estate for that claim"[39].

41 On the other hand, s 111A of the *Companies Act* 1985 (UK) appears[40] to reflect a policy which is to the contrary of that in the United States, and which denies any such subordination of shareholder claims. Section 111A provides:

> "A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares."

42 The principal provisions of the present Australian legislation in play in these appeals are s 553(1) (describing the debts and claims which may be proved in a winding up), s 555 (providing as the general rule for the equal ranking of proved debts and claims), and s 563A. This states:

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36 281 F 3d 133 at 141-142 (2002).

37 281 F 3d 133 at 142 (2002).

38 281 F 3d 133 at 140 (2002). See Slain and Kripke, "The Interface Between Securities Regulation and Bankruptcy – Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors", (1973) 48 *New York University Law Review* 261 at 286-287, 294.

39 Christensen, "The Fair Funds for Investors Provision of Sarbanes-Oxley: Is it Unfair to the Creditors of a Bankrupt Debtor?", (2005) *University of Illinois Law Review* 339 at 348-349.

40 cf *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 at 326-327.

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

The provisions of s 563A do not manifest any clear legislative policy seen in the modern legislation in the United States and the United Kingdom. Rather, as Hayne J explains in his reasons, while to some extent s 563A may derive from s 38(7) of the 1862 UK Act, the present legislation has not been marked by any close legislative consideration of the ends sought to be achieved by a provision in the terms of s 563A.

43 To some degree, the submissions on the appeals sought to put in two camps the interests of investors and creditors, in particular the trade creditors who are unsecured. Those with "shareholder claims" may be seen as in the camp of the shareholders. But such division into such discrete categories is not fully satisfactory. For example, while creditors have their own special position in insolvent administrations, large institutional lending may be made, at least in contemporary circumstances, without taking security in its traditional forms. The reasons for this may reflect the market strength of corporate borrowers at any one period, stamp duty considerations and other matters peculiar to the nature of the project to be funded[41]. However that may be, it would be an oversight to see the issues at stake as no more than attempted "boot strapping" by shareholder claimants to attain parity with the general body of unsecured creditors as understood in the past.

The present appeals

44 The central issues on the appeals should be resolved in favour of Mr Margaretic and the appeals dismissed.

45 First, upon a proper construction of the Act, Mr Margaretic's claims may be proved in a company winding up pursuant to s 553(1) of the Act. The terms of that provision remove any impediment to claims of this kind. Secondly, Mr Margaretic's claim is not a debt owed to him in his "capacity as a member" of Gwalia, whether by way of dividends, profits or otherwise; the claim is not to be postponed by s 563A of the Act to claims made by "persons otherwise than as members of the company".

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41 See, for example, the financing structure considered in *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 80 ALJR 1282 at 1302 [111]-[118]; 228 ALR 301 at 325-326.

46 I agree generally with the reasons given by Hayne J. What is said in these reasons assumes a reading of what is said by his Honour.

47 In what follows, I deal further with two additional and related points. The first is the adequacy of the reasons given in *Webb Distributors (Aust) Pty Ltd v Victoria*[42] and the second is the dependence upon that reasoning of a principle said to be derived from the speeches in the House of Lords in *Houldsworth v City of Glasgow Bank*[43].

48 It also is appropriate to deal in some detail with *Houldsworth* for a particular reason which emerges from the way in which ING put its case on what would be a threshold issue. In its written submissions, ING submitted that "the principle in *Houldsworth*" prevented, as a matter of common law, a shareholder claim such as that of Mr Margaretic arising in the first place, irrespective of statutory issues respecting admission to proof and ranking of claims. In the course of oral argument, counsel appeared to shift ground but, however that may be, in subsequent supplementary written submissions ING again invoked "the rule in *Houldsworth*" and its significance for *Webb*, upon which decision ING relied.

49 As these reasons will seek to demonstrate, in Australia the existence of any such common law "principle" of company law based upon *Houldsworth* should be rejected. Further, *Houldsworth* did not supply the support relied upon for the reasoning in *Webb*.

Webb's Case

50 *Webb* concerned admission to proof, not ranking of claims admitted to proof[44]. However, Gwalia and ING submitted that the reasoning in *Webb* was determinative of the issues of statutory construction upon which the appeals turned. Mr Margaretic challenged the applicability of the reasoning in *Webb* and, alternatively, its correctness. Gwalia and ING submitted that leave should not be given to re-open *Webb*.

51 The facts of *Webb* are described in the judgment of Hayne J; it is not necessary to repeat them here. There is a question whether *Webb* may be

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42 (1993) 179 CLR 15.

43 (1880) 5 App Cas 317.

44 See questions (a) and (b) answered by the Appeal Division of the Supreme Court: *State of Victoria v Hodgson* [1992] 2 VR 613 at 616, 631. The appeal to this Court was dismissed: (1993) 179 CLR 15 at 43.

distinguished on the basis that it concerned only claims by shareholders who acquired their shares by subscription, whereas Mr Margaretic purchased his shares from a third party on the market conducted by the Australian Stock Exchange. A distinction of this nature was drawn by the House of Lords in *Soden v British & Commonwealth Holdings Plc*[45], and *Webb* was distinguished on this ground. Both Gwalia and ING submitted that the distinction was without substance because the reasoning in *Webb* was equally applicable to claims by "transferee shareholders" as to claims by subscribers, and was intended by the Court to apply to all claims by members. Mr Margaretic supported the distinction but, as previously indicated, did not shrink from seeking leave to argue the correctness of *Webb*.

52 It is fruitless to pursue narrow factual distinctions of the kind adverted to above. Section 563A of the Act is expressed in terms of the postponement of certain debts. Unless the means by which a person became a member (that is, by acquiring shares by subscription or by transfer) is relevant to the characterisation of the "debt" owed by the company to the person as one owed to the person in his or her capacity as a member or not, the distinction is difficult to maintain as a matter of principle. This especially is so in a context where s 231 of the Act defines "member" without making any distinction of that kind. Therefore, alleged deficiencies in the reasoning in *Webb* should be grappled with; the decision cannot be put to one side on the basis of factual distinctions of the kind mentioned above.

53 In their joint judgment, the majority in *Webb* (Mason CJ, Deane, Dawson and Toohey JJ) concluded that the holders of non-withdrawable shares were not entitled to prove in the winding up of the building societies in respect of their claims in deceit and for misleading and deceptive conduct under s 52 of the *Trade Practices Act* 1974 (Cth) ("the TP Act"). This conclusion rested upon four related propositions. The first was that the "principle" on which *Houldsworth* was decided was that the share capital represents a "guarantee fund" and "protection" to creditors which should not be returned to shareholders other than on a permissible reduction of capital[46]. The second was that this "principle" received statutory recognition in s 360(1) of the *Companies (Victoria) Code* ("the Code")[47]. The third proposition[48] was that par (k) of s 360(1) of the Code bore the same interpretation as that ascribed to s 38(7) of the 1862 UK Act in *In re*

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45 [1998] AC 298 at 326-327.

46 (1993) 179 CLR 15 at 32-33.

47 (1993) 179 CLR 15 at 33.

48 (1993) 179 CLR 15 at 34.

Addlestone Linoleum Co[49] by Kay J[50]. Those sections were respectively the immediate forebear and the first progenitor of s 563A. The fourth proposition, which depended on the first three, was that[51]:

> "[The TP Act] is not to be seen as eliminating, 'by a side-wind'[52], the detailed provisions established for more than a hundred years to govern the winding up of a company."

Rescission

54 Before turning to examine these propositions, some reference should be made to a proposition which was said in the joint reasons in *Webb* not to be in issue[53]. It was common ground in *Webb* that the holder of shares ordinarily loses any right to rescission on winding up. In *Houldsworth* itself, Earl Cairns LC had noted that it was admitted and could not have been denied that, after the commencement of the winding up, it was too late for rescission[54].

55 Shortly before *Houldsworth*, the Lord Chancellor had emphasised, with reference to *Oakes v Turquand and Harding*[55], that upon the commencement of winding up "innocent third parties [would] have acquired rights which would be defeated by the rescission"[56]. Later, in *Civil Service Co-operative Society v*

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49 (1887) 37 Ch D 191.

50 The joint judgment continued ((1993) 179 CLR 15 at 34):

> "The Court of Appeal dismissed an appeal from the decision of Kay J, principally by reference to the decision in *Houldsworth*. However, Lopes LJ agreed [(1887) 37 Ch D 191 at 206] with the construction placed upon s 38(7) by Kay J. And Cotton LJ, with reference to the applicants, stated [(1887) 37 Ch D 191 at 205] that 'now they come here as shareholders, and in substance retain their shares, and seek to sue the company for breach of the contract under which they took them'."

51 (1993) 179 CLR 15 at 37.

52 See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 224 per Brennan J.

53 (1993) 179 CLR 15 at 31.

54 (1880) 5 App Cas 317 at 322.

55 (1867) LR 2 HL 325.

56 *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615 at 621.

Blyth[57], Isaacs J repeated the fuller explanation by Fry LJ of the attitude of equity which he gave in 1883 as follows[58]:

> "Now the general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern."

Isaacs J also emphasised that, in the case of a contract to take shares, equitable relief was essential and that such a contract was not of a character "that at common law ... is rescindable by the act of the party, that is, by mere repudiation ... [which] itself works avoidance"[59].

56 In *Webb*, reference was made[60] to the explanation given by Jessel MR of the unavailability of a remedy of rescission after a company is wound up. In argument, the Master of the Rolls stated[61] as "doctrine" the proposition that rescission must be impossible after a company is wound up because the company "ceases to exist"; further, he said that this was the meaning of observations by Earl Cairns LC in the then recent decision in *Houldsworth*.

57 Several points should be made here. The first is that it since has become clear that a winding up has no immediate effect upon the corporate existence or personality, or upon the powers of the company[62]. Secondly, it is not readily apparent that, when explaining in *Houldsworth* why the remedy for damages in deceit was not available, Earl Cairns LC relied upon any non-existence of the corporation.

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57 (1914) 17 CLR 601 at 613.

58 *In re Scottish Petroleum Co* (1883) 23 Ch D 413 at 439.

59 *Civil Service Co-operative Society v Blyth* (1914) 17 CLR 601 at 613. As to the distinction between rescission as understood at common law and as an equitable remedy, see *Alati v Kruger* (1955) 94 CLR 216 at 223-224.

60 (1993) 179 CLR 15 at 30.

61 *In re Hull and County Bank* (*Burgess's Case*) (1880) 15 Ch D 507 at 509-510.

62 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 598-600 [3]-[11], 611 [49]; Keay, *McPherson's The Law of Company Liquidation*, 4th ed (1999) at 218-219.

58 Thirdly, however, in administering an equitable remedy such as that of rescission, it is proper to take into account both the supervening, albeit indirect, interests of the shareholders and creditors referred to by Isaacs J in *Blyth*[63], and the changes brought about in the enjoyment of the rights of shareholders and creditors by the administration required by a winding up, even where the claims of creditors will be satisfied. It is in this context that one may agree with the view of Dixon J in *Southern British National Trust Ltd v Pither*[64] that the denial of equitable relief to rescind the contract of membership after winding up was inevitable.

59 However, it is difficult in this area to state propositions in absolute terms. Shortly after *Pither*, in *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd*[65], Rich ACJ, Dixon and McTiernan JJ held that the plaintiff was entitled to an order for rectification of the register of members and stayed an order for repayment of subscription moneys with interest to enable the plaintiff to prove in the winding up of the company for those moneys. The proceedings had been instituted six weeks before the lodgment of the winding-up petition, but at a time when the company was in a hopeless financial position.

60 Whatever be the basis in principle for the rescission cases, they do not dictate any particular conclusion respecting the denial in *Houldsworth* of the existence of any remedy in damages. Something more now should be said respecting that case.

Houldsworth's Case

61 As noted above, the "principle" derived by the majority in *Webb* from *Houldsworth* they identified as being that "a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company"[66]. The majority had earlier in their reasons set out[67] a passage from the judgment of Lindley LJ in *Addlestone*[68] in which he stated in similar terms "the principle" on which *Houldsworth* was decided. The majority in *Webb* also accepted the thesis to similar effect advanced by Professor Gower, to which further reference will be made.

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63 (1914) 17 CLR 601 at 613.

64 (1937) 57 CLR 89 at 114.

65 (1941) 65 CLR 603 at 619-620.

66 (1993) 179 CLR 15 at 33.

67 (1993) 179 CLR 15 at 31.

68 (1887) 37 Ch D 191 at 205-206.

62 Their Honours in *Webb* acknowledged that the above "principle" could no longer be supported in absolute terms, given provisions in the Code permitting authorised reductions of share capital. These provisions had their origin in the *Companies Act* 1867 (UK)[69], s 9 of which had conferred an express power for a company to include in its Memorandum of Association a power to reduce its capital, although subject to confirmation by the court[70]. Prior to the enactment of these provisions, the effect of ss 8 and 12 of the 1862 UK Act appears to have been, in the case of a limited company, to prohibit reductions of capital[71]. In the opinion of the majority in *Webb*, the statutory provisions for the reduction of capital were "not inconsistent with the *Houldsworth* proposition" because they proceeded on an acceptance of the reasoning underlying that case; this was that "subscribed capital [is] a protection to creditors"[72].

63 However, *Houldsworth* cannot be explained in those terms. Rather, it is the gradual development of legal thought respecting the nature of corporate personality which Isaacs J later traced in *Howe*[73] and the use of inapt analogy drawn from established areas of the law which is manifested in *Houldsworth*.

64 *Houldsworth* was an appeal from Scotland in a proceeding on an interlocutory plea by the defenders as to the relevancy of the pursuer's action against the City of Glasgow Bank, in liquidation, for damages caused by fraudulent representations which allegedly induced him to take up stock in the Bank. The procedure adopted in Scotland appears to have been similar to a demurrer.

65 The Bank had been incorporated under the 1862 UK Act as an unlimited joint stock company, but *Houldsworth* was not decided upon s 38 of the 1862 UK Act, dealing with the liability of members for contributions on a winding up, or upon principles concerning the reduction of capital. Moreover, *Houldsworth* was decided at a time when the 1862 UK Act was relatively new and when other

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69 30 & 31 Vict c 131.

70 See now Div 1 of Pt 2J.1 of the Act, where authorisation by the court is no longer required.

71 See the remarks of Lord Herschell in *Trevor v Whitworth* (1887) 12 App Cas 409 at 415-416.

72 (1993) 179 CLR 15 at 33.

73 (1922) 31 CLR 290 at 308-312.

areas of law applicable to the relations between members, directors and the company were in a state of fluidity.

66 The Bank had stopped payment on 2 October 1878 and, at an extraordinary general meeting held on 22 October, resolutions were passed for a voluntary winding up; there was a deficiency of some £5 million and this would fall to be made up by calls on shareholders[74]. Houldsworth claimed against the Bank and the liquidators damages in sums representing the price paid for his shares, a call already made and the anticipated amount of further calls to meet the above deficiency in assets. In that respect, his claim was "for a total relief and indemnification, after the creditors have been fully paid, out of the surplus assets of the company, or out of the private estates of those of his fellow-partners who then remain solvent"[75].

67 The Court of Session accepted the Bank's submissions that, while an action for damages might lie against the fraudulent officials of the Bank, the Bank itself had not authorised their actions, nor had it adopted them except in the sense of getting the benefit of the resulting contract; all the company could be asked to do was to give up the contract[76]. Neither in the Court of Session nor in the House of Lords was the litigation determined by reference to the law respecting admission or ranking of claims in a winding up conducted in accordance with s 38 of the 1862 UK Act. It is incorrect to say, as was remarked in *Webb*, that the House of Lords "distilled" a proposition for which *Houldsworth* is authority "from the provisions of the [1862 UK Act]"[77]. Rather, Houldsworth failed at the threshold; his action in damages did not lie against the Bank.

68 Two issues were considered by the House of Lords in *Houldsworth*. One, emphasised particularly by Earl Cairns LC[78], concerned the existence of a qualification to what he stated as the general rule that a purchaser of goods who bought under a fraudulent misrepresentation may retain the goods and recover any damages sustained by reason of the fraud[79]. His Lordship held that there was

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74 *Houldsworth v City of Glasgow Bank* (1879) 6 R (Ct of Sess) 1164 at 1170; 16 Sc LR 700 at 704.

75 *Houldsworth v City of Glasgow Bank* (1879) 6 R (Ct of Sess) 1164 at 1167-1168; 16 Sc LR 700 at 703.

76 See the report of argument in (1879) 6 R (Ct of Sess) 1164 at 1167.

77 (1993) 179 CLR 15 at 33.

78 (1880) 5 App Cas 317 at 323-324.

79 See *Clarke v Dickson* (1858) El Bl & El 148 [120 ER 463]; *Alati v Kruger* (1955) 94 CLR 216 at 222.

an exception where the plaintiff is a shareholder who retains the shares acquired by reason of the fraud of the agents of the company, but seeks damages against the company. Such a claim was said by the Lord Chancellor to be[80]:

> "inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law".

In one part of his speech, Lord Hatherley spoke in similar terms[81]. In *Addlestone*, Lindley LJ appeared to regard this as the sole principle for which *Houldsworth* stood[82].

69 References here to inconsistent positions and approbating and reprobating appear to be to the common law rules requiring choice between alternative remedies, for example, between affirming or avoiding a contract induced by fraud[83]. No such choice was required where the contract for sale of goods was affirmed and damages sought in deceit. The reason given by Earl Cairns LC for a different principle where shares had been acquired was that recovery of damages would be "inconsistent" with the contract, affirmed by the shareholder. Analogies with what were seen as principles of partnership law were relied on by the Lord Chancellor as follows[84]:

> "It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions, shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his co-partners, in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered."

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80 (1880) 5 App Cas 317 at 325.

81 (1880) 5 App Cas 317 at 333.

82 (1887) 37 Ch D 191 at 205-206.

83 See the discussion by Viscount Maugham in *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 417-418.

84 (1880) 5 App Cas 317 at 325.

70 That reasoning bears the marks of its time. So, also, does the ground upon which Lord Selborne and Lord Blackburn particularly relied. This concerned the extent to which the law of agency rendered a company liable for the fraud of its directors. An appreciation of what was involved on this branch of the reasoning is assisted by looking to the course of the litigation in *Houldsworth*.

71 The Lord Ordinary assoilzied (ie, set free or absolved) the defenders[85] on the basis that the case was governed by the decision of the House of Lords in another appeal from Scotland, *Western Bank of Scotland v Addie*; *Addie v Western Bank of Scotland*[86]. The pursuer then appealed to the Inner House of the Court of Session[87]. By majority[88], the Inner House dismissed the appeal[89]. *Addie* was expressly relied upon by two members of the majority[90]. Likewise, all members of the House of Lords relied upon *Addie* in determining the appeal[91], Lords Selborne and Blackburn very clearly so.

Addie's Case

72 In *Addie*, a shareholder had claimed that he had been induced to purchase shares in the bank[92] by false and fraudulent representations of the directors and sought reduction of the deeds of transference of the shares and *restitutio in integrum* (that is, rescission) or, alternatively, damages. As later in *Houldsworth*, the defenders pleaded relevancy. In the House of Lords, a distinction was drawn

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85 See *Houldsworth v City of Glasgow Bank* (1879) 6 R (Ct of Sess) 1164 at 1166; 16 Sc LR 700 at 702.

86 (1867) LR 1 Sc & Div 145.

87 By a reclaiming note, a procedure described in Walker, *A Legal History of Scotland*, vol 6 (2001) at 534-535.

88 Lord President Inglis, Lord Deas, Lord Mure; Lord Shand dissenting.

89 *Houldsworth v City of Glasgow Bank* (1879) 6 R (Ct of Sess) 1164; 16 Sc LR 700.

90 *Houldsworth v City of Glasgow Bank* (1879) 6 R (Ct of Sess) 1164 at 1175 per Lord Deas, 1177 per Lord Mure; 16 Sc LR 700 at 707, 708.

91 (1880) 5 App Cas 317 at 326 per Earl Cairns LC, 330 per Lord Selborne, 332 per Lord Hatherley, 337 per Lord Blackburn.

92 The bank had been established as an unincorporated banking co-partnership but, for the purposes of a voluntary winding up, had been incorporated and registered under the *Joint Stock Companies Act* 1856 (UK) (19 & 20 Vict c 47), as amended by the *Joint Stock Companies Act* 1857 (UK) (20 & 21 Vict c 14) and 20 & 21 Vict c 80.

between the claim for rescission (from which on the facts the pursuer was disqualified by lapse of time and intervening events[93]) and the action for deceit, which did not lie in any circumstances. Lord Chelmsford LC said[94]:

> "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, *because a company cannot retain any benefit which they have obtained through the fraud of their agents*. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally." (emphasis added)

Lord Cranworth was more explicit. He said[95]:

> "[T]he true principle is, that these corporate bodies, *through whose agents* so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents *to the extent to which the companies have profited from these frauds*; but that they cannot be sued as wrong-doers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." (emphasis added)

Similar opinions had earlier been expressed by each of their Lordships in *New Brunswick and Canada Railway and Land Co v Conybeare*[96]. That appeal arose from a Chancery suit to rescind for misrepresentation a contract to take up shares. The suit failed on the facts, but it was said that, if the charge of equitable fraud

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93 *Addie* was decided on 20 May 1867, *Oakes v Turquand and Harding* (1867) LR 2 HL 325, which in turn was followed by *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615, was to be decided on 15 August 1867. These cases largely ruled out the rescission remedy in a winding up, as noted earlier in these reasons.

94 (1867) LR 1 Sc & Div 145 at 157-158.

95 (1867) LR 1 Sc & Div 145 at 167.

96 (1862) 9 HLC 711 at 740, 749 [11 ER 907 at 919, 922].

had been sustainable against the directors, the company would not have been liable for their acts unless it had adopted them.

73 At the time *New Brunswick* and *Addie* were decided, there was considerable uncertainty as to whether a principal could be rendered liable in deceit for the fraudulent misrepresentations of an agent when the principal neither knew of nor authorised the fraud. The Court of Exchequer Chamber had divided equally on the question in *Udell v Atherton*[97]. The Exchequer Chamber subsequently distinguished *Udell* in *Barwick v English Joint Stock Bank*[98], where Willes J delivered the sole reasons for himself, Blackburn, Keating, Mellor, Montague Smith and Lush JJ.

74 In *New South Wales v Lepore*[99], Gummow and Hayne JJ said of *Barwick* and its later adoption in *Lloyd v Grace, Smith & Co*[100], that it was thereby established that:

> "the circumstance that the employee who practises a fraud upon a third party does so for the benefit of the employee not the employer, is no answer to the liability of the employer if the employer, whilst not authorising 'the particular act', has placed the employee in a position 'to do that class of acts'; the employer then 'must be answerable for the manner in which that [employee] has conducted himself'[101]".

Houldsworth and *Addie*

75 *Barwick* was decided on 18 May 1867, after argument in *Addie* had concluded, and two days before the House of Lords delivered judgment on that appeal. The matter seems to have been regarded as still unsettled when *Houldsworth* came before the House of Lords a decade later, as the observations

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97 (1861) 7 H & N 172 [158 ER 437]. Pollock CB and Wilde B were in favour of the principal's liability, whereas Bramwell B and Martin B were in favour of the principal's immunity.

98 (1867) LR 2 Ex 259.

99 (2003) 212 CLR 511 at 590 [228]. See also at 613 [304] per Kirby J.

100 [1912] AC 716.

101 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 733 per Lord Macnaghten, adopting the statement of Willes J in *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 at 266.

of Lord Blackburn reveal[102]. However, in *Houldsworth*, the House of Lords is to be regarded as having rationalised *Barwick* and *Addie* by confining *Addie* to the case of persons who had been induced by the directors to subscribe for shares in a corporation.

76 Ashburner, writing in 1902, considered *Houldsworth* as establishing the "one exception to the rule that the principal is liable for the frauds of his agent committed in the matter of his agency and for the principal's benefit"[103]. *Houldsworth* was treated in similar terms in the third edition of Kerr's *Treatise on the Law of Fraud and Mistake*, which also appeared in 1902[104]. But was this "exception" soundly based? The better view is that it was not.

77 *Houldsworth* sustained the outcome in *Addie* in the case of these transactions with subscribers by reference to the "contract" into which the shareholder had entered, and which the shareholder must affirm in order to sustain the action. Mention has already been made of the approach taken, particularly by Earl Cairns LC, in relation to this contract. It was characterised variously by their Lordships as requiring that the assets of the company should be applied in paying its "antecedent debts and liabilities"[105], that shareholders "should all contribute equally to the payment of all the company's debts and liabilities"[106], and that shareholders should "contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning"[107].

78 It is not easy to discern why an action for damages was inconsistent with the features of the contract whereby shares were taken up. Nor is it clear why this inconsistency should have prevented the shareholder from claiming that the fraud of the directors was imputable to the company.

79 Accordingly, *Houldsworth* should not be regarded in Australia as establishing any principle based upon the above reasoning; nor does it establish

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102 (1880) 5 App Cas 317 at 339; Lord Blackburn treated *Barwick* as overruled by *Addie*.

103 *Principles of Equity*, (1902) at 404.

104 At 86. The same passage appeared at 102 of the sixth edition, *Kerr on Fraud and Mistake*, published in 1929.

105 (1880) 5 App Cas 317 at 325 per Earl Cairns LC.

106 (1880) 5 App Cas 317 at 329 per Lord Selborne; cf at 333 per Lord Hatherley.

107 (1880) 5 App Cas 317 at 337 per Lord Blackburn.

any exception respecting the responsibility of a principal for the frauds of an agent, stated by Ashburner in the passage referred to above.

80 It is true that acceptance of the doctrine associated with the subsequent decision in *Salomon*[108] of the endowment of the corporation with a distinct legal personality has not gone without modern criticism. In a revenue case, *Gorton v Federal Commissioner of Taxation*[109], Windeyer J remarked upon "the unreality and formalism" engendered in the law by *Salomon*. The facts considered in *Halloran v Minister Administering National Parks and Wildlife Act 1974*[110] were dictated by fiscal considerations[111], and may be a recent example of that tendency, although the steps taken nevertheless had legal efficacy[112].

81 The propositions that a corporation has no hands save those of its officers and agents and no mind save the mind of those who guide its activities, and cannot be subjected to the range of punishments visited upon a natural person, in general has not, as Brennan J explained in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[113], relieved corporations from the attribution of criminal guilt.

82 However, as *Caltex* decided, the considerations which supported the privilege of individuals against self-incrimination did not sustain the extension of the privilege to corporations. They cannot be witnesses or swear or affirm an affidavit. Nor may the commercial interests of a corporation suffice for protection by a tort based on protection of privacy[114]. But considerations of that nature do not support the outcome in *Houldsworth*.

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108 [1897] AC 22. Professor Sealy writes that the contemporary significance of *Salomon* lay in the endorsement of the right to claim the benefit of limited liability by what was essentially a single-member company, some years before the private company was accorded formal recognition by the *Companies (Consolidation) Act* 1908 (UK): "Modern Insolvency Laws and Mr Salomon", (1998) 16 *Company and Securities Law Journal* 176 at 176.

109 (1965) 113 CLR 604 at 627.

110 (2006) 80 ALJR 519; 224 ALR 79.

111 (2006) 80 ALJR 519 at 523-524 [18]-[19]; 224 ALR 79 at 84-85.

112 (2006) 80 ALJR 519 at 530 [56]; 224 ALR 79 at 93-94.

113 (1993) 178 CLR 477 at 514-515.

114 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [43], 231 [58], 256-258 [126]-[132], 279 [190]-[191], 326-327 [328].

Webb and *Houldsworth*

83 Reference already has been made to the reliance upon the thesis of Professor Gower to the effect that the decision in *Houldsworth* is explicable by the notion that share capital is a "guarantee fund" for creditors[115]. He sought to rationalise what was described as the "anomalous rule" in *Houldsworth* by reference to later conceptions as to the nature of share capital explained in *Trevor v Whitworth*[116] and its sequelae.

84 Section 13 of the *Limited Liability Act* 1855 (UK)[117] had provided that a company should be wound up once three quarters of its subscribed capital stock had been lost. But the validity of a proposition such as that of Professor Gower could not have been sustained once the point was reached after the 1862 UK Act that there was no impediment to a company carrying on business even once it had exhausted its original capital through trading.

85 In any event, there is much to be said for the view that a company satisfying its liability in tort to a member should not be characterised as attempting an unauthorised reduction of capital. The award of damages is not charged upon any fund representing capital. Large awards may adversely affect the market value of shares in the company, but they do not require any return of capital.

86 What this discussion reveals is that the "principle" attributed by the majority in *Webb* to *Houldsworth*, as the first step in their reasoning, reflects the attempt to rationalise that case which is discussed above. Further, as to the second step in *Webb*, that concerned with s 360(1) of the Code, this provision did not embody that "principle", any more than it embodied the decision in *Houldsworth*. That case, as I have explained, must be understood in the milieu of developing doctrine applicable to company law. Neither the "principle" attributed to *Houldsworth*, nor *Houldsworth* itself, had anything to do with the presently relevant provisions of the Act and the Code. Section 360(1)(k) of the Code cannot have been enacted on the basis that *Houldsworth* represents an "entrenched rule of company law" which must be regarded as having been

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115 *The Principles of Modern Company Law*, (1954) at 314-315.

116 (1887) 12 App Cas 409.

117 18 & 19 Vict c 133.

"expressly considered and approved" by the legislature[118]. The origins of s 360(1)(k) may be traced to the 1862 UK Act, which preceded *Houldsworth*.

The construction proffered by Kay J in *Addlestone*

87 The third proposition upon which the majority judgment in *Webb* proceeded was that par (k) of s 360(1) of the Code bore the same meaning as that ascribed to s 38(7) of the 1862 UK Act by Kay J in *Addlestone*[119]. Indeed, it may be said that it was only by the efforts of Kay J in that case that the section was explicitly related to *Houldsworth*, because Kay J referred to it to bolster his conclusion that the statute barred the claim[120].

88 In *Addlestone*, existing shareholders were given the opportunity to take up new £10 preference shares at a discount of 25 per cent to par value, the share certificates reciting that the shares were fully paid-up. However, no contract was registered in accordance with s 25 of the *Companies Act* 1867 (UK)[121]. As a result, the preference shareholders were included in the list of contributories in the winding up of the company. A call was ordered that they make up the 25 per cent discount in cash. Having paid the call, the shareholders sought to prove in the winding up for damages "for breach of contract or otherwise" on the basis that the company had failed to issue fully paid-up shares as promised. The action apparently proceeded as one for breach of contract, the breach being failure by the company to meet its promise to provide fully paid-up shares. The application to have the proof admitted failed.

89 Kay J held that the claim was "unquestionably" made by the applicants in the character of members of the company, and that therefore the question was whether it was also for sums due "by way of dividends, profits, or otherwise" for

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118 cf *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 40 per McHugh J (emphasis omitted).

119 (1887) 37 Ch D 191.

120 Earlier in his career, Kay J had been counsel for the successful respondents in *Houldsworth* itself, although the respondents had not been called upon by the House of Lords in that case: (1880) 5 App Cas 317 at 322.

121 30 & 31 Vict c 131. Section 25 stated:

> "Every Share in any Company shall be deemed and taken to have been issued and to be held subject to the Payment of the whole Amount thereof in Cash, unless the same shall have been otherwise determined by a Contract duly made in Writing, and filed with the Registrar of Joint Stock Companies at or before the Issue of such Shares."

the purposes of s 38(7) of the 1862 UK Act[122]. In this respect, his Lordship said[123]:

> "To determine that it is necessary to consider the scope and intent of [s 38(7)] in the statute. The obvious analogy is the case of a partner attempting to prove in bankruptcy in competition with the creditors of the firm. But whether this section is intended to have entirely the same effect or not, it is quite clear from the language of it that a debt due to a member in that character, such as for dividends, directors' fees, or the like, could not be so proved."

Notwithstanding that, it is not clear that the partnership analogy remains an "obvious" one. The analogy had suggested itself to Earl Cairns LC in *Houldsworth*[124], and that case did concern an unlimited company. References to partnership indicate an incomplete understanding of the separate nature of the personality of the corporate entity from those of the corporators. At the time *Addlestone* was decided, partnership law and company law were not distinctly regarded; Lindley's *Treatise on the Law of Partnership, including its application to Companies* was then in its fourth edition[125].

90 The applicable English rule in partnership to which Kay J was referring was that regarded by Lord Eldon as "settled law", namely that a partner "shall not prove in competition with the creditors of the firm, who are in fact his own creditors"[126]. However, the 1862 UK Act was designed as a general statute applicable in England and Scotland, unlike some of the earlier legislation in the field[127], and the law of partnership significantly differed in a relevant respect.

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122 (1887) 37 Ch D 191 at 197-198.

123 (1887) 37 Ch D 191 at 198.

124 (1880) 5 App Cas 317 at 325.

125 The treatise was divided into two parts "each of which should be complete without the other" in the fifth edition, published in 1888: see Lindley, *A Treatise on the Law of Partnership*, 6th ed (1893) at v.

126 *Ex parte Sillitoe; In the matter of Goodchilds and Co* (1824) 1 Gl & J 374 at 382; see Lindley, *A Treatise on the Law of Partnership, including its application to Companies*, 4th ed (1878) at 1187ff.

127 A point made in 1867 by Lord Colonsay in *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 377.

91 In *Oakes v Turquand and Harding*[128], Lord Colonsay had remarked[129]:

> "Your Lordships know that the law of *Scotland* in regard to partnerships was not the same as the law of *England* – that in *Scotland*, as in some other countries, the separate *persona* of an unincorporated trading company was fully recognised, and that joint stock share companies for trading existed there at common law, and that the country had derived great advantage from them, as is recorded in a statute passed in the reign of *George* IV. There were other differences also."

Lord Colonsay then turned his attention to the 1862 UK Act, saying[130]:

> "Now, I apprehend that the [1862 UK Act] was intended to establish a uniform system of law in both ends of the island in regard to such companies. But if, in reference to joint stock companies in *England*, the provisions of the statute are not to be read in a literal or obvious sense, but are to be overridden, and qualified, and controlled by implications and inferences deduced from rules of the law of *England* applicable to a state of things antecedent to the existence of any such companies, then, by parity of reasoning in reference to joint stock companies in *Scotland*, the statute would be qualified and controlled by implications and inferences deduced from the different principles that had prevailed in *Scotland*; and thus there would be again produced a diversity instead of the uniformity which it was the object of the statute to establish."

92 Nevertheless, in *Addlestone*, having posed the question, and the (inadequate) analogy with partnership, Kay J continued[131]:

> "Now, is the mischief against which [s 38(7)] is intended to provide the same in the case before me? Practically, what these Applicants are seeking to recover by their proof is a dividend in respect of the £2 10s per share which they have been compelled to pay in the winding-up. But as shareholders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors whose debts are not due to them as members of the company – that is, they are practically admitting their liability to pay the £2 10s per share to such other creditors and yet seeking to get part of it back out of the pockets of those very

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128 (1867) LR 2 HL 325.

129 (1867) LR 2 HL 325 at 377 (original emphasis).

130 (1867) LR 2 HL 325 at 377-378 (original emphasis).

131 (1887) 37 Ch D 191 at 198.

> creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, accordingly, it comes within the words "or otherwise", which I have read from s 38."

When referring to the shareholders having entered into a contract, Kay J would have been mindful of those principles relating to deeds of co-partnership which established and governed the relations between partners. These were the forebears of the memoranda and articles of association of companies, which, however, acquired statutory force. The body of shareholders does not comprise a company in the same sense as partners constitute their partnership. To say that a shareholder has "contracted" to contribute money to pay the company's creditors does not answer the question as to whether that shareholder *is* a creditor whose debt is not due to him as a member of the company. That is the key question required to be answered by s 563A of the Act.

93 It is reasonably clear from the foregoing that Kay J was construing s 38(7) as if it were the statutory equivalent for companies of the rule applicable on the bankruptcy of a partnership. The "construction" of the section proffered by Kay J (which the majority in *Webb* adopted) was not so much an analysis and construction of the statutory provision as an assimilation of the statutory provision with the prior learning applicable to the law of partnership. That is not to say his Lordship was wrong so to do at the time, but doubt must be entertained as to the appropriateness of perpetuating this construction with respect to modern statutes such as the Code and the Act.

The statutory cause of action

94 The fourth proposition upon which the majority in *Webb* proceeded was that the TP Act could not eliminate the long-established "detailed provisions" governing the winding up of a company by a "side-wind"[132]. It was upon this point that McHugh J, in dissent, departed from the majority[133]. Those "detailed provisions" were the subject of the first two propositions upon which the majority reasoned. Given the foregoing discussion, this final conclusion is also open to question in so far as it proceeds from unsound premises.

95 Whatever may be said of the TP Act, the causes of action relied upon by Mr Margaretic in these appeals include those conferred by the Act itself. Those causes of action are likely to be relied upon where, under other provisions of the

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132 (1993) 179 CLR 15 at 37.

133 (1993) 179 CLR 15 at 41.

Act, there is an insolvent administration of the company in question. The claims in this case include a claim for compensation pursuant to s 1325 of the Act, for breach by the company of its obligations of continuous disclosure under s 674 or, alternatively, misleading and deceptive conduct in relation to a financial product in contravention of s 1041H of the Act. Section 1325(2) confers the right to claim compensation on any person. There is no warrant for reading down that right by reference to the provisions of Div 6 of Pt 5.6, in which s 563A is found.

Conclusion

96 The foregoing reveals that the validity of the four key propositions upon which the decision of the majority in *Webb* depended is open to question. In my view, they should not be accepted as correct in so far as they relate to the Act.

97 In *Webb* the majority concluded, on the basis of those propositions, that the claims by the holders of the non-withdrawable shares were not debts to be admitted to proof in the winding up of the building society, but were sums owed by the company to them in their capacity as members of the company by way of dividends, profits, or otherwise. *Webb* concerned the Code where, as Hayne J indicates, claims of the kind now brought by Mr Margaretic (not arising from a contract with the company) would not have been admissible to proof. Nevertheless, it must be doubted whether the result reached by the majority in *Webb* was correct. However, there is no point in further consideration of that matter here.

98 It suffices to observe that, as a matter of principle, the reliance by Gwalia and ING on *Webb* does not assist their case. To that it should be added that the reliance by ING upon *Houldsworth* for a threshold principle of the kind discussed earlier in these reasons should be rejected.

99 I agree in the orders proposed by Hayne J.

100 KIRBY J. Two appeals are before this Court. They come from a judgment of the Full Court of the Federal Court of Australia, constituted by Finkelstein, Gyles and Jacobson JJ[134]. That judgment affirmed a decision reached, adversely to the appellants, by the primary judge in the Federal Court (Emmett J)[135].

101 The essential issue presented by each appeal concerns the operation of insolvency provisions in the *Corporations Act* 2001 (Cth) ("the Act"). In effect, it relates to the proof and ranking of claims against an insolvent company as between the general creditors (represented by the appellant in the second appeal ("the second appellant")) and shareholders in the company having claims against the company for alleged misleading and deceptive conduct contrary to other federal legislation (represented by the first respondent in each matter ("the respondent"))[136]. The general creditors assert that the shareholders' claims are postponed so that they rank after the satisfaction of those creditors' claims. The shareholder claimant asserts that, in this respect, shareholders' claims for damages against the company rank equally with the claims of the general creditors and are not subordinate to them.

102 The resolution of the difference between the parties depends on the meaning and operation of s 563A of the Act. More particularly, it depends on whether, in the facts and circumstances of this case (and upon the assumptions on which the respective arguments of the parties have been litigated), any "debt" owed by the insolvent company to the claimant shareholder, if the claims are proved, is one owed in that person's "capacity as a member of the company". The general creditors say that it is and is thereby postponed. The claimant shareholder says that it is not and asserts that his membership of the company is, in respect of the "debt owed", immaterial both to the "debt" itself and to the reasons why it is "owed".

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134 *Sons of Gwalia Ltd v Margaretic* (2006) 149 FCR 227.

135 (2005) 55 ACSR 365; (2006) 24 ACLC 244.

136 *Trade Practices Act* 1974 (Cth), s 52; *Australian Securities and Investments Commission Act* 2001 (Cth), s 12DA; the Act, s 1041H. See also reasons of Hayne J at [135]-[137].

A surprising result?

103 *A counter-intuitive outcome*: The other members of the majority[137] have concluded, alike with the judges of the Federal Court[138], that the arguments of the general creditors fail. In the result, upon the assumptions on which the proceedings have been conducted, any "debt" later demonstrated to be "owed" by the company to the respondent will not be postponed until all debts[139] owed to general creditors have been satisfied, but will rank with them in the distribution of the assets of the company. This enhances significantly the claimant shareholder's prospects of recovery.

104 On the face of things, this conclusion seems to be counter-intuitive. It appears somewhat difficult to reconcile with the main thrust of this Court's reasoning and conclusion in *Webb Distributors (Aust) Pty Ltd v Victoria*[140]. I am inclined to agree with the analysis of that decision contained in the reasons of Gummow J[141]. In light of the present legislation, specifically s 563A, there would appear to be no foundation for the operation of the distinction drawn in that case. *Webb Distributors* is proof once again (if further proof is needed) of the dangers of attributing undue weight to what was said in England in the 19th century when attempting to construe contemporary Australian legislation[142].

105 The counter-intuitive impression arises in this way. The respondent's claim is made against the company of which he was, and still is, a member. His claim concerns the value of the very shares by which his membership of that company was procured, that is, by the acquisition on the Australian Stock Exchange of the shares in the company at the then market rate for such shares.

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137 Reasons of Gleeson CJ at [31]-[32]; reasons of Gummow J at [44]-[49]; reasons of Hayne J at [206]-[207]; reasons of Heydon J at [261]-[262]; reasons of Crennan J at [265], [273]; cf reasons of Callinan J at [251]-[259].

138 (2006) 149 FCR 227 at 240-243 [44]-[51] per Finkelstein J, 244-245 [61]-[62] per Gyles J, 251-254 [116]-[135] per Jacobson J.

139 Note that "debt" and "claim" are used interchangeably in the Act, including s 563A. See reasons of Gleeson CJ at [10].

140 (1993) 179 CLR 15.

141 Reasons of Gummow J at [50]-[98].

142 cf *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 148 [76]-[77]; 222 ALR 202 at 220-221; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527-1528 [77]-[84]; 229 ALR 1 at 21-23.

The foundation of the respondent's complaint against the company is that it did not conform to the applicable federal legislation requiring disclosures to be made, and obliging the avoidance of misleading and deceptive conduct, which could deceive the very persons, that is, potential shareholders, who were contemplating the acquisition of shares in, and membership of, the company.

106 *Continuous disclosure to shareholders*: The respondent was, it is true, not seeking to recover any paid-up capital or to avoid any liability to make contribution to the company's capital. In this sense, his membership of the company was not, as such, definitive of the capacity in which he made his claim against the company when it suddenly appeared that the shares in the company, just acquired, were worthless[143]. However, one of the principal reasons for the enactment of the federal legislation, invoked by the respondent to establish his claim against the company, was the provision of protection, in circumstances such as arose in his case, to persons like him. The obligation of continuous disclosure, introduced by the Act[144], was specifically designed and enacted to protect shareholders and potential shareholders from losses that might be suffered from undisclosed facts and to afford a foundation that would prevent, compensate for and reduce the incidence of such losses[145].

107 In these circumstances, the type of claim brought by the respondent is not atypical or unexpected. It is a claim by a shareholder for deceptive and misleading conduct, so far as it affected potential shareholders for which the Federal Parliament, by its enactment, has provided for new remedies that are designed, ultimately, to improve the protection of (and remedies available to) Australian shareholders as such. This might not be the *only* purpose of the legislation or the sole circumstance in which it applies. But it certainly is a typical circumstance and, one might say, a usual and predictable one. This fact gives rise to an arguable foundation for a submission, on the part of the general creditors represented by the second appellant, that the claim made by the respondent against the company whose shares he has acquired is to be characterised as one made in respect of an alleged "debt owed by a company to a person in the person's capacity as a member of the company".

108 *A purposive approach*: The ultimate duty of a court in a case of this kind is to give effect to the meaning of the law as expressed by the Parliament. That meaning is ascertained from the language of the enactment. But it is also ascertained by reference to the context in which the provision in question appears

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143 cf reasons of Gleeson CJ at [31].

144 Reasons of Hayne J at [141] referring to the Act, ss 674 and 675.

145 The Act, s 1325, particularly s 1325(5)(e).

and by perceptions that may be derived from that context, the legislative history and the apparent policy of the Act, as to the respective rankings of claims against a company, which has become insolvent, of general creditors as a class and disaffected shareholders, represented by persons such as the respondent.

109 One can readily conceive why, as a matter of policy, strong arguments can be mounted that claims by persons such as the respondent should be postponed to claims made by the general creditors of the insolvent company. Putting it broadly, most general creditors, although not all, will be innocent of the business and entrepreneurial decisions of the company that led to its insolvency. Most will have dealt with the company as outsiders in good faith on the basis of its incorporation and, where applicable, its listing on the Stock Exchange and its subjection to regular and rigorous legal obligations. On the other hand, persons such as the respondent are investors. As such, they are not involved in the provision of goods and services to the company, as ordinary creditors generally are. Their interest in membership of the company is with a view to their own individual profit. Necessarily, their investment in the company involves risks, albeit risks increasingly informed by mandatory disclosures. In particular, where, as here, the company was involved in the extraction of gold, the acquisition of which notoriously and historically involves substantial risks and a significant degree of chance, the purchase of shares will commonly entail a measure – even a high measure – of speculation. Such speculation would ordinarily be expected to fall on the shareholders themselves, not shared with general creditors who would thereby end up underwriting the investors' speculative risks.

110 *The policy of the Act*: If, therefore, one were to approach the meaning of s 563A of the Act, in proceedings such as the present, with an object to give effect to a presumed general policy of the Act, it would by no means be surprising if a textual and contextual analysis of the Act had the consequence of postponing the claims against the company of investors, such as the respondent, to those of the general creditors. To the claim that he was the victim of misleading and deceptive conduct, the answer of the general creditors would inferentially be to the effect: "By purchasing your shares in a gold mining venture, you engaged in an inescapably risky and speculative operation. Now you claim to have been deceived. But that kind of risk is one that is inherent in the very acquisition of shares in a company by which you become a member of it. You can make your claim for deception; but it ranks after the general creditors have recovered their proved losses. Your claim or 'debt', if owed at all, is owed to you in your capacity as a member of the company."

111 Whilst the interpretation to be given to s 563A of the Act cannot be confined to the circumstances of gold mining companies or the investment decisions of persons such as the respondent, his case and its circumstances are by no means unique. Nor is his claim singular or atypical. One can thus acknowledge significant policy reasons, arguably consistent with the language,

purpose and design of the Act, that would postpone the respondent's entitlement to the recovery of his "debt owed by [the] company" to the debts that the company owed as a result of its operations to the general creditors, whose involvement with the company is typically not, as such, risky or speculative in character.

112 *Compatibility with past authority*: The previous decision of this Court in *Webb Distributors* is described elsewhere as proceeding upon a "chronological curiosity"[146] and resting uneasily on a questionable interpretation of the "elusive"[147] principle purportedly derived from *Houldsworth v City of Glasgow Bank*[148]. On the other hand, the result in *Webb Distributors* is not so puzzling if the approach taken to the statutory issue presented is informed by the type of considerations just mentioned. I have explained those considerations because they make me more sympathetic to the arguments of the second appellant than might otherwise appear. Those considerations rest, ultimately, on the perceived claims to priority respectively of general creditors and investing shareholders, the latter of whom become members of a company that fails and who then seek to recoup their resulting losses from the assets of the company itself. In such a conflict, it is not difficult (at least for me) to feel a greater sympathy for the general creditors and their claim to priority in the recovery of their claims[149].

113 Nevertheless, in the end, alike with the other members of the majority, I have concluded that a correct analysis of the statutory provisions in issue in these appeals does not sustain the arguments of the general creditors. I will briefly say why.

Rejecting general postponement of members' claims

114 *A statutory question*: The starting point for the answer is a clear appreciation that the issue presented for decision is, from first to last, one of statutory interpretation. Relevantly, it is presented by the terms of s 563A of the Act. It is not concerned with the application of common law principles which anticipated, or would circumvent the application of, the enacted statutory criteria[150].

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146 Reasons of Gleeson CJ at [14].

147 Reasons of Gleeson CJ at [14].

148 (1880) 5 App Cas 317. See also reasons of Gleeson CJ at [13]-[16], [20]-[32]; reasons of Gummow J at [47]-[49], [53]-[79], [83]-[86], [98].

149 See also reasons of Callinan J at [241].

150 cf reasons of Gleeson CJ at [11]; reasons of Gummow J at [35]-[37]; reasons of Hayne J at [136].

115 A study of past decisions, in this country, in England and elsewhere, may be helpful, by analogy, to a court applying the relevant statutory provisions to the case in hand. This is so because of the long history of statutory provisions like s 563A of the Act, detailed by Hayne J in his reasons[151]. However, in the end, the duty of this Court, in disposing of the appeals, is to give effect to the provisions of s 563A itself[152]. Having regard to the limited question which the parties to the appeals chose to contest, the question presented for analysis effectively comes down to the interpretation of the phrase "in the person's capacity as a member of the company".

116 It is of the nature of contestable statutory provisions (such as this one) that persuasive arguments can commonly be mounted in support of the alternative interpretations[153]. This is why, in cases such as the present, it is impossible to be dogmatic about the way in which a provision such as s 563A operates. Nonetheless, this Court has the obligation to state, and explain, why it chooses one interpretation rather than another. That interpretation, once adopted, becomes the correct and only interpretation to be applied – at least until the Parliament amends the provision or this Court changes its mind. In repeated decisions of the Court in recent years, where a statutory problem is proffered for resolution, the Court has insisted, with a very high degree of uniformity[154], that analysis must commence and finish with the text of the legislation[155]. The analysis must proceed, not only by reference to the words of the statutory provision but also by reference to the object and purpose of those words[156].

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151 Reasons of Hayne J at [149]-[167].

152 cf *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527-1528 [77]-[84]; 229 ALR 1 at 21-23.

153 *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 175-176 [54]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42] per McHugh J.

154 But cf *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264-266 [35]-[41].

155 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528 [84] fn 64; 229 ALR 1 at 22-23, where the line of authority is collected.

156 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423 per McHugh JA approved *Bropho v Western Australia* (1990) 171 CLR 1 at 20. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; *Acts Interpretation Act* 1901 (Cth), s 15AA.

117 It follows that any presumed general subordination of shareholder claims on the assets of an insolvent company to the claims of general creditors, must give way to the true meaning of the legislation that actually governs the case. In this instance, that involves unpacking the meaning of s 563A of the Act and, in the end, nothing else. If any general presumptions do not accord with the legislation, properly construed, it is the legislation that must prevail for it expresses the parliamentary command. Statutory interpretation is ultimately, always, a text-based activity[157].

118 *A nuanced command*: Starting from this vantage point, it is evident that s 563A of the Act does not adopt a general policy (as it might have done) of "members come last"[158] in a corporate insolvency, as Gleeson CJ puts it in his reasons. To the contrary, the terms of s 563A of the Act, reflecting a very long legislative history, adopt a less absolute, and more nuanced criterion.

119 Thus, it is not every "debt" (which it was agreed[159] included a "claim" for unliquidated damages) owed by the company to a person who is a member of the company that is postponed. Instead, it is only such "debts" as are owed "in the person's capacity as a member of the company". This more limited ambit of postponement is clearly deliberate. Its exact boundaries may be disputable. But they are different from a simple postponement by reference to the fact that the claim is made by "a member of the company". The identity of the claimant is not the chosen criterion for postponement. Instead, the criterion is addressed to the character and incidents of the "debt", that is, the claim.

120 It would have been easy for the Parliament, if that had been its purpose, to make the identity of the claimant the relevant test for postponement. However, that course was not chosen. Instead, a more difficult and contestable criterion was enacted. It is the duty of courts to give effect to the criterion chosen; not some other criterion which a judge might consider to be more appropriate or more just to the respective claims of general creditors, on the one hand, and disappointed investors who have acquired the company's shares, on the other.

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157 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at 305-306 [87].

158 Reasons of Gleeson CJ at [19].

159 Reasons of Gleeson CJ at [10].

121 It is true that the application of the criterion, so explained, depends in every case on the facts and circumstances of the "debt" in question[160]. It is also true that these appeals have been conducted upon various assumptions which may, or may not, be borne out if ever a trial court comes to consider whether the respondent can establish a "debt" of the kind he asserts[161]. Nevertheless, it is proper to proceed upon those assumptions and upon the understanding of the facts and circumstances accepted in the Federal Court. When this is done, the focus for decision, so as to resolve the issues in the appeals, is upon the character of the "debt" allegedly owed to the respondent. That question is not decided by the simple fact that the "debt" is allegedly owed by the company to a person who is a "member of the company". This is why it is unhelpful, in construing s 563A, to distinguish between shares acquired by subscription, and those acquired by transfer[162].

122 Moreover, the alleged failure of the company to comply with duties of disclosure does not, without more, render the consequent "debt" one owed in the member's capacity *as* a member of the company. The disclosure requirements have been adopted by the Parliament for the protection of persons other than members of the company – including the investing public more generally. The requirements are of concern to corporate regulators, media, industry and university observers, macro-economists and bankers as well as employees and the general public having an interest in corporate disclosures. At the time of the alleged non-disclosures, the respondent was not a member of the company at all. In this sense, the disclosures were not then received in that capacity but as a consumer of corporate information and as an investor.

123 *Examples of "debts"*: A third consideration is that s 563A of the Act gives specific examples of the type of "debt" which is "owed by a company to a person in the person's capacity as a member of the company". It is such "debts" that will be "postponed until all debts owed to, or claims made by, persons otherwise" have been satisfied. The examples are stated to be "dividends, profits or otherwise".

124 It is true that the phrase "or otherwise" in this formulation is expressed in language of complete generality. Standing alone, it would be broad enough to include a "debt" owed by a company pursuant to a claim for unliquidated damages for proof of misleading and deceptive conduct giving rise to remedies

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160 Reasons of Hayne J at [201], [205].

161 Reasons of Gleeson CJ at [9].

162 See reasons of Gleeson CJ at [28]-[32]; reasons of Gummow J at [51]-[52]; reasons of Hayne J at [205].

under the specified federal legislation. This point is not conclusive. However, to the extent that the Parliament has identified the kind of "debts" owed by a company to a person "as a member of the company", the specification of "dividends" and "profits" suggests that what is involved in the postponement are sums constituting the ordinary revenue (and possibly the capital) of the company and not claims of an extraordinary and exceptional kind for false and misleading conduct.

125 So far as the Parliament has given an explicit indication, by the specified examples, of the claims that will be postponed ("dividends, profits"), these are apt to exclude claims such as those made by the respondent. Therefore, if the phrase "or otherwise" is construed *ejusdem generis* with the immediately preceding words, unliquidated claims for damages for misleading and deceptive conduct do not fit comfortably with debts such as "dividends" and "profits" which normally inhere in the ordinary operation of the company as such.

126 *Earlier judicial conclusions*: Given that statutory language such as that now under scrutiny is often disputable, it is not without significance that, upon the problem presented by the present appeals, all of the judges of the Federal Court have reached the same conclusion, adversely to the appellants[163]. Similarly, when a like problem arose in England, under legislation bearing much similarity to that applicable in Australia, all of the judges in that country reached an identical conclusion[164]. In the face of this unanimity of judicial opinion, it is reasonable to infer that no deep or fundamental impediment to the conclusion argued for by the respondent has been perceived by the experienced decision-makers who have examined this issue.

127 In the United States of America, special legislation governs the point and directly subordinates claims made by shareholders arising out of the purchase of shares[165]. The hypothesis upon which that legislation is expressed, viewed against the absence of a similar provision in the Act and the contrasting text of s 563A, is also favourable to the respondent's arguments[166]. In the face of this understanding of a basic, and not atypical, issue of admitting and ranking of claims against insolvent companies, the general approach of the law in this and other similar jurisdictions is a reassurance that the conclusion arrived at by the

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163 Reasons of Gleeson CJ at [7].

164 *Soden v British and Commonwealth Holdings plc* [1995] 1 BCLC 686; [1995] BCC 531 per Robert Walker J, affd *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 at 304 (CA), 321 (HL).

165 Bankruptcy Code, 11 USC §510(b).

166 See also reasons of Gleeson CJ at [17]-[19]; reasons of Gummow J at [39]-[42].

Federal Court is not out of harmony with basic legal principle as it has been perceived elsewhere.

128 In matters of basic principle in the law of corporate insolvency it is increasingly important to consider the legal provisions applicable in the major countries with which Australia conducts its trade. Absent particular legislative variations, it will ordinarily be expected that basic legal problems will be addressed in basically similar ways[167]. In the present appeals, this consideration favours the respondent.

129 *Uncopied precedents*: Related to this last point is the fact that, had it been the purpose of the Parliament in Australia to adopt a general principle postponing, to the claims of general creditors, claims by disappointed shareholders against a company which becomes insolvent, it would have been relatively easy for that purpose to be given effect in the Act. One way would have been simply to delete from s 563A of the Act the words "a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise" and substitute "a debt owed by a company to a person who is a member of the company". This was not done.

130 Alternatively, the Parliament could have copied a form of drafting that followed the provisions of §510(b) of the Bankruptcy Code of the United States[168]. Claims by members of a company "for damages arising from the purchase or sale of … a security" might have been expressly identified and, as such, postponed to the claims of the general creditors. After all, the cases show that claims of this kind are not unusual. Shareholders have been making them for many years, certainly before the enactment of the present Act[169].

131 The problem presented by the present appeals was not therefore unknown when s 563A was included in the present Act. It would have been open to the

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167 This is also relevant to areas of law where international treaties are applied: *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 ALR 340; *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 ALR 380.

168 See reasons of Gleeson CJ at [19].

169 See eg *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 where the holders of non-withdrawable shares offered by building societies to the public under the *Building Societies Act* 1986 (Vic), s 122 complained of being misled ("tricked") about the nature of the shares and led to believe the shares were redeemable and "like a deposit". See (1993) 179 CLR 15 at 16-17; reasons of Gleeson CJ at [22]; reasons of Hayne J at [180]-[190].

drafters, and the Parliament, at the time of adopting s 563A, to deal expressly with the claims of disappointed shareholders if that had been its purpose. The occasion was not availed of. Instead, a more limited criterion for postponement was adopted.

132 *Availability of amendment*: The Act is a major statute of the Federal Parliament. The sources of the constitutional power to sustain it are large. They may possibly be greater than was formerly assumed[170]. The Act is constantly being amended and fine-tuned, to deal with problems that arise in its operation and perceived defects that require particular attention. Further, related aspects of corporate insolvency were the subject of the report of the Australian Law Reform Commission, referred to by Hayne J in his reasons[171].

133 If the Parliament concludes that the interpretation adopted by the Federal Court in these appeals, now confirmed by this Court, strikes the wrong balance between the rights of general creditors and the claims of disaffected shareholders, it can easily repair the defect by amending s 563A of the Act. Although some elements of bankruptcy law reform have not attracted timely attention from the Parliament[172], corporate insolvency seems to have gained at least some degree of priority. It should not therefore be assumed that the inclusion of shareholder claims, such as those of the respondent, with the debts of general creditors is contrary to the will of the Parliament or the result of a slip or oversight requiring a measure of judicial inventiveness and surgery. By sticking to a variation of a time-honoured[173] statutory phrase, it can be assumed that the Act was intended to effect only a limited subordination of claims brought by people who happen to be shareholders.

Conclusion and orders

134 It follows from these reasons that the preferable construction of s 563A of the Act is that adopted by Gleeson CJ[174]. In the result, the judges of the Federal

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170 *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 91 [197]-[198], 95 [221], 143 [481]; 231 ALR 1 at 60, 65, 130.

171 Reasons of Hayne J at [172]; Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 315 [774]. See also reasons of Callinan J at [246]-[247].

172 *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 158 [141]; 222 ALR 202 at 234.

173 See reasons of Hayne J at [149]-[167].

174 Reasons of Gleeson CJ at [31]-[32].

Court came to the correct conclusion. The appeals to this Court should be dismissed with costs.

135 HAYNE J. A person who buys, or subscribes for, shares in a company, relying upon misleading or deceptive information from the company, or misled as to the company's worth by its failure to make disclosures required by law, may have a claim for damages against the company. That claim may be framed in the tort of deceit but, more probably than not, will now be framed as a claim under consumer protection provisions of the *Trade Practices Act* 1974 (Cth)[175] or investor protection provisions of the *Corporations Act* 2001 (Cth)[176] ("the 2001 Act") or the *Australian Securities and Investments Commission Act* 2001 (Cth)[177] ("the ASIC Act"). If the company comes under external administration before it has satisfied the shareholder's claim, and the company's affairs are to be administered as on a winding up, does the shareholder's claim rank with the claims of other creditors, or is it postponed? If, as is agreed to be the case here, the shares become worthless when the company goes into external administration, is the shareholder's claim one the circumstances giving rise to which occurred before "the relevant date" (fixed by the 2001 Act as the commencement of that administration)?

136 These questions are to be answered by reference to the applicable statutory regime: in particular, the provisions of Pt 5.6 of the 2001 Act. In construing those statutory provisions, it will be necessary to take account of their long legislative history. The answer to the questions that arise in this case do not depend upon any principle of judge-made law. In particular, they do not depend upon the application, or the identification of the content, of what is sometimes called "the rule in *Houldsworth's Case*" (*Houldsworth v City of Glasgow Bank*[178]).

137 The central statutory provisions in issue are s 553 and s 563A of the 2001 Act. Section 553(1) provides:

> "Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company."

Section 563A provides:

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175 ss 52 and 82.

176 For example, ss 1041H, 1041I and 1325.

177 For example, ss 12DA, 12GF and 12GM.

178 (1880) 5 App Cas 317.

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

What is meant in s 563A by "a debt owed by a company to a person *in the person's capacity as a member of the company*"? Is a claim by a shareholder for damages assessed as the loss sustained as a result of the shareholder's acquisition of the shares, when the shares were less valuable than was represented, or would have been revealed to be the case had proper disclosure been made, a claim in the capacity of shareholder? Does the answer to that question differ according to whether the shareholder acquired the shares by subscription and allotment by the company, or acquired them by transfer from an existing shareholder?

The facts and the proceedings

138 In August 1981, Sons of Gwalia Ltd ("SOG") was incorporated (as Hawk Mining NL) under the *Companies Act* 1961 (WA). It was incorporated as a no liability company. In July 1992, SOG converted[179] to a company limited by shares. Its shares were first listed on the official list of the Australian Stock Exchange Ltd ("ASX") in December 1991.

139 In August 2004, the directors of SOG, being of the opinion that the company was insolvent or was likely to become insolvent, appointed administrators of the company[180]. The company later made a deed of company arrangement under Div 10 of Pt 5.3A of the 2001 Act. Under that deed a fund was to be set aside by the Deed Administrators from identified sources and distributed (subject to some immaterial exceptions) in the same order of priority as would apply if SOG were being wound up. Clause 4.2(d) of the deed provided that:

> "For the avoidance of doubt, payment of any debts or liabilities owed by the Company to Members in the Members' capacity as a member of the Company, whether by way of dividends, profits or otherwise are, to the extent contemplated by Section 563A of the [2001 Act] and the general law, to be postponed until all debts owed to, or claims made by, Creditors have been satisfied."

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179 Pursuant to the then applicable provisions of s 167 of the Corporations Law of Western Australia.

180 s 436A(1).

It may be noted that, unlike s 563A, this clause spoke of "debts *or liabilities* owed by the Company to Members", not just of "debts". But no party to the appeals to this Court sought to make any point based upon that difference. Argument proceeded on the footing that the issue to be decided turned upon the proper construction of s 563A.

140 In August 2004, the first respondent in both proceedings, Mr Margaretic, bought 20,000 fully paid ordinary shares in the capital of SOG. He made that purchase on the market conducted by the ASX. He was entered on the register of members of SOG soon after the purchase, but only a few days before administrators were appointed to the company. It is an agreed fact that upon the appointment of administrators "the value of the SOG shares purchased by Mr Margaretic became zero ... and has remained and will remain zero".

141 Mr Margaretic claims that, when he bought the shares, SOG was in breach of its obligations under s 674 of the 2001 Act. To explain what is meant by that claim it is necessary to say a little about the "continuous disclosure" requirements of the 2001 Act. A company, whose securities are included in the official list of a prescribed financial market such as the ASX and that is a "disclosing entity"[181], may be subject[182] to the continuous disclosure requirements of ss 674 and 675 of the 2001 Act. If a disclosing entity does not notify the market operator of information that is not generally available, but which a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities[183], a person who has suffered, or is likely to suffer, loss or damage because of that failure, may obtain[184] orders against the company, and against any person who was involved in the contravention. The orders that may be made are orders that will compensate for, prevent or reduce, that loss or damage. They include an order to pay the person who suffered the loss or damage the amount of that loss or damage[185].

142 Mr Margaretic claims that he lost the whole of the amount he paid to buy the shares as a result of SOG's breach of the continuous disclosure provisions. Alternatively, he claims to recover that sum on the basis that SOG engaged in

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181 Division 2 of Pt 1.2A of the *Corporations Act* 2001 (Cth) ("the 2001 Act") (ss 111AB-111AM) contains definitions relevant to identifying a "disclosing entity".

182 s 111AP.

183 s 674(2).

184 s 1325.

185 s 1325(5)(e).

misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act*, s 1041H of the 2001 Act and s 12DA of the ASIC Act, and that he is thus entitled to compensation under the relevant provisions[186] of those Acts.

143 It was an agreed fact that Mr Margaretic had made a claim against SOG for damages or compensation under statute, or at common law or in equity, in respect of fraud, misrepresentation, or other acts or omissions of SOG. It was further agreed that Mr Margaretic was intending to submit his claim for proof in the deed of company arrangement of SOG. There was evidence that other shareholders made or intended to make like claims.

144 The Deed Administrators applied to the Federal Court of Australia for a declaration that Mr Margaretic's claim is not provable in the deed of company arrangement or, alternatively, a declaration that payment of that claim will be postponed until all debts owed to, or claims made by, persons otherwise than in their capacity as members of SOG have been met. ING Investment Management LLC ("ING"), a company which was not a shareholder but was a creditor of SOG, was named as second respondent to that application. Mr Margaretic cross-claimed for a declaration that he is a creditor of SOG and is entitled to all the rights of a creditor under Pt 5.3A of the 2001 Act, including the right to attend and vote at creditors' meetings and the right to receive information and circulars sent to creditors.

145 At first instance, Emmett J made a declaration[187] that, in respect of Mr Margaretic's claim, he is a creditor of SOG within the meaning of Pt 5.3A of the 2001 Act for such amount as the Administrators may admit to proof, or be ordered to admit to proof, and that he is entitled to all the rights of a creditor under that Part. His Honour further declared that the claim is not postponed until debts owed to, or claims made by, persons other than Mr Margaretic (or, it may be assumed, others in like case) have been satisfied.

146 Both SOG and ING appealed to the Full Court of the Federal Court. Those appeals were dismissed[188]. By special leave, both SOG and ING appeal to this Court. The only issue initially agitated in this Court was whether Mr Margaretic's claim is postponed to the claims of other creditors. That issue was argued on the footing that there was no question that Mr Margaretic's claim

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186 *Trade Practices Act* 1974 (Cth), s 82; the 2001 Act, ss 1041I and 1325; the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act"), ss 12GF and 12GM.

187 *Sons of Gwalia Ltd v Margaretic* (2005) 55 ACSR 365; 24 ACLC 244.

188 *Sons of Gwalia Ltd v Margaretic* (2006) 149 FCR 227.

is a provable debt and that the relevant question was in what order does the claim rank for payment: with creditors of the company who are not shareholders, or after those creditors have been satisfied?

147 After the conclusion of oral argument the parties were asked to make submissions about whether Mr Margaretic's claim was a provable debt. In particular was it a claim the circumstances giving rise to which occurred before "the relevant date"?

148 As stated at the outset of these reasons the questions that must be considered in these matters are questions of statutory construction. They do not present any question of developing or applying judge-made law. The task of construing both s 553 and s 563A requires attention to the context provided by other provisions of the 2001 Act, but it also requires an understanding of the legislative history that lies behind the particular provisions and the other provisions which together form its context. It is convenient to begin by examining that history.

The legislative history

149 The legislative origins of many provisions of modern company legislation can be traced to *The Companies Act* 1862 (UK) ("the 1862 UK Act"). It is to be recalled that the 1862 UK Act hinged about the prohibition, in s 4, against any "company, association, or partnership" consisting of more than a specified number of persons being formed after the commencement of the Act for the purpose of carrying on the business of banking or "any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof" unless incorporated. And it was against this understanding of the corporation (as a company, association, or partnership of persons, formed for the purpose of carrying on a business) that s 38 of the 1862 UK Act dealt with the liability of members of the company on winding up. It provided that:

> "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following ..."

There then followed seven qualifications. Of these it is important to notice only two. Sub-section (4) provided that:

> "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member".

Sub-section (7) provided:

> "No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."

150 Several aspects of the provisions of s 38(7) of the 1862 UK Act are noteworthy. First, there is where it fitted in the Act as a whole: as a qualification to the general obligation of past and present members to contribute to the assets of the company sufficient not only for payment of the debts and liabilities of the company but also for the "payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves". Of course, that liability could be limited. Section 38(4) limited the contribution required of a member of a company limited by shares to "the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member".

151 The second aspect of note about s 38(7) is that it spoke of a "sum due to any member of a company, in his character of a member". It said that no sum of that kind "shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company". In modern terms it was a provision that is best understood, when applied in an *insolvent* winding up, as regulating the ability of a member to prove in the winding up rather than as a provision regulating priority of payment. If the company was insolvent there would inevitably be competition between the member and other creditors, and the sum due to a member "in his character of a member" was not to be deemed to be a debt. Only if the company was solvent could there be no competition of the kind identified and only then could there be any "final adjustment of the rights of the contributories amongst themselves".

152 The third matter to note is that the reference in s 38(7) to "profits" makes greater sense when it is recalled that, at the time of the 1862 UK Act, the corporation was understood as a company, association or partnership of persons, and when it is also recalled that early forms of articles of association sometimes obliged the directors to divide and distribute the profits of the company[189]. The

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189 *Bishop v Smyrna and Cassaba Railway Co* [1895] 2 Ch 265.

reference is not to be seen only through the prism provided by judicial decisions about members' entitlements to dividends depending upon declaration[190] or statutory provisions[191] obliging a company to declare dividends only out of profits.

153 In 1981, when SOG was first incorporated, as a no liability company, the then applicable companies legislation, the *Companies Act* 1961 (WA) ("the 1961 WA Act"), contained a number of provisions evidently based on the 1862 UK Act. The *Companies Acts* of other States (the so-called "Uniform Acts") contained generally similar provisions. In particular, s 218 of the 1961 WA Act (and equivalent sections in the other Uniform Acts) largely reproduced what was found in s 38 of the 1862 UK Act. But as SOG was a no liability company, s 218 would not have applied[192] had SOG then been wound up.

154 The several Companies Codes of the States, enacted in the early 1980s under what was known as the "co-operative scheme", replaced the so-called Uniform Acts and made provision in s 360 for the liability of contributories in terms not substantially different from the provisions of s 38 of the 1862 UK Act. There were some minor textual differences but they were of no moment.

155 By the time SOG converted from a no liability company to a company limited by shares, however, the relevant provisions regulating the winding up of such a company were to be found in the Corporations Law of Western Australia enacted in the late 1980s as part of what was described as the "national scheme" replacing the former "co-operative scheme"[193]. The provisions of Pt 5.6 of the Corporations Law differed from the 1862 UK Act in several ways.

156 First, the content of s 38 of the 1862 UK Act was dealt with in a number of separate provisions. Section 515 prescribed the general liability of a contributory, but s 525 dealt with what the heading to the section described as "debts to a member". The text of s 525 was substantially the same as the text of

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190 cf *Bishop v Smyrna and Cassaba Railway Co* [1895] 2 Ch 265; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 and *Evling v Israel & Oppenheimer* [1918] 1 Ch 101. See also *Re Buck* [1964] VR 284 at 290.

191 For example, Corporations Law, s 201 (until repealed by *Company Law Review Act* 1998 (Cth)).

192 *Companies Act* 1961 (WA) ("the 1961 WA Act"), s 319.

193 The origin of the national scheme and the way in which it operated are described in *Gould v Brown* (1998) 193 CLR 346 at 393-394 [43]-[44], 413-416 [98]-[105], 433-437 [151]-[166] and *R v Hughes* (2000) 202 CLR 535 at 544 [1].

s 38(7) of the 1862 UK Act[194], but it was not cast as one of several qualifications to a general imposition of liability on past and present members to contribute sufficient to meet both the debts of the company and the adjustment of rights between contributories.

157 This process of legislative disassembling of what had been s 38 of the 1862 UK Act, which was begun in the Corporations Law by dividing the provisions into separate sections, was continued by the *Corporate Law Reform Act* 1992 (Cth) ("the 1992 Act"). The 1992 Act made substantial alterations to the legislative provisions governing external administration of companies. It introduced administration and deed of company arrangement provisions of the kind to which SOG was later to resort. But for present purposes, it is the changes to the winding up provisions which are of most importance.

158 Section 10 of the *Supreme Court of Judicature Act* 1875 (UK) had provided that, in the winding up of any company under the 1862 UK Act or *The Companies Act* 1867 (UK) "whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed ... as to debts and liabilities provable ... as may be in force for the time being under the Law of Bankruptcy". Australian company law followed this model. Thus, until the 1992 Act, subject to some qualifications that are presently irrelevant, the same rules were to be observed in the winding up of an insolvent company "with regard to the respective rights of secured and unsecured creditors *and debts provable* ... as are in force for the time being under the *Bankruptcy Act 1966* [Cth], in relation to the estates of bankrupt persons"[195] (emphasis added).

159 It followed that claims of the kind encompassed by s 82(2) of the *Bankruptcy Act* 1966 and its legislative predecessors – "[d]emands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust" – were not provable in a winding up. As this Court held in *Coventry v Charter Pacific Corporation Ltd*[196], s 82(2) of the *Bankruptcy Act* has

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194 Section 525 provided:

> "A sum due to a member in that capacity, whether by way of dividends, profits or otherwise, shall not be treated as a debt of the company payable to that member in a case of competition between the member and a creditor who is not a member, but may be taken into account for the purposes of the final adjustment of the rights of the contributories among themselves."

195 Corporations Law, s 553(2); cf Companies Code, s 438(2); the 1961 WA Act, s 291(2).

196 (2005) 80 ALJR 132; 222 ALR 202.

the consequence that a statutory claim for unliquidated damages, for misleading or deceptive conduct which induced the claimant to make a contract with a third party, is not a debt provable in bankruptcy. For the same reason, a claim for damages for fraudulent misrepresentation inducing the claimant to enter a contract with a third party is not provable in bankruptcy[197]. It follows that, under the provisions of the Corporations Law as they stood before the 1992 Act, the claims now made by Mr Margaretic would not have been admissible to proof in the winding up of SOG.

160 The 1992 Act severed the connection between the statutory identification of debts and claims admissible to proof in a winding up, and the classes of debts admissible to proof in bankruptcy. (Other connections with *Bankruptcy Act* provisions remained in the Corporations Law, particularly in relation to identifying the effect of winding up on other transactions[198].) The 1992 Act repealed s 553 and enacted a new s 553. The text of sub-s (1) of the new s 553 is set out earlier in these reasons.

161 The former rules excluding some claims for unliquidated damages from proof in a winding up were thus removed. What mattered under the new s 553 was whether "the circumstances giving rise to [the debt or claim in question] occurred before the relevant date". Section 553 of the 2001 Act specifies the debts and claims that are admissible to proof in a winding up in terms identical to those introduced into the Corporations Law by the 1992 Act. It will be necessary to return, at a later point in these reasons, to consider the application of s 553 of the 2001 Act.

162 The 1992 Act also repealed s 525, the provision derived from s 38(7) of the 1862 UK Act dealing with sums "due to a member in that capacity". The 1992 Act inserted two provisions concerning what it identified as "debt[s] owed by a company to a person in the person's capacity as a member of the company". First, s 553A provided that:

> "A debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is not admissible to proof against the company unless the

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197 C*oventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 146 [62]; 222 ALR 202 at 217-218.

198 In particular, s 565 identified certain kinds of transaction as being void against the liquidator, if the transaction, had it been made or incurred by a natural person, would, in the event of bankruptcy, have been void against that person's trustee in bankruptcy.

> person has paid to the company or the liquidator all amounts that the person is liable to pay as a member of the company."

Secondly, s 563A provided that:

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

163 The two provisions appeared in separate subdivisions of Div 6 of Pt 5.6, the division which dealt with proof and ranking of claims in winding up, but it may be doubted that anything turns on that fact. For present purposes, what is to be noted is first, that s 553A assumed that a "debt owed by a company to a person in the person's capacity as a member of the company" could be admitted to proof. Section 553A provided only that payment of "all amounts that the person is liable to pay as a member of the company" was a condition for admission to proof. The section thus excluded the operation of the mutual credit and set-off provisions of s 553C, which applied in the winding up of insolvent companies.

164 Secondly, the other provision introduced by the 1992 Act to deal with members' debts, s 563A, was evidently directed to the question of priority of payment of the debts with which it dealt. In terms, that section said nothing at all about what *kinds* of claim a member might make against the company of which that person was a member. That subject, of what debts or claims were to be admissible to proof, was dealt with comprehensively by s 553.

165 The provisions of the 1992 Act dealing with members' debts thus took a very different form from the provisions of s 38 of the 1862 UK Act. Members' debts were no longer dealt with as a qualification to an otherwise general obligation to contribute sufficient to meet the company's debts and liabilities, the costs and expenses of the winding up and the payment of sums required for the adjustment of the rights of the contributories amongst themselves. Against a background where former rules limiting the kinds of claims that were admissible to proof were removed, and the class of admissible claims thus extended, provision was made by the 1992 Act for the condition on which such a debt might be admitted to proof (the previous payment of sums due to the company in the capacity of member) and provision was also made for the priority to be afforded to the satisfaction of such debts. And finally, whereas s 38(7) of the 1862 UK Act (and all subsequent forms of Australian companies legislation down to the Corporations Law as it stood before the 1992 Act) had dealt with any *sum* due to any member in his character of a member, and provided that no sum of that kind "shall be deemed to be a debt of the company", the 1992 Act dealt with "[p]ayment of a *debt* owed by a company".

166 The Explanatory Memorandum for the Bill that became the 1992 Act asserted[199] that s 563A was intended to have the same effect as the then current s 525, and argument of the present matters proceeded on the footing that the 1992 Act should not be understood as failing to achieve that end. It is not necessary to examine the correctness of this assumption. In particular, it will not be necessary to consider whether some distinction could or should be drawn in the operation of s 563A according to whether a member has a claim for unliquidated damages against the company as distinct from a claim for a debt.

167 The 2001 Act followed the drafting pattern set by the 1992 Act, not only in relation to the prescription of the debts and claims admissible to proof in winding up, but also in relation to the separate provisions made in respect of a debt due to a person in that person's capacity as a member of the company. Thus, s 553(1) of the 2001 Act is in the same terms as the 1992 Act; ss 553A and 563A dealing with debts to members are also in the same terms as the 1992 Act.

The application of s 553(1)

168 Although not put directly in issue in the courts below, SOG's claims for declaratory orders, concerning the admissibility of Mr Margaretic's claim to proof, necessarily required consideration of whether the circumstances giving rise to that claim occurred before "the relevant date". Only claims meeting that criterion (whether the claims were present or future, certain or contingent, ascertained or sounding only in damages) were admissible to proof. In the administration of SOG, "the relevant date" was the day on which the directors appointed administrators to the company under Pt 5.3A[200]. It was on that day that the administration began.

169 It was the fact that administrators were appointed to SOG which was agreed to have rendered Mr Margaretic's shares in the company worthless. Until that event, the shares had been traded on the ASX. Mr Margaretic would now say that the market was ill-informed but, whether or not that was so, when Mr Margaretic bought his shares, he paid the then prevailing market price for them. And there was a market for those shares up to the time when trading was suspended, upon the directors' resolving to appoint administrators.

170 At least some of the circumstances giving rise to Mr Margaretic's claim (in particular, the events and circumstances alleged to constitute SOG's failure to comply with the disclosure requirements of s 674 or alleged to constitute the

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199 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [957].

200 2001 Act, ss 435C and 513C.

misleading or deceptive conduct relied on) occurred before the appointment of administrators, and thus occurred before "the relevant date". But the loss or damage of which Mr Margaretic now complains was not apparent to him *before* the appointment of administrators. The extinction of value could be said to have arisen *because of* the administrators' appointment.

171 What is meant, in s 553, by "debts or claims the circumstances giving rise to which occurred before the relevant date"? How does that expression apply in the present matters? Those questions have not previously been considered by this Court, or by any Australian intermediate court[201].

172 In construing the temporal limit that is imposed by s 553, it is important to recognise the generality of other expressions used in s 553 in defining what debts and claims are to be admissible to proof. The section speaks of "*all* debts payable by, and *all* claims against, the company". It amplifies those expressions by the parenthetical reference: "present or future, certain or contingent, ascertained or sounding only in damages". If the words of the section were not wholly sufficient (as they are) to indicate an intention to define provable claims very widely, the Report of the Australian Law Reform Commission on the General Insolvency Inquiry ("the Harmer Report"), read with the Explanatory Memorandum for the Bill that became the 1992 Act, puts the point beyond any doubt. The Harmer Report[202] identified a basic aim of insolvency laws as being "to deal comprehensively with *all* of the debts and liabilities of the insolvent" and said that, "[i]n the case of a company, the aim is to deal with *all* the claims against a company so that its affairs can be fully wound up or so that it can resume trading" (emphasis added). The Harmer Report concluded[203] that "[t]he categories of claims which are admissible should be as wide as possible so that the financial affairs of the insolvent are dealt with comprehensively". Otherwise, as the Harmer Report pointed out[204], "if the creditors are unable to make their claims in the insolvency, they are unable to recover at all (unless they have a basis for action against either directors of the company or a guarantor of the company's debts or unless the winding up is stayed)". The Explanatory Memorandum[205] for the Bill that became the 1992 Act said that the reforms

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201 But see *McDonald v Commissioner of Taxation* (2005) 187 FLR 461; *Environmental & Earth Sciences Pty Ltd v Vouris* (2006) 152 FCR 510.

202 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 315 [774].

203 Report No 45, (1988), vol 1 at 315 [777].

204 Report No 45, (1988), vol 1 at 315 [777].

205 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [849].

embodied in the new provisions of ss 553 to 553E "reflect[ed] the recommendations of the Harmer Report".

173 Is Mr Margaretic's claim one the circumstances giving rise to which occurred before the administration began? This temporal limit to s 553 is to be approached with these considerations of legislative intention well in view. What are the relevant "circumstances"?

174 It is important to begin by recognising that Mr Margaretic's claim is not a future or contingent[206] claim or debt. It is a present and, he would say, a certain claim. If not ascertained, and the better view may well be that his claim is now ascertained, it is a claim sounding in damages.

175 The claims which Mr Margaretic makes under the 2001 Act that are founded on a breach of the continuous disclosure requirements, and the claims he makes under that and other Acts which are founded on allegations of misleading or deceptive conduct, are claims for damages. But had Mr Margaretic known what he now says are the relevant facts *before* SOG appointed administrators (assuming for the purposes of argument that his allegations are true) he would have had complete causes of action against SOG for identical relief under the various statutory provisions upon which he now relies. And the claims he could then have made would not have been contingent or future claims; they would have been present claims for damages representing the difference between what he had outlaid in buying the shares and the true value of what he bought as determined by a *properly informed* market. The appointment of administrators so soon after Mr Margaretic bought his shares reveals that the shares he bought would have been judged by a properly informed market to be worthless when he bought them and accordingly, he suffered loss when he bought the shares[207]. Contrary to the submissions of ING, renouncing his shareholding, whether by selling the shares to a third party or rescinding the contract with the vendor, was not a necessary step in his claiming that loss.

176 It follows that, although the agreed facts demonstrate that the *appointment* of administrators reduced the value of Mr Margaretic's shares to zero, his claim is one the circumstances giving rise to which occurred before the administrators' appointment. Had the facts upon which Mr Margaretic now relies been known then, they would have been known to the whole market, not just him, and he

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206 *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459 per Kitto J; *National Bank of Australasia Ltd v Mason* (1975) 133 CLR 191 at 200 per Barwick CJ.

207 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 654-659 [28]-[40].

would have had the same claim he now makes[208]. His knowledge of the relevant facts bears only upon whether he *makes* a claim; his knowledge of those facts does not bear upon whether he *has* a claim. His claim is of a kind that is within s 553 of the 2001 Act.

In the person's capacity as a member – framing the issue

177 As noted at the outset of these reasons, the other central question in the present appeals is whether the claim by Mr Margaretic is a debt owed by SOG to him in his capacity as a member. That is not how that question was identified in the Full Court of the Federal Court. It is convenient to examine the way in which this aspect of the problem was identified in the Full Court, and then deal with the several aspects of the matter that are thus presented.

178 In the Full Court, the central question was said[209] to be "whether a purchaser (as opposed to an allottee) of shares can in a winding up prove for damages against the company for the misrepresentation which induced the purchase". This issue was seen as turning on the proper understanding of this Court's decision in *Webb Distributors (Aust) Pty Ltd v Victoria*[210] and, if the point that arises in the present matters was not decided in *Webb Distributors*, as requiring consideration of the decision of the House of Lords in *Soden v British & Commonwealth Holdings plc*[211].

179 At once it can be seen that the way in which the issue was framed in the Full Court does not direct attention immediately to either s 553, and its identification of what debts or claims are provable, or s 563A, and its special provision for members' debts. It is, nonetheless, convenient to say something at this point about both *Webb Distributors* and *Soden*.

Webb Distributors (Aust) Pty Ltd v Victoria

180 *Webb Distributors* concerned questions that had arisen in the winding up of three insolvent Victorian building societies. The litigation proceeded on the footing that the winding up of each of the societies was to be treated as though it were the voluntary winding up of a company under the then provisions of the *Companies (Victoria) Code*[212]. The liquidator of the three societies sought

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208 *HTW Valuers* (2004) 217 CLR 640 at 657-658 [37].

209 (2006) 149 FCR 227 at 228 [1] per Finkelstein J.

210 (1993) 179 CLR 15.

211 [1998] AC 298.

212 *State of Victoria v Hodgson* [1992] 2 VR 613 at 615 per Tadgell J.

directions from the Supreme Court of Victoria about the treatment to be accorded in the winding up to persons who had subscribed for shares in the societies known as "non-withdrawable investing shares". Some of those persons claimed that they had been tricked into subscribing for their shares, and they alleged that they had claims for damages for deceit and claims for damages and other relief under the *Trade Practices Act*[213]. The liquidator applied to the Supreme Court for directions upon a number of questions, of which two are now relevant: first, whether the shareholders' claims for unliquidated damages were provable in the winding up of the societies, and second, whether the shareholders were precluded from rescinding the contracts pursuant to which they purchased their shares and were "thereby precluded from maintaining an action or claim against the [societies] for damages"[214].

181 At first instance, Vincent J held[215] that the shareholders' claims were admissible to proof, that the shareholders were precluded from rescinding the contracts pursuant to which they acquired the shares, but that they were not precluded from maintaining actions against the societies for damages. On appeal, the Appeal Division of the Supreme Court held[216] that the claims of the shareholders were not admissible to proof, and that the shareholders were both precluded from rescinding the contracts pursuant to which they had acquired their shares and from maintaining the foreshadowed claims for damages against the societies. In *Webb Distributors* this Court dismissed an appeal against the orders of the Appeal Division.

182 It is of the first importance to recognise that *Webb Distributors* concerned whether the claims which the shareholders sought to make against the societies were admissible to proof in the winding up. The arguments that the parties in that litigation advanced in support of, or in opposition to, the admissibility of such claims to proof were based on what was said to be the "common law rule in *Houldsworth v City of Glasgow Bank*[217]" and whether that "rule" had received statutory recognition in the *Companies (Victoria) Code*. In particular, the arguments of the parties in *Webb Distributors*, both in this Court and in the courts below, laid heavy emphasis upon principles of maintenance of capital[218],

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213 [1992] 2 VR 613 at 616 per Tadgell J.

214 [1992] 2 VR 613 at 616 per Tadgell J.

215 *Re Pyramid Building Society (in liq)* (1991) 6 ACSR 405; 10 ACLC 110.

216 *State of Victoria v Hodgson* [1992] 2 VR 613.

217 (1880) 5 App Cas 317.

218 See, for example, the argument of counsel for the State of Victoria recorded at (1993) 179 CLR 15 at 20.

and upon the issues presented by the second of the questions identified earlier, namely, whether the shareholders could rescind the contracts pursuant to which they became members and could sue the societies. The Court's reasons are to be understood as responding to these arguments of the parties.

183 The decision in *Houldsworth* concerned an unlimited company. It was decided before *Salomon v Salomon & Co*[219] revealed what is now accepted to be one of the axiomatic consequences of incorporation – the separate legal personalities of the corporation and its corporators. It has been said[220] to be a decision that is anomalous because it shows confusion between the corporation and its members[221]. It has been described as being "of legendary impenetrability"[222]. It is, as Tadgell J said in *State of Victoria v Hodgson*[223], a decision that "no doubt bears the stamp of its era". All this notwithstanding, the parties in *Webb Distributors* placed *Houldsworth*, not the applicable statutory provisions, at the forefront of their arguments.

184 There are at least two explanations for the approach that was taken in argument in *Webb Distributors*. First, the central question in the case was whether the shareholders had claims that could be proved in the winding up. The question was not, as here, what priority is a claim that is admissible to proof to be afforded in the application of the assets of the company in winding up. Secondly, decisions after *Houldsworth*, especially *In re Addlestone Linoleum Co*[224], explained *Houldsworth* as depending upon the application of s 38(7) of the 1862 UK Act. Claims by shareholders for damages for misrepresentation were said[225] to be claims in the character of members to recover a dividend in respect of the share of capital which they were bound to pay on a winding up. The

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219 [1897] AC 22.

220 Gower, *The Principles of Modern Company Law*, (1954) at 63-64, 279 and 314-315.

221 Gower, "Notes of Cases", (1950) 13 *Modern Law Review* 362 at 367. See also Hornby, "*Houldsworth v City of Glasgow Bank*", (1956) 19 *Modern Law Review* 54, the response by Professor Gower at 19 *Modern Law Review* 61, and the rejoinder by Mr Hornby at 19 *Modern Law Review* 185.

222 *Soden v British & Commonwealth Holdings plc* [1995] 1 BCLC 686 at 695; [1995] BCC 531 at 537.

223 [1992] 2 VR 613 at 625.

224 (1887) 37 Ch D 191.

225 (1887) 37 Ch D 191 at 197-198 per Kay J.

claims were thus characterised as sums allegedly due to members, in their character of member, by way of dividends, and for that reason were *not to be deemed to be debts of the company* payable to those members in a case of competition between the members and other creditors not being members.

185 The conclusion that members' claims for damages for misrepresentations are to be excluded from proof on this basis assumed that the claims were otherwise of a kind that would be admissible to proof. Under the provisions then specifying the debts admissible to proof in a winding up[226], claims for unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust were excluded from proof as claims not admissible to proof in the bankruptcy of a natural person. Claims for unliquidated damages for deceit by the company causing a person to acquire shares *from a third party* were therefore excluded from proof, but claims for damages for deceit causing a person to *subscribe* for shares would not have been excluded. The latter form of claim would be a claim arising by reason of a contract or promise[227].

186 On this basis a line might have been drawn dividing claims for deceit made by subscribers for shares and claims for deceit made by those who acquired their shares by transfer. But no such line was drawn. Rather, the question, that appears to have been seen in *Houldsworth* as calling for examination, was whether a subscribing shareholder could retain the shares which had been issued while, at the same time, maintaining an action for damages to recover the damage suffered by reason of the subscription for shares.

187 This question was addressed in *Houldsworth* as though its answer depended wholly upon the general law of deceit and, in particular, what remedies were to be available for deceit where the property acquired in consequence of the deceit had not been given up or returned to the party making the fraudulent misrepresentation upon which the acquirer had relied. Not until *In re Addlestone Linoleum Co* was there any attempt to relate the conclusion reached in *Houldsworth* to the relevant provisions of the 1862 UK Act[228].

188 This course of decision, coupled with the various criticisms that have been levelled at the decision in *Houldsworth*, reveals the difficulties implicit in taking the state of judge-made law in the field as the starting point for consideration of issues of the kind considered in *Webb Distributors*. Yet that was the premise for

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226 *Supreme Court of Judicature Act* 1875 (UK), s 10.

227 *Jack v Kipping* (1882) 9 QBD 113.

228 cf *In re Hull and County Bank* (*Burgess's Case*) (1880) 15 Ch D 507 at 511-513.

the parties' arguments in that case and, not surprisingly, the Court's reasons reflect those arguments.

189 The Court held in *Webb Distributors* that the provisions of s 360 of the *Companies (Victoria) Code* (the provisions of the Code that were based on s 38 of the 1862 UK Act) precluded the shareholders from rescinding the contracts under which they acquired their shares and precluded them from maintaining an action for damages in respect of that acquisition. The proposition that a shareholder could not, either directly or indirectly, receive back any part of the amount contributed by that shareholder to the capital of the company was said to have received statutory recognition in that provision of the Code (s 360(1)(k)) which was the then equivalent of s 38(7) of the 1862 UK Act. It followed that the shareholders could not prove in the liquidation of the societies.

190 The conclusion reached in *Webb Distributors* concerned, and concerned only, the rights of a member who had subscribed for shares, as distinct from having acquired shares by contract from a person other than the company itself. Maintenance of capital may be relevant to a shareholder's entitlement to recover from the company amounts that the shareholder subscribed as capital, but it has no direct relevance to the recovery from the company of damages for loss occasioned by the making of a contract to acquire existing shares in the company from a third party. It has no direct relevance to that second kind of case because the shareholder does not seek the return of what was subscribed as capital when the shares were allotted. Whether, in the first kind of case, it is right to describe the claim as one which seeks the return of what was subscribed is a question that need not be answered here. Even if it were right, it would provide no reason for concluding that a shareholder like Mr Margaretic, who was not a subscriber, has no claim against the company under the consumer and investor protection provisions mentioned at the start of these reasons. Nor would it provide a reason for concluding that such a shareholder had no claim for deceit. Neither *Webb Distributors* nor *Houldsworth* established any common law "principle" that no shareholder, no matter how the shares were acquired, can have a claim of the kind now in issue against a company whose assets were to be administered as on a liquidation. The reasoning in those cases, because it was founded in important respects upon considerations of preservation of capital, can have no direct application when the plaintiff shareholder did not subscribe capital. But whether or not that is so, the asserted common law "principle" could not deny the operation of the relevant consumer protection and investor protection provisions. Finally, the conclusion reached in *Webb Distributors*, like the conclusion reached in *Houldsworth*, turned, in important respects, upon whether the shareholder could rescind the contract with the company for subscription for shares. None of these considerations is relevant to the present matters where there was no contract for the acquisition of shares made between the shareholder, Mr Margaretic, and the company, SOG.

Soden v British & Commonwealth Holdings plc

191 The decision in *Webb Distributors* may be compared with the decision of the House of Lords in *Soden.* The latter decision focused upon what is meant by a sum due to a person in his character as a member. The House of Lords held[229] that "in the absence of any contrary indication sums due to a member 'in his character of a member' are only those sums the right to which is based by way of cause of action on the statutory contract". The statutory contract was said[230] to be constituted by the bundle of rights and liabilities created by the constituent documents of the company[231], and the rights and obligations conferred and imposed on members by the applicable company legislation. Accordingly, the House of Lords held that the only claims that fell within the reach of the legislative successor to s 38(7) of the 1862 UK Act were claims "based upon the statutory contract between the member and the company" and "claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract"[232]. Because the legislature had intervened[233] and provided that a person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company, it was not necessary for the House of Lords to express any view about the conclusion reached in *Webb Distributors* concerning the admissibility to proof in a winding up of a claim for damages brought against the company by a subscriber for shares[234].

In the person's capacity as a member – reframing the issue

192 The claim which Mr Margaretic makes against SOG is, for the most part, framed as a claim under statute. It was not, and could not be, suggested that the statutes which permitted the making of such a claim could not be engaged by

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229 [1998] AC 298 at 323.

230 [1998] AC 298 at 323 per Lord Browne-Wilkinson.

231 Section 140 of the 2001 Act provides that a company's constitution and any replaceable rules have effect as a contract between (among others) the company and each member. See *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 434-438.

232 [1998] AC 298 at 325.

233 *Companies Act* 1985 (UK), s 111A, as inserted by the *Companies Act* 1989 (UK), s 131(1).

234 [1998] AC 298 at 326.

Mr Margaretic. He thus has a claim against SOG. Whether that claim is admissible to proof in the winding up of SOG depends, and depends only, upon the relevant provisions of the 2001 Act. Because the statutory definition of claims admissible to proof on a winding up was changed in 1992, the decision reached in *Webb Distributors* does not dictate the outcome in the present case or in a case where the shareholder who makes the claim acquired the shares by subscription rather than transfer. Nor is the question to be framed, at least in the first instance, by assuming that a different answer may be given according to whether the shares were acquired by subscription rather than transfer. Rather, the question is, as it was in *Soden*, whether there is "a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise".

193 That question should be answered "no". Even assuming that Mr Margaretic's claim falls within the expression "a debt owed by a company" his claim is not one "owed by a company to a person in the person's capacity as a member of the company".

In the person's capacity as a member

194 What was meant by the legislative predecessor of the expression now found in s 563A of the 2001 Act ("sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise") has been considered in a number of decisions other than *In re Addlestone Linoleum Co*, the case which, so often, is treated as relating the decision in *Houldsworth* to s 38(7) of the 1862 UK Act.

195 In this Court, in *King v Tait*, Dixon J referred[235] to what had been said in *Lock v Queensland Investment and Land Mortgage Co*, both in the House of Lords[236] and in the Court of Appeal[237], about that expression. Both *King v Tait* and *Lock* concerned advances made to a company by the holder of partly paid shares in anticipation of later calls. Is the interest payable by the company on that advance a debt owing to the shareholder in his character of member? As Dixon J recorded in *King v Tait*[238]:

> "Lord Herschell and Lord Macnaghten said [in *Lock*] that it [the interest payable under such an agreement] was a debt which could not be properly

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235 (1936) 57 CLR 715 at 758-759.

236 [1896] AC 461.

237 [1896] 1 Ch 397.

238 (1936) 57 CLR 715 at 758-759.

> described as owing to the shareholder in his character of member ... But Lindley LJ[239] expressly said that the shareholder could not rank with creditors in respect of any capital whether prepaid or not; and Kay LJ[240] said that the effect of the transaction was that the company borrows money from the shareholders which it need not repay."

196 A distinction can be drawn between the character of the interest paid to a member in these circumstances, and the advance whose making is recompensed by the payment of interest, only if the expression "in his character of member" is given a narrow reach. In particular, no such distinction can be maintained if a line is drawn according only to whether the fact of membership is a necessary allegation in pleading the relevant claims.

197 The meaning attributed to the expression in *Lock* is apparent from the speech of Lord Herschell. His Lordship said[241]:

> "I think it is a fallacy to speak of this payment of interest as being a payment made to a member in his character of member. *As member* he has no right to have that interest paid to him: he could not claim it. *As member* he was under no obligation to make the payments in consideration of which the company undertook to pay the interest. When, therefore, the company, although they received the money from a member, received it from him without any obligation upon him as a member to pay it, and undertook to make a payment to him in consideration of it which they were not under any obligation to make to him *as a member*, it seems to me that it is manifestly erroneous to describe this as a payment made to a member in his character of member." (emphasis added)

That is, "in his character of member" was understood as requiring the identification of the right to receive the sum as a right which attached to membership of the company.

198 A generally similar approach to the problem can be seen as underpinning the decision in *In re New Chile Gold Mining Co*[242]. There a claim by a former member, for damages suffered in consequence of the forfeiture of his shares

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239 [1896] 1 Ch 397 at 405.

240 [1896] 1 Ch 397 at 407.

241 [1896] AC 461 at 468.

242 (1890) 45 Ch D 598.

without giving notice as required by the articles of association, was held[243] not to be a sum due to him in his character of a member but "on the contrary, due to him in the character of non-member". It was said[244] that what was claimed was "not any sum which is payable to a member, but damages payable to him by reason of his having been deprived of the rights of a member by an irregular act on the part of the company in respect of which the contract, contained in the articles of association, entitles him to damages".

199 And the like approach can also be seen in *In re Harlou Pty Ltd (In Liq)*[245] where an employee of the company claimed damages for breach of the company's obligation, undertaken in his employment contract, to find a purchaser for shares issued to him when he took up employment, if that employment was terminated. As O'Bryan J said[246], the amount claimed was "not due to him in his character of a member at all. *It is not because he is a shareholder that he is entitled to these damages*, but it is because he has made a contract with the company ... which contract the company has broken" (emphasis added).

200 Because the question that must be answered is one of statutory construction, little or no assistance is to be had from considering the way in which other forms of statutory schemes, ordering the priorities for meeting an insolvent company's obligations, have been held to operate. And while it may be observed that each particular statutory scheme allocates the risks of insolvency between investors and creditors in a specific order, that is, in each case, an observation about the proper construction of the relevant statute, not an observation about some immutable policy. In particular, to say that "shareholders come last"[247] or that "stockholders seeking to recover their investments cannot be paid before provable creditor claims have been satisfied in full"[248] is no more than an observation about how the relevant statute has been, or should be, construed.

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243 (1890) 45 Ch D 598 at 605.

244 (1890) 45 Ch D 598 at 605.

245 [1950] VLR 449.

246 [1950] VLR 449 at 454.

247 cf *In re Geneva Steel Co* 281 F 3d 1173 at 1179 (2002) citing *In re Granite Partners LP* 208 BR 332 at 344 (1997).

248 Slain and Kripke, "The Interface between Securities Regulation and Bankruptcy – Allocating the Risk of Illegal Securities Issuance between Securityholders and the Issuer's Creditors", (1973) 48 *New York University Law Review* 261 at 261.

201 The expression now found in s 563A, "in the person's capacity as a member of the company" (like its legislative ancestor, "in his character of a member") must, of course, be given work to do in the provision. The expression defines (and confines) the particular kinds of obligations that are to be postponed. That is, it identifies the particular kinds of "debt owed by a company" (formerly, "sum due to any member of a company") to which particular consequences are attached. These consequences are now identified as postponement until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied; they were formerly identified as not being "deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company". And once it is recognised that the provision, both in its present and in its historical form, singles out particular obligations for the attachment of the specified consequences, two observations may be made. First, the words "by way of dividends, profits or otherwise" can more readily be seen as examples of the kinds of obligation in question, rather than as words limiting or defining the obligations with which the provision deals. Secondly, the need to connect the obligation with membership is more apparent.

202 "Membership" of a company is a statutory concept. That is why the connection between obligation and membership that must be shown, if the obligation is to fall within s 563A, will find its ultimate foundation in the relevant legislation, now the 2001 Act. It is the legislation which defines the obligations owed by and to the members of a company.

203 That definition of obligations will often require resort to the company's constituent documents to flesh out the content of the relevant obligation. It is on that basis that reference is often made to "the statutory contract", but it is the statute (now s 140 of the 2001 Act) which gives those documents their particular legal effect. And in other cases, it will not be necessary to look beyond the four corners of the statute to conclude that the obligation which the member seeks to enforce is an obligation owed to members.

204 It will be noted that these conclusions about the operation of s 563A are not expressed in the terms used in *Soden*. In particular, it is to be observed that there is no reference to what Lord Browne-Wilkinson, speaking for the House of Lords, called[249] "negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract". These were said to be "claims necessarily made in his character as a member".

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249 [1998] AC 298 at 325.

205 If money is paid to the company *under* the statutory contract, there may be cases in which it may be said that the obligation which it is then sought to enforce is one whose ultimate foundation is the legislative prescription of the rights of members. Whether that is so would depend entirely upon the facts and circumstances of the particular case and, very probably, would be much affected by the provisions of the company's constituent documents. But if money is paid to the company to *create* the relationship of member (as will be the case when a person subscribes for shares) the company's obligation to pay damages for fraudulent misrepresentation inducing that subscription, or to pay damages because loss was occasioned by the company's misleading or deceptive conduct, will not, in the absence of specific legislative provision to the contrary, be an obligation whose foundation can be found in the legislative prescription of the rights and duties of members. In this respect, absent specific legislation giving subscribing members particular remedies as members, no distinction is to be drawn between shareholders who complain that a company's deceit or misleading or deceptive conduct induced them to acquire shares in the company according to whether that acquisition was by subscription or transfer.

206 In the present case, the obligation which Mr Margaretic seeks to enforce is not an obligation which the 2001 Act creates in favour of a company's members. The obligation Mr Margaretic seeks to enforce, in so far as it is based in statutory causes of action, is rooted in the company's contravention of the prohibition against engaging in misleading or deceptive conduct and the company's liability to suffer an order for damages or other relief at the suit of *any* person who has suffered, or is likely to suffer, loss and damage as a result of the contravention. In so far as the claim is put forward in the tort of deceit, it is a claim that stands altogether apart from any obligation created by the 2001 Act and owed by the company to its members. Those claims are not claims "owed by a company to a person in the person's capacity as a member of the company". For these reasons, s 563A does not apply to the claim made by Mr Margaretic.

207 Each appeal should be dismissed with costs.

208 CALLINAN J. Mr Margaretic is not the first person, and will certainly not be the last to suffer the misfortune of buying shares in a terminally ailing gold mining company. Indeed, he has as fellow sufferers thousands of investors over the years who have chosen to invest in various kinds of joint enterprises of which, in modern times, companies are the most common, and which will almost always involve the divestment of personal management of the investment to others. Different people will have different subsidiary reasons to invest in this way: because they lack entrepreneurial flair and skills; because they perceive that a large concentration of capital can be more productive than a portion of it; because they are disabled in some way from managing investments; because they have insufficient money to fund a business; or perhaps because they wish to participate in a variety of businesses in the hope of insulating themselves from the vagaries of one business or market. All of these, and no doubt others, may operate on the minds of shareholders, but there can be no question that all are principally impelled by a wish to make as much money by way of income, capital gain, or both, as possible. No one investing in shares in a corporation could, however, be unaware that there will always be a risk of reverses, and that a shareholder alone, or indeed even a substantial body of shareholders, may not be able to manage or control that risk. Indeed, the risk itself may be uncontrollable by human agency, even the agency of a very cautious board of directors. Risk averse people, on the other hand, may choose to buy lower yielding government bonds, or, for example, shares in regulated utilities, understanding that by doing so they may forego a chance of greater financial rewards.

209 None of this is to suggest that directors and officers of corporations should not adhere to proper standards, or that there should not be as strict a regime as reasonably possible to ensure efficiency, diligence and probity, whilst at the same time not stifling ingenuity and enterprise.

210 There have been many corporations which have produced, and continue to produce, for their shareholders, much wealth. Sometimes, that result has been achieved by undertaking financially risky activities without in any way infringing any written or other rules of law. On other occasions, again without infringing any relevant law, the risk has materialized and the corporation has failed. Despite looking for the potential benefits had the corporation Sons of Gwalia Ltd ("SOG") succeeded[250], and enjoying the benefit of limited liability on its failure, Mr Margaretic, as a shareholder, now wants to be heard to say that he should be in exactly the same position to share equally in the remains of the corporation as its unpaid unsecured creditors, who, unlike shareholders, had the misfortune of being injured by the company simply by dealing with it in the entirely reasonable expectation that it could and would pay its debts to them, but not of course, any share of its profits if it were to make them.

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250 The extent to which SOG may have rewarded its shareholders in past years was not canvassed.

211 The principal question in this case is whether Mr Margaretic can be heard to say this, and accordingly whether the decision of the Full Court of the Federal Court, which said he could, should be reversed by this Court. That question need only be answered if, as other members of the Court hold, another and less difficult question, whether Mr Margaretic should be entitled to claim as a creditor at all in the administration, is answerable in the affirmative. As to that, because I agree with the answer given by Hayne J, I need only deal in detail with the more difficult question.

212 The course of proceedings so far, and the issues, are described in the reasons for judgment of other members of the Court. It may be useful however to set out a short summary of Mr Margaretic's claim[251]:

> "[Mr Margaretic] alleges that on 18 August 2004 he purchased 20,000 fully paid ordinary shares in SOG on market for $1.31 per share with a brokerage of $81.21 and GST of $7.38 and that at the time that he purchased his shares:
>
> (a) SOG failed to notify the [Australian Stock Exchange ('ASX')] and the market of changes to SOG's estimated gold resources and reserves, and of the significance of this given SOG's gold delivery commitments ('Disclosures') and was thereby in breach of its disclosure obligations under section 674 of the [*Corporations Act* 2001 (Cth) ('the Act')] and Rule 3.1 of the ASX Listing Rules;
>
> (b) alternatively, by its failure to make the Disclosures, SOG engaged in misleading and deceptive conduct in breach of:
>
> (1) section 52 of the *Trade Practices Act 1974* ('TPA');
>
> (2) section 1041H of the Act; or
>
> (3) section 12DA of the *Australian Securities and Investments Commission Act 2001* ('ASIC Act');
>
> and he claims compensation from SOG in the amount of $26,288.59 pursuant to section 1325 of the Act, section 82 of the TPA, sections 1041I

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251 Taken from the affidavit of Mr Darren Gordon Weaver, one of the voluntary administrators of SOG, sworn 1 July 2005. The affidavit was sworn and filed in support of SOG's application for a declaration that Mr Margaretic's claim was not provable in the deed of company arrangement or, alternatively, that it was subordinated to all other debts or claims owed otherwise than in the claimants' capacity as members of SOG.

and 1325 of the Act, or sections 12GF and 12GM of the ASIC Act, respectively."

The legislation

213 Reference to the legislation upon which Mr Margaretic relies for his claims is necessary.

214 Section 674 of the Act is found in Ch 6CA ("Continuous disclosure"). Its effect is to create criminal and civil penalties for non-compliance with r 3.1 of the ASX Listing Rules, but only if the information not disclosed is not generally available (s 674(2)(c)(i)), and, in the event of a criminal offence, if mens rea can be established[252]. Rule 3.1 of the ASX Listing Rules provides that an "entity" (a term defined to include a listed company[253]), once aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, must immediately disclose that information to the ASX. Disclosure is not required, however, if a reasonable person would not expect the information to be disclosed (r 3.1A.1); where the information is confidential and the ASX has not formed the view that the information has ceased to be confidential (r 3.1A.2); or, where it would be a breach of a law to disclose, if the information concerns an incomplete proposal or negotiation, if the information comprises matters of supposition, or, is insufficiently definite to warrant disclosure, where the information is generated for internal management purposes, or where the information is a trade secret (r 3.1A.3).

215 It should be noted that the obligation of disclosure is imposed on the "entity" itself, that is, the company. A company, an artificial legal personality, of course may only function by its directors and officers. In practice it is they who will be making relevant disclosures, and who in consequence of any failure to do so will also be liable.

216 One section upon which Mr Margaretic relies is s 52 of the TPA, which provides as follows:

"**Misleading or deceptive conduct**

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

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252 For a civil penalty, s 674(2), s 1317E and s 1317G of the Act. For a criminal offence, s 1311 of the Act and the *Criminal Code*, s 3.2.

253 r 19.12.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

217 Section 1041H of the Act is in relevantly similar terms to s 52 of the TPA:

"**Misleading or deceptive conduct (civil liability only)**

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4."

218 There then follow a number of provisions identifying, without limiting sub-s (1), specific instances of "conduct":

"(2) ...

(3) Conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence."

219 Reliance is also placed upon s 12DA of the ASIC Act:

"**Misleading or deceptive conduct**

(1) A corporation must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

(1A) Conduct:

(a) that contravenes:

(i) section 670A of the Corporations Act (misleading or deceptive takeover document); or

(ii) section 728 of the Corporations Act (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A of the Corporations Act; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(2) Nothing in sections 12DB to 12DN limits by implication the generality of subsection (1)."

220 Mr Margaretic claims relief under various provisions. One is s 82 of the TPA, which enables a person who has suffered loss or damage by conduct in contravention of s 52 of that Act, to recover the amount of the loss or damage suffered (s 82(1)). A court may, however, reduce the amount recovered to the extent it thinks just and equitable, where a claimant has contributed to the loss or damage and if the defendant neither intended nor fraudulently caused the loss or damage (s 82(1B)).

221 As with ss 82 and 87 of the TPA, s 1325 of the Act, which is primarily concerned with accessorial liability, allows a degree of flexibility to the court in granting appropriate relief to compensate a person adversely affected by relevant conduct:

"**Other orders**

(1) Where, in a proceeding instituted under, or for a contravention of, Chapter 5C, 6CA or 6D or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer,

loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(2) The Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of Chapter 5C, 6CA or 6D or Part 7.10, or on the application of [the Australian Securities and Investments Commission ('ASIC')] in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(3) Where, in a proceeding instituted for a contravention of Chapter 5C, 6CA or 6D or Part 7.10 or instituted by ASIC under section 1324, a person is found to have engaged in conduct in contravention of Chapter 5C, 6CA or 6D or Part 7.10, ASIC may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct, but ASIC must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(4) An application under subsection (2) may be made within 6 years after the day on which the cause of action arose.

(5) The orders referred to in subsections (1) and (2) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct

or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void ab initio or at all times on and after a specified day before the order is made; and

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made; and

(c) an order refusing to enforce any or all of the provisions of such a contract; and

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage; and

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage; and

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

(5A) Subsections (1) and (2) have effect subject to section 1044B.

Note: Section 1044B may limit the liability, under an order under subsection (1) or (2) of this section, of a person for his or her contravention of section 1041H (Misleading or deceptive conduct) or involvement in such a contravention.

(6) Where an application is made for an order under this section against a person, the Court may make an order under section 1323 in respect of the person."

222 It is unnecessary to set out s 1041I of the Act. Among other things, it makes provision for the apportionment of responsibility as between participatory wrongdoers. Nor is it necessary to quote any of ss 12GF and 12GM of the ASIC Act. Both make provision for claims of the type that Mr Margaretic makes and allow some flexibility in the granting of relief by the court.

223 All of Mr Margaretic's causes of action have in common reliance upon deceptive conduct consisting in a failure on the part of SOG to keep the market fully informed about matters relevant to its financial capacity and prospects. The "market" can be a very broad concept, capable of including within it virtually everyone with an interest, actual or potential, in the activities of a relevant company, including brokers, bankers and financiers, and shareholders, past, present and potential. It is on the rights of the last category that these appeals focus, but it is important in doing so not to lose sight of the interests that those others, and other categories such as general creditors may have in a corporation's trading and prospects.

224 Returning however to the category of shareholders, past, present and prospective, I would make the point, the significance of which will become apparent later, that there is no reason why a shareholder, who, unlike Mr Margaretic, has subscribed for, or bought shares in SOG in earlier, seemingly happier, times and has been induced to hold them on the faith of the deceptive conduct constituted by non-compliance with the continuous disclosure rules, could not frame a claim in almost identical terms to that of Mr Margaretic.

225 It cannot be seriously argued here that the particular provision to be construed, s 563A is unambiguous, or, to use the language of Kirby J[254], not "contestable". Its meaning could not otherwise have demanded the time and attention that the Federal Court and other members of this Court have been obliged to give it. It provides:

> "**Member's debts to be postponed until other debts and claims satisfied**
>
> Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

226 That it may contemplate, in its terms, an equal ranking of members of a company with other creditors in a case of a claim for compensation of the kind brought here, is no more natural a reading, than that it is intended to postpone comprehensively, a claim by a member of a company arising in any way out of the fact of, or the necessity for the purposes of the claim, a member's membership of the company. Indeed, there are I think, some internal indications arguing in favour of the second of these possible constructions. First, there is the use of the word "capacity". *The Shorter Oxford English Dictionary* gives as its

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254 At [116].

first meaning the "[a]bility to take in or hold"[255]. That meaning attaches importance to the taking or holding of something, relevantly here a share. The second internal indication is the use of the expression of comprehensiveness, "or otherwise". These however are merely indications giving rise to no more than an impression, insufficient in itself to resolve the ambiguity.

227 Resort must accordingly be had to the fundamental tenets of construction, the ones which I take to be most relevant here being: first, the ascertainment of the scope, objects and purposes of the Act; secondly, the need to construe the Act as a whole, which is perhaps merely another way of saying that each section of it must be put in context; thirdly, the importance of paying due regard to relevant history; and, fourthly, the desirability of giving effect to a construction, if it is reasonably available, which will better maintain coherence in the law and promote fairness.

The scope, objects and purposes of the Act

228 Some provisions of the Act have already been noticed. It is a very large and complex piece of legislation. Its long title describes it as "An Act to make provision in relation to corporations and financial products and services, and for other purposes". Those purposes include the regulation of corporations, their directors and other officers and the rights and obligations of, among others, shareholders and creditors. It is important to keep in mind that the Act is intended however to cover not only large, apparently highly capitalized, listed corporations but also proprietary companies both small and large[256].

Context

229 Even though, indeed perhaps because members of companies necessarily entrust their investment to the management of others, and thereby accordingly run the risks that that necessarily involves, the Act confers very valuable rights, whilst the company remains afloat, upon members over and above those enjoyed by creditors, in relation to the control, the conduct of the affairs of, and access to the profits of a company.

230 Before coming to those statutory rights, s 140(1) which is concerned with the "statutory contract" should be noticed:

> "A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

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255 3rd ed (1973), vol 1 at 280.

256 s 45A.

(a) between the company and each member; and

(b) between the company and each director and company secretary; and

(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person."

231 That the section provides that the constitution is to have effect as a contract between the company and each director of it, and between a member and each other member, highlights the close legal relationship, indeed the interdependence, and consequentially a degree of reliance, of each of these with and upon the others. And although the section acknowledges the replaceability of the rules of the constitution of a company, shareholders can move to prevent changes in the event that any can be shown to be a fraud on a power according to conventional equitable doctrine. As Dixon J said in *Peters' American Delicacy Co Ltd v Heath*[257]:

> "If no restraint were laid upon the power of altering articles of association, it would be possible for a shareholder controlling the necessary voting power so to mould the regulations of a company that its operations would be conducted or its property used so that he would profit either in some other capacity than that of member of the company or, if as member, in a special and peculiar way inconsistent with conceptions of honesty so widely held or professed that departure from them is described, without further analysis, as fraud. For example, it would be possible to adopt articles requiring that the company should supply him with goods below cost or pay him ninety-nine per cent of its profits for some real or imaginary services or submit to his own determination the question whether he was liable to account to the company for secret profits as a director.
>
> The chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power."

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257 (1939) 61 CLR 457 at 511.

It is also relevant that the constitution of a company may be amended to allow expropriation of shares only if the amendment is to be made for a proper purpose, and is fair in all of the circumstances, both procedurally and substantively[258].

232 One of the powerful rights of members is the appointment of directors. It is unnecessary to go into the detail of the provision for this, which is contained in Pt 2D.3 of the Act, or the sections which deal with the effectiveness of acts done by directors and other officers, but this can be said: by electing the directors, the members choose the persons to conduct the affairs of the company and to use the members' funds and equity in it for that purpose. The directors are in a real, if not a necessarily technically legal sense, not just the instruments of the company, but are also the instruments and agents of the members in the use of the members' funds. By contrast, creditors have no such rights. In no sense do the directors act on their behalf.

233 The Act imposes many duties upon directors. Section 180 expressly requires that they act as carefully and diligently as a reasonable person would in the circumstances of the corporation and its business. An (exculpatory) "business judgment" will be taken to have been made not improperly if it is made in good faith for a proper purpose on a properly informed basis rationally in the best interests of a company, and without consideration of material personal interest. It is unnecessary to refer in detail to directors' other obligations. The point can be made however that directors can be rendered personally liable, certainly at the suit of a liquidator or administrator[259], but not directly, except in certain circumstances, the creditors, for what may well have occurred here, insolvent trading.

234 Part 2F.1 of the Act confers important rights on members to prevent, or remedy the oppressive conduct of the affairs of companies. Section 232 provides as follows:

> "**Grounds for Court order**
>
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or

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258 *Gambotto v WCP Ltd* (1995) 182 CLR 432 at 446-447 per Mason CJ, Brennan, Deane and Dawson JJ.

259 See Pt 5.7B, Div 4 of the Act.

(c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company."

235 Courts are empowered by s 233(1) of the Act to make various orders, where oppressive conduct is established:

"(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act."

236 Standing to apply for an order is the subject of s 234, which provides that an application may be made by a member, a person who has been removed from a register of members because of a selective reduction, a person who has ceased to be a member, a transmitee by will or operation of law of a share, or a person whom the regulator, ASIC thinks appropriate, but not a creditor. Interestingly, s 234 is another section which refers to a "member in their capacity as a member" and a related phrase, a "member in a capacity other than as a member". Expressions used more than once in legislation should be given the same meaning throughout in most, if not all, conceivable circumstances. It is possible however to give the expression "member in their capacity as a member" the meaning advanced by either side as to the like phrase in 563A without doing injury to either s 234 or s 563A.

237 Another important right that members now enjoy under the Act is to bring or intervene in proceedings on behalf of a company. Until the introduction of provision for this, the rule in *Foss v Harbottle*[260] operated, that only the company could be a proper plaintiff in respect of wrongs done to it, members having no personal rights to interfere in the management of the company unless they did so in general meeting, and even then subject to a rule that they not attempt to invalidate otherwise apparently valid actions of directors before a resolution at such a meeting. Subject to some presently non-relevant qualifications, a member, a former member, or a person entitled to be registered as a member, has a right to apply to intervene under s 236 of the Act where they do so with the leave of the court under s 237. That section also provides that an officer or a former officer of the company, with leave, might have the same right, but it can be seen that, in general, the rights conferred are primarily intended as rights of members.

238 Part 2F.2 is concerned with "class rights". It provides[261] that if members of a class do not agree to a variation or cancellation of their rights, the holders of no fewer than 10 per cent of the votes in the class may apply to the court to set aside a variation or cancellation of their rights.

239 Earlier I referred to limited liability. Provision for that is made by ss 515 and 516 of the Act. Section 515 provides:

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260 (1843) 2 Hare 461 [67 ER 189].

261 s 246D. See also, for deemed variations of class rights, s 246C.

"**General liability of contributory**

Subject to this Division, a present or past member is liable to contribute to the company's property to an amount sufficient:

(a) to pay the company's debts and liabilities and the costs, charges and expenses of the winding up; and

(b) to adjust the rights of the contributories among themselves."

Section 516 states that "if the company is a company limited by shares, a member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member".

240 It is also relevant that dividends may only be paid out of profits[262]. That this is so serves to emphasize the continuing importance, relevance, indeed sanctity, of the capital, as opposed to any clearly ascertainable profits generated by it.

241 It is in the context in particular of the provisions to which I have so far referred that s 563A must be read. What can fairly clearly be discerned from that context is that, up to the point of insolvency, liquidation or administration of a company, its members enjoy superior opportunities, rights and advantages to creditors, yet the latter are no less likely to be disadvantaged by deceptive conduct of a company lying in a failure to comply with the continuous disclosure rules. There can be no doubt that the financial capacity of a company to satisfy its obligations to all of those who deal with or rely on it, is a matter of continuing interest and concern to them. That being so, it seems intuitively, as Kirby J points out[263], to be a more likely construction of s 563A that it means what SOG, rather than Mr Margaretic contends it to mean.

242 It does appear to me then that the contextual indications are more than mere straws in a breeze sighing in SOG's direction. Shareholders' ample and superior statutory rights, their voluntary abdication of control over their investment in favour of their appointees, the directors, who have large statutory and constitutional discretions and obligations in the application of it, their rights of intervention, their rights to proceed against the directors personally as well as the company in some circumstances, their statutorily mandated limited liability, especially that, and their rights to participate in the bounty of any successes, sit uncomfortably with the notion that s 563A gives them equal billing, on the failure of the company, with ordinary creditors.

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262 s 254T.

263 At [103]-[104].

History

243 The history of the Act has been traced by Hayne J[264] and accordingly little of it needs repetition by me. I would make some observations about it, however. I do not think that anything turns upon the relocation of s 563A in a different part of the Act from the location of its precursors in the Acts in which they appeared. And whilst it is certainly true that *Salomon v Salomon & Co Ltd*[265] did put beyond all dispute the proposition that a company was a different and separate personality from the members of it, the attainment of limited liability had been an object of legislators and the commercial community long before that case. The United Kingdom 1844 Statute 7 & 8 Vict c 111 did not achieve it, but did lay a foundation for it by drawing, as it did, a distinction between joint stock companies and private partnerships, incorporation by registration rather than by legislation or charter, and establishment of a registrar of companies with whom companies' constitutions and returns were filed so as to become accessible to the public. That Act did, however, provide that the liability of members should cease three years after transfer of their shares and that creditors must proceed first against the assets of the company[266].

244 According to *Gower's Principles of Modern Company Law*, public opinion hardened in favour of the extension of limited liability, "particularly when the slump of 1845-1848 drew poignant attention to the consequences of its absence"[267]. The *Joint Stock Companies Act* 1856 (UK) provided that a company of limited liability could be registered and could operate if seven or more persons signed and registered a memorandum of association. The use of the word "limited" was required and was regarded as a clear indication of any risk that might attach to dealing with this new form of legal personality. Perhaps the better way to regard *Salomon v Salomon & Co Ltd* is not as establishing unarguably merely "limited liability", but, as Gower puts it[268], as bringing home its "implications" to the courts. As I said in *New South Wales v Commonwealth*[269]:

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264 At [149]-[167].

265 [1897] AC 22.

266 *Gower's Principles of Modern Company Law*, 4th ed (1979) at 41.

267 4th ed (1979) at 43.

268 *Gower's Principles of Modern Company Law*, 4th ed (1979) at 97.

269 (2006) 81 ALJR 34 at 234 [843]; 231 ALR 1 at 250-251.

> "Given that the United Kingdom 1844 Statute 7 & 8 Vict c 111 allowed creditors to proceed against an insolvent company 'in like Manner as against other Bankrupts'[270], and 'in its corporate or associated Capacity'[271], I think it would be unwise to try to draw too much from the fact of the decision in *Salomon v Salomon & Co Ltd*[272]."

245 One particularly relevant change which occurred in Australia was that effected by the *Corporate Law Reform Act* 1992 (Cth) which, for the first time in this country, made provision for proof of "all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), ... the circumstances giving rise to which occurred before the relevant date", thereby enabling members of companies to prove in respect of debts or claims of the kind made here.

246 Section 553 reflected the recommendations which had been made in the Australian Law Reform Commission's *General Insolvency Inquiry* ("the Harmer Report")[273]. The Explanatory Memorandum for the Act of 1992 said this[274]:

> "Section 553 of the Corporations Law will be repealed and replaced and proposed sections 553, 553A to 553E and 554A through to 554J inserted into Division 6 of Part 5.6. These sections constitute three Subdivisions:
>
> - Subdivision A – Admission to proof of debts or claims;
> - Subdivision B – Computation of debts and claims; and
> - Subdivision C – Special provisions relating to secured creditors of insolvent companies.
>
> The reforms embodied in these provisions reflect the recommendations of the Harmer Report in relation to the making of claims in insolvency. As the reforms relate to matters which under the current law are dealt with under the Bankruptcy Act, and incorporated into the Corporations Law by reference under section 553, the implementation

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270 Section 1.

271 Section 2.

272 [1897] AC 22.

273 (1988), vol 1 at 315 [774].

274 At 169-170 [848]-[853].

of these reforms has necessitated the incorporation in the Corporations Law of provisions modelled on sections in the Bankruptcy Act. This is in line with the general policy implicit in the Harmer Report that the provisions dealing with insolvency of companies should, as far as practicable, be located within the Corporations Law rather than included by reference.

As the result of the current application of the Bankruptcy Act provisions, demands in the nature of damages arising otherwise than by reason of contract, promise or breach of trust are not provable in the winding up of a company (*Bankruptcy Act*, subsection 82(2)).

The Harmer Report noted that this could result in a number of anomalies, not the least of which is that a set of circumstances can produce both a claim in tort and in contract. The right to make a claim under the present law may depend merely on a technical distinction between framing the claim in contract or framing it in tort. The Harmer Report made the point that there was no justification for such a distinction and noted that this could result in significant injustice where a claim could only be framed in tort. In such cases the claimant would make no recovery at all. The Harmer Report noted that the only substantial argument against permitting claims for unliquidated damages in tort was the problem of quantification. The Report noted too that this had not prevented claims for unliquidated damages arising from contract being made. The claiming of unliquidated damages in tort may presently be made in other jurisdictions (under the *Insolvency Act 1967* (NZ) and under the *Insolvency Act 1986* (UK)).

The Harmer Report recommended that claims for unliquidated damages arising from tort should be admissible. The Report also recommended that to the extent that there may be practical problems in estimating the amount of such claims, the Court be expressly empowered to direct that the quantification be determined in such manner as the Court specifies (by, for example, referring the claim to a specialist tribunal).

The operation of proposed sections 553 and 554A overcome the effect of subsection 82(2) of the *Bankruptcy Act* and thereby permit claims in tort which are unliquidated at the time of the winding up to be admissible in the winding up. Proposed section 554A provides for the determination of the value of debts and claims of uncertain value."

247 The Explanatory Memorandum and the Harmer Report, which recommended[275] the relocation of s 563A in the Act, throw no light upon the

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275 At 305 [749].

meaning to be given to the section, merely stating that the provision should be relocated to that part of the law which deals with priority of creditors.

248 To make provision by legislation for new rights of proof is not necessarily to say anything about the ranking of the debts or claims the subject of them. That provision represented a marked departure from more than 100 years of legislation which consistently denied such a right. To provide it, clear and unmistakable language was required and used. Equally, I would have thought that if the departure and the right said to be conferred by it, for which Mr Margaretic contends, and which the majority and the Full Court of the Federal Court say he should have, were intended by the legislature, it would have used the same sort of clear and unmistakable language as is deployed in s 553, for it is at least as remarkable a departure as that effected by s 553 to promote shareholders, including those with unliquidated claims, to the same rank as ordinary creditors in place of their long-standing position below them.

249 This is so even though, as Kirby J has demonstrated, a verbal formula, much clearer in its terms, to give effect to the result for which SOG contends, could fairly easily be devised[276]. But as is the case with most of the ambiguous provisions in enactments which come to the courts, it is possible to devise, in the course of, and following exhaustive argument and scrutiny by several judges, a better formula to support the meaning contended for by either side. As I have already pointed out, "or otherwise" is an expression of very wide import. The case for Mr Margaretic would be stronger if, for example, s 563A provided as follows:

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits, or other benefits arising directly out of the statutory contract between the member of the company and the company, and *not* otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

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276 Reasons of Kirby J at [129]-[130]. In the United States of America, the Bankruptcy Code relevantly provides (11 USC §510(b)):

> "[A] claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock."

Relevant cases

250 The history includes the relevant case law. Other members of the Court have discussed that. With respect, I do not entirely agree, however, with the complexion that has been placed upon some of it by the majority. It is said that one factor which influenced, either unnecessarily or excessively, certainly for modern purposes, the courts in *Houldsworth v City of Glasgow Bank*[277], *In re Addlestone Linoleum Company*[278] and latterly in *Webb Distributors (Aust) Pty Ltd v Victoria*[279] was a preoccupation with the amount and maintenance of paid up capital[280]. It is also suggested that "assets and liabilities" are matters of more significance to creditors than paid up capital[281], and that paid up capital is "wholly irrelevant"[282] to a purchaser of fully paid shares on the market. The assets and liabilities of a company will, it is true, be matters of the greatest concern both to creditors and acquirers of shares. But what, it may be asked, is the connexion between those two, other than that the latter is the product at any time of the use of the other, the paid up capital of the company? The difference between liabilities and assets, members' equity, is the product of, and stands in place of, and assumes the importance of paid up capital, and is the real measure of the worth of the company. It is unnecessary to go into the detail of the provisions for it here, but the law, that is the Act, continues to make elaborate provision for, and limits the circumstances, being circumstances in general of clear solvency only, in which funds may be returned to shareholders, and the company's worth reduced, that is, its paid up capital, sometimes enlarged by capitalization of profits[283], may be returned or reduced[284]. For these reasons, I cannot dismiss as irrelevant the discussion of the courts on paid and unpaid shares in past cases which were concerned primarily with questions relating to access by members to capital, and returns of capital to members of a company. Whatever criticisms may be made of *Houldsworth*, this Court accepted in *Webb* that it did stand for a proposition which the House of Lords had distilled from the

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277 (1880) 5 App Cas 317.

278 (1887) 37 Ch D 191.

279 (1993) 179 CLR 15.

280 Reasons of Gleeson CJ at [5].

281 Reasons of Gleeson CJ at [5].

282 *Soden v British & Commonwealth Holdings Plc* [1998] AC 298 at 326.

283 s 254S.

284 See Ch 2J of the Act.

provisions of the *Companies Act* 1862 (UK), and that it had "received statutory recognition in s 360(1) of the [Victorian Companies] Code"[285]. It is true, as the Chief Justice points out[286], that there is a chronological disconformity contained in this statement by some members of this Court in *Webb*. But even so, the fact remains that *Houldsworth* has stood as the law, as to the effect of relevant parts of companies legislation in a relevantly unchanged form from 1880. As McHugh J said in *Webb*[287], it must have been applied hundreds of times. And as the majority put it in *Webb*[288]:

> "However, the critical question is not whether *Houldsworth* is right or wrong but whether the proposition which the House of Lords distilled in the case from the provisions of the *Companies Act* 1862 is incorporated in the provisions of the Code. That proposition, namely, that a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company, cannot now be supported in absolute terms. A direct return of capital may be effected with the approval of the court having regard, inter alia, to the interests of creditors[289].
>
> The statutory provisions authorizing the return of capital are not inconsistent with the *Houldsworth* proposition. Indeed, they proceed on an acceptance of part of the reasoning which underpinned the decision in that case. They permit a return of capital to shareholders when it is established to the satisfaction of the court that the return of capital will not prejudice the interests of creditors or when it is consented to by creditors. Hence, the statutory provisions treat the subscribed capital as a protection to creditors and accept that the capital should not be returned *directly* to shareholders otherwise than pursuant to a permissible reduction of capital.
>
> Tadgell J concluded that the principle in *Houldsworth* received statutory recognition in s 360(1) of the Code and was therefore imported into the windings up of the three building societies by s 121(4) of the Act. In our view, the conclusion reached by his Honour was correct and it draws support from the provisions of s 360(1)(k).

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285 (1993) 179 CLR 15 at 33.

286 At [14].

287 (1993) 179 CLR 15 at 39-40.

288 (1993) 179 CLR 15 at 33.

289 See s 123 of the Code; s 195 of the Corporations Law.

> Section 360 imposes an obligation on members to contribute to the payment of all the liabilities of a company on its liquidation. Paragraph (e) limits that obligation to the amount unpaid on the members' shares. Paragraph (k) subordinates sums due to a member in his or her capacity as a member to sums due to non-members." (original emphasis)

Those provisions concerning reduction of capital referred to in *Webb* in the joint judgment appear now in a somewhat different form in the Act[290]. But the general proposition that financial capacity and absence of prejudice to creditors are necessary conditions precedent for reduction or return of capital holds true under the Act as it currently reads[291].

251 Thirteen years have now passed since *Webb* was decided, yet there have been no relevant statutory interventions to correct or change what it stands for.

252 I do not think that anything turns upon whether the "purchase price" of shares was subscribed to the company or paid to a third party. The claim in either case is for damages because the underlying circumstances, and therefore the value of the shares were not what they were represented to be. In each case a claim by a subscriber or transferee still falls within areas of intense concern to creditors, the solvency and the maintenance of the capital of the company, whether in an enhanced or diminished form. Any participation by members in the funds of a company not postponed to ordinary creditors will inevitably effect a major reduction in the nett funds of the company, however they be described, whether capital, paid up capital, or owners' equity. Owners' equity is a matter of considerable relevance to both a subscriber and a purchaser of shares from third parties because it is difficult to imagine any prudent purchaser being guided by other than what that appeared to be.

253 This then can be said of the relevant case law. Apart from *Soden v British & Commonwealth Holdings Plc*[292], it does not support the position of Mr Margaretic. *Soden* itself is in my view open to the criticism that it fails to take due account of the importance of the maintenance of both paid up capital and owners' equity, and therefore the continuing solvency of the company. On the other hand, *Webb* does so, and tends to support SOG's position.

254 In my view therefore, the history, overall, including the absence of relevant legislation to effect a change to render *Webb* irrelevant or otherwise not binding, favours SOG's position.

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290 ss 256B to 256E.

291 See, eg, s 256B(1).

292 [1998] AC 298.

Coherence in the law

255 It is desirable that an Act be read so as to maintain coherence in the law and promote fairness, if a construction to achieve those ends is reasonably available. The construction contended for by Mr Margaretic does not in my opinion achieve those ends, indeed the contrary.

256 Purchasers in Mr Margaretic's position are not the only ones who have suffered by reason of the failure to disclose by the company. In addition to creditors, all of the shareholders at the time of the placing of SOG in administration have a fair claim to say that they have been equally wronged. Most could fairly and honestly say that they decided to hold on to their shares by, and on the faith of the deceptive conduct alleged. In his Honour's reasons for judgment, Hayne J says[293] that the measure of Mr Margaretic's damages is the difference between the amount that he paid for his shares and the value of the shares on a properly informed market, which is nil. On that analysis, a longer standing shareholder than Mr Margaretic who has held on to his shares might arguably fail because he could not establish any loss. In a properly informed market his shares would also have been valueless: nobody would have wanted to have had any part of them. The consequence of all of that could be a very unfair and incoherent result, although one not stemming directly from the priority provisions of s 563A. It would give only recent purchasers such as Mr Margaretic a very large advantage over other equally wronged, longer term members. It may however be possible to devise a different basis or measure of claim for those members who had held the shares for some time before administration (or liquidation) by resort to the provisions of the Act to which I have referred, and perhaps s 87 of the TPA, which allow courts greater flexibility in framing relief than at common law for deceit or negligent misstatement. Assume that to be so: the result produced could still be quite unfair to creditors for it would mean that most, perhaps all, of the shareholders at the time of the administration would have much the same claim for compensation as Mr Margaretic, thereby placing all, or practically all of the shareholders at that time in competition with the ordinary creditors, a consequence which can be seen to flow from the ranking provisions of s 563A. It is not difficult to imagine a situation in which claims of a large body of shareholders, perhaps most of them, would dilute the creditors' rights to less than a trickle.

257 This tendency, of unfairness and legal incoherence, of the construction contended for by Mr Margaretic provides further reason therefore to reject it.

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293 At [175].

Other matters and conclusion

258 The language of s 563A has, as the Chief Justice in his reasons points out[294], a long history. In my view, that language could and would have been changed if it were intended that creditors should be left to scramble, in competition with the shareholders who paid too much for their shares, for the remains of a company. It is no answer to SOG's arguments that Mr Margaretic's claim is said not to be based on the amount of capital paid up on the shares which he purchased but rather upon the market price of them. The market price of the shares depended entirely upon the wrongly induced perception that the paid up capital of the company had produced a position in which the market price of the shares was their true value. SOG's capital structure in its current form did therefore have the most direct bearing on the apparent market value of the shares. The fact that Mr Margaretic needed to plead that he was a member of the company may not be decisively against him, but it is a fact that cannot be dismissed as irrelevant. In that sense, membership of the company does have essentiality to his claim. Even if he could have found a buyer for his shares in the event, for example, of his wishing to crystallize a loss for tax purposes, he would still have had to have pleaded that he *had been* a member of the company. So too, an attempt to become a "member of the company" by acquiring shares not as yet registered in his name, would need to be pleaded and would have been a fact essential to a claim of the kind now made by Mr Margaretic. It is unnecessary for me here to form a concluded view about the correctness of SOG's concession, that s 563A has a relevant temporal aspect. Suffice to say, I doubt whether that is so, or so in all relevant circumstances[295].

259 In conclusion then, having regard to the scope and objects of the Act, the language used in s 563A itself, the context in which that section appears, the history of the Act, the relevant case law, and the desirability of maintaining coherence and fairness in the law, the construction to be preferred is that advanced by SOG. I would accordingly make the following orders:

1. The appeals in matters no S208 of 2006 and no S209 of 2006 be allowed with costs.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 27 February 2006 and, in their place, order:

   (a) appeals allowed with costs;

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294 At [3].

295 cf reasons of Gleeson CJ at [10].

(b) that orders 2, 4 and 5 made by Emmett J in the Federal Court of Australia on 27 September 2005 be set aside; and

(c) in lieu thereof, order:

(i) that there be a declaration that payment of the claim of the first respondent in each of the matters, being the claim more particularly described in the Agreed Statement of Facts, pursuant to the deed of company arrangement of the appellant in matter no S208 of 2006, dated 30 August 2005, be postponed until all debts owed to, or claims made by, persons otherwise than in their capacity as members of the appellant in matter no S208 of 2006, have been satisfied in full; and

(ii) that Mr Margaretic pay the costs in the Federal Court of Australia.

260 HEYDON J. I agree with the orders proposed by Hayne J.

261 Mr Margaretic's claim falls within the expression in s 553 "debts or claims the circumstances giving rise to which occurred before the relevant date" for the reasons given by Hayne J[296].

262 Mr Margaretic's claim is not a claim for payment of "a debt owed by a company to a person in [his] capacity as a member of the company" within the meaning of s 563A for the reasons given by Hayne J[297].

263 So far as *Webb Distributors (Aust) Pty Ltd v Victoria*[298] and *Houldsworth v City of Glasgow Bank*[299] were relied on by SOG and ING in relation to the construction of s 563A, it is not necessary to say more about them than that which Hayne J has said in explaining why they are not determinative[300]. Further, the issue on which the *Webb* case was decided was whether a claim was provable, whereas the issue on which the SOG appeal is to be decided in relation to s 563A turns on whether a provable claim ranks after or alongside the claims of general creditors.

264 So far as those cases were relied on by ING in its written submissions in chief in support of a contention that Mr Margaretic's claim was not provable, by reason of a principle which, it contended, had been stated in *Houldsworth's* case and approved by this Court in the *Webb* case, it is not necessary to deal with them. That is because both at the start and at the close of his final address, counsel for ING abandoned that contention. If that contention was not abandoned, I agree with Hayne J's reasons for rejecting it[301].

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296 Reasons of Hayne J at [168]-[176].

297 Reasons of Hayne J at [201]-[206].

298 (1993) 179 CLR 15.

299 (1880) 5 App Cas 317.

300 Reasons of Hayne J at [180]-[190].

301 Reasons of Hayne J at [180]-[190].

265 CRENNAN J. I have had the advantage of reading in draft form the reasons of each of Gleeson CJ and Hayne J. I agree with their conclusions and with their reasons. I have also had the advantage of reading in draft form the additional reasons of Gummow J and I agree generally with his Honour's reasons and analysis of what was referred to in argument as a "principle" said to be derived from *Houldsworth v City of Glasgow Bank*[302].

266 Prior to the *Companies Act* 1862 (UK) ("the 1862 Act") creditors were not entitled to apply for an order for winding up, but they were not restricted from pursuing legal remedies against individual shareholders[303]. In the same period, shareholders induced to take shares by fraud, imputable to the company, were entitled to repudiate their shares, were not liable to be contributories in a winding up[304] and could, as creditors, pursue remedies against individual shareholders. These possibilities did not continue after the consolidation and reforms[305] encapsulated in s 38 of the 1862 Act ("s 38").

267 It was decided in *Oakes v Turquand and Harding*[306] that a shareholder induced to take shares by fraud, imputable to the company, giving rights to rescission and indemnity against the company could not avoid being on the list of contributories by exercising those rights once a winding up had commenced. This was because s 38 imposed a "statutable liability"[307] on shareholders in respect of creditors, who were not able to pursue remedies against individual shareholders under the 1862 Act. In *Tennent v City of Glasgow Bank*[308], Earl Cairns LC considered that the rationale of *Oakes v Turquand* applied as soon as a company became insolvent, and before a winding up, because of the assumption at that point of "new liabilities" to creditors[309].

268 In *Houldsworth's Case*, Houldsworth accepted that winding up precluded rescission, as decided in *Oakes v Turquand*. He then unsuccessfully sought

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302 (1880) 5 App Cas 317.

303 Lindley, *A Treatise on the Law of Companies*, 5th ed (1889) at 612.

304 Lindley, *A Treatise on the Law of Companies*, 5th ed (1889) at 79-81.

305 Discussed in the reasons of Hayne J at [149]-[167].

306 (1867) LR 2 HL 325.

307 (1867) LR 2 HL 325 at 350 per Lord Chelmsford LC.

308 (1879) 4 App Cas 615.

309 (1879) 4 App Cas 615 at 622.

damages in respect of an inducement by fraud to take up shares, such damages to be paid after the creditors were paid, either from the company's surplus or by solvent co-contributories. It is not clear why Earl Cairns LC decided that £4000 paid by Houldsworth for the stock could not form part of "the debts and liabilities of the company"[310]. However, it is clear at several points that when Earl Cairns LC speaks of Houldsworth's claim as "inconsistent with the contract into which he has entered"[311], he is referring to Houldsworth's contract "as between himself and those with whom he becomes a partner"[312], ie other shareholders. It is also clear that Lord Selborne's reasons concerned the "contract between the shareholders"[313] and Lord Selborne regarded the action as being, in truth, an action against co-contributories[314], innocent of any fraud.

269 Three months after *Houldsworth's Case* was decided, *Burgess's Case*[315] came before Sir George Jessel MR. There, assets in the hands of a liquidator were sufficient to pay creditors and the costs of the winding up. In resisting being listed by the liquidator as a contributory, Burgess contended that as all creditors' claims had been met, he was entitled to rescind as against other contributories, notwithstanding the winding up order. The liquidator met that contention with the submission that the decision in *Houldsworth's Case* barred an action for damages in respect of fraud inducing the purchase of shares, to which the Master of the Rolls responded thus[316]:

> "The doctrine is that after the company is wound up it ceases to exist, and rescission is impossible. There are then only creditors and co-contributories and no company, and that is the meaning of Lord Cairns' observations in *Houldsworth v City of Glasgow Bank*."

He then said in his reasons for judgment[317]:

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310 (1880) 5 App Cas 317 at 325.

311 (1880) 5 App Cas 317 at 325.

312 (1880) 5 App Cas 317 at 324.

313 (1880) 5 App Cas 317 at 329.

314 (1880) 5 App Cas 317 at 329.

315 *In re Hull and County Bank* (*Burgess's Case*) (1880) 15 Ch D 507.

316 (1880) 15 Ch D 507 at 509-510 (footnote omitted).

317 (1880) 15 Ch D 507 at 511 (footnote omitted).

> "It has been decided by a series of decisions in the House of Lords, commencing with *Webb v Whiffin*, that the 38th section of the *Companies Act* is not to be read otherwise than literally, and it is not to be read with reference to the previous liabilities of the shareholders or by analogy to the law of partnership whether of a limited or unlimited character, but it is to be read as imposing *new liabilities* on the members of the company – *liabilities imposed and defined by that section*.
>
> The result, therefore, is this, that the member is liable to contribute to the assets of the company, not only to an amount sufficient for the payment of the debts and liabilities and the costs, but to the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves." (emphasis added)

270 Sir George Jessel MR relied on *Oakes v Turquand* and *Tennent v City of Glasgow Bank* as relevant to the first "new liability" as both cases turned on the consideration that it is too late to rescind where innocent third parties after a winding up had acquired rights as creditors under s 38; and he relied on *Houldsworth's Case* as relevant to the second "new liability" turning on the consideration that it is too late to rescind after a winding up when the rights of contributories *inter se* fell to be dealt with under s 38[318]. In *Southern British National Trust Ltd v Pither*[319] Dixon J pointed out that both those considerations influenced the adoption of "the well known rule that a member of a company loses on the commencement of a winding up any right he might otherwise have had to the rescission of his contract of membership". Citing *Burgess's Case*, Dixon J regarded the rule as the inevitable result of the legislative provision that on a liquidation "an entire change took place in the relation of creditors and shareholders to the assets and of shareholders *inter se*"[320].

271 The notion that the "inconsistency" in Houldsworth's position as a shareholder turned on an implied term in the contract between the shareholder and the company, or a "principle" that capital could not be returned to a shareholder, seems to have first been suggested by Kay J in *In re Addlestone Linoleum Company*[321]. On appeal, it was then repeated by Lindley LJ[322]:

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318 Sir George Jessel MR's explication of *Houldsworth's Case* is supported by s 101 of the 1862 Act as it applies to contributories of an unlimited liability company.

319 (1937) 57 CLR 89 at 113.

320 (1937) 57 CLR 89 at 114.

321 (1887) 37 Ch D 191 at 200.

322 (1887) 37 Ch D 191 at 206.

> "[A] shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and … it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money".

If, however, the "inconsistency" in Houldsworth's position in fact had nothing to do with analogy to the law of partnership on a bankruptcy, but is explicable by reference to the specific provisions of s 38 affecting shareholders *inter se*, as explained by Sir George Jessel MR, two points, at least, can be made.

272 First, *Salomon v Salomon and Co*[323] disposes of the conception that an action by a shareholder against a company in respect of fraud inducing the taking up of the shares is, in effect, an action against individual innocent co-contributories. Secondly, if the significance of *Houldsworth's Case* for s 38, including s 38(7), was as explained almost contemporaneously by Sir George Jessel MR in *Burgess's Case*, namely that the legislation "imposed and defined" obligations of and to shareholders, it is difficult to understand why its significance for s 38 was characterised much more widely as turning on a "principle" that share capital represents a "guarantee fund" for creditors which should not be returned to shareholders other than in a lawful reduction of capital. In any event, the idea that it is "the legislation which defines the obligations owed by and to the members of a company"[324] has remained a constant, notwithstanding critical legislative changes dealing with members' debts which have been described in the reasons of Hayne J.

273 The claims Mr Margaretic makes are not founded on any obligations owed by or to him as a member. He relies on statutory causes of action not confined to members which are available to "a person who has suffered, or is likely to suffer, loss or damage"[325], as a consequence of conduct in contravention of certain provisions of the *Corporations Act* 2001 (Cth), such as s 674 and s 1041H. Any obligation on the company to pay compensation to Mr Margaretic for fraudulent misrepresentation inducing him to become a member and occasioning him loss does not answer the description of being owed to Mr Margaretic "in [his] capacity as a member of the company".

Conclusion

274 In my opinion also, each of the appeals should be dismissed with costs.

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323 [1897] AC 22.

324 Reasons of Hayne J at [202].

325 *Corporations Act* 2001 (Cth), s 1325(2).