

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PATRICK STEVEDORES OPERATIONS
NO 2 PTY LTD & ORS

APPLICANTS

AND

MARITIME UNION OF AUSTRALIA & ORS

RESPONDENTS

Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia
(M29-1998) [1998] HCA 30
4 May 1998

ORDER

1. *Special leave to appeal granted.*
2. *Appeal treated as instituted and heard instant.*
3. *Appeal allowed in part.*
4. *The orders of the Full Court contained in pars 3 and 5 of the order of the Full Court set aside and in lieu thereof order:*
 - (i) *Paragraphs 2, 3 and 5 of the orders made by North J on 21 April 1998 ("the orders of North J") be varied by inserting at the commencement of each paragraph the words: "Subject to par 5A of this order".*
 - (ii) *Add as par 5A of the orders of North J the following:*

"5A. The orders in pars 2, 3 and 5 of this order are made without prejudice to the powers of the Administrators of the First, Second, Third or Fourth Respondents during the period of administration."
 - (iii) *Add as par 10A of the orders of North J the following:*

"10A. Without limiting the generality of the liberty to apply reserved in par 10, reserve liberty to any party to apply in relation to the foregoing orders upon 24 hours written notice to all other parties upon the administration of any of the First, Second, Third or Fourth Respondents ending."

(iv) Add as par 12 of the orders of North J the following:

"12. Orders 1, 2, 3, 4 and 5 of this order shall lapse unless by 4.00pm on 6 May 1998 (or such other time as a Judge shall order before the expiry of that time) the Applicants shall give to the Federal Court of Australia an undertaking by their solicitors or counsel in the terms or to the effect of the undertakings given to the Federal Court but with an amendment of the first undertaking to add after the words 'to pay to any party' the words 'or to any person who is or hereafter becomes a creditor of the First, Second, Third or Fourth Respondents'".

(v) Vary the order contained in par 4 of the Full Court's order by deleting "these orders" and inserting in lieu "the orders of the High Court of Australia".

5. *Remit to the Full Court of the Federal Court any application by a party for an order with respect to costs of the proceedings in the Federal Court.*
6. *Otherwise dismiss the appeal.*
7. *The appellants pay the costs in this Court of the First to the Sixth Respondents. Otherwise no order as to costs.*

Representation:

R V Gyles QC with J E Middleton QC and M P McDonald for the applicants (instructed by Freehill Hollingdale & Page)

J W K Burnside QC with H Borenstein, M Bromberg and M G R Gronow for the first and second respondents (instructed by Maurice Blackburn & Co)

P B Murdoch QC with J D Elliott for the third, fourth, fifth and sixth respondents (instructed by Phillips Fox)

3.

G P Harris for the seventh and ninth respondents (instructed by Blake Dawson Waldron)

No appearance for the eighth and tenth respondents

J D Merralls QC with J I Fajgenbaum QC and P M Tate for the eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth respondents (instructed by Minter Ellison)

G T Pagone QC with W A Harris for the seventeenth and eighteenth respondents (instructed by Dunhill Madden Butler)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Patrick Stevedores Operations No 2 Pty Ltd & Ors v
Maritime Union of Australia & Ors

High Court and Federal Judiciary - Federal Court of Australia - Power under s 298U of the *Workplace Relations Act* 1996 (Cth) and s 23 of the *Federal Court of Australia Act* 1976 (Cth) to grant interlocutory injunctions to restrict purported termination of labour supply agreements, termination of employment of employees, obtaining stevedoring services, engaging in conduct having the effect of termination employment of employees, and engaging in conduct having the effect of the divestment of assets or dealing with assets otherwise than in the ordinary course of business.

Equity - Equitable Remedies - *Mareva* injunctions and other interlocutory injunctions - Whether within jurisdiction of the Federal Court of Australia to grant injunction with the effect of fettering discretion of administrators appointed under Pt 5.3A of the Corporations Law - Whether effect of such injunction requires company to trade while insolvent - Whether injunction necessary to prevent frustration of process - Whether confined to maintaining status quo at the time of making application - Whether available to protect the subject matter of litigation conferring greater rights than when application made - Whether serious question to be tried - Whether appropriate on balance of convenience - Effect on third parties - Exercise of supervisory jurisdiction.

Corporations - Companies - Management and Administration - Appointment of administrators under Pt 5.3A of the Corporations Law - Powers and duties in administration of company - Personal liability in administration of company - Jurisdiction of court fettering discretion of administrators - Jurisdiction of court to make orders compelling administrators to retain employees and to trade while insolvent contrary to responsibilities under the Corporations Law.

Industrial Law - Commonwealth - Stevedoring Industry - Whether restructuring of companies so as to remove assets from employer company with the effect of dismissing, injuring or altering the position of employees by reason of their membership of a union contravenes Pt XA of the *Workplace Relations Act* 1996 (Cth) - Nature of interlocutory injunctive relief available under s 298U of that Act.

Tort - Joint or Several Tortfeasors - Conspiracy - Whether interlocutory injunction an appropriate remedy - Whether interlocutory mandatory injunction an appropriate remedy.

2.

Corporations Law, Pt 5.3A, s 1321.

Federal Court of Australia Act 1976 (Cth), ss 23, 32.

Workplace Relations Act 1996 (Cth), Pt XA, ss 298K, 298L, 298T, 298U, 298V.

BRENNAN CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ.

The Application

1 This is an application for a grant of special leave to appeal. However, the parties were invited to present as full an argument as would be put on the hearing of an appeal. It has become apparent that issues of general public importance are involved and that special leave should be granted. The issues are complex and, as the reasons which follow will show, important questions of law arise for consideration. These reasons deal with the disposition of the appeal.

2 The proceeding was commenced in the Federal Court of Australia by the Maritime Union of Australia ("the MUA") a registered Organisation and members of the MUA employed by four companies in the Patrick group against the Patrick group of companies ("the Group") and other respondents. The MUA and the employees¹ obtained interlocutory orders from North J which were designed to protect the employees against imminent termination of their employment. The Full Court (Wilcox, von Doussa and Finkelstein JJ) dismissed an appeal against the orders made by North J and added a further order. This appeal is brought from the judgment and orders of the Full Court.

3 In order to appreciate the nature of the orders made by North J, it is necessary first to state the statutory provisions on which the employees seek to rely and to recall the facts upon which his Honour proceeded. His Honour's findings of fact were, of course, provisional in nature in the sense that he found there were serious questions of fact to be tried. Those findings are so regarded in this Court. They were not challenged in the argument before us. On those findings, questions of statutory construction, of jurisdiction, of final and interlocutory remedies and of company law arise. We have had full argument upon them. There are circumstances in which, at the interlocutory stage, considered views upon questions of law are appropriate². The present is such an occasion.

1 Hereafter the term "the employees" is used to describe both the employees and the MUA except where the context otherwise indicates.

2 *Cohen v Peko-Wallsend Ltd* (1986) 61 ALJR 57 at 59; 68 ALR 394 at 397.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

2.

The Workplace Relations Act

4 The *Workplace Relations Act* 1996 (Cth) ("the Act") defines³ as one of its objects:

"ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association".

In pursuance of this object, the Act prohibits an employer from engaging in certain conduct for a "prohibited reason", that is to say, because (inter alia) the employee -

"is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association"⁴.

The proscribed conduct is set out in s 298K(1) of the Act:

" An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee's prejudice;
- ..."

Paragraph (a) covers termination of employment; par (b) covers injury of any compensable kind; par (c) is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question. Proof of the reason for engaging in the prescribed conduct is the subject of s 298V:

3 s 3(f).

4 s 298L(1)(a).

3.

" If:

- (a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
- (b) for the person or industrial association to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise."

A contravention of s 298K(1) is not an offence⁵ but the Federal Court of Australia is given a wide jurisdiction to make orders in respect of contravening conduct. Section 298T(1) reads:

" Subject to subsection (4), an application may be made to the Court for orders under section 298U in respect of conduct in contravention of this Part."

Section 298U provides:

" In respect of conduct in contravention of this Part, the Court may, if the Court considers it appropriate in all the circumstances of the case, make one or more of the following orders:

- (a) an order imposing on a person or industrial association whose conduct contravened or is contravening the provision in question a penalty of not more than:
 - (i) in the case of a body corporate - \$10,000; or
 - (ii) in any other case - \$2,000;

5 s 298X.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

4.

- (b) an order requiring the person or industrial association to reinstate an employee, or to re-engage an independent contractor;
- (c) an order requiring the person or industrial association to pay to an employee or independent contractor, or to a prospective employee or independent contractor, compensation of such amount as the Court thinks appropriate;
- (d) an order requiring the person or industrial association not to carry out a threat made by the person or association, or not to make any further threat;
- (e) injunctions (including interim injunctions), and any other orders, that the Court thinks necessary to stop the conduct or remedy its effects;
- (f) any other consequential orders."

The employees submit that a series of steps taken by the members of the Group and by certain officers of the member companies were taken because the employees were members of the MUA. They claim the steps taken altered the position of the employees of four companies in the Group to their prejudice and that, if the intended conclusion of those steps be realised, the employees of those four companies would be dismissed.

The facts

5 The facts hereafter set out are taken substantially from the reasons for judgment of North J supplemented by evidence that is not presently in dispute.

6 Prior to September 1997, Patrick Stevedores No 1 Pty Ltd ("PS1"), Patrick Stevedores No 2 Pty Ltd ("PS2"), Patrick Stevedores No 3 Pty Ltd ("PS3") and National Stevedores Tasmania Pty Ltd ("Stevedores Tasmania") carried on the business of stevedoring at various ports in Australia. These are the four Patrick companies ("the employer companies") which employed and continue presently to employ the employees. The profits derived from the carrying on by the employer companies of their respective businesses were substantial: for the year ended 30 September 1996, PS1's after tax profit was \$20,431,000, PS2's after tax profit was \$9,322,000 and PS3's after tax profit was \$6,943,285. The amount of the after tax profit of those companies reflected large future tax benefits but two of the three

5.

companies showed significant operating profits⁶. The profits of Stevedores Tasmania do not appear in his Honour's reasons for judgment, but may have been reflected in the profits of PS1 which held 83% of the issued shares in Stevedores Tasmania, the remaining 17% being held by a company outside the Group. After September 1997, with the exception of that 17%, the shares in each of the employer companies were held, directly or indirectly, by Patrick Stevedores Holdings Pty Ltd ("Patrick Holdings"), a member of the Group the ultimate holding company of which was and is Lang Corporation Ltd. In or before March 1998, the Group acquired the minority shareholding in Stevedores Tasmania.

7 In or before September 1997, officers of the Group decided to reorganise the Group in a manner which affected the capital structure, business, debts and inter-company accounts of the employer companies. The reorganisation was not then known to the employees. First, the employer companies sold their stevedoring businesses to Patrick Stevedores Operations No 2 Pty Ltd⁷ ("Patrick Operations No 2") for a price of \$314.9 million. The employer companies thus disposed of their property, plant, equipment and all contractual interests save those relating to their employees. The employer companies ceased to carry on the business of stevedores. Their businesses were reduced to the provision of their employees' labour to the stevedore - at first Patrick Operations No 2 and subsequently Patrick Stevedores Operations Pty Ltd ("Patrick Operations"), another wholly-owned subsidiary of Patrick Holdings. The agreements ("the Labour Supply Agreements") under which each employer company supplied labour to Patrick Operations No 2 (and, later, to Patrick Operations) gave the stevedoring company the right to terminate the agreement without notice if there were any interference with, delay in or hindering of the supply of labour⁸. Thus the security of the employer companies' businesses was extremely tenuous. The security of the employees' employment was consequentially altered to their prejudice.

6 PS1 had an operating profit before tax of \$7.4m, PS2 an operating loss before tax of \$0.7m and PS3 an operating profit before tax of \$2.6m.

7 The name of the company has been changed since the date of the sale. Its name at the time was Patrick Stevedores ESD Pty Ltd.

8 Clauses 2.3(h) and 13(1)(b) of the Labour Supply Agreements.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

6.

8 The Labour Supply Agreements permitted Patrick Operations to obtain labour otherwise than from the employer companies. The agreements were non-exclusive agreements. But until 7 April 1998 only the labour supplied by the employer companies was used; the right to obtain labour elsewhere was not exercised. In practice the disposition by employer companies of their stevedoring businesses left the carrying on of the actual stevedoring operations in the same state as they were before the Group reorganisation.

9 The Corporate Legal Counsel to Lang Corporation Ltd gave evidence to North J that the corporate restructuring was "to streamline the business and place it on a more modern footing". He identified various commercial advantages to the Group including being able better to measure the performance of the companies employing the labour and being able to refinance borrowing facilities at lower interest rates than bank rates. He said that the transactions were undertaken at full commercial value and after directors had taken independent legal advice. With reference to this evidence, North J observed⁹:

"There is no express denial that a reason for undertaking the restructure in this particular way was to facilitate the termination of the employees' employment. The reasons given do not explain why clause 13(1)(b) of each LSA took the particular form. Furthermore, the reasons given are not inconsistent with the reason alleged by the applicants. Section 298K(1) requires the prohibited reason to be one reason, but not the only reason. In my view, there is a serious question to be tried that one reason why the employers made the BPAs and LSAs in the form they took and the reason why they appointed the administrators was because the employees were members of the Union, and the employers wanted to dismiss them to replace them with a non-Union workforce."

10 Although the level of shareholders' funds in the employer companies would have been unchanged by the disposition of the employer companies' businesses at full commercial value, the businesses were exchanged for a receivable, not all of which was received and retained by the employer companies. The effect on the employees might have been less had the purchase price for the businesses of the employer companies been paid to and retained by those companies. But, after applying so much of the purchase price as was needed to discharge intra-Group loans and other debts owing by the employer companies, a significant amount -

9 Judgment at 10.

7.

counsel variously stated the amount as \$60 million or \$70 million - was expended in buying back shares in the employer companies. Assuming that the buy-back was authorised by s 206B of the Corporations Law and thus avoided¹⁰ the prohibition against a company acquiring its own shares¹¹, the shares bought back were cancelled immediately after the registration of their transfer¹². The issued capital and shareholders' funds of the employer companies were reduced accordingly. The result of this restructuring was that somewhere between \$60 and \$70 million of the capital of the employer companies, which would have been available to finance their business operations, was returned to the shareholders. Apart from the 17% holding of an outside company in Stevedores Tasmania the shareholders of the employer companies were other members of the Group. The \$60 to \$70 million transferred to these shareholders was no longer available to employees and other creditors or potential creditors of the employer companies in the event of the loss of or significant downturn in the business of the employers. The shareholders' funds of the employer companies were reduced to approximately \$2.5 million. It seems that those funds might have been exhausted by April 1998 when the employer companies were placed under administration.

11 The employer companies are said to be owed an amount of \$16 million or \$17 million by other companies in the Group but the security trustee of the Group's financiers gave notice of a crystallisation of its charge over that debt on the evening of 7 April 1998 - a date of some significance in the history of the relevant events - and counsel for the Group (other than the employer companies) asserted that whatever was owing to the employer companies was exceeded by the liabilities for which the employer companies were bound to provide. The material tendered in evidence before North J was not sufficient to demonstrate conclusively that the employer companies were insolvent at the time when his Honour was sitting. However, North J proceeded on the footing that the employer companies were insolvent.

12 In early 1998, there were interruptions in the supply of labour which enlivened Patrick Operations' power to terminate the Labour Supply Agreements. On 7 April 1998, that company exercised that power. This action left the employer

10 Section 205(1A) of the Corporations Law.

11 Section 205(1)(b)(i) of the Corporations Law.

12 Section 206I(3) of the Corporations Law.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

8.

companies with no work for their workforces to perform. The employer companies, most of their capital having been consumed by buying back their own shares from other members of the Group and their source of income having been taken away by the termination of the Labour Supply Agreements by Patrick Operations, were then put under administration under Pt 5.3A (ss 435A-451D) of Ch 5 of the Corporations Law. Mr Clayton, the sole director of each employer company¹³, resolved that, in the opinion of each of the boards of PS1, PS2 and PS3, the company was then insolvent and, in the opinion of the Board of Stevedores Tasmania, that company was likely to become insolvent: see s 436A(1) of the Corporations Law.

13 The position of the workforces of the several employer companies thus became parlous in the extreme. Counsel for the Group informed North J that the Administrators of the affairs of the employer companies intended to dismiss the workforce because the employer companies were insolvent. One of the Administrators gave evidence that that was their intention.

14 In January 1998, the Group had transferred the right to use No 5 Webb Dock in Victoria to companies associated with the National Farmers' Federation ("NFF"). North J found:

"[The Group] also agreed to provide cranes and other equipment to those companies so that they could conduct the stevedoring operations at No 5 Webb Dock. This transaction was seen by the [MUA and its members] as part of a plan by Patricks to replace its workforce. No 5 Webb Dock, they thought, would be used to train an alternative workforce and then that workforce would be used to do the work which the employees had previously done. The [MUA and its members] believed that Patricks had some involvement with the NFF companies."

15 The events relating to the transfer of use of No 5 Webb Dock and of the equipment to allow the transferee companies to carry on stevedoring operations there had two immediate consequences. First, some of the employees of the employer companies took "industrial action" (by which we assume his Honour meant that they withheld their labour) in some facilities as a protest against the transfer by the Group of No 5 Webb Dock. This was the interruption in the labour

13 Section 221 of the Corporations Law provides that a proprietary company must have at least one director.

supply which enlivened the power of Patrick Operations to terminate the Labour Supply Agreements with the employer companies. Secondly, the MUA and its members (or some of them) filed an application in the Federal Court of Australia seeking relief on the footing that the transfer of No 5 Webb Dock was part of a plan to replace Patrick's workforce.

16 On 6 April 1998, the Monday before Easter, those applicants filed a notice of motion seeking to prevent the dismissal of the employees of the employer companies - a step which they apprehended was proposed over the Easter period. The motion was set down for hearing on Wednesday 8 April. However, on 7 April 1998, Patrick Operations, having terminated the Labour Supply Agreements with the employer companies, entered into three new agreements for the provision of services to enable Patrick Operations to carry on its stevedoring business. It entered into agreements with KSK Contractors Pty Ltd and PCS Resources Pty Ltd ("PCS Resources") for the supply of labour and with Ganelect Engineering Services Pty Ltd for the provision of consulting services in connection with the maintenance of equipment. Patrick Holdings decided to discontinue funding any of the employer companies. These steps were taken before the employer companies were placed under administration.

17 Late in the evening of 7 April 1998, the Group published a press release which included the following:

"Patrick today accepted offers and entered into contracts for a range of services from nine separate companies including the National Farmers Federation (NFF) backed P&C Stevedoring which will provide some crane and machinery operators.

...

Patrick has taken steps to ensure all displaced employees of the relevant companies will be eligible to receive their full leave and redundancy entitlements.

...

Patrick expects to continue stevedoring under the new contracted arrangements."

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

10.

- 18 On 8 April, Patrick Operations proposed to continue to carry on its stevedoring business with a new workforce supplied by KSK Contractors Pty Ltd and PCS Resources. This was the position when the employees sought interlocutory relief from North J.

The pleadings to date

- 19 At the time of the application to North J for interlocutory relief, the employees had filed their application and amended Statement of Claim. The employees' pleadings seek at the trial of the action orders against the employer companies and other companies in the Group to remedy the effects of what is alleged to be conduct contravening s 298K. In addition to the allegation of conduct contravening s 298K, the employees allege that the sale of the employer companies' businesses, the Labour Supply Agreements and the share buy-back expenditure alienated the employer companies' property with the intent to defraud the employees. The employees seek orders that will undo the Group reorganisation and place the stevedoring business back in the hands or under the control of the employer companies. Interlocutory relief was sought in order to keep the employer companies in existence and to restore, as far as practicable, the situation that existed before the reorganisation of the Group took place.

- 20 The employees also allege that the members of the Group, Mr Corrigan (the Chief Executive of Lang Corporation Ltd), Mr Clayton (the Director of the employer companies), Mr Dunn (a Director of Patrick Operations No 2), PCS Resources and other companies that are under the control of the National Farmers' Federation, Messrs McGauchie, Houlihan and Ferguson (who are Directors of PCS Resources and its associated companies) and Mr Reith, the Minister of State for Workplace Relations and Small Business, conspired together by unlawful means - chiefly by conduct in contravention of s 298K(1) of the Act - to injure the employees. These parties are alleged not only to have agreed to alter the position of the employees to their prejudice (in contravention of par (c) of s 298K(1)) but also to dismiss the employees (in contravention of par (a) of s 298K(1)) for the reason that they were members of the MUA. Interlocutory relief was sought to protect the employment of the employees by the employer companies.

- 21 The interlocutory relief that was sought by the employees was directed only to members of the Group. Although it was necessary for North J to consider the effect of that relief on persons other than the members of the Group, the first question for his Honour's determination was whether there were serious questions to be tried as between the employees and the members of the Group as to the

liability of the members on the causes of action for contravention of s 298K(1) of the Act and in conspiracy. North J found that there were serious questions to be tried as to those causes of action. One of the conditions for the grant of interlocutory injunctions was thus satisfied¹⁴; the other, balance of convenience, was resolved in favour of the employees. North J accordingly granted interlocutory relief.

The orders made by North J

22 On 21 April 1998, North J made the following orders:

"UPON THE APPLICANTS by their Counsel undertaking to pay to any party adversely affected by the interim injunctions granted by the Court on the motion, notice of which was filed by the Applicants on 14 April 1998, such compensation if any as the Court thinks just, in such manner as the Court directs -

AND UPON THE APPLICANTS by their Counsel further undertaking that until the hearing and determination of this proceeding, or until further order, they will not engage in any industrial action -

AND UPON THE APPLICANTS by their Counsel further undertaking that they will not hold the administrators appointed to the First, Second, Third and Fourth Respondents personally liable for their wages and other benefits arising from their employment with the First, Second, Third and Fourth Respondents for which the administrators would otherwise incur personal liability as administrators during the course of their administration -

In this undertaking 'industrial action'¹⁵ does not include action by an employee if:

14 *American Cyanamid v Ethicon Ltd* [1975] AC 396 at 407; *Murphy v Lush* (1986) 60 ALJR 523 at 524; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154.

15 In the Full Court, this definition was amended by inserting after the words "industrial action" the following:

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

12.

- (a) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
- (b) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

THE COURT ORDERS THAT:

1. Until the hearing and determination of this Application, or further order, the Fifth Respondent, Patrick Stevedores Operations No 2 Pty Ltd, and the Seventeenth Respondent, Patrick Stevedores Operations Pty Ltd, each by itself, its servants and agents, are restrained from acting upon or giving effect to:
 - (a) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the First Respondent, Patrick Stevedores No 1 Pty Ltd;
 - (b) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Second Respondent, Patrick Stevedores No 2 Pty Ltd;
 - (c) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Third Respondent, Patrick Stevedores No 3 Pty Ltd;
 - (d) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Fourth Respondent, National Stevedores Tasmania Pty Ltd.

"means 'industrial action' as defined in paras (a) to (d) inclusive of the definition of that term in s 4 of the *Workplace Relations Act* 1996 but".

13.

2. Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents shall subject to paragraph 4 of these orders¹⁶:
 - (a) continue to treat the Labour Hire Agreements referred to in paragraphs 1(a) to (d) as remaining on foot and binding upon the parties to those agreements;
 - (b) give effect to the terms of those agreements.
3. Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents by themselves, their servants or agents, are restrained from terminating the Labour Hire Agreements referred to in paragraphs 1(a) to (d) for any reason without first giving to the First Applicant 14 days written notice of that intention and the reason for that proposed termination.
4. Until the hearing and determination of this proceeding, or further order, the Fifth Respondent and the Seventeenth Respondent, by themselves, their servants or agents, are restrained from acquiring the stevedoring services, which until 7 April 1998 they acquired from the First, Second, Third and Fourth Respondents, from any person other than the First, Second, Third or Fourth Respondents.
5. Until the hearing and determination of this proceeding, or further order, the First, Second, Third and Fourth Respondents by themselves, their servants or agents, are restrained from:
 - (a) entering into any agreement, arrangement or other transaction; or
 - (b) taking any action or doing anything;having the effect that the employment of the employees engaged in their stevedoring business is or will be terminated.

16 Transcript of proceedings before North J at 5.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

14.

6. Until the hearing and determination of this proceeding, or further order, the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Respondents, by themselves, their servants and agents, are restrained from:
 - (a) entering into any agreement, arrangement or other transaction, or taking any action or doing any thing, having the effect of divesting itself of their assets or undertaking, otherwise than in the ordinary course of business;
 - (b) dealing with or otherwise disposing of any of their assets or undertaking otherwise than in the ordinary course of business.
7. Leave is granted to the Applicants to proceed against the First, Second, Third and Fourth Respondents until further order, for the purpose only of further proceedings, if any, relating to the grant of interim relief.
8. The Respondents file and serve their Defences by 12 May 1998."

Order 9 provided for discovery within a limited period expiring shortly after 26 May 1998. His Honour added:

- "10. There be liberty to all parties to apply in relation to the foregoing orders upon 24 hours written notice to all other parties.
11. The directions hearing is adjourned to 10.15 am on 28 May 1998."

23 The appeal to the Full Court against these orders failed. That Court made a further order that is material to the present application. That order reads as follows:

"Part 5.3A of the Corporations Law operate in relation to each of Patrick Stevedores No 1 Pty Ltd, Patrick Stevedores No 2 Pty Ltd, Patrick Stevedores No 3 Pty Ltd and National Stevedoring Tasmania Pty Ltd in such a way that s 443A(1) is not to operate in respect of services rendered to those companies by employees who are members of the Maritime Union of Australia."

24 This appeal against the orders of the Full Court is brought by the members of the Group other than the employer companies ("the appellants"). They have joined as respondents the MUA and the personal employees, the employer companies,

Messrs Corrigan, Clayton and Dunn, PCS Resources and its associated companies, Messrs McGauchie, Houlihan and Ferguson, Mr Reith and the Commonwealth of Australia. The employer companies were represented by counsel for the Administrators of those companies.

The jurisdiction of the Federal Court

25 The jurisdiction of the Federal Court under the Act is conferred by s 412(1). Relevantly, that section provides that the Federal Court -

"has jurisdiction with respect to matters arising under this Act in relation to which -

- (a) applications may be made to it under this Act; or
- (b) actions may be brought in it under this Act; or
- (c) questions may be referred to it under this Act; or
- (d) ...
- (e) penalties may be sued for and recovered under this Act; or
- (f) ..."

The terms "matter" and "arising under" are constitutional expressions found, in particular, in s 76(ii) and s 77(i) of the Constitution. Their reach is explained in decisions such as *Fencott v Muller*¹⁷ and *LNC Industries Ltd v BMW (Australia) Ltd*¹⁸. It follows that jurisdiction is conferred upon the Federal Court with respect to a matter which arises under the Act in relation to which an application for orders under s 298U may be made to it. The applications which may be made to the Court under s 298T and the orders which may be made by the Court under s 298U are defined in the same terms, namely, "in respect of conduct in contravention of this Part". Counsel for the appellants submits that those words preclude the exercise

17 (1983) 152 CLR 570 at 608-610.

18 (1983) 151 CLR 575 at 581. See also *Re McJannet; Ex parte Australian Workers Union* (1997) 71 ALJR 1309 at 1310; 146 ALR 567 at 570-571.

of any of the powers prescribed by s 298U unless the Court is satisfied on a final hearing that the contravening conduct has in fact occurred. But s 298T is not defining a condition that must be satisfied before an application can be made or the jurisdiction to hear and determine the application can be exercised; that section is defining the subject matter of the Court's jurisdiction under the Act. Whether or not an application is "in respect of" contravening conduct depends not on the facts that are ultimately found but on the basis of the relief which is sought by the party invoking the jurisdiction. If the relief sought is an order of the kind prescribed in the lettered paragraphs of s 298U and if the basis of the relief is alleged conduct in contravention of Pt XA of the Act, the jurisdiction of the Court is effectively invoked.

26 True it is that the only person who can engage in conduct contravening s 298K(1) is an "employer" (a term that is defined to include a person who is usually an employer¹⁹). But applications under s 298U(e), unlike applications made under pars (a) to (d) of s 298U in respect of conduct contravening s 298K(1), can be made against persons other than an employer. Given that an application is "in respect of" contravening conduct and that the Court is empowered to make any order it thinks necessary to remedy the effects of the conduct, the order may be made against persons other than the person who has engaged in the contravening conduct. In so far as the power of the Court under s 298U(e) is to make an order necessary to remedy the effects of contravening conduct, counsel for the appellants may well be correct in submitting that the power conferred by s 298U(e) is exercisable only when those effects have been found to exist. That is the condition upon the power to make a final order; it is not the definition of the jurisdiction to hear and determine an application in respect of alleged contravening conduct. The power to make an interlocutory order is exercised by reference to the relief finally available but that is not, or is not necessarily, to say that the power to make the final order is the source of the power to make an interlocutory order or confines the power to make an interlocutory order.

27 Once the jurisdiction conferred on the Federal Court by the Act is invoked, that Court has power under s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") to make "orders of such kinds, including interlocutory orders ... as the Court thinks appropriate". That power may be exercised in any proceeding in which the Federal Court has jurisdiction unless the jurisdiction invoked is conferred in terms which expressly or impliedly deny the s 23 power to

19 s 4(1).

the Court in that class of proceeding. It cannot be invoked to grant an injunction where the Court acquires its jurisdiction under a statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an injunction²⁰. But this is not such a case.

- 28 It was emphasised in the joint judgment of four members of this Court in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission*²¹ that s 23 of the Federal Court Act "does not provide authority for granting an injunction where there is otherwise no case for injunctive relief", whether "under the general law or by statute". In *Jackson v Sterling Industries Ltd*, Brennan J²² and Toohey J²³ expressed the point as being that s 23 confers on the Federal Court such powers as are necessary or incidental to the exercise of the jurisdiction of that Court. Toohey J also emphasised²⁴:

"To formulate the question in the present case by reference to the existence and history of Mareva injunctions tends to obscure the basic question which goes to the power of the Federal Court. Nevertheless decisions relating to Mareva injunctions may throw light on the question of powers arising expressly or by implication from legislation conferring jurisdiction and they may also throw light upon the existence of such powers as may be incidental and necessary to the exercise of that jurisdiction or the powers so conferred."

- 29 Both *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* and *Jackson v Sterling Industries Ltd* concerned relief in respect of claims founded upon laws made by the Parliament. Here the claims are for relief under s 298U(e) and in the tort of conspiracy. For present purposes and as indicated later in these reasons, it may be taken that the common law claims in conspiracy are founded

20 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 425-426, 456.

21 (1981) 148 CLR 150 at 161.

22 (1987) 162 CLR 612 at 620.

23 (1987) 162 CLR 612 at 632.

24 (1987) 162 CLR 612 at 631. See also at 639-642 per Gaudron J.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

18.

either in the accrued jurisdiction as explained in *Fencott v Muller*²⁵ or as an associated matter within the meaning of s 32 of the Federal Court Act²⁶.

30 The orders which the Federal Court is authorised to make under s 298U(e) include an order to "remedy" the effects of conduct in contravention of Pt XA. The final orders sought in the present proceeding include orders which undo the reorganisation of the Group and once more place the stevedoring business now being conducted by Patrick Operations in the hands or under the control of the employer companies. The basis on which that relief is sought is that it is necessary to remedy the reorganisation of the Group in which the employer companies, in alleged contravention of s 298K(1)(c), altered the position of the employees to their prejudice. That remedy is sought in reliance on s 298U(e) of the Act. Similar remedies are sought in reliance on the auxiliary jurisdiction of equity to prevent the commission of a tort or the accruing of continuing damage from a tort committed. Before examining the power of the Federal Court to grant interlocutory injunctions, that Court's jurisdiction to grant final relief of the kind sought by the employees should be considered. The jurisdiction to grant relief in tort - whether at law or in equity - is not conferred by the Act; it is conferred by s 23 of the Federal Court Act or by s 32 of that Act²⁷.

31 Given that the claims in conspiracy are part of the controversy which, by reason of s 412 of the Act, attracts the jurisdiction of the Federal Court, that Court has jurisdiction to hear and determine the conspiracy claims and to grant the remedies appropriate under the general law²⁸. What remedies are available and against whom?

32 Although only an employer can engage in conduct contravening s 298K(1), all parties to a conspiracy that the employer companies should engage in such

25 (1983) 152 CLR 570 at 608-610.

26 *PCS Operations Pty Ltd & Ors v Maritime Union of Australia & Ors* [1998] HCA 29.

27 *PCS Operations Pty Ltd v Maritime Union of Australia* [1998] HCA 29.

28 *Fencott v Muller* (1983) 152 CLR 570 at 608; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 292; *PCS Operations Ltd v Maritime Union of Australia* [1998] HCA 29.

conduct are liable as concurrent tortfeasors²⁹. If the conspiracy to perform an unlawful act is completed by the performance of the act, it is only necessary for one of the conspirators to have performed the act or to have procured the act to be performed for an action to lie against all³⁰. If damages are recovered, each is liable for the whole amount³¹. The conspiracy alleged - more accurately, the conspiracies alleged - were to engage in two examples of contravening conduct. The first alleged conspiracy was an agreement to reorganise the Group whereby the position of the employees would be altered to their prejudice for reasons which included the reason that the employees were members of the MUA. This would be a conspiracy in contravention of par (c) of s 298K(1). The second alleged conspiracy, which has not yet been brought to completion, was an agreement to take action whereby the employees would be dismissed (by the employer companies) for the reason, or for reasons which included the reason, that the employees were members of the MUA. This would be a conspiracy in contravention of par (a) of s 298K(1). The dismissal of the employees has not occurred. If it were to occur, and the employees were without work and were to find employment difficult to obtain, the consequences for them would be extremely serious. And, of course, if damages were awarded, the measure of damages, having regard to all the usual qualifications and factors in mitigation would be very large. The seriousness of the consequences for the workforce and the magnitude of the damages that might be payable in the event that the workforce is dismissed are relevant in two respects to the relief which the Federal Court might grant under the general law.

29 *Clerk and Lindsell on Torts*, 17th ed (1995) at 1272; Fleming, *The Law of Torts*, 9th ed (1998) at 288; *The Koursk* [1924] P 140 at 155-156; *O'Brien v Dawson* (1942) 66 CLR 18 at 27-28, 41; *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1058; *Newcastle (Town) v Mattatall* (1988) 52 DLR (4th) 356 at 365; *State of New South Wales v McCloy Hutcherson Pty Ltd* (1993) 116 ALR 363 at 369; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 581, 607.

30 *Galea v Cooper* [1982] 2 NSWLR 411 at 417.

31 *Rich v Pilkington* (1691) Carthew 171 [90 ER 704]; *Mitchell v Tarbutt* (1794) 5 TR 649 [101 ER 362].

33 A court whose jurisdiction is invoked in a conspiracy case has power to grant an injunction to prevent the completion or effecting of the conspiracy³². Where the acts contemplated by the conspirators have all occurred and the tort is complete, the remedy available to an injured plaintiff is ordinarily limited to the recovery of pecuniary damages³³. But for over a century it has been established that "there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action"³⁴. Where the damage caused by tortious conduct is ongoing and is "extreme, or at all events very serious", a mandatory injunction may issue compelling the wrongdoer to prevent the occurrence of further damage³⁵. Here, if attention be focused on the conspiracy to engage in conduct in contravention of s 298K(1)(c) and it is found on trial that that conspiracy was entered into and completed, there would be power to make mandatory orders to prevent damage to the employees flowing from the Group reorganisation. If attention be focused on the conspiracy to engage in conduct in contravention of s 298K(1)(a) and it is found on trial that that conspiracy was entered into there would be power to restrain the dismissal of the employees for a "prohibited reason". These remedies would be available against any or all of the conspirators according to the exigencies of the situation then existing.

34 If the employees were dismissed before trial in contravention of s 298U(a) or pursuant to a conspiracy in contravention of that provision, the damages would be likely to be enormous. The huge amount of the likely damages is a factor relevant to the scope of the relief available against the Group by way of interlocutory injunction.

32 *British Motor Trade Association v Salvadori* [1949] Ch 556; *Gulf Oil Ltd v Page* [1987] Ch 327; *Femis-Bank (Anguilla) Ltd v Lazar* [1991] Ch 391 at 397, 400.

33 See *Deere v Guest* (1836) 1 My & Cr 516 [40 ER 473].

34 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50.

35 *Durell v Pritchard* [1865] LR 1 Ch App 244 at 250; *McManus v Cooke* (1887) 35 Ch D 681 at 698; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 810; [1974] 2 All ER 321 at 337; Joyce, *The Law of Injunctions*, 2nd ed (1872), vol 1 at 439; *Daniell's Chancery Practice*, 8th ed (1914), vol 2 at 1400.

Interlocutory relief

35 The powers of the Federal Court under s 23 of its Act are powers "to make orders of such kinds, including interlocutory orders, as it 'thinks appropriate'", as Deane J noted in *Jackson v Sterling Industries Ltd*³⁶. He added:

"Wide though that power is, it is subject to both jurisdictional and other limits. It exists only 'in relation to matters' in respect of which jurisdiction has been conferred upon the Federal Court. Even in relation to such matters, the power is restricted to the making of the 'kinds' of order, whether final or interlocutory, which are capable of properly being seen as 'appropriate' to be made by the Federal Court in the exercise of its jurisdiction."

One limitation on the powers of the Federal Court to grant interlocutory injunctions is that those powers must be exercised for the purpose for which they are conferred. In a later passage of the judgment of Deane J in *Jackson v Sterling Industries Ltd*³⁷, his Honour said a power to prevent the abuse or frustration of a court's process should be accepted "as an established part of the armoury of a court of law and equity" and that "the power to grant such relief in relation to a matter in which the Federal Court has jurisdiction is comprehended by the express grant to that Court by s 23 of the *Federal Court of Australia Act*". But, his Honour observed³⁸, orders must be framed "so as to come within the limits set by the purpose which [the order] can properly be intended to serve". The *Mareva* injunction is the paradigm example of an order to prevent the frustration of a court's process³⁹ but other examples may be found⁴⁰. The moulding of an interlocutory injunction must

36 (1987) 162 CLR 612 at 622.

37 (1987) 162 CLR 612 at 623. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74 per Gaudron J.

38 (1987) 162 CLR 612 at 625.

39 *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268 at 1272; [1980] 3 All ER 409 at 411; *Mercedes Benz AG v Leiduck* [1996] AC 284 at 299, 306-307.

40 *Gibbs v David* (1875) LR 20 Eq 373 at 377-378; *Hatton v Car Maintenance Company, Limited* [1915] 1 Ch 621 at 624-625; *Heavener v Loomes* (1924) 34 CLR 306 at 326; *Hannam v Lamney* (1926) 43 WN (NSW) 68; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

22.

depend upon the circumstances of each case. As Brennan J observed in *Jackson v Sterling Industries Ltd*⁴¹:

"A judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case and, the schemes which a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order."

The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked⁴². The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding.

36 Before the September 1997 reorganisation of the Group, the employees of the employer companies enjoyed the security of an award that bound the employer companies which were carrying on the stevedoring businesses of the Group. The security of their employment and of the terms of their employment was dependent, inter alia, on the worth of the employer and the commercial viability of its business. But when, in effecting the 1997 reorganisation, the employer companies disposed of their assets including their stevedoring businesses, reduced their issued capital and disposed of a substantial amount of money by the buy-back of their shares and became the mere suppliers of labour, they exposed their continued commercial viability to the discretion of Patrick Operations No 2 (and later to Patrick Operations) in the event of any disruption in the supply of labour. After the reorganisation, the principal asset of the employer companies was an inter-company debt which appears to have been matched by liabilities in the form of employee entitlements.

37 Given the weakened financial structure of the employer companies, the commercial death knell of those companies was sounded by the termination of the Labour Supply Agreements by Patrick Operations, the refusal of further funding by Patrick Holdings, the fixing by the security trustee on 7 April 1998 of the charge over any debts actually or contingently owing to the employer companies by

41 (1987) 162 CLR 612 at 621.

42 See *Tait v The Queen* (1962) 108 CLR 620.

Patrick Holdings and the non-payment of the receivable of \$16 million or \$17 million. If the power of the Federal Court to prevent the frustration of its process was to be effective, extraordinary orders were needed to ensure that, if the employees were successful in the final hearing, the employer companies, from which the employees derived such security of employment as they had, could be maintained in existence as stevedores or as the continuing suppliers of labour in the stevedoring business. If that could not be done, the conduct of the Group which had altered the position of the employees to their prejudice would lead inevitably to the dismissal of the employees.

38 Presuming, in accordance with s 298V (even without reference to any inference to be drawn from the facts), that one of the reasons for the conduct which weakened and then contributed to the commercial unviability of the employer companies was that the employees were members of the MUA, the Court had power to make orders to prevent irremediable prejudice or damage to the employees pending the trial of the action. The orders made by North J were designed to provide the commercial framework in which the employer companies could be maintained in existence with a workforce that would allow it to carry on the business of supplying labour to Patrick Operations. That was the status quo which his Honour sought to maintain until the time came (if it were to come at all after trial) when orders to re-establish the employer companies either as the stevedore or as the suppliers of labour in the stevedoring business might be made.

39 However, the granting of those orders as against the employer companies under administration and as affecting the interests of innocent third parties raises further issues for consideration.

The position of the employer companies under administration and the functions of the Administrators

40 When the employer companies were placed under administration, the Administrators were invested with the powers prescribed by ss 437A and 442A of the Corporations Law. Section 437A reads:

" While a company is under administration, the administrator:

(a) has control of the company's business, property and affairs; and

(b) may carry on that business and manage that property and those affairs; and

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

24.

- (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
- (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration."

This section reposes in the Administrators the duty of determining whether, during the period of administration, the employer companies should attempt to continue to trade. The employees submit that the Court should not be deterred by the intervention of voluntary administration from giving appropriate interlocutory relief, including orders which - at least in part - undo the Group reorganisation. The alleged insolvency of the employer companies is (so the argument goes) but the last, or next to last step, in the effectuation of a conspiracy to injure the employees of the employer companies by terminating their employment for the reason that they were members of the MUA. An important element of the conspiracy, so it is alleged, was the dismissal of the employees through the innocent agency of the Administrators. It was submitted that North J was right to prevent the dismissal of the employees and to do whatever was necessary to ensure that the employer companies would continue in business, employing the employees until the trial of the action.

- 41 It is well established that the jurisdiction of this Court directly conferred by Ch III of the Constitution cannot "be affected by the exercise of the authority of [a] State legislature"⁴³, nor can a State law diminish the jurisdiction or power conferred on a court by a law of the Commonwealth: by s 109 of the Constitution, the law of the Commonwealth prevails. But the powers of the Federal Court under s 23 are limited to the making of orders that are "appropriate" and that limitation directs attention to the rights and liabilities of the parties to the proceeding under the applicable law, both Commonwealth and State or Territorial laws. The Corporations Law, though substantially uniform throughout Australia, is a law enacted by the Parliaments of the States. How do the provisions of Pt XA of the Act and the Corporations Law operate together?

43 *Commissioner of Stamp Duties (NSW) v Owens* [No 2] (1953) 88 CLR 168 at 169 and *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93 cited by Gummow J in *Re Residential Tenancies Tribunal* (1997) 71 ALJR 1254 at 1279; 146 ALR 495 at 528.

42 The answer depends on the true construction of the two laws and the fields of their operation. When one law - the Corporations Law - deals with the constitution, administration and assets of a corporation and another law - the Workplace Relations Act - deals with relationships between employers and employees or conduct in which persons engage qua employer or employee, there is not likely to be any general inconsistency between them. Corporations, like natural persons, can be subject to laws governing relationships and conduct. A law of the Commonwealth which governs the relationship of employer and employee does not purport to alter, and would not be construed as intending to alter, a State law prescribing a general regime for the administration of the assets of insolvent companies or the assets of companies which are, or are likely to become, insolvent. Just as the *Bills of Exchange Act* 1909 (Cth) was held not to be inconsistent with the regime created by the *Moratorium Act* 1930 (NSW) in *Stock Motor Ploughs Ltd v Forsyth*⁴⁴ and just as the *Defence Housing Authority Act* 1987 (Cth) was held not to be inconsistent with the relevant provisions of the *Residential Tenancies Act* 1987 (NSW) in *Re Residential Tenancies Tribunal*⁴⁵, so in the present case the provisions of Pt XA of the Workplace Relations Act and s 23 of the Federal Court Act are not shown to be inconsistent with Pt 5.3A of the Corporations Law.

43 There is a substantial reason why that should be so. Part 5.3A and other provisions of the Corporations Law are concerned to regulate the control and distribution of the assets of a company in the interests not only of the statutory entity itself, the company, and its members but also in the interests of the company's creditors. The company is an entity brought into existence to provide the vehicle for organising, deploying and distributing its assets. The Corporations Law prescribes the regime which defines and protects the interest of third parties - the creditors - in the deployment and distribution of a company's assets. Another law which governs conduct in which companies and natural persons may engage and relationships which companies and natural persons may enter should not be construed as intending to affect or modify a regime that affects the interests of third parties. Prima facie, a law which deals indifferently with companies and natural persons does not affect the regimes prescribed by laws dealing with bankruptcy and insolvency; a law of the former kind would have to manifest clearly an intention to affect those regimes before it would be held to do so.

44 (1932) 48 CLR 128.

45 (1997) 71 ALJR 1254; 146 ALR 495.

44 It follows that the orders which might properly be made by the Federal Court under s 298U(e) of the Act or s 23 of the Federal Court Act ought not to interfere with the exercise by the Administrators of their powers in respect of the employer companies provided the Administrators act lawfully. Relevantly, that means that the Administrators cannot dismiss the employees for the reason, or for reasons which include the reason, that they are members of the MUA.

45 Section 440D(1) of the Corporations Law forbids the commencement or prosecution of proceedings against a company during administration except, inter alia, with the leave of a court. North J gave leave and that was an appropriate order in so far as it allowed the prosecution of a proceeding designed to remedy the effects of an alleged contravention of s 298K(1) of the Act. However, the other orders made with respect to the business of the employer companies during administration require some qualification as will subsequently appear.

46 The orders appear to assume that the Administrators will remain in office for a significant period of time (if not for the whole of the time until the action is tried). They are also designed to assist the bringing back of the employer companies to profitable operation. Further, the orders (as varied by the Full Court) are intended to relieve the Administrators of personal liability for the wages that the employees of those companies will earn pending the trial of the action.

47 There are some features of the operation of Pt 5.3A of the Corporations Law which should be noted. First, voluntary administration under Pt 5.3A is intended to be a temporary measure. There are times within which steps in the administration must be taken⁴⁶. Thus, there are times set within which meetings of creditors must be convened⁴⁷. That period can be extended by court order⁴⁸ or a meeting of creditors can agree that the meeting will be adjourned. But the meeting cannot agree to adjourn to a day more than 60 days after the first day on which the meeting was held⁴⁹.

46 s 435C(2) and (3).

47 s 439A.

48 s 439A(6).

49 s 439B(2).

48 Next, the fate of a company in voluntary administration is in the hands of its creditors - at least in the sense that it is that group which decides whether the company will execute a deed of company arrangement or the administration will end or that the company will be wound up⁵⁰. No doubt that is subject to the supervision of the Court in various ways. But in the end it must always be remembered that the company that is subject to voluntary administration is one that the board has resolved is insolvent or is likely to become insolvent at some future time⁵¹. Any step that the Federal Court takes to prevent the frustration of its jurisdiction must be taken having regard, inter alia, to the interests of creditors of the company. It must also be taken in light of the fact that the board of the company has concluded that its debts cannot be paid as and when they fall due now or at some future time.

49 Ordinarily, administrators of companies are not in office very long. They must decide quickly whether the company and its business is beyond rescue. If the company or some or all of its business might be rescued, a deed of company arrangement will be proposed. It is the creditors of the company who decide whether the company should make that deed of company arrangement⁵². The administrator will ordinarily become the administrator of the deed but the affairs of the company are then regulated by the deed. Although the creditors may resolve otherwise⁵³, the deed will ordinarily provide for the application of money received under the deed in the order of priorities that would apply in a winding up⁵⁴.

50 If the company and its business cannot be rescued, the company will go into liquidation and its assets will be realised and the proceeds distributed among

50 s 439C.

51 s 436A.

52 s 439C(a) and Pt 5.3A Div 10, ss 444A to 444H.

53 Corporations Regulations, reg 5.3A.06.

54 Corporations Regulations, Sched 8A, par 4.

creditors in the manner prescribed by the Corporations Law⁵⁵. The entitlements of employees are then to be paid in priority to the debts of third parties⁵⁶.

51 Although an administrator has power to conduct the business of the company during administration⁵⁷ the administrator is personally liable under s 443A for debts he or she incurs in doing so. The administrator then has a right of indemnity against the company's assets⁵⁸, ranking in priority to unsecured debts and, generally speaking, debts secured by a floating charge⁵⁹. The administrator has a lien over the company's property to secure that right⁶⁰. But if an administrator forms the view that the company is and is likely to remain insolvent, it is unlikely that a decision would - or ought - be taken to continue trading. Personal liability of the administrator for the debts incurred would be the price of unsuccessful trading by an insolvent company. If the employer companies are indeed insolvent and if there be no prospect of supplying their employees' labour to a stevedore under a profitable contract, the Administrators are not likely to incur debts in carrying on trading, without a third party indemnity.

52 An administrator has the power to carry on trading though the company is insolvent, the personal liability of the administrator being the protection given by the Corporations Law to the company's creditors. But the statutory protection of the creditors generally cannot be set aside by a court's order in litigation between a plaintiff party and the company purporting to suspend s 443A of the Corporations Law⁶¹; nor can a court order an administrator to incur, or to run the risk of incurring, a personal liability under s 443A in order to preserve the rights of a plaintiff against the company. The administrator must act impartially as among all parties having or claiming to have an interest in the present or future assets of the

55 s 478(1) (winding up in insolvency); s 501 (voluntary winding up).

56 ss 556, 558.

57 s 437A(1).

58 ss 443D, 443E.

59 s 443E(1).

60 s 443F.

61 cf the provisions relating to liability for rent: ss 443B(2) and (8).

company and must make those decisions which, in the light of contemporary circumstances, best serve those interests. It is for the administrator, in exercise of the discretionary powers conferred by s 437A, to decide whether or not to carry on the company's business and the form in which it should be carried on during the administration.

53 The central difficulty about the orders made by the primary judge is that they are orders which took away from the Administrators of the employer companies the discretions conferred upon them by s 437A of the Corporations Law. At least on one view of the effect of the orders, they would oblige the Administrators to continue to trade while the employer companies were insolvent. Freeing the Administrators from personal liabilities for wages incurred by employees - pursuant to the undertaking given by the employees - was not to the point. The companies themselves would remain liable for those wages.

54 It is one thing to restrain Patrick Operations from giving effect to the termination of labour supply contracts and restraining those companies in ways that would, if the employees were to succeed at trial, permit the making of orders that would undo the transactions alleged to have been undertaken as a party to a conspiracy to engage in conduct in contravention of s 298K of the Act. But it is a very different thing to fetter the discretion of the Administrators (and of the creditors) in the exercise of the powers they possess under the Corporations Law. It is for the Administrators and the creditors (including the majority creditors, the employees) to take the decisions about continued trading.

The financial state of the employer companies

55 A report to the directors of Patrick Holdings tendered in evidence before North J said that following the sale of the employer companies' businesses, the balance sheets of the three employer companies other than Stevedores Tasmania "will consist only of employee provisions, associated future income tax benefit, an intercompany receivable and shareholders funds". It also recorded that following the share buy-back which has been mentioned earlier, the shareholders' funds of those three companies would be reduced to an aggregate amount of \$2.5 million. The inter-company receivable owing to employer companies by other members of the Group does not precisely appear in the evidence but the argument proceeded both in this Court and before the primary judge on the basis that it was of the order of \$16 million to \$17 million.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

30.

56 The 1997 financial statements of the employer companies were not in evidence. The balance sheets of PS1, PS2 and PS3 for the financial year ended 30 September 1996 show that the amounts then provided for current employee entitlements (such as long service leave, annual leave and the like) totalled \$18,915,840. The provisions for non-current employee entitlements added a further \$14,566,563. The evidence does not disclose whether the amount required to be provided for employee entitlements was markedly different by April 1998.

57 Mr Clayton, the sole director of PS1, PS2 and PS3, gave evidence to the primary judge that when he took over control of those companies (in September 1997) he started with all four companies on what he described as "with a level playing field". This, taken with the other evidence, would lead to the conclusion that in September 1997 the four employer companies had balance sheets which had a provision for employee entitlements of about the same amount as the inter-company receivable owing to them as part of the price for the assets they had sold and a total of the shareholders' funds of PS1, PS2 and PS3 (representing the excess of their assets over liabilities) amounting to \$2.5 million⁶². The evidence does not show whether Mr Clayton was taking account of the non-current liabilities in speaking of a level playing field.

58 According to Mr Clayton the companies incurred running losses of \$6 million in the period from September 1997 to April 1998. If that is so, shareholders' funds in the employer companies would be exhausted, the inter-company debt owing to the employer companies would be taken up by employee entitlements and, given the stated unwillingness of Patrick Holdings and Patrick Operations to continue to support the employer companies as they had until then by paying their wages bills of \$2 million per week, there is an obvious basis for the conclusion that PS1, PS2 and PS3 were then insolvent.

59 Mr Butterell, one of the Administrators, gave evidence before North J that he was of the opinion that, to the best of the information available to him at that time, the employer companies were insolvent. It is apparent that, in forming that conclusion, he took account of the existence of the inter-company receivable. He had in fact made statutory demand for some or all of that amount. North J proceeded on the premise that, at least after the termination of the Labour Supply Agreements, each of the employer companies was insolvent. Indeed, in considering whether the companies could be conducted profitably, his Honour

62 It was not suggested that Stevedores Tasmania requires separate consideration.

appears to have concluded that the cash inflows of their businesses would exceed the outflows only if employees did not hold the Administrators responsible for their wages. That is, the companies would be "profitable" only if, to adopt and adapt his Honour's words, the employees were to "sacrifice wages" for a few days each month. On that basis, the companies would be trading while unable to pay their debts as they fell due.

- 60 The parlous condition of the employer companies means that a continuation of trading runs the risk of causing detriment to third party creditors or the risk of the Administrators becoming personally liable for any losses incurred. But s 437A confers on the Administrators a power to be exercised in their discretion to continue or to desist from trading. That power is to be exercised in the interests of those affected (general creditors as well as employee creditors and shareholders) and having regard to the object⁶³ of Pt 5.3A -

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

- 61 The orders made by North J fettered the discretion. In particular, order 5 precluded the Administrators from deciding whether, if trading were resumed, it would be feasible to retain the whole workforce of the employer companies. Decisions of that kind are for the Administrators to make, not the Court. They are to be made having regard to all of the circumstances known at the time.

- 62 It was submitted on behalf of the employees that if the Administrators wanted to exercise their powers they could always approach the Federal Court pursuant to the liberty to apply that was reserved. If they could justify their proposed course of conduct, the orders could then be varied to permit it. This contention identifies an error in the orders made by the courts below. The Administrators cannot be deprived of the discretion which the Corporations Law reposes in them. True, they must obey the general law in exercising their discretions⁶⁴, including the law

⁶³ s 435A.

⁶⁴ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 413.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

32.

governing the dismissal of redundant employees, but that is not to say that their discretionary power is subject to court approval. No doubt, a decision made by an administrator may be challenged by appeal under s 1321 of the Corporations Law but there is a radical difference between a challenge to an exercise of discretion under s 1321 and a denial of the administrator's discretionary power without the court's prior approval.

63 Section 447A of the Corporations Law empowers the Court to "make such order as it thinks appropriate about how [Pt 5.3A] is to operate in relation to a particular company". Assuming that the Federal Court could exercise that power, it would not support an order taking away the discretionary powers of the Administrators. The Full Court invoked s 447A to support an order to exonerate the Administrators from personal liability under s 443A for wages and other benefits for which the employees (including the MUA) undertook not to hold the Administrators liable. It is unnecessary to consider the validity of the Full Court's order as the order was unnecessary. The undertaking related to the enforcement of claims for wages and other benefits, not the existence of claims susceptible of enforcement. The employees' claims for the wages and the other benefits for which the employer companies would be liable in the event of resumed trading were understood to remain enforceable against the relevant employer companies.

64 As the orders made by North J were not subject to the power of the Administrators to determine whether or not to resume trading by the employer companies, there was an appealable error which can and will be rectified by the insertion of an appropriate qualification. But before turning to the precise form of the orders to be made, the position of third parties which were affected by the orders made by North J should be considered.

Third Parties

65 In applications to grant interlocutory injunctions, the court is concerned to examine and in appropriate cases to protect, pending the trial, the moving party's right to relief against that party's opponent. But the rights of plaintiff and

defendant are not the only rights considered in determining where the balance of convenience lies. In *Wood v Sutcliffe*⁶⁵ Sir Richard Kindersley V C said:

"whenever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to the surrounding circumstances, to the rights or interests of other persons which may be more or less involved: it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one), of granting an injunction."

The principle in *Wood v Sutcliffe* was approved by Cumming-Bruce LJ in *Miller v Jackson*⁶⁶:

"Courts of equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the court."

His Lordship cited with approval a passage from Dr Spry's *Equitable Remedies*⁶⁷. We too adopt the author's statement:

"the interests of the public and of third persons are relevant and have more or less weight according to the other material circumstances. So it has been said that courts of equity 'upon principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the courts'. Regard must be had 'not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved'. So it is that where the plaintiff has *prima facie* a right to specific relief, the court will, in accordance with these principles, weigh the disadvantage or hardship that he would suffer

⁶⁵ (1851) 2 Sim (NS) 163 at 165-166 [61 ER 303 at 303-304]. See also *Kerr on Injunctions*, 6th ed (1927) at 31-32 and cases there cited; Spry, *Equitable Remedies*, 5th ed (1997) at 402-403 and cases there cited.

⁶⁶ [1977] QB 966 at 988.

⁶⁷ 5th ed (1997) at 402-403.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

34.

if relief were refused against any hardship or disadvantage that might be caused to third persons or to the public generally if relief were granted, even though these latter considerations are only rarely found to be decisive. (Conversely, detriment that might be caused to third persons or to the public generally if an injunction were refused is taken into account.)"

- 66 *Miller v Jackson* has been approved and applied on a number of occasions in Australian courts⁶⁸. However, the weight to be given to third party interests varies according to the circumstances. In the present case, PCS Resources offered to supply labour knowing that the Group proposed to sever the stevedoring operations from the workforce employed by the employer companies. Although North J made no adverse findings against PCS Resources as to the circumstances in which it entered into the hiring agreement with Patrick Operations on the evening of 7 April, the services which PCS Resources contracted to perform were known by it to be in substitution for the services which the employer companies had theretofore performed. In balancing the interests of the employer companies and their employees against the interests of PCS Resources and their employees, North J was entitled in the exercise of a discretionary judgment to conclude that the injunctions directed to the members of the Group should be made. At all events, there is no reason shown why that exercise of discretion should be overturned on appeal.

The undertakings and orders

- 67 The orders made by North J were made on the employees giving three undertakings - first, as to damages, second, that they would not engage in industrial action and third, that they would not hold the Administrator of the employer companies personally liable for their wages and other benefits. It is necessary to say something of the undertaking as to damages and the undertaking about the liability of the Administrators.

68 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 419 (per Thomas J with whom Campbell CJ and Andrews SPJ agreed); *O'Keeffe Nominees Pty Limited v BP Australia Limited* [1990] ATPR 41-057 at 51,740-51,741 per Spender J; *Gilltrap & Anor v Autopromos Pty Ltd & Anor* [1995] ATPR 41-395, at 40,377 per Spender J. See also *Perrey v Mordiesel Co Pty Ltd* [1976] VR 569 at 576 per Lush J.

68 The undertaking as to damages was offered and accepted in the usual form of such undertakings in the Federal Court⁶⁹. It was, therefore, an undertaking in favour only of parties to the proceeding, not any third party that might suffer damage because of the orders. Counsel for the employees said in argument in this Court that he had instructions to extend the undertaking to any third party that might suffer loss.

69 We need not resolve the question whether the undertakings given or to be given bind each individual who is represented by those employees whose counsel gave the undertakings or whether the employees named on the record warrant their authority to bind all the parties represented. But the undertakings bind the MUA, an organisation which is not shown to be insubstantial. The significance of the undertakings is that the Administrators, in the light of those undertakings, might be assisted in coming to a decision whether to resume trading. As the employees have chosen (or may choose) to bind themselves in this way there was no occasion for the Full Court to make order 3 (nor is there occasion for this Court to uphold it). And if the employees had not chosen to bind themselves, or were to choose not to offer a like undertaking in support of the varied orders which we will make, there is no warrant for disturbing the priority of claims on the assets of the companies which is prescribed by the Corporations Law. It follows that order 3 of the Full Court's orders should not have been made. That order should be set aside.

70 Orders 1 and 4 made by North J are directed to Patrick Operations No 2 and Patrick Operations. The effect of those orders is to compel those companies to treat the employer companies as their sole supplier of labour under the Labour Supply Agreements. That was the position before 7 April 1998. Although the Labour Supply Agreements were non-exclusive, and order 4 provides for exclusivity, there is justification for order 4. It is necessary in the first place to ensure that, so far as the companies subject to the orders are concerned, they do not prevent the employer companies being maintained with their workforce until the trial of the action. If the Administrators are able to preserve the commercial viability of the employer companies and if the employees' action succeeds, those companies will then be in a position to resume control of the stevedoring business upon the setting aside of the agreements for the sale of the employer companies' businesses. Next, order 4 is necessary to maintain the employment of the

69 Federal Court of Australia Practice Note No 3 of 8 April 1994.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

36.

employees to prevent the fulfilment of the alleged conspiracy to dismiss the employees in contravention of s 298K(1)(a) of the Act.

71 Order 2 is directed to the employer companies and purports to bind them to treat the Labour Supply Agreements as remaining on foot. That order is appropriate if, but only if, the Administrators decide to resume trading. It should be made subject to the power of the Administrators to make their own decision whether to resume trading.

72 Order 3 is also directed to the employer companies as well as to Patrick Operations No 2 and Patrick Operations. It will take effect subject to the powers of the Administrators. The order's chief purpose is to prevent the completion of the alleged conspiracy to dismiss the employees in contravention of s 298K(1)(a), albeit the dismissal is effected by the innocent agency of the Administrators.

73 Order 6 is a form of a *Mareva* injunction. The principles upon which *Mareva* injunctions are granted were recently considered in *Mercedes Benz AG v Leiduck*⁷⁰. This was an appeal to the Privy Council from Hong Kong. The judgment of the majority of their Lordships was delivered by Lord Mustill. His Lordship observed⁷¹:

"Unlike a suit founded on the cause of action created by a judgment the *Mareva* injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future. Secondly, and more simply, in a case such as the present the injunction does not enforce a 'judgment,' but is intended to hold the position until a judgment comes into existence. At the time when the injunction is sought and granted there is no judgment."

In *Jackson v Sterling Industries Ltd*⁷², Wilson and Dawson JJ had spoken to similar effect, remarking of the *Mareva* injunction:

70 [1996] AC 284.

71 [1996] AC 284 at 299.

72 (1987) 162 CLR 612 at 619.

"It exists not to create additional rights but to enable a court to protect its process from abuse in relation to the enforcement of its orders. It is neither a species of anticipatory execution nor does it give a form of security for any judgment which may ultimately be awarded."

74 In *Patterson v BTR Engineering (Aust) Ltd*⁷³, Gleeson CJ observed that whatever doubts there may previously have been about the matter, in *Jackson v Sterling Industries Ltd*⁷⁴ this Court determined authoritatively that orders commonly referred to as "Mareva injunctions" might properly be made by Australian courts⁷⁵. As these two cases themselves illustrate, orders of this nature are made not only in actions to recover liquidated sums⁷⁶ but also in aid of such claims as those for the recovery of secret profits and for damages both in tort and under such provisions as s 82 of the *Trade Practices Act* 1974 (Cth)⁷⁷.

75 Whatever may be the limitations in the product of the conjunction between the remedies provided by s 23 of the Federal Court Act and the new statutory regime established by s 298U of the Workplace Relations Act⁷⁸ (as to which we express no opinion), they do not deny a foundation for order 6. In deciding whether to make an order in the terms of order 6, North J was confronted by

73 (1989) 18 NSWLR 319 at 321.

74 (1987) 162 CLR 612.

75 Meagher JA spoke to the same effect: (1989) 18 NSWLR 319 at 326.

76 In *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, the relief was given in aid of the recovery of a debt due and owing by the defendant under a time charterparty.

77 In *Patterson*, the acts complained of included the derivation of a secret profit (see (1989) 18 NSWLR 319 at 321) and in *Jackson v Sterling Industries Ltd* the claim was under s 82 and at common law for fraudulent misrepresentation and negligent misstatement (see (1987) 162 CLR 612 at 628).

78 cf *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 186, 199; *ICI v Trade Practices Commission* (1992) 38 FCR 248 at 254-257, 263-264.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

38.

considerations of a nature identified by Lord Mustill in the following passage from *Mercedes Benz*⁷⁹:

"The remedy is now 20 years old and the problems, of which there is no lack, are of a practical kind; how to frame an order which, on the one hand, protects the claimant against the manipulations of a defendant who may prove to be unscrupulous, without strangling the working capital of a defendant at the instance of a claimant who may prove to be unscrupulous; how to form the necessary judgment at a time when every fact is hotly controverted; how to choose ancillary orders which are effective without being oppressive."

76 In the present case, there is little dispute as to the constituent elements of the basic legal structure which laid the ground for the events of 7 April 1998. Having formed the view that he did as to the existence of a serious question with respect to the alleged conspiracy by unlawful means, it was well open to the primary judge to make an order in the terms of order 6.

77 The applicants referred to the reliance by North J upon the proposition that the inter-company transactions of September 1997 were "an instance of rapid re-arrangement of assets within the group to the detriment of some members of it". They emphasised that value was received and it appeared to have been adequate. However, a sure foundation for order 6 rests upon a consideration of breaches of s 298K(1) as the unlawful means employed in the alleged conspiracy.

78 We see in the orders no defect which sometimes is expressed as the involvement of the court in "constant supervision" of continued conduct. Reservations of that nature have been expressed in decisions of this Court⁸⁰. However, questions of degree rather than absolute restrictions upon the scope of curial relief are involved⁸¹. Reference was made in the Federal Court judgments and in submissions to this Court to the speech of Lord Hoffmann in *Co-operative*

79 [1996] AC 284 at 299.

80 *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 298; *H Jones & Co Pty Ltd v Talbot* (1948) 180 CLR 63 at 66.

81 *Tito v Waddell (No 2)* [1977] Ch 106 at 321; *Posner v Scott-Lewis* [1987] Ch 25 at 36; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 12-15.

*Insurance Society Ltd v Argyll Stores (Holdings) Ltd*⁸². His Lordship affirmed the refusal by the judge at first instance of an order for specific performance of a lease for a term of 35 years containing a covenant to keep premises open for retail trade during usual hours of business in the locality. His Lordship's statement that the usual practice was not to grant specific performance to carry on an activity over a period of time was made in response to a submission by the lessor to the effect that the equitable remedy was no longer to be understood as granted in the auxiliary jurisdiction where damages would be an inadequate remedy. The lessor submitted, without success, that in cases such as *Argyll Stores* the court "should look at the whole panoply of available remedies and consider the appropriate one rather than the gloss of rules put on them restricting their use"⁸³.

- 79 The House of Lords discharged the order for specific performance which the Court of Appeal had made. The significance of Lord Hoffmann's speech for present purposes is not the rejection of the lessor's submissions. That rejection, with respect, was virtually inevitable. What is significant is the acceptance by the House of Lords that the concept of "constant supervision by the court" by itself is no longer an effective or useful criterion for refusing a decree of specific performance⁸⁴. Rather, Lord Hoffmann placed stress on other propositions. First, a person who is subject to a mandatory order attended by contempt sanction (which "must realistically be seen as criminal in nature"⁸⁵) ought to know with precision what is required⁸⁶; and, second, the possibility of "repeated applications for rulings on compliance" with orders requiring a party "to carry on an activity, such as running a business over a more or less extended period of time"⁸⁷ should be discouraged.

82 [1998] AC 1.

83 [1998] AC 1 at 7.

84 See Tettenborn, "Absolving the Undeserving: Shopping Centres, Specific Performance and the Law of Contract", [1998] *The Conveyancer* 23 at 27-28.

85 *Witham v Holloway* (1995) 183 CLR 525 at 534.

86 [1998] AC 1 at 13-14.

87 [1998] AC 1 at 13.

80 Reference to constant court applications should not be misunderstood. The courts are well accustomed to the exercise of supervisory jurisdiction upon applications by trustees, receivers, provisional liquidators and others with the responsibility for the conduct of administrations. The reservation of liberty to apply to the Federal Court in respect of certain of the orders to be made is in no way out of ordinary in the exercise of equitable jurisdiction.

81 Further, those orders do not, in form or in substance, require the Administrators to carry on business activities in the sense with which the *Argyll* case was concerned. Nor do the undertakings and orders leave those bound by them not knowing what is expected of them. This is not a case, referred to by Isaacs and Rich JJ in *Pakenham Upper Fruit Co Ltd v Crosby*⁸⁸, where the Court "could never be sure that it was in a position to enforce its order without injustice".

82 The orders leave the factual position as it was prior to 7 April if the Administrators decide to resume trading. No supervision by the Court is required to give practical operation to the legal rights affected by orders 1 to 5, although North J appropriately gave all parties leave to apply: order 10. However, we propose to add a further paragraph to the order of North J relating expressly to the termination of the administration. Whenever that occurs a new regime affecting the control of the employer companies' affairs and the rights of their creditors comes into existence. The parties may need on that occasion to seek some variation of the orders made. Such a liberty to apply is not given in order to revisit the issues in this case.

83 The orders made by North J and which are to be varied by this Court provide for the restoration of the Labour Supply Agreements that were in force before 7 April 1998 if the Administrators decide to resume trading. It is not the orders made but a decision to resume trading that may see the employees return to work. The courts do not - indeed, they cannot - resolve disputes that involve issues wider than legal rights and obligations. They are confined to the ascertainment and declaration of legal rights and obligations and, when legal rights are in competition, the courts do no more than define which rights take priority over others. In the orders which follow, priority is given to the powers of the Administrators of the employer companies but, subject to those powers, the orders seek to restore the position that existed prior to 7 April 1998. That position will

88 (1924) 35 CLR 386 at 395.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

41.

be achieved, however, only if undertakings be given to protect amongst others the creditors of the employer companies.

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

42.

Orders

- 84 1. Special leave to appeal granted.
2. Appeal treated as instituted and heard *instanter*.
3. Appeal allowed in part.
4. The orders of the Full Court contained in pars 3 and 5 of the order of the Full Court set aside and in lieu thereof order:
- (i) Paragraphs 2, 3 and 5 of the orders made by North J on 21 April 1998 ("the orders of North J") be varied by inserting at the commencement of each paragraph the words: "Subject to par 5A of this order".
- (ii) Add as par 5A of the orders of North J the following:
- "5A. The orders in pars 2, 3 and 5 of this order are made without prejudice to the powers of the Administrators of the First, Second, Third or Fourth Respondents during the period of administration."
- (iii) Add as par 10A of the orders of North J the following:
- "10A. Without limiting the generality of the liberty to apply reserved in par 10, reserve liberty to any party to apply in relation to the foregoing orders upon 24 hours written notice to all other parties upon the administration of any of the First, Second, Third or Fourth Respondents ending."
- (iv) Add as par 12 of the orders of North J the following:
- "12. Orders 1, 2, 3, 4 and 5 of this order shall lapse unless by 4.00pm on 6 May 1998 (or such other time as a Judge shall order before the expiry of that time) the Applicants shall give to the Federal Court of Australia an undertaking by their solicitors or counsel in the terms or to the effect of the undertakings given to the Federal Court but with an amendment of the first undertaking to add after the words 'to pay to any party' the words 'or to any person who is or hereafter becomes a creditor of the First, Second, Third or Fourth Respondents'".

Brennan CJ
McHugh J
Gummow J
Kirby J
Hayne J

43.

- (v) Vary the order contained in par 4 of the Full Court's order by deleting "these orders" and inserting in lieu "the orders of the High Court of Australia".
- 5. Remit to the Full Court of the Federal Court any application by a party for an order with respect to costs of the proceedings in the Federal Court.
- 6. Otherwise dismiss the appeal.
- 7. The appellants pay the costs in this Court of the First to the Sixth Respondents. Otherwise no order as to costs.

85 GAUDRON J. The Maritime Union of Australia ("the MUA") is an organisation of employees registered under the *Workplace Relations Act* 1996 (Cth) ("the Act"). Certain of its members are employed by Patrick Stevedores No 1 Pty Ltd, Patrick Stevedores No 2 Pty Ltd, Patrick Stevedores No 3 Pty Ltd and National Stevedores Tasmania Pty Ltd, respectively. It is convenient to refer to those companies collectively as "the Patrick Employers" and to the MUA members employed by them as "the MUA employees".

86 The MUA employees are employed in accordance with the Stevedoring Industry Award 1991 ("the Award"). In some cases, their employment is also regulated by an agreement known as "the Patrick-Melbourne Enterprise Agreement 1996". However, they have been locked out of their employment since the night of Tuesday, 7 April 1998. On that day, Patrick Stevedores Operations Pty Ltd ("the Stevedoring Company"), which then had the benefit of labour supply agreements with the Patrick Employers ("the labour supply agreements"), terminated or purported to terminate those agreements.

87 With the termination of the labour supply agreements, each of the Patrick Employers lost its entire business. Steps were then taken by the sole Director of those companies to appoint administrators. Administrators ("the Administrators") were, in fact, appointed that day. It is not in issue that, by reason of the termination of the labour supply agreements, the Administrators would have had little choice but to terminate the employment of the MUA employees had there not then been proceedings pending in the Federal Court of Australia in which the MUA was seeking interlocutory orders to prevent that course.

88 Before turning to the Federal Court proceedings, it is convenient to note that there were events other than the termination or purported termination of the labour supply agreements which bore on the appointment of the Administrators on 7 April 1998. Those events go back to September 1997 when the Patrick Employers were carrying on profitable businesses as stevedores and their assets exceeded their liabilities. In September 1997, the Patrick Employers, other than National Stevedores Tasmania Pty Ltd, sold their assets to their parent company, Patrick Stevedores ESD Pty Ltd, now called Patrick Stevedores Operations No 2 Pty Ltd ("the Operating Company"). National Stevedores Tasmania Pty Ltd also sold its assets to the Operating Company, but that sale was not effected until March 1998. Nothing turns on the fact that that sale was not completed until then and, for simplicity, it will be convenient to proceed as if it occurred in September 1997.

89 In September 1997, the Operating Company and the Patrick Employers entered into agreements by which the Patrick Employers agreed to supply labour to the Operating Company. As already noted, the benefit of those agreements was, on 7 April 1998, held by the Stevedoring Company. The agreements allowed the Operating Company and, later, the Stevedoring Company to obtain labour from other sources. And their terms were such that they could be terminated in the event

that the Patrick Employers could not maintain the labour supply. As a result of industrial action, which the MUA claims was permitted by the Act, the Patrick Employers were, apparently, not able to maintain the supply of labour in the period leading up to April 7 1998. Hence, the labour supply agreements were terminated that day.

90 The proceeds of the sale, in September 1997, of the assets of the Patrick Employers were used by those companies to extinguish debts owed to other companies in the Patrick Group of Companies ("the Patrick Group") and to effect share buybacks, the moneys again going to other companies in the Patrick Group. There then remained an amount - apparently \$16 million - owing to the Patrick Employers from one or more of the other companies in the Patrick Group. It seems likely that that money was owed by the Stevedoring Company. The money has not yet been paid. However, it is not clear that it is presently payable. Nor is it clear whether it is subject to offsetting claims for moneys provided by the Stevedoring Company to the Patrick Employers to meet their operating costs.

91 Whatever the amount owing to the Patrick Employers from the sale of their businesses, on 7 April 1998 it was effectively frozen in the hands of the company or companies which owed it. Although the Patrick Employers did not at any relevant stage after September 1997 owe any moneys other than wages and associated on-costs, their assets were, at some stage, charged to secure the indebtedness of other companies in the Patrick Group. On the evening of 7 April 1998, the security trustee of the creditors of those other companies gave notice under various floating charges crystallising those charges so that each became fixed on, but only on, the moneys owed to the Patrick Employers. With their right to receive payment of those moneys frozen and their labour supply agreements terminated, the view was formed that the Patrick Employers were insolvent. Hence, the appointment of the Administrators.

92 On 7 April 1998, the same day that the right of the Patrick Employers to receive the moneys due to them was frozen, their labour supply agreements terminated, the MUA employees locked out of their employment and the Administrators appointed, the Stevedoring Company and the Operating Company entered into arrangements with PCS Resources Pty Ltd ("the PCS Company"), a company associated with the National Farmers Federation ("the NFF"), and with one or more other companies for the supply of their labour requirements. It is not in issue that, since 7 April 1998, the PCS Company has employed non-union labour to undertake work previously performed by the MUA employees.

93 The actions which have been recounted took place, apparently, without the knowledge of the MUA or the MUA employees. However, other events had occurred which led the MUA to fear that the Patrick Employers intended to dismiss their employees. It is not necessary to recount those events. It is sufficient to note that, because of them, the MUA and three MUA employees who sued as representatives of all the MUA employees (collectively, "the MUA applicants")

commenced proceedings in the Federal Court of Australia on 11 February 1998 ("the February proceedings").

94 It seems that the February proceedings were brought against the Patrick Employers, the Stevedoring Company, the Operating Company, other companies in the Patrick Group and individuals associated with the Patrick Group (collectively, "the Patrick interests") and the NFF, the PCS Company and other companies and individuals associated with the NFF (collectively, "the NFF interests"). It appears that the MUA applicants alleged breaches of the Award and of the Patrick-Melbourne Enterprise Agreement 1996 as well as a wrongful plan to replace the MUA employees with a non-union workforce.

95 On 6 April 1998, fearing the imminent dismissal of the MUA employees, the MUA applicants moved in the Federal Court for an interlocutory order restraining the Patrick Employers from pursuing that course. That motion was listed for hearing before North J on 8 April 1998. It is not contended by any of the Patrick interests that they did not know of that application when the events of 7 April 1998, which resulted in the MUA employees being locked out of their employment, occurred. And it was conceded by Counsel for the PCS Company that, by then, it also knew that an application had been made to the Federal Court for an order preventing the dismissal of the MUA employees. On 8 April 1998, North J granted an injunction to restrain the Patrick Employers under administration from dismissing their employees and adjourned the motion until 15 April 1998. By then, the MUA applicants had commenced fresh proceedings ("the second proceedings").

96 The second proceedings were also brought against the Patrick interests and the NFF interests. Additionally, claims were made against the Commonwealth of Australia and The Hon Peter Keaston Reith MP, Minister for Workplace Relations and Small Business. In those proceedings, the MUA applicants allege a breach of the Award, breach of the Patrick-Melbourne Enterprise Agreement 1996, breach of the MUA employees' employment contracts, breach of s 298K(1) of the Act and contraventions of the Corporations Law. They also plead causes of action founded in conspiracy, including a conspiracy to breach s 298K(1), and claim damages against some of the Patrick interests (not including the Patrick Employers) and the NFF interests for the tort of inducing a breach of the MUA employees' employment contracts. And they plead that the transactions involving the sale of the businesses of the Patrick Employers in September 1997, and the share buybacks, are void or voidable for fraud. On 15 April, interlocutory orders were sought in those proceedings.

97 On 21 April 1998, North J made various interlocutory orders as set out in Schedule I to these reasons. The orders included an order restraining the Stevedoring Company and the Operating Company from acting on the termination or purported termination of the labour supply agreements (Order 1) and another preventing them from acquiring stevedoring services previously acquired from the

Patrick Employers from any other source (Order 4). There were also orders requiring the Stevedoring Company, the Operating Company and the Patrick Employers to treat the labour supply agreements as remaining on foot and to give effect to their terms (Order 2) as well as restraining them from terminating those agreements without first giving notice to the MUA (Order 3). Additionally, the Patrick Employers were restrained from entering into any agreement, taking any action or doing anything else that would result in the termination of the employment of their employees (Order 5). Further, various of the companies in the Patrick Group (but not including the Patrick Employers) were restrained from disposing of their assets other than in the ordinary course of business (Order 6). Leave was granted to the MUA applicants to proceed against the Patrick Employers for the purpose of obtaining interim relief (Order 7).

98 Orders 1, 2 and 4 of the Orders of North J were stayed by the Full Court of the Federal Court pending the hearing of appeals to that Court. The appeals resulted in leave being given to the MUA to amend undertakings given before North J and an order under s 447A of the Corporations Law, to which it will later be necessary to refer. Otherwise, the appeals were dismissed. Orders 1, 2 and 4 of the orders made by North J were then stayed by order of this Court⁸⁹ pending the outcome of this application for special leave to appeal by the Operating Company and other companies in the Patrick Group of Companies named in Schedule II to these reasons.

99 There are three main strands to the argument advanced by the applicants in support of their application for the grant of special leave. First, they argue that, except for Order 7 and procedural orders which are not in issue in these proceedings, the Federal Court lacked power to make the Orders made by North J. They then contend that there was a failure to follow principle in the making of those Orders. Third, they claim that neither North J nor the Full Court gave proper consideration to the impact of those Orders upon those provisions of the Corporations Law that confer and regulate the powers of administrators to manage companies placed under administration.

100 So far as concerns the argument that the Federal Court lacks power to make the Orders made by North J, it is necessary to note that, in the second proceedings, the MUA applicants clearly allege a breach of s 298K(1) of the Act. That subsection relevantly provides:

" An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

89 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* unreported, High Court of Australia (Hayne J), 24 April 1998.

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee's prejudice".

Section 298L(1) of the Act relevantly provides that "[c]onduct ... is for a ***prohibited reason*** if it is carried out because the employee ... :

- (a) is ... [a] member of an industrial association; or
- ...
- (h) is entitled to the benefit of an industrial instrument or an order of an industrial body; or
- ...
- (l) ... is a member of an industrial association that is seeking better industrial conditions ... [and] is dissatisfied with his or her conditions; or
- ...
- (n) as ... [a] member of an industrial association, has done ... an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee ... by the industrial association under its rules."

101 The pleaded allegations of breach of s 298K(1) of the Act include an allegation that, by the Patrick Employers' sale of their businesses to the Operating Company in September 1997, their entry into the labour supply agreements and the appointment of the Administrators, the MUA employees were injured in their employment and their position was altered to their prejudice for one or all of the prohibited reasons set out above or, else, for reasons that include one or all of those prohibited reasons⁹⁰.

102 It has not been put by any of the parties to these proceedings that the actions which the MUA applicants contend injured the MUA employees in their

90 Amended Statement of Claim, pars 116 and 117.

employment or altered their position to their prejudice did not occur or did not have those consequences. Rather, it has been conceded by the Patrick interests that the actions complained of did occur and that they did have the results pleaded. But they assert that, in accordance with established principle, orders cannot be made to undo those actions. Moreover, they claim that the actions complained of by the MUA applicants were undertaken for legitimate commercial purposes, and not for a "prohibited reason" or for reasons including a "prohibited reason".

103 To answer the question whether, by reason of the allegation of breach of s 298K(1) of the Act, the Federal Court had power to make the Orders made by North J, it is necessary to begin with s 298T of that Act. That section provides that "an application may be made to the [Federal] Court for orders under section 298U in respect of conduct in contravention of [Pt XA of the Act]", which Part includes s 298K. Section 298U is in these terms:

" In respect of conduct in contravention of this Part, the Court may, if the Court considers it appropriate in all the circumstances of the case, make one or more of the following orders:

- (a) an order imposing on a person or industrial association whose conduct contravened or is contravening the provision in question a penalty of not more than:
 - (i) in the case of a body corporate - \$10,000; or
 - (ii) in any other case - \$2,000;
- (b) an order requiring the person or industrial association to reinstate an employee, or to re-engage an independent contractor;
- (c) an order requiring the person or industrial association to pay to an employee or independent contractor, or to a prospective employee or independent contractor, compensation of such amount as the Court thinks appropriate;
- (d) an order requiring the person or industrial association not to carry out a threat made by the person or association, or not to make any further threat;
- (e) injunctions (including interim injunctions), and any other orders, that the Court thinks necessary to stop the conduct or remedy its effects;
- (f) any other consequential orders."

104 The applicants for special leave to appeal contend that s 298U only authorises orders once the Court has found a contravention of Pt XA of the Act. In other

words, it is argued that s 298U only authorises final orders. They also contend that s 298U only authorises such orders against persons who have contravened a provision of Pt XA and, thus, in this case, only against the Patrick Employers. The same view was taken of that aspect of s 298U by the Full Court⁹¹. That Court held, however, that s 23 of the *Federal Court of Australia Act* 1976 ("the Federal Court Act") authorised the Orders made by North J to the extent that s 298U of the Act did not⁹². The applicants for special leave contend that s 23 of the Federal Court Act is irrelevant because s 298U of the Act provides exclusively and exhaustively as to the relief that may be granted for a contravention of Pt XA of the Act.

105 The argument in favour of confining orders under s 298U to final orders was made by reference to the opening words of that section, namely, "[i]n respect of conduct in contravention of this Part". It is said those words mean "in respect of conduct which has been found to be in contravention of [this] Part" and that they do not extend to conduct alleged to be in contravention of Pt XA.

106 In my view, the powers conferred by s 298U cannot be confined to the making of final orders, save in the case of penalties imposed under s 298U(a). That paragraph, unlike the other paragraphs of s 298U, conditions the making of an order imposing a penalty on the existence of "a person or industrial association whose conduct contravened or is contravening [a] provision [of Pt XA]". Those words would be otiose if the opening words of the section were construed as limited to conduct found to be in contravention of Pt XA.

107 Moreover, it is clear that the words "conduct in contravention of this Part" in s 298T, which, as previously noted, provides that "an application may be made to the Court for orders under section 298U in respect of conduct in contravention of this Part", extend to conduct alleged to be in contravention of Pt XA. It would be surprising if the words "in contravention of this Part" mean something different when used in s 298U. And the wording of s 298U(a) suggests they do not.

108 In my opinion, the terms of ss 298T and 298U require that, apart from s 298U(a), s 298U be construed as including conduct alleged to be in contravention of Pt XA. That conclusion is supported by two other considerations. The first is the subject-matter of the Act: workplace relations. The principal object of the Act is "to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia". The means of achieving that object are set out in s 3 of the Act. "Cooperative workplace relations" often depend on there being an independent tribunal able to provide

91 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* unreported, Federal Court of Australia, 23 April 1998 at 6.

92 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* unreported, Federal Court of Australia, 23 April 1998 at 6-8.

interim or interlocutory relief pending final determination of the matters in issue. And the availability of interim or interlocutory relief is conducive to ensuring that employers and employees abide by the provisions of Pt XA. The achievement of that legislative purpose would be much more difficult if s 298U is read as permitting a breach to continue pending final determination of the question whether it, in fact, occurred.

109 One other aspect of s 298U should be noted. It is that s 298U provides as to the orders that may be made concerning the cessation of work by employees as proscribed by s 298N of the Act, industrial action proscribed by s 298P, and other proscribed coercive action by industrial associations against employees⁹³, members⁹⁴, and independent contractors⁹⁵. To construe s 298U as confined to authorising only final orders in restraint of that conduct would not, in my view, be conducive to harmonious workplace relations.

110 The view that s 298U should be construed as applying to conduct alleged to contravene a provision of Pt XA is also borne out by s 298U(e), which allows for "injunctions (including interim injunctions)". Although the expression "interim injunction" is sometimes used in a technical sense to mean an injunction granted until the happening of some specific event (such as a named day or further order)⁹⁶ and the expression "interlocutory injunction" is sometimes used to mean an injunction until the final hearing or further order⁹⁷, it is not uncommon for the expression "interim injunction" to be used more widely so as to include relief in the nature of an interlocutory injunction. "Interim injunction" is used in that sense in s 80(2) of the *Trade Practices Act 1974* (Cth)⁹⁸, which provides that "the Court may grant an interim injunction pending determination of an application under subsection (1)". It would not be surprising if the words "interim injunction" were used in the same sense in s 298U(e) of the Act⁹⁹.

93 Section 298Q.

94 Section 298R.

95 Section 298S.

96 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) par 2183.

97 Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 508.

98 See, for example, *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 185 per Bowen CJ.

99 See the discussion in *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 198-199 per Brennan J; cf *ICI Australia Operations Pty Ltd v Trade Practices* (Footnote continues on next page)

- 111 The argument that s 298U is confined to orders against persons whose conduct is or is alleged to be in contravention of a provision of Pt XA of the Act is clearly correct in the case of orders made under pars (a), (b), (c), (d) and, also, (e), to the extent that par (e) is concerned with injunctions and orders "that the Court thinks necessary to stop the conduct". That limitation is clear from the terms of those paragraphs. Thus, par (a) is concerned with orders imposing penalties on those "whose conduct has contravened or is contravening the provision in question". And pars (b), (c) and (d) refer to orders "requiring the person or industrial association" to do or refrain from doing some act or thing. There, "the person or industrial association" clearly refers to the person or association found or alleged to be in contravention of Pt XA. However, there is no such limitation in that part of s 298U(e) which permits "injunctions (including interim injunctions), and any other orders, that the Court thinks necessary to ... remedy [the] effects [of the conduct in question]".
- 112 It is well settled that provisions granting power to or conferring jurisdiction on a court should not be construed as subject to limitations not required by their

terms¹⁰⁰. Thus, in *Knight v FP Special Assets Ltd*¹⁰¹, a general provision as to cost orders was construed as authorising an order against a person who was not party to the proceedings in which the order was made. For present purposes, it may be assumed that an order could not be made under s 298U(e) against persons who were not parties to proceedings under that section. However, that is not the question in this case. All the individuals or companies against whom North J made orders are parties to the proceedings. The question is simply whether an order can be made against persons who are parties but whose conduct is not or is not alleged to be in contravention of Pt XA of the Act. In my view, established principles of statutory construction require that s 298U(e) be read as authorising orders against such persons.

113 Once it is accepted that interlocutory orders can be made under s 298U, and that orders under s 298U(e) can be made against persons other than those whose conduct is or is alleged to be in contravention of Pt XA, the only questions which then arise in the context of s 298U are:

- (1) whether, in terms of s 298U, it was open to North J to form the view that it was "appropriate in all the circumstances of the case" to make such orders as were "necessary to ... remedy [the] effects [of the conduct alleged to contravene s 298K]";
- (2) if so, whether, it was open to North J to form the view that the Orders which he made were necessary to remedy the effects of that conduct; and
- (3) if questions 1 and 2 are answered in the affirmative, whether, nonetheless, settled principles with respect to the grant of injunctions or the interaction of the Orders made by North J with the Corporations Law direct the conclusion that those Orders should not have been made.

The last question can, for the moment, be put to one side. It is convenient that questions (1) and (2) be considered together.

114 It is to be remembered that, by the evening of 7 April 1998, none of the Patrick Employers had a business and they were unable to obtain money owing to

100 *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J (with whom Brennan, Deane and Dawson JJ agreed), 290 per Gaudron J; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ, 316 per Toohey and Gummow JJ.

101 (1992) 174 CLR 178.

them from the earlier sale of their assets. They had no other assets of any significance. They had no funds in hand or, at least, insufficient funds to pay wages and associated on-costs for which they were then liable. It follows that they were in no position to cover continuing wage costs. It also follows that they did not have sufficient funds in hand to cover liability for accrued leave and severance entitlements if the MUA employees were dismissed. Although the Patrick Employers were no doubt entitled, at some stage, to the moneys owing from the sale of assets in September 1997, it seems clear that that amount was not more than, or not significantly more than \$16 million. And it is not disputed that if their employees were to be dismissed, either because there was no work for them or, else, no funds to pay them, that would result in a liability in respect of accrued leave entitlements and severance pay in the order of \$125 million.

115 It is not seriously in doubt that, if the events of 7 April 1998 were allowed to reach their almost certain conclusion, the Patrick Employers would have dismissed their employees and, being then irretrievably insolvent, gone into liquidation. The assets available to pay creditors, chiefly employees, would have been nowhere near sufficient to cover what was owed. And there would have been no prospect of the MUA employees obtaining the practical benefit of remedies available against the Patrick Employers under s 298U of the Act. In those circumstances, it was clearly open to North J to form the view that it was appropriate to make such orders as were necessary to remedy the effects of the conduct alleged to contravene s 298K of the Act.

116 Further, it was clearly open to North J to conclude that, to remedy the effects of the conduct alleged to be in contravention of s 298K of the Act, it was necessary to make orders dealing with the transactions of September 1997. The events of 7 April 1998 had their genesis in those earlier transactions and, according to the MUA applicants, those transactions were, themselves, distinct contraventions of s 298K. Certainly, they resulted in prejudice to the MUA employees. Their consequence was that the MUA employees ceased to be employed by profitable companies carrying on business as stevedores with assets in excess of liabilities. Instead, they became employees of companies carrying on business with depleted capital, and not as stevedores, but as the non-exclusive suppliers of labour for the stevedoring operations of the Operating Company and, later, the Stevedoring Company. Because of the changes effected by the transactions of September 1997, it would have been impossible to provide an effective remedy for the consequences of the events of 7 April 1998 without also remedying the consequences of the earlier transactions. Specifically, it would have been impossible to effectively remedy what happened on 7 April 1998 if the labour supply agreements were not restored and conditions imposed restraining the Stevedoring and Operating Companies from obtaining labour from other sources.

117 In the context just described, it was clearly open to North J to form the view that to remedy the effects of the conduct alleged to constitute contravention of s 298K of the Act, it was necessary to restrain the Stevedoring and Operating

Companies from acting on the termination or purported termination of the labour supply agreements (Order 1), and, that it was also necessary to require those companies and the Patrick Employers to treat those agreements as remaining on foot and to give effect to their terms (Order 2). Additionally, it was clearly open to his Honour to form the view that it was necessary to restrain the Patrick Employers from terminating the employment of their employees (Order 5) and, to ensure the longer term efficacy of that Order, to restrain the Stevedoring and Operating Companies and the Patrick Employers from taking action to terminate those agreements without notice to the MUA (Order 3). As already indicated, it was also clearly open to his Honour to form the view that it was necessary to restrain the Stevedoring and Operating Companies from acquiring stevedoring services previously acquired from the Patrick Employers from any other source (Order 4). Whether Order 6 was necessary will be considered later in these reasons.

118 Counsel for the applicants for special leave contended that Order 4 should not have been made because it conferred greater rights on the Patrick Employers than they had under the labour supply agreements and because it curtailed the right of the Stevedoring and Operating Companies to obtain labour from other sources. Counsel made the same argument with respect to Order 3. As already mentioned, that Order confers on the MUA a right which, it was contended, they did not previously have, namely, a right to be notified before termination of the labour supply agreements¹⁰².

119 As a general rule, interlocutory orders and injunctions are confined to orders maintaining the status quo at the time of the making of an application for those orders¹⁰³. However, that is not invariably so¹⁰⁴. Nor, as the applicants' argument assumes, is that a rule that applies in the same way to relief under s 298U(e) of the Act.

120 Because the power to make an order under s 298U(e) is conditioned on the opinion that "it [is] appropriate in all the circumstances of the case, [to] make [the order]", it clearly permits of a refusal to make an order which confers greater rights than existed when the application was made. However, it is impossible to construe s 298U as requiring that an order be refused because it would have that effect. And

102 Note, it may be that the Patrick-Melbourne Enterprise Agreement 1996 gives that or a similar right in respect of the employees covered by that agreement.

103 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408 per Lord Diplock; *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 at 140 per Lord Diplock.

104 See, for example, *Thompson v Park* [1944] KB 408. See also Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 455-456.

in the circumstances of this case, it cannot be said that, because Orders 3 and 4 travel beyond the status quo existing when application was made for interlocutory relief, the decision of North J that it was appropriate to make orders under s 298U(e) was infected with error. And once the view was formed that it was appropriate to make orders under s 298U and, in terms of s 298U(e), those orders were "[thought] necessary", it cannot matter that they were of a kind that a Court might refuse to make if it were exercising equitable jurisdiction¹⁰⁵.

121 It was also contended that, in making the Orders impugned in these proceedings, North J erred in holding there was a serious question to be tried concerning the alleged contravention of s 298K of the Act and, also, in not properly weighing the balance of convenience. In that last regard, it was put that "it was [not] appropriate to use interlocutory orders to frustrate achievement of objectives that might be lawful"¹⁰⁶ and that "North J gave no real or no sufficient weight to hardship inherent ... in the operation of the regime established by the orders made"¹⁰⁷.

122 For the reasons already given in relation to the arguments that the Orders of North J travel beyond the maintenance of the status quo, the question whether there was a serious question to be tried and questions of hardship and convenience are matters relevant to but not decisive of the question whether it was appropriate for North J to make the Orders in question. However, in this case, the proposition that there was not a serious case to be tried is so clearly untenable and the argument with respect to the balance of convenience so clearly without substance, that it is unnecessary to further consider their relevance to the exercise required by s 298U of the Act.

123 As to the question whether there was a serious question to be tried, it is necessary to note again that it is not in issue that the conduct of which the MUA applicants complain occurred, or, that it had the consequences which they assert. The only issue is whether it was engaged in for a "prohibited reason" or for reasons including a "prohibited reason". Section 298V of the Act¹⁰⁸ operates to create a

105 See, with respect to the approach to be taken to the interpretation of legislative provisions authorising injunctive relief, *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 199 per Brennan J; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 263 per Gummow J; Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 445-446.

106 Draft Notice of Appeal, Ground 11.

107 Draft Notice of Appeal, Ground 14.

108 Section 298V provides:

presumption that it was. And it also operates to place the onus on those who contend otherwise to show that it was not. There is, thus, a very strong *prima facie* case of contravention, one which, if it proceeds to final hearing, must be determined in favour of the MUA applicants unless the Patrick Employers can prove otherwise.

124 The fact that it is for the Patrick Employers to establish that there was no contravention of s 298K of the Act is also relevant to the claims of the applicants for special leave with respect to hardship and inconvenience. Once it is accepted that, but for Orders 1, 2, 3, 4 and 5 made by North J, the inevitable consequences of the conduct of which the MUA applicants complain would be that the Patrick Employers would have no business and the MUA employees would have no jobs and no real prospect of securing the benefit of remedies available under s 298U, the balance of convenience is overwhelmingly in favour of the making of those Orders. And that is so even if that conduct was engaged in for "objectives that might be lawful".

125 It is convenient now to turn to Order 6 of the Orders made by North J. As already indicated, I am of the view that s 298U(e) of the Act authorises Orders 1, 2, 3, 4 and 5 of the Orders made by his Honour. Although his Honour might well have formed the view that Order 6 was desirable, it does not seem to me that it can be said that it was necessary to remedy the effects of the conduct alleged to constitute a contravention or contraventions of s 298K of the Act. However, in my view, Order 6 is authorised by s 23 of the Federal Court Act which provides:

" The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

126 It is correct to say, as the applicants for special leave contend, that resort cannot be had to s 23 of the Federal Court Act to supplement a provision of another Act which provides exclusively and exhaustively as to the relief available, which provides as to conditions which must be satisfied before relief is granted or

" If:

- (a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
- (b) for the person or industrial association to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise."

otherwise imposes limitations on the grant of relief¹⁰⁹. However, that does not direct the conclusion that the Federal Court lacked power to make Order 6.

127 One clear purpose of s 23 of the Federal Court Act is to enable the Federal Court to make orders which might otherwise be made by a superior court in the exercise of inherent jurisdiction "to enable it to act effectively within [its] jurisdiction"¹¹⁰. It is well settled that it authorises asset preservation orders of the kind made in *Mareva Compania Naviera SA v International Bulkcarriers SA* ("The 'Mareva'")¹¹¹ to prevent a defendant from "deliberately disposing of his assets with the object of defeating or frustrating the ultimate judgment of the court"¹¹². But it is not confined to orders of that kind. As already pointed out, it extends to whatever orders are necessary to enable the Federal Court effectively to exercise its jurisdiction.

128 Two approaches can be taken to determining whether it is appropriate to make what, for convenience, may be called a "jurisdiction protection order" under s 23 of the Federal Court Act. The first is to ask whether it is necessary to make an order of that kind and, then, to ask whether, having regard to the circumstances of the case, the order in question reasonably serves the purpose of ensuring the effective exercise of jurisdiction. The second is simply to ask whether it is necessary to make the order in question.

129 In this case, it does not matter which approach is adopted to the grant of jurisdiction protection orders under s 23 of the Federal Court Act. It was clearly open to North J to conclude, in the light of the manoeuvres which culminated in the events of 7 April 1998, and, the attitude of the Patrick interests to the position of the MUA employees thereby revealed, that it was necessary to protect the

109 See *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J, 13 per Evatt J, 20 per McTiernan J; *R v Wallis* (1949) 78 CLR 529 at 544 per Latham CJ, 550-552 per Dixon J; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 162 per Gibbs CJ, Stephen, Mason and Wilson JJ, 166 per Murphy J; *Refrigerated Express Lines (A/Asia) Pty Limited v Australian Meat and Livestock Corporation* (1980) 29 ALR 333 at 347 per Deane J; *Spencer v Australian Workers' Union* (1983) 46 ALR 389 at 396 per Toohey J; *Dunham v Randwick Imaging Pty Ltd* (1994) 122 ALR 323 at 330 per Wilcox CJ; cf *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

110 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301.

111 [1975] 2 Lloyds Rep 509.

112 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 per Gaudron J. See also at 617 per Wilson and Dawson JJ, 623 per Deane J.

effective exercise of jurisdiction with respect to the claims made against them¹¹³ by making an asset preservation order. And it cannot be said that, having regard to the circumstances of the case, Order 6 is not reasonably cast to achieve that purpose. Alternatively, it cannot be said that North J erred in principle in forming the view that it was necessary to make an order in terms of Order 6.

130 Before leaving s 23 of the Federal Court Act, it is appropriate to note that, in my view, if s 298U of the Act did not permit Orders 1, 2, 3, 4 and 5 of the Orders as made by North J, those Orders could have been made under s 23 of the Federal Court Act to ensure the effective exercise of jurisdiction with respect to the claimed contravention of s 298K of the Act. It is, however, unnecessary to pursue that issue. So, too, it is unnecessary to pursue the question whether Orders 1, 2, 3, 4 and 5 can be supported by s 23 of the Federal Court Act as orders granted in accordance with equitable principles either to prevent the consummation of the conspiracy pleaded by the MUA applicants or to forestall its unworked consequences.

131 What has been written thus far should be understood in the light of two propositions. The first is that, ordinarily, an interlocutory injunction will not issue if its effect would be to interfere with the rights of innocent third parties¹¹⁴. The second is that neither s 298U(e) of the Act nor s 23 of the Federal Court Act can be construed as authorising orders requiring action in contravention of the law. Equally, however, neither can be construed as circumscribed by legislative provisions which simply confer powers and discretions to be exercised in accordance with the general law. It is in the light of the last two considerations that the argument that the Orders made by North J impermissibly interfere with the operation of Pt 5.3A of the Corporations Law should be considered. It is convenient to deal with that argument before considering the position of third parties.

132 The object of Pt 5.3A of the Corporations Law ("the Law") is:

" ... to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

113 Note it is not and could not have been claimed that they contravened s 298K of the Act, which proscribes conduct by an employer.

114 *Hartlepool Gas and Water Co v West Hartlepool Harbour and Rail Co* (1865) 12 LT 366 at 368. See also Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 473-474.

- (b) if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company."¹¹⁵

133 Various provisions of Pt 5.3A impose duties on a company administrator. Thus, he or she must convene a meeting of the company's creditors within five business days of the commencement of the administration to determine whether to appoint a committee of creditors and, if so, to determine its membership¹¹⁶. The administrator must also investigate the "business, property, affairs and financial circumstances" of the company and form an opinion as to whether it is in the best interests of the creditors to execute a deed of company arrangement, or, for the administration to end, or, for the company to be wound up¹¹⁷. And he or she must convene a further meeting of creditors to decide those matters within the time allowed by s 439A of the Law.

134 As well as imposing duties upon an administrator, Pt 5.3A of the Law imposes both positive and negative duties on others, sometimes by providing that only an administrator may do certain things. Thus, for example, there are duties imposed on directors of a company under administration to deliver all books to the administrator of the company and to attend on the administrator as he or she reasonably requires¹¹⁸. And because s 437D provides that, save in the case of a court order, only an administrator can deal with the company's property, others have a duty not to.

135 Apart from imposing duties, Pt 5.3A confers important powers and discretions on administrators. The most significant of these are to be found in s 437A(1) which provides:

" While a company is under administration, the administrator:

- (a) has control of the company's business, property and affairs; and
- (b) may carry on that business and manage that property and those affairs; and

115 Corporations Law, s 435A.

116 Corporations Law, s 436E.

117 Corporations Law, s 438A.

118 Corporations Law, s 438B.

- (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
- (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration".

136 It is not contended that the Orders made by North J interfere with the performance by the Administrators, or any other person, of any duty which Pt 5.3A of the Law imposes. Rather, it is put that those Orders impermissibly limit the powers and discretions conferred by s 437A and, therefore, should not have been made. It is also contended that the Orders made by North J require the Administrators to carry on businesses that are insolvent. Finally, it is argued that the Orders are contrary to the purposes of Pt 5.3A.

137 The powers and discretions conferred on Administrators by s 437A of the Law are not entirely at large. They are subject to court orders made under the Law, including, as already indicated, orders as to transactions or dealings with respect to a company's property¹¹⁹. Further, s 1321 of the Law confers a right on a "person aggrieved" by an act, omission or decision of an administrator to appeal to a court and provides that the court "may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit".

138 Most significantly, it is clear that the powers and discretions conferred on an administrator by s 437A of the Law are to be exercised subject to the general law¹²⁰, particularly those laws which operate directly upon a company's business, property or affairs. Obviously, for example, s 437A does not authorise an administrator to carry on business on land owned by a company contrary to town planning or environmental protection laws. Of direct relevance to this case, s 437A does not authorise an administrator to dismiss employees contrary to an award or legislative provisions. Nor does it authorise action contrary to a court order made before the administration commenced. And it does not authorise action

119 Corporations Law, s 437D(2). See also, for example, s 447E which gives the court power to make orders if it is satisfied that the administrator's actions are prejudicial to the interests of creditors or members.

120 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 287-288 per Wilson J.

contrary to an order made during the course of administration. That is necessarily implicit in s 440D of the Law¹²¹.

139 As already indicated, neither s 298U of the Act nor s 23 of the Federal Court Act is circumscribed by legislative provisions, such as s 437A of the Law, which confer powers or discretions to be exercised in accordance with the general law. Accordingly, the validity of the Orders made by North J is unaffected by s 437A. Nor, in my view, can it be said that any error of principle is disclosed by reason that the Orders curtail the powers and discretions of the Administrators conferred by s 437A. Before explaining why that is so, it is necessary to consider precisely how those Orders affect their powers and discretions.

140 Order 5 of the Orders made by North J prevents the Administrators, pending hearing or further order, from doing anything that has "the effect that the employment of the employees engaged in [the Patrick Employers'] stevedoring business is or will be terminated". Orders 2 and 3 also bear on the Administrators' powers and discretions. Order 2 requires them, along with the Stevedoring Company and the Operating Company, to treat the labour supply agreements as remaining on foot and to give effect to their terms. And, so far as is presently relevant, Order 3 requires them to give fourteen days notice to the MUA before taking any step to terminate those agreements.

141 The requirement in Order 2 that the various companies "give effect to the terms of [the labour supply] agreements" is, perhaps, ambiguous. It may mean that they are required to perform their obligations under those agreements. However, that would impliedly require the Administrators to re-commence and continue the businesses carried on by the Patrick Employers prior to 7 April 1998. The Orders cannot be read as requiring that course. And neither the MUA applicants nor the Administrators suggest that they should.

142 Once it is accepted, as I think it must be, that the Orders made by North J do not oblige the Administrators to carry on business, it follows that they do not require the Administrators to carry on business in any particular way. That being so, Order 2 must be read as binding the Administrators only in the event, and to the extent that, they elect to carry on the businesses carried on by the Patrick Employers prior to 7 April 1998. So read, Order 2 does not curtail the powers or discretions of the Administrators. Instead, it gives them a choice to carry on business - a choice which, in practical terms, would be denied them if the events of 7 April 1998 were to go unremedied.

121 Section 440D allows that proceedings may be commenced against a company during its administration, but only with the administrator's written consent or with the leave of a court.

- 143 Orders 3 and 5 are in a different position. They do fetter the Administrators' discretion by requiring them to maintain the employment of all employees, not just the MUA employees, and by requiring them to give notice to the MUA before terminating the labour supply agreements. However, those Orders have little practical impact. The powers of the Administrators to dismiss the MUA employees are, in any event, circumscribed by the Award, by the Patrick-Melbourne Enterprise Agreement 1996 and, perhaps, by the Act¹²². Moreover, as already indicated, dismissal of employees will attract liability for accrued leave entitlements and, very likely, severance pay, thereby increasing the risk that the Patrick Employers will be wound up.
- 144 Of greater significance than the limited practical effect of Orders 3 and 5 is the consideration that it would be inequitable to hold the MUA applicants to the undertakings they have given in these proceedings if the employment of the MUA employees is not protected by court order. More accurately, it was open to North J to form that view. The undertakings of the MUA applicants serve to protect the Administrators from personal liability, to the extent that they choose to carry on the businesses previously carried on by the Patrick Employers. They also serve to protect third parties against loss or damage. More precisely, they were intended to protect third parties in that way and the MUA applicants have indicated unambiguously that, if the Orders of North J stand, they are prepared to give further undertakings which have that effect.
- 145 In the context of the undertakings given or intended to be given, it is impossible to conclude that North J erred in principle in effecting a limited curtailment of the Administrators' powers and discretions by obliging them to retain the services of their employees and requiring them to give notice before terminating the labour supply agreements, particularly as the curtailment is of little practical significance.
- 146 I have already indicated that I do not read the Orders of North J as requiring the Administrators to carry on business. It follows that, contrary to the submissions of the applicants for special leave, the Orders do not require them to carry on insolvent businesses. The clear effect of the Orders made by North J is to permit of the possibility that the Patrick Employers might trade their way back to solvency. That possibility would not exist but for those Orders. For that reason, the argument that the Orders are contrary to the policy of Pt 5.3A of the Law must also be rejected.
- 147 The only matter that remains to be considered is the impact of the Orders made by North J on third parties. As already indicated, the Patrick Employers are indebted to their employees for wages, and to others for labour on-costs. They also have contingent liabilities to their employees, not simply their MUA

122 See the *Workplace Relations Act* 1996, Pt VIA, Div 3.

employees, with respect to accrued leave, severance and redundancy pay. It does not appear that they have any other significant debts or liabilities. Accordingly, the third parties most likely to suffer direct loss or damage in consequence of the Orders made by North J are the non-MUA employees and the Administrators, although the latter are not strictly third parties.

148 The Administrators are at risk because, by s 443A of the Law, they are personally liable for various debts incurred by them in the performance of their powers and functions¹²³. Their position is, to some extent, protected by an undertaking by the MUA applicants that they will not hold the Administrators personally liable for wages and other benefits for which the Administrators would otherwise incur personal liability. That undertaking is, apparently, reinforced by Order 3 of the Orders made by the Full Court of the Federal Court.

149 Order 3 of the Orders of the Full Court is in these terms:

"Part 5.3A of the Corporations Law operate[s] in relation to each of [the Patrick Employers] in such a way that s 443A(1) is not to operate in respect of services rendered to those companies by members of the [MUA]".

That Order was made pursuant to s 447A(1) of the Law which provides:

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

150 It must, I think, be doubted whether, if construed according to its terms, s 447A is, in its application to the Federal Court, within constitutional power¹²⁴. That question can be put to one side. For if, as the Full Court appears to have thought, some feature of s 447A(1) had the consequence that the MUA applicants

123 Section 443A provides:

"(1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:

- (a) services rendered; or
- (b) goods bought; or
- (c) property hired, leased, used or occupied.

(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else."

124 See *Gould v Brown* (1998) 72 ALJR 375; 151 ALR 395.

could not effectively give undertakings to relieve the Administrators from personal liability, it is difficult to see that it was appropriate for the Full Court to make its Order 3. However, nothing turns on these questions. The position of the Administrators is amply protected by the undertaking given by the MUA applicants as to damages. Thus, it does not matter whether Order 3 of the Orders of the Full Court stands or not. And the same is true of the undertaking by the MUA applicants not to hold the Administrators personally liable.

151 The position of non-MUA employees is not protected by the undertaking as to damages given by the MUA applicants. That is an undertaking "to pay [compensation] to any party adversely affected by the [Orders of North J]". It is to be construed as limited to the parties to the second proceedings. Thus, it does not extend to non-MUA employees. As already indicated, however, a more expansive undertaking has been offered to protect their interests.

152 There remains the question of the effect of the Orders on the interests of the PCS Company, other companies who entered into labour supply arrangements with the Stevedoring and Operating Companies on 7 April 1998, and the employees of those companies. It may be assumed for present purposes that they are all innocent third parties, in the sense that they were unaware of the possibility that they were part of a plan to circumvent s 298K of the Act. They will, doubtless, suffer considerable inconvenience if the Orders of North J are carried into effect. However, such rights as they have pursuant to their contracts and arrangements will be unaffected. In the circumstances of this case, it cannot be said that the fact that those parties will be inconvenienced reveals any error of principle in the approach taken by North J.

153 It will be apparent from what has been written that I think the Orders of North J cannot be criticised, except in two very minor respects. First, it would be preferable if Order 2 were made subject to a qualification or proviso to make it clear that the Administrators are obliged to give effect to the terms of the labour supply agreements only if and to the extent that they elect to carry on the businesses previously carried on by the Patrick Employers. Second, it is desirable that the undertaking as to damages by the MUA applicants be extended to persons who are not parties to the proceedings. However, they are not matters which warrant the intervention of this Court. They can be dealt with, if the parties desire, by North J.

154 No error of principle has been revealed in the approach of North J or of the Full Court. Accordingly, I would favour an order refusing special leave to appeal with costs. On the other hand, the majority would grant special leave and make orders disposing of the appeal. That being so, I would grant special leave to appeal but dismiss the appeal with costs.

SCHEDULE I

Orders of North J

UPON THE APPLICANTS by their Counsel undertaking to pay to any party adversely affected by the interim injunctions granted by the Court on the motion, notice of which was filed by the Applicants on 14 April 1998, such compensation if any as the Court thinks just, in such manner as the Court directs -

AND UPON THE APPLICANTS by their Counsel further undertaking that until the hearing and determination of this proceeding, or until further order, they will not engage in any industrial action -

AND UPON THE APPLICANTS by their Counsel further undertaking that they will not hold the administrators appointed to the First, Second, Third and Fourth Respondents personally liable for their wages and other benefits arising from their employment with the First, Second, Third and Fourth Respondents for which the administrators would otherwise incur personal liability as administrators during the course of their administration -

In this undertaking "industrial action" does not include action by an employee if:

- (a) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
- (b) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

THE COURT ORDERS THAT:

- 1 Until the hearing and determination of this Application, or further order, the Fifth Respondent, Patrick Stevedores Operations No 2 Pty Ltd, and the Seventeenth Respondent, Patrick Stevedores Operations Pty Ltd, each by itself, its servants and agents, are restrained from acting upon or giving effect to:
 - (a) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the First Respondent, Patrick Stevedores No 1 Pty Ltd;
 - (b) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Second Respondent, Patrick Stevedores No 2 Pty Ltd;

67.

- (c) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Third Respondent, Patrick Stevedores No 3 Pty Ltd;
 - (d) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Fourth Respondent, National Stevedores Tasmania Pty Ltd.
- 2 Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents shall subject to paragraph 4 of these orders:
 - (a) continue to treat the Labour Hire Agreements referred to in paragraphs 1(a) to (d) as remaining on foot and binding upon the parties to those agreements;
 - (b) give effect to the terms of those agreements.
- 3 Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents by themselves, their servants or agents, are restrained from terminating the Labour Hire Agreements referred to in paragraphs 1(a) to (d) for any reason without first giving to the First Applicant 14 days written notice of that intention and the reason for that proposed termination.
- 4 Until the hearing and determination of this proceeding, or further order, the Fifth Respondent and the Seventeenth Respondent, by themselves, their servants or agents, are restrained from acquiring the stevedoring services, which until 7 April 1998 they acquired from the First, Second, Third and Fourth Respondents, from any person other than the First, Second, Third or Fourth Respondents.
- 5 Until the hearing and determination of this proceeding, or further order, the First, Second, Third and Fourth Respondents by themselves, their servants or agents, are restrained from:
 - (a) entering into any agreement, arrangement or other transaction; or
 - (b) taking any action or doing anything;having the effect that the employment of the employees engaged in their stevedoring business is or will be terminated.
- 6 Until the hearing and determination of this proceeding, or further order, the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth,

Fourteenth, Fifteenth, Sixteenth and Seventeenth Respondents, by themselves, their servants and agents, are restrained from:

- (a) entering into any agreement, arrangement or other transaction, or taking any action or doing any thing, having the effect of divesting itself of their assets or undertaking, otherwise than in the ordinary course of business;
- (b) dealing with or otherwise disposing of any of their assets or undertaking otherwise than in the ordinary course of business.

7 Leave is granted to the Applicants to proceed against the First, Second, Third and Fourth Respondents until further order, for the purpose only of further proceedings, if any, relating to the grant of interim relief.

8 The Respondents file and serve their Defences by 12 May 1998.

9 (a) The Applicants and Respondents other than the First to Fourth Respondents are to make discovery to each other of the documents:

- (i) on which they rely in support of their contentions in the proceedings;
- (ii) of which they are aware and which, to a material extent, adversely affect their own case or support the other cases.

(b) Discovery is to be made in four stages as follows:

- (i) Stage 1: 21 April 1998 to 5 May 1998;
- (ii) Stage 2: 6 May 1998 to 12 May 1998;
- (iii) Stage 3: 13 May 1998 to 19 May 1998;
- (iv) Stage 4: 20 May 1998 to 26 May 1998.

(c) At the end of each of the first three stages, each of the said parties are to provide the other parties with an interim list of documents which it has been able to ascertain within that stage, and allow immediate inspection of such documents.

(d) By the end of Stage 4:

- (i) the said parties are to file and serve a consolidated list of all documents necessary to be disclosed under paragraph 9(a), verified by affidavit;

69.

- (ii) provide immediate inspection of the documents disclosed in Stage 4;
 - (iii) file and serve any notice of motion and affidavit in support relating to discovery.
- 10 There be liberty to all parties to apply in relation to the foregoing orders upon 24 hours written notice to all other parties.
- 11 The directions hearing is adjourned to 10.15 am on 28 May 1998.

SCHEDULE II

Applicants for Special Leave

PATRICK STEVEDORES OPERATIONS NO 2 PTY LTD

First Applicant

and

LANG CORPORATION LTD

Second Applicant

and

STRANG PATRICK HOLDINGS PTY LTD

Third Applicant

and

NATIONAL STEVEDORING HOLDINGS PTY LTD

Fourth Applicant

and

PIZEN PTY LTD

Fifth Applicant

and

INTRAVEST PTY LTD

Sixth Applicant

and

CUMBERLANE HOLDINGS PTY LTD

Seventh Applicant

and

EQUITIUS PTY LTD

Eighth Applicant

and

JAMISON EQUITY LTD

Ninth Applicant

and

SERENADE PTY LTD

Tenth Applicant

71.

and

SCARABUS PTY LTD

Eleventh Applicant

and

PATRICK STEVEDORES HOLDINGS PTY LTD

Twelfth Applicant

and

PATRICK STEVEDORES OPERATIONS PTY LTD

Thirteenth Applicant

- 155 CALLINAN J. The applicants, members of a group of companies controlled by Lang Corporation Ltd ("the group") seek special leave to appeal from a decision of the Full Court of the Federal Court given on 23 April 1998, affirming and varying far reaching interim orders made by a single judge of the Federal Court, North J, on 21 April 1998 restraining the applicants from acting upon, or giving effect to, the purported termination by Patrick Stevedores Operations No 2 Pty Ltd ("Patrick Operations") of Labour Supply Agreements ("LSAs") between Patrick Operations and some of its associated companies, the third to sixth respondents, and requiring the reinstatement of those agreements and by them, approximately 1400 workers, represented, in this application by the first respondent, the Maritime Union of Australia ("the MUA").
- 156 That brief outline understates the complexity and reach of the several orders that the Court has to consider. In view of the importance of the matter the Court asked the parties to make their submissions in such a way as to enable the Court to determine the appeal if special leave were granted.
- 157 The originating application was commenced in the Federal Court by the MUA and representatives of the Patrick workforce on 15 April 1998. I will refer to the first and second respondents in this Court for convenience as the MUA. The MUA alleges that the effective dismissal of the workforce by Patrick employers arising out of a complex corporate restructure of the Patrick group in late 1997 contravened the *Workplace Relations Act* 1996 (Cth) ("the *Workplace Relations Act*"), and was the direct and intended result of a conspiracy between the applicants and others.
- 158 On 23 September 1997, Patrick Stevedores No 1 Pty Ltd ("PS1"), Patrick Stevedores No 2 Pty Ltd ("PS2"), Patrick Stevedores No 3 Pty Ltd ("PS3") and National Stevedores Tasmania Pty Ltd ("NST") (collectively "the employers"), owners and operators of container and general cargo facilities at several Australian ports entered into business purchase agreements ("BPAs") with Patrick Operations¹²⁵, for the sale of the business and assets of the employers to Patrick Operations, for approximately \$315 million. The price paid was struck in accordance with a valuation of the Patrick group made by a firm of accountants, Price Waterhouse Corporate Finance in late 1996.
- 159 The employers used part of the proceeds of sale to buy back a substantial proportion of their own shares, and to repay debts. It was not suggested that the buy back of the shares infringed Div 4B of Pt 2.4 of the Corporations Law which authorises buy backs. There is said to be, and the primary judge placed reliance on the existence of, a receivable payable to the employers of approximately \$16 million. The applicants contend (a contention supported by evidence before the

125 Then Patrick Stevedores ESD Pty Ltd.

courts) that a syndicate of banks is owed at least that sum by the group and that a charge in respect of it has now become fixed.

160 The primary judge makes no mention of this last matter. It may be an answer to any suggestion implicit in the judgment at first instance that one or more of the applicants is deliberately withholding a fund now due and owing to the employers which could be paid to them and used to facilitate compliance with the orders made by North J.

161 At this point I should say something about the accounting information which was before the courts below and this Court. Some attempt was made by the MUA to make a case that because the employee companies had made recent profits there was no reason why the businesses of the group should have been reorganised and that it therefore had no legitimate commercial reason for reorganising its affairs. It would be inappropriate to draw such an inference from the incomplete, and to a large extent unexplained financial information before the courts. Nothing was known for example of the internal rate of return of the business of the group or each of its components, whether what was being earned was a fair return, whether it was a comparable return with other, like, or indeed other businesses generally, or what the rights and attitude of the group's bankers were to the group's asset ratios, activities, loans and cashflows. No reliable assessment of the financial rationale for what was done can be made without information of this kind, and perhaps expert commentary upon it.

162 In order to operate the businesses they had now acquired, Patrick Operations entered into LSAs with each employer under which the employers would provide labour and carry out services at, and using the facilities now controlled by Patrick Operations: principally, the conduct and supervision of stevedoring and associated administrative activities.

163 As a result of these arrangements each employer was left with what North J described as its only significant asset: its LSA with Patrick Operations, an agreement terminable immediately by Patrick Operations in the event of interruption to the supply of labour to it.

164 To this effect, each LSA contains cl 13.1 which states in part:

"(a) In the event of a breach of this Agreement by the Contractor (other than a breach of clause 2.3(h)) [Patrick Operations] may give written notice to the Contractor to rectify the breach ('Rectification Notice'). If the breach is not rectified to the reasonable satisfaction of [Patrick Operations] within a 30 day period after a Rectification Notice is given, [Patrick Operations] may terminate this Agreement immediately by giving written notice to the Contractor ('Termination Notice').

- (b) In the event of a breach of clause 2.3(h) of this Agreement [Patrick Operations] may terminate this ~~agreement~~ Agreement immediately."

Clause 2.3(h) of each LSA provides:

"In the performance of the Services, the Contractor will:

...

- (h) ensure that the performance of the Services are not interfered with or delayed or hindered for any reason;"

The applicants refer to several industrial disputes which they say caused the employers to be in breach of the LSAs. The uncontradicted particulars of these are as follows:

In December 1997 industrial action commenced at Webb Docks and East Swanson Dock in Melbourne and default notices pursuant to the LSAs were issued by Patrick Operations to PS1 and PS2. On 9 January 1998 default notices were issued to PS1, PS2 and PS3 pursuant to the LSAs.

On 28 January 1998, PS1 subleased part of Webb Dock Melbourne to PCS Operations ("PCS"). At that time PS2 entered into an equipment hire agreement with PCS Operations and PCS Operations commenced occupation of berth 5 Webb Dock for the purpose of training stevedoring employees. Strike action by the MUA members followed at Webb Dock between 29 January 1998 and 13 February 1998.

A four day strike next occurred at East Swanson Dock Melbourne for the period 16 to 20 February 1998. On 16 February 1998 a further notice of breach of the LSAs was served by Patrick Operations on PS1, PS2 and PS3.

On 11 March 1998 there was industrial action at Port Botany by employees of PS1 and PS2 which lasted for 48 hours and on 11 March 1998 a further notice of the breach of the LSAs was served by Patrick Operations on PS1, PS2 and PS3. Strike action commenced at Port Botany by employees of PS1 and PS2 on 25 March 1998 which continued for seven days.

It may well have been this last event that led Mr Clayton, the director of the employer companies, to write a letter dated 17 March 1998 to each of the workers to make them personally aware, if they did not already know, that the employers were "being drawn into a serious commercial situation by the actions of [their] unions". The letter made clear that contractual arrangements were under severe strain and threat, and breaches had already occurred:

75.

"Let me assure you that the contractual arrangements we need for our current and future existence are under severe strain and threat."

In the same letter this was also written:

"The campaign being waged against the company by the unions and, in turn, its employees have already put the company in breach of its contractual obligations and caused significant loss and damage. It seems likely to be escalated and will cause us further damage. I urge you to think very seriously about the consequences of the irresponsible vendetta embarked upon by the union. It is the company and not the union who has to find the funds to keep your needs intact. At the end of the day, the matter is entirely in your own hands and it is time to think of your own future needs."

An exchange of correspondence followed in which the MUA stressed its entitlement to information bearing upon the possible effect upon the workforce of changes in production, program, organisation, structure or technology pursuant to cl 43¹²⁶ of the relevant award. Assuming, as seems likely, that what occurred in

126 Clause 43 of the *Stevedoring Industry Award* 1991 provides:

"Employers' duty to notify

- (a) (i) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and their union or unions.
- (ii) 'Significant effects' includes termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure, the alteration of hours of work, the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

Employers' duty to discuss change

- (b) (i) The employer shall discuss with the employees affected and their union or unions, inter alia, the introduction of the changes referred to in subclause (a) hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union or unions in relation to the changes.

(Footnote continues on next page)

September 1997 was a change within the meaning of the award, the employers should have provided information of the substance and effect of the LSAs. It is not however a question which needs to be resolved now whether the letter of 17 March provided nearly enough information of the kind which cl 43 of the award requires.

165 The applicants' complaint of, and responses to, the industrial dispute then continue:

On 30 March 1998 Mr Clayton wrote to Patrick Stevedore Holdings advising of his inability to rectify the breaches of the LSA and requesting continuation of funding from Patrick Stevedore Holdings to pay salaries to employees. There was further industrial action at Fishermans Islands and Maritime Wharves by employees of PS1 and PS2 for the period 3 to 6 April 1998.

The respondents then filed a notice of motion on 6 April 1998 seeking orders to prevent the dismissal of the employees of PS1, PS2, PS3 and NST. Strike action commenced at Port Botany on 7 April 1998 by employees of PS1 and PS2 which lasted for seven days.

On 7 April 1998, the directors of Patrick Operations resolved to terminate the LSAs with PS1, PS2 and PS3 and not to continue to meet the obligations of those companies. Notice of termination was served at approximately 4pm that day.

166 North J at first instance referred to reasons given by Mr William Hara, a deponent on behalf of the applicants for the corporate restructure:

"The corporate counsel of Lang Corporation Ltd deposed to the reasons for the restructure, which involved the making of the BPAs and LSAs, the share buybacks and debt repayments. The reasons were to avoid customer confusion, confusion as to which entity owned which assets, to allow better performance monitoring and to allow borrowing at better rates. There is no express denial that a reason for undertaking the restructure in this particular way was to facilitate the termination of the employee's employment."

-
- (ii) The discussion shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in subclause (a) hereof.
 - (iii) For the purposes of such discussion, the employer shall provide in writing to the employees concerned and their union or unions, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that an employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's (sic)."

His Honour also referred to the consequences of the exercise by Patrick Operations on 7 April 1998 of its right to terminate the LSAs:

"That action meant that the employers had lost their only significant asset, were rendered insolvent, and thereby provided the ground for the employers to appoint administrators. On the same day, [Patrick Operations] entered into a number of contracts for the provision of labour by a new workforce."

I interpolate that what his Honour described as a significant asset, each LSA, could only be significant, if, and to the extent that it could and would be performed according to its tenor and that of course required an uninterrupted supply of labour. Even then the asset would only be significant if the contracts were productive of profits.

167 An administrator was appointed to the employers under Pt 5.3A of the Corporations Law during the course of the evening of 7 April 1998.

168 The interim relief sought by the MUA resulted in orders in the following terms, as varied by the Full Court of the Federal Court:

- "1. Until the hearing and determination of this Application, or further order, the Fifth Respondent, Patrick Stevedores Operations No 2 Pty Ltd, and the Seventeenth Respondent, Patrick Stevedores Operations Pty Ltd, each by itself, its servants and agents, are restrained from acting upon or giving effect to:
 - (a) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the First Respondent, Patrick Stevedores No 1 Pty Ltd;
 - (b) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Second Respondent, Patrick Stevedores No 2 Pty Ltd;
 - (c) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Third Respondent, Patrick Stevedores No 3 Pty Ltd;
 - (d) its purported termination of the Labour Supply Agreement made on 23 September 1997 between it and the Fourth Respondent, National Stevedores Tasmania Pty Ltd;
2. Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents shall subject to paragraph 4 of these orders:

- (a) continue to treat the Labour Hire Agreements referred to in paragraphs 1(a) to (d) as remaining on foot and binding upon the parties to those agreements;
 - (b) give effect to the terms of those agreements.
- 3. Until the hearing and determination of this Application, or further order, the First, Second, Third, Fourth, Fifth and Seventeenth Respondents by themselves, their servants or agents, are restrained from terminating the Labour Hire Agreements referred to in paragraphs 1(a) to (d) for any reason without first giving to the First Applicant 14 days written notice of that intention and the reason for that proposed termination.
- 4. Until the hearing and determination of this proceeding, or further order, the Fifth Respondent and the Seventeenth Respondent, by themselves, their servants or agents, are restrained from acquiring the stevedoring services, which until 7 April 1998 they acquired from the First, Second, Third and Fourth Respondents, from any person other than the First, Second, Third or Fourth Respondents.
- 5. Until the hearing and determination of this proceeding, or further order, the First, Second, Third and Fourth Respondents by themselves, their servants or agents, are restrained from:
 - (a) entering into any agreement, arrangement or other transaction; or
 - (b) taking any action or doing anything;having the effect that the employment of the employees engaged in their stevedoring business is or will be terminated.
- 6. Until the hearing and determination of this proceeding, or further order, the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Sixteenth and Seventeenth Respondents, by themselves, their servants or agents, are restrained from:
 - (a) entering into any agreement, arrangement or other transaction, or taking any action or doing any thing, having the effect of divesting itself of their assets or undertaking, otherwise than in the ordinary course of business;
 - (b) dealing with or otherwise disposing of any of their assets or undertaking otherwise than in the ordinary course of business."

Orders 7 to 11 are not relevant to this application.

169 The orders (1 to 6) are of breathtaking reach. No case was cited to the Court in which orders of such breadth had been made in any jurisdiction.

170 Undertakings were given by the first and second respondents in respect of those orders:

- (i) to pay to any party adversely affected by the interim injunctions such compensation as the Court sees fit;
- (ii) not to engage in any industrial action (as defined by the *Workplace Relations Act* by paragraphs (a) to (d) of the definition of that term in s 4 of the Act) except where based on reasonable concerns by the employee about an imminent risk to health and safety, and where an employee does not unreasonably fail to comply with a direction of the employer to perform other available work; and
- (iii) not to hold the administrators appointed to the employers personally liable for the wages and other benefits payable to the employees.

The principles governing the determination of applications for interlocutory injunctions are well established. First, the Court must decide whether there is a serious question to be tried. If the answer to that question is an affirmative one, then the Court must consider whether the balance of convenience favours the grant of the relief sought. Sometimes interim injunctions and interlocutory injunctions are spoken of as if they are interchangeable terms. The former is more appropriately used in the case of an injunction granted for a finite period usually brief and sometimes ex parte. The latter is usually granted to preserve the status quo pending trial. The *Workplace Relations Act* in one of the sections (s 298U(e)) with which the Court is concerned, uses the term "interim injunction", and it is not clear in which sense the Act uses it.

171 North J found that there were three serious issues to be tried:

- (i) whether the BPAs and LSAs or the appointment of administrators injured the employees or altered the employees' position to their prejudice;
- (ii) whether one reason for the corporate restructure of the Patrick group, the resulting BPAs and LSAs and the appointment of administrators was to dismiss the MUA workforce because they were members of a union; and
- (iii) whether there was a scheme, involving Patrick Operations, the employers and others to dismiss the workforce in contravention of s 298K(1) of the *Workplace Relations Act*.

Section 298K(1) provides:

"An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee's prejudice;
- (d) refuse to employ another person;
- (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person."

The section, it will be noted, proscribes conduct undertaken in part only for a reason which is prohibited, and by s 298L(1)(a) a prohibited reason includes the employee's past, present or proposed membership of a union. Furthermore, s 298V¹²⁷ of the *Workplace Relations Act* raises a rebuttable presumption against the employers which the primary judge was entitled to take into account in assessing the strength of the MUAs case on an interim or an interlocutory application.

172 In respect of evidence put before his Honour on these matters, North J said:

"As the evidence presently stands, it is arguable that the Patrick group, including the employers and [Patrick Operations], were dissatisfied with the Union and its approach to waterfront reform. The Patrick group wanted to achieve wholesale change to their workforce and to reduce award conditions. They had a number of meetings with the Minister for Workplace Relations [the eighteenth respondent].

...

127 "If:

- (a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
- (b) for the person or industrial association to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise."

On the present state of the evidence, I can infer that the question of replacing the Union workforce of the employers was discussed [at a meeting with the Minister on 12 March 1997]. Further, the evidence suggests that Mr Corrigan, [the seventh respondent], the Chief Executive Officer of Lang Corporation Ltd, had a role in facilitating the training of a new waterfront workforce in Dubai. At about the same time in September [1997], the BPAs and LSAs were concluded. ... The LSAs made it easier for the employers to terminate the workforce. If the LSA was terminated, the employers' only significant asset was gone. There was a clear case of redundancy and the Australian Industrial Relations Commission would not have reinstated the employees. But [Patrick Operations] could continue the existing business with a new workforce. Before the BPAs and LSAs, if the employers had terminated the workforce and attempted to continue the business with a new workforce, the old workforce could have applied successfully to the Australian Industrial Relations Commission for reinstatement because there would have been no redundancy to justify the terminations. ... The reasons given [by the corporate counsel of Lang Corporation for the restructure in September 1997 and quoted above] do not explain why clause 13.1(b) of each LSA took the particular form [it did]. Furthermore, the reasons given are not inconsistent with the reason alleged by the [first and second respondents]. Section 298K(1) requires the prohibited reason to be one reason, but not the only reason. In my view, there is a serious question to be tried that one reason why the employers made the BPAs and LSAs in the form they took and the reason why they appointed the administrators was because the employees were members of the Union, and the employers wanted to dismiss them to replace them with a non-Union workforce."

Conscious of the authorities establishing the relatively low factual threshold test applicable to the grant of interim and interlocutory injunctions, and, no doubt, the effect of ss 298L and 298V of the *Workplace Relations Act*, the applicants accepted that they could not at this stage challenge those findings. As to the question of balance of convenience his Honour said:

"In respect of the balance of convenience, the case raised a large number of matters. ... In the end, the assessment of the relative weight of the factors is a matter of judgment. It is a balancing exercise. After reflection, I have formed a clear view that the balance is in favour of granting the injunctions sought. The judgment is based, in part, ... upon my assessment of Mr Butterell in the witness box in relation to his future role in the administration of the employers. Although I favour the approach to the grant of interlocutory mandatory injunctions expressed by Gummow J in *Business World Computers Pty Ltd v Australian Telecommunications Commission*¹²⁸, I have reached the 'high degree of assurance' referred to in *Queensland v*

128 (1988) 82 ALR 499.

*Australian Telecommunications Commission*¹²⁹ which the [applicants] argued should govern the approach to the grant of such injunctions."

His Honour was, it seems, able to reach this high degree of assurance notwithstanding the administrator's apparent absence of experience in managing a large stevedoring workforce on a daily basis and absence of experience in the industry generally. He was no doubt influenced by the responsible approach to their obligations in these proceedings that the administrators have taken, and their experience as liquidators and receivers generally. His Honour pointed to circumstances favouring the grant of interim relief as including:

- (i) the first and second respondents' claim is an attempt to vindicate the rights of employees to earn a living free of victimisation and not a commercial dispute about money;
- (ii) The *Workplace Relations Act*, pursuant to s 298U(b), provides for reinstatement as a remedy for breach of s 298K;
- (iii) The irreversible nature of the changes that would result from the employees' absence from the workplace if interim relief were not granted;
- (iv) The first and second respondents' undertakings; and
- (v) The presence of the administrators, thereby placing the employers in the hands of a neutral independent person.

Within hours of that decision an appeal was lodged in the ~~Full Federal Court~~Full Court of the Federal Court and a stay obtained on three of his Honour's orders until the determination of the appeal: orders 1 and 2 which require Patrick Operations and the employers to treat as operative the LSAs, and order 4 which precludes Patrick Operations from using personnel supplied by others.

- 173 The ~~Full Federal Court~~Full Court of the Federal Court (Wilcox, von Doussa and Finkelstein JJ) unanimously rejected the applicants' appeal. In their reasons for judgment, their Honours said:

"it is appropriate to say we have read, and carefully considered, the whole of North J's reasons for judgment but we find them free from appellable error. In relation to the first issue he had to confront, whether there was a serious question to be tried in respect of the claims made by the applicants, the MUA and employees, his Honour's reasoning is tightly structured and compelling. Significantly, it has not been subjected to serious attack before us. In relation to the second issue, the proper discretionary order to be made, having regard

129 (1985) 59 ALR 243 at 245.

to the overall balance of convenience, the question for us is not whether we would have ascribed the same weight to each element as his Honour, or even come to the same overall conclusion, but whether his Honour erred in law or in the application of legal principle, failed to take into real account a proper matter for his consideration, took into account some extraneous matter or reached a decision so extraordinary that it must be concluded his discretion miscarried."

In the ~~Full Federal Court~~ Full Court of the Federal Court the applicants contended that the interim orders, in the terms in which they were made, were beyond the remedial powers conferred by s 298U of the *Workplace Relations Act* and s 23 of the *Federal Court of Australia Act 1976* (Cth) ("the *Federal Court Act*") in their application to Patrick Operations (as distinct from the employers).

174 Secondly, they contended that the orders were an improper exercise of the discretionary powers to grant interim injunctions.

175 As to the applicants' first ground, the Full Court of the Federal Court found that it was highly doubtful that s 298U of the *Workplace Relations Act* authorised the orders made by North J against Patrick Operations because the provisions of the *Workplace Relations Act* did not extend to the making of orders that affected the agents of, or impose duties on, persons other than the employer¹³⁰. In my opinion the operation of s 298U is confined to remedies against an employer only.

176 Their Honours then went on to hold however that the orders fell within the jurisdiction conferred by s 23 of the *Federal Court Act* which provides:

"The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or to direct the issue of, writs of such kinds, as the Court thinks appropriate."

Their Honours were of the opinion that orders of the kind in question were "appropriate" in the sense in which Deane J discussed that concept in *Jackson v Sterling Industries Ltd*¹³¹:

"Section 23 of the *Federal Court of Australia Act 1976* (Cth) confers upon the Federal Court a broad power to make orders of such kinds, including interlocutory orders, as it 'thinks appropriate'. Wide though that power is, it is subject to both jurisdictional and other limits. It exists only 'in relation to matters' in respect of which jurisdiction has been conferred upon the Federal Court. Even in relation to such matters, the power is restricted to the making

130 cf *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354 per Gibbs J.

131 (1987) 162 CLR 612 at 622.

of the 'kinds' of order, whether final or interlocutory, which are capable of properly being seen as 'appropriate' to be made by the Federal Court in the exercise of its jurisdiction."

In the Full Court of the Federal Court their Honours said:

"What is 'appropriate' in this case, in relation to the Patrick operators? The answer must have regard to the case made against them. If an order has the effect, or may have the effect, of preventing or mitigating the harm that will or may be suffered by an applicant as a result of alleged wrongful behaviour of a particular person, it is an 'appropriate' order, within the language used by Deane J. In other words, there must be a relationship between the alleged wrong, the likely damage and the effect of the order.

In the present case one wrong alleged against the Patrick operators, and found to raise a serious question for trial, is that those companies conspired with the employer companies to restructure members of the Patrick group of companies in such a way as to enable the employers to breach s 298K(1) of the *Workplace Relations Act*. Orders 1, 2 and 4 are designed to prevent that result occurring.

It is true, as counsel for Patrick observe, that damages are the relief usually awarded in conspiracy cases. But that is probably because, in most cases, by the time the court is able to deal with the case irreparable harm has already been sustained; in which case no injunction will be useful. If it should happen that an applicant gets to court before irreparable damage has been suffered, there seems to be no reason in principle why the court should not grant injunctive relief to prevent or mitigate the threatened damage. It is true that conspiracy is a tort developed by the common law and that the injunction is a remedy fashioned in the Courts of Equity. But it is now over 100 years since the fusion of law and equity has enabled courts to use equitable remedies in aid of common law proceedings and it has become commonplace for them to do so; for example, to restrain a trespass.

It seems to us the only thing that needs to be considered in relation to the Court's power to issue injunctions against Patrick operators, including mandatory injunctions such as orders 2 and 4, is whether it is interim relief related to wrongful conduct alleged against those respondents (the conspiracy) and fairly calculated to prevent or mitigate harm to the applicants from that wrongful conduct. Upon the basis of the tentative findings of North J, which are not challenged before us, that question must be answered affirmatively.

The orders will have the tendency to provide stevedoring business, and therefore income, to the Patrick employers, thereby enabling them to continue to employ the employees. That result will, in turn, have the effect

of precluding the Patrick employers from justifying termination of the services of the employees on the basis that they are redundant. In short, the orders will have the tendency to frustrate achievement of the objects of the conspiracy, involving the Patrick operators, about whose existence North J was satisfied there was a serious issue for trial.

In our view, there is no problem about the power of the Court to make all the orders under challenge."

With respect to their Honours it is open to question whether the resurrection of the LSAs would have a tendency to provide, let alone would be, such a sufficient source of income as would enable the employers to continue to employ the employees. To answer this question with any confidence would require access to, and careful consideration of, not only the business and financial records of the employers in the past, but also a careful and realistic consideration of the employers' business prospects for the future. Counsel for the administrators made it plain in his submissions to this court that the employers could not even recommence business without a substantial injection of capital. Ordinarily of course, the conduct of a business by an administrator of a company will be a relatively short term activity.

177 The applicants further argued in the appeal to the ~~Full Federal Court~~Full Court of the Federal Court that because the orders required Patrick Operations to accept labour from the Patrick employers, the injunctions required the specific performance of the LSAs, contrary to the principle that specific performance of a contract for personal services will not be granted¹³². The Full Court rejected this argument:

"Here the relevant order is one by which the Patrick operators are restrained from giving effect to the purported termination of the [LSAs]. As was pointed out by Yeldham J in *Sanderson Motors (Sales) v Yorkstar Motors Pty Ltd*¹³³ such an order might be made notwithstanding the fact that a court might not order specific performance of the agreement whose termination is to be restrained. The rights and obligations of the parties to the [LSAs] are not being supervised by the Court. They are regulated by the terms and conditions of the [LSAs] themselves.

Moreover, having regard to the provisions of the *Workplace Relations Act 1996* it should not be assumed that the principles expressed in cases such as

132 *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282; *Co-operative Insurance Society v Argyll Stores Ltd* [1998] AC 1.

133 [1983] 1 NSWLR 513.

*JC Williamson*¹³⁴ ... and *Argyll*¹³⁵ ... have application to contracts of employment regulated by that Act. For example, the Act contemplates the reinstatement of a wrongfully dismissed employee. When the legislation contemplates relief of that type then there is no reason why interlocutory relief which may have the same practical effect should not be available to an employee whose rights have been arguably unlawfully infringed.

Quite apart from our own views on this aspect of the case, it is clear that North J gave detailed consideration to this very question. He pointed out, quite correctly in our opinion, that if any difficulty arises from the operation of the injunction the party affected can return to the Court to apply for a variation of the injunction. We do not apprehend any error in his Honour's approach to the problem. Moreover, we are firmly of the view that if the parties behave in a fashion which accords with common sense and displays some element of good will then there should be no difficulty with the practical operations of the [LSAs]. If we are wrong in this belief then the Court is well able to remedy any problem at short notice."

Mr Gyles QC who appears for Patrick Operations in this Court, submits that the *Workplace Relations Act* creates a complete and special regime with respect to obligations, rights and remedies for breach of it and that the remedies for which it makes provision are in no way enlarged by s 23 of the *Federal Court Act*.

178 Division 3 of Pt VIA of the *Workplace Relations Act* is the part that deals with termination of employment. The point was made that s 170CFA(2)(b) and (d), and s 170CP refer to an "alleged contravention" to draw a distinction between that expression, and "contravention", a term used elsewhere in the Act.

179 Within the meaning of s 298K(1), a threat itself may be a contravention. And, quite obviously, a threat to dismiss an employee might well be productive of disadvantage to that employee or other employees, such as, for example, submission to an implicit demand for longer working hours or participation in onerous or dangerous work practices.

180 Section 298T uses the term "contravention" as does s 298U. Section 298V, speaks in terms, for its operation, of a contravention as opposed to an alleged contravention. Section 298U(e) empowers the court to grant an interim injunction to stop the conduct or remedy its effect. The last phrase "remedy its effects" strongly implies, it was put, that before an injunction, including an interim

134 (1931) 45 CLR 282.

135 *Co-operative Insurance Society v Argyll Stores Ltd* [1996] 3 WLR 27 (CA).

injunction (in whatever sense that expression is used) may be granted, there must be an actual contravention, and not a prima facie or arguable case for one.

181 With respect neither to the argument that no injunction may be granted until an actual contravention is found nor to the argument that the orders were authorised by s 23 of the *Federal Court Act* do I express any opinion as I would decide the case on different bases.

182 Indeed, as will appear, I expressly refrain from deciding points not essential to my decision. The application the subject of the appeal is an interlocutory one. The matter is urgent. There are no concluded findings of fact. On a trial, matters may bear an entirely different complexion. The allegations are grave ones and to be made out, will require clear and cogent proof.

183 It is true however that the reasoning in the cases relied on by the applicants: *Downey v Trans Waste Pty Ltd*¹³⁶, *Thomson Australian Holdings Pty Ltd v Trade Practices Commission*¹³⁷, *Jackson-v Sterling Industries*¹³⁸ and *Ascot Industries Pty Ltd v Harper*¹³⁹ with respect to other and apparently similarly exhaustive provisions, lend some weight to the applicants' argument.

184 Courts should, in my opinion, be cautious in making orders based on special legislation relating to parties of a particular status or in a particular relationship, binding upon persons or corporations not having the requisite status or not being in the relevant relationship. Clear language intending that such special legislation should or may have that reach would usually be required. One reason why this is so is because special legislation (for example, the *Family Law Act* 1975 (Cth) and this Act, the *Workplace Relations Act*) usually confers extraordinary and especially focussed powers to deal with situations arising out of the status or particular relationship. Another reason is that it may not always be possible to determine what impact orders may have upon those who in turn have obligations to, or rights in respect of, legal personalities not having the requisite status or relationship, but bound by the orders. Each of these considerations is however subject to the proposition stated by Gibbs J in relation to the operation of the *Federal Court Act* in *Ascot*¹⁴⁰:

¹³⁶ (1991) 172 CLR 167 at 171-172 per Mason CJ, Deane, Gaudron and McHugh JJ and 180-182 per Dawson J.

¹³⁷ (1981) 148 CLR 150 at 161-162 per Gibbs CJ, Stephen, Mason and Wilson JJ.

¹³⁸ (1987) 162 CLR 612 at 622 per Deane J.

¹³⁹ (1981) 148 CLR 337.

¹⁴⁰ (1981) 148 CLR 337 at 354-355.

"The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it."

The extent to which another provision of another statute (s 23 of the *Federal Court Act*) may be called in aid of the operation of the special statute here (the *Workplace Relations Act*) in a case in which conspiracy is alleged and relief under the latter act is sought, raises a further question which I do not need to answer in this case.

185 In substance, the applicants² contend that the orders should not have been made for a number of reasons, some of which overlap. I have already touched upon these in part. They include:

- (i) the orders are made in respect of the implementation of a tort (of conspiracy), which is, if proved, complete: an injunction in these circumstances, assuming it to be available anyway in respect of a conspiracy, should not be granted here;
- (ii) the orders purport to bind persons and corporations who were not employers at any time and to require them to enter into effectively new arrangements with the employer companies;
- (iii) the fourth order might not be made as a final order and could not be undone if and when the case is finally disposed of: its purpose is simply to impose economic duress upon the applicants;
- (iv) the orders for their operation depend upon the performance of undertakings designed to cure, or in some way make lawful, what would otherwise be unlawful: the carrying on of the business of the employer companies when they are, or may be, insolvent, and the employment of labour upon a basis contrary to the relevant award and the *Workplace Relations Act*;
- (v) that for their operation the orders require the supervision on a regular basis of the activities of the parties in the carrying on of business or, as it was otherwise put in argument, the orders are so uncertain in effect that it would not be practicable for a court to supervise their operation;
- (vi) the orders were made in breach of a fundamental rule that preservation of the status quo was all that a court should order in granting an interlocutory injunction: the stevedoring companies, indeed the employer companies were

never confined to using the workers who were the represented applicants in the original proceedings;

- (vii) the orders were so uncertain that the parties bound by them could not know precisely what they must do to satisfy them; so too the court would be left in doubt in the future whether a contempt may have been committed;
- (viii) the more serious the conduct (the conspiracy) is alleged to be, the greater will be the need for assurance as to the necessity for and precision of the orders;
- (ix) if the applicants in these proceedings succeed at the trial, restoration to their previous position will be impossible;
- (x) the orders purport to impose upon the administrators of the employer companies, obligations at variance with their obligations under the Corporations Law¹⁴¹;
- (xi) the orders have the capacity to, and are likely to affect adversely the rights of third parties, such as bankers and other creditors;
- (xii) the trial judge made a finding of insolvency of the employer companies: to require them to continue or resume operations would be to require them to trade, in breach of the Corporations Law, whilst they are insolvent;
- (xiii) compliance with the orders is likely to be detrimental to the MUA because the reality is that the regime contemplated by the orders will be a deterrent to those who might otherwise deal with the applicants and provide a source of funds to the employers to pay the employees.

There is varying strength in all of these submissions, and some authority to support most of them¹⁴¹.

186 However, the raising of strongly arguable defences by a respondent to an application for an interlocutory injunction will not ordinarily be enough for the respondent to defeat the application. That flows from the principle that all the applicant need show in the first instance is that there is a serious question to be tried, although the strength of the defences may bear upon the issue of the balance of convenience because the two conditions which an applicant must satisfy are not always capable of discrete treatment. For the purposes of the application and appeal to this Court I will proceed upon the basis that the applicants to this Court

¹⁴¹ See the discussion of defences to applications for interlocutory injunctions in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992), at [2174].

must actually make out a complete answer to the contention that the interlocutory orders and injunctions were properly made and granted.

187 It is a matter of concern that interlocutory mandatory injunctions were sought in respect of an alleged conspiracy, which is, on one view already complete. Cases in which such an injunction will be granted will be rare. *Gulf Oil Ltd v Page*¹⁴², which was relied upon by the MUA depends upon its own facts, is distinguishable, and provides no support for the orders made here. The injunction granted was a negative injunction. The defendants' threatened activities were to be carried out pursuant to a conspiracy to injure the plaintiffs by inflicting the maximum possible damage on them in revenge for financial reverses that the defendants had suffered. Sir Nicolas Browne-Wilkinson V-C, a member of the Court of Appeal which decided the case, was to describe its facts subsequently as "bizarre" in *Femis-Bank Ltd v Lazar*¹⁴³. Even though the facts in *Femis* were of an unusual kind and a negative injunction only was sought to restrain a defamatory publication pursuant to an alleged conspiracy, his Lordship, in the exercise of his discretion refused to grant the relief claimed.

188 The only other case cited on this point, *British Motor Trade Association v Salvadori*¹⁴⁴ is also a case in which the injunction granted was a negative one, and, on examination, it can be seen that the relief was then only granted by way of final relief after the proof of the conspiracy and breach of contract.

189 However I am prepared to proceed upon the basis, without deciding it to be so, that mandatory interlocutory injunctions are potentially available in the case of a conspiracy said to be incomplete.

190 In my opinion one matter that is immediately fatal to the challenged orders is that, for their operation, involving commercial dealings and business decisions on a day to day basis, there can be no certainty as to the way in which they can be carried out. They necessarily involve commercial considerations and decisions with respect to which even the best informed, and most well intentioned commercial minds might differ. Indeed, as the debate proceeded before the Court, it became apparent that further applications to the Federal Court with respect to these matters if the orders stood and were to operate until trial would be inevitable. At one point in his submissions, Mr Burnside QC who appeared for the MUA, referred to a possibility that following a reinstatement of his clients, if there were

142 [1987] Ch 327.

143 [1991] Ch 391 at 399.

144 [1949] Ch 556.

found to be a surplus of workers, application might be made to North-J for permission to dismiss some workers.

191 In *Co-operative Insurance v Argyll Stores Ltd*¹⁴⁵ the House of Lords allowed an appeal against an order for specific performance requiring a tenant in a shopping centre to re-open an unprofitable supermarket which it had, contrary to the terms of the lease, closed down. The matters which influenced their Lordships were similar to some which arise for consideration here: the difficulty of drawing up a sufficiently precise order to avoid further litigation and applications to the court; and that the losses to the defendants might far exceed the losses or disadvantages to the plaintiffs, a situation likely to give the plaintiffs an unjust and disproportionate bargaining position (in other words, an ability to impose economic duress). It is right to observe that the situation which the orders granted here create could well have a tendency to impose economic duress upon parties other than the employer parties.

192 In *Argyll*, Lord Hoffmann (with whom Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Hope of Craighead and Lord Clyde agreed) said¹⁴⁶:

" Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy. By contrast, in countries with legal systems based on civil law, such as France, Germany and Scotland, the plaintiff is *prima facie* entitled to specific performance. The cases in which he is confined to a claim for damages are regarded as the exceptions. In practice, however, there is less difference between common law and civilian systems than these general statements might lead one to suppose. The principles upon which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but *a priori* I would expect that judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case.

145 [1998] AC 1.

146 [1998] AC 1 at 11-13.

The practice of not ordering a defendant to carry on a business is not entirely dependent upon damages being an adequate remedy. In *Dowty Boulton Paul Ltd v Wolverhampton Corporation*¹⁴⁷, ... Sir John Pennycuick V-C refused to order the corporation to maintain an airfield as a going concern because: ... 'It is very well established that the court will not order specific performance of an obligation to carry on a business'. He added: 'it is unnecessary in the circumstances to discuss whether damages would be an adequate remedy to the company'¹⁴⁸ ... Thus the reasons which underlie the established practice may justify a refusal of specific performance even when damages are not an adequate remedy.

The most frequent reason given in the cases for declining to order someone to carry on a business is that it would require constant supervision by the court. In *JC Williamson Ltd v Lukey and Mulholland*¹⁴⁹ ... Dixon J said flatly: 'Specific performance is inapplicable when the continued supervision of the court is necessary in order to ensure the fulfillment of the contract.'

There has, I think, been some misunderstanding about what is meant by continued superintendence. It may at first sight suggest that the judge (or some other officer of the court) would literally have to supervise the execution of the order. In *CH Giles & Co Ltd v Morris*¹⁵⁰ ... Megarry J said that 'difficulties of constant superintendence' were a 'narrow consideration' because:

'there is normally no question of the court having to send its officers to supervise the performance of the order ... Performance ... is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court; ...'

This is, of course, true but does not really meet the point. The judges who have said that the need for constant supervision was an objection to such orders were no doubt well aware that supervision would in practice take the form of rulings by the court, on applications made by the parties, as to whether there had been a breach of the order. It is the possibility of the court

147 [1971] 1 WLR 204 at 211; [1971] 2 All ER 277 at 284.

148 [1971] 1 WLR 204 at 212; [1971] 2 All ER 277 at 284.

149 (1931) 45 CLR 282 at 297-298.

150 [1972] 1 WLR 307 at 318; [1972] 1 All ER 960 at 969.

having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable.

Why should this be so? A principle reason is that, as Megarry J pointed out in the passage to which I have referred, the only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. This is a powerful weapon; so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order. The heavy-handed nature of the enforcement mechanism is a consideration which may go to the exercise of the court's discretion in other cases as well, but its use to compel the running of a business is perhaps the paradigm case of its disadvantages and it is in this context that I shall discuss them.

The prospect of committal or even a fine, with the damage to commercial reputation which will be caused by a finding of contempt of court, is likely to have at least two undesirable consequences. First, the defendant, who ex hypothesi did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of Damocles which may descend if the way the business is run does not conform to the terms of the order. This is, as one might say, no way to run a business. In this case the Court of Appeal made light of the point because it assumed that, once the defendant had been ordered to run the business, self-interest and compliance with the order would thereafter go hand in hand. But, as I shall explain, this is not necessarily true."

I respectfully agree with what his Lordship said. I would only add these observations which may well be implicit in his Lordship's remarks. There are sound reasons of public policy why courts should not make orders requiring the carrying on of businesses. Business affairs require mutuality in dealings. The pressure upon courts today is heavy. The role of the courts is the adjudication of cases, not the making, under the guise of supervisory orders, of de facto business decisions.

193 Business presents problems with which courts are generally not equipped to deal. A decision which turns out to be a wrong one, or an unfortunate course of action in relation to a commercial activity forced upon a business person by an order of the court, may have a tendency to bring the court into disrepute.

194 Although his Lordship's observations were made in a case of specific performance, they are equally apposite, probably more so, to cases of interim or interlocutory injunctions of the kind granted here which not only purport to insist upon a return to past contractual dealings, but also purport to order what is effectively the creation and continued operation of new ones. It is obvious that the practical effect of the orders will be to compel the employers to employ only their

current workforce (comprised almost exclusively of MUA members), to change and restrict the operation of cll 2.3(h) and 13.3¹⁵¹ of the LSAs, to compel the applicants to give notice to the MUA when formerly the MUA had no contractual relationship with Patrick Operations, and to preclude the employers from using, for stevedoring tasks previously undertaken by MUA labour, non-union labour that they might be disposed to employ. There is a further difficulty in the way of the operation of the orders of the kind referred to by Dixon J in *JC Williamson Ltd v Lukey and Mulholland*¹⁵²:

"Probably the true rule is that an injunction should not be granted which compels, in substance, the defendant to perform his side of the agreement when the continuance of his obligation to do so depends upon the future conduct of the plaintiff in observing conditions to be fulfilled by him."

In this case, the continuance of obligations of the applicants, pursuant to the orders, would depend upon the future conduct of the first and second respondents in observing the undertakings given by them and generally their performance on a daily basis in the workplace.

195 In *Bethlehem Engineering Export Co v Christie*¹⁵³, Learned Hand J (with whom Augustus Hand and Chase JJ agreed) discussed decrees of specific performance and injunctions going to the performance of obligations which might be affected by the activities of third parties. Other considerations were relevant there, but some observations of his Honour are pertinent to this case, especially the reference to interwoven performances¹⁵⁴:

"Every reason which makes a specific performance of the defendants' obligation impracticable applies equally to an injunction conditional on the plaintiff's performance, since the two performances are so mutually interwoven. It may be asked why the same reasoning does not apply to cases in which a principal obtains an injunction against an agent, or an employer against an employee. So it must, if the principal's performance is a condition

151 "Termination in other Circumstances

If an application is made to wind up either party, voluntarily or otherwise, or a receiver, receiver and manager, liquidator, administrator or controller (as defined in the Corporations Law) is appointed over any assets of either party, this Agreement ~~will~~ terminate immediately."

152 (1931) 45 CLR 282 at 299.

153 (1939) 105 F 2d 933.

154 (1939) 105 F 2d 933 at 935.

upon the agent's obligation, and is of a kind which demands the continuous or repeated supervision of a court."

Some of the observations of Isaacs and Rich JJ in *Packenhams Upper Fruit Co Ltd v Crosby*¹⁵⁵ are also apposite here. Dealing with applications for injunctions and a decree of specific performance in respect of a contract allegedly constituted by the membership and articles of association of a co-operative between the members and the co-operative, their Honours said¹⁵⁶:

" Now, assuming, as this judgment does for the purpose of argument, that, notwithstanding this vague and uncertain result, there exists technically a valid binding agreement to run all the risk mentioned, it seems unarguable that the Court should by a process of equitable interposition, discretionary in the sense of doing what is nearest to justice in the circumstances and nothing highly unreasonable¹⁵⁷, ... compel the grower, at the peril of imprisonment, to observe as well as he thinks he can the tortuous scheme framed by the regulations.

Consequently the relief by way of 'specific performance,' as it is termed, which implies ordering the respondent to do something, is inappropriate."

The scheme contemplated by the orders made by North J in this case is an elaborate, if not to say tortuous one, and depends upon many imponderables. On that account also, attempts to implement it are likely to lead to numerous undesirable attempts to invite the court to intervene to solve what are in truth, industrial and business problems, and to impose arrangements which really require mutuality.

196 It is obvious that the Court is likely to become enmeshed in the business of the parties if the orders stand. For example, on an application for permission to dismiss some of the workforce (an application which Mr Burnside QC for the MUA foreshadowed as a possibility) the Federal Court would, no doubt, be faced with arguments whether the number to be dismissed was the right number, which employees should be dismissed, whether, if the business had been conducted differently that number, or some lesser number, should be dismissed, and whether bad business decisions or the actions of the applicants or strangers led to the need for a reduced workforce, all matters of day to day business judgment. That the supervising judge might be able to refer some aspects only of such a controversy

¹⁵⁵ (1924) 35 CLR 386.

¹⁵⁶ (1924) 35 CLR 386 at 396-397.

¹⁵⁷ *Stewart v Kennedy* (1890) 15 App Cas 75 at 105 per Lord Macnaghten; *Watson v Marston* (1853) 4 DeG M & G 230 at 239-240 [43 ER 495 at 499].

to an appropriate industrial forum does not provide a sufficient answer. Indeed such a reference could itself delay or complicate the resolution of the controversy and the conduct of the business.

- 197 Order 6, the Mareva injunction, requires some separate consideration. The conditions for the grant of a Mareva injunction are those stated by Deane J (with whom Mason CJ, Wilson, Brennan and Dawson JJ agreed) in *Jackson*¹⁵⁸:

"As a general proposition, it should now be accepted in this country that a 'Mareva injunction can be granted ... if the circumstances are such that there is a danger of [the defendant's] absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied'¹⁵⁹ ...".

I would also refer to *Z Ltd v A-Z and AA-LL*¹⁶⁰ in which Kerr LJ warned against any too ready an inclination to grant relief of this kind:

"it is clear that the jurisdiction may be properly exercisable in many cases which are not limited to situations where the defendant is foreign or only has some tenuous connection with this country by reason of having assets here. On the other hand, it would not be properly exercisable against the majority of defendants who are sued in our courts. In non-international cases, and also in many international cases, the defendants are generally persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to, dissipate merely in order to avoid some judgment which seems likely to be given against them; ... the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements."

The conditions for an order in terms of order 6 are not satisfied here. There is no evidence that Lang Corporation [Ltd](#) or any member of the group is about to secrete its assets offshore. Nor is there any suggestion that the net worth of the group is in some other way about to be diminished to defeat the first or second respondents or other creditors. The group and each member of it is, in any event, bound by the Corporations Law to deal with its assets in such a way as not to defeat its creditors.

¹⁵⁸ (1987) 162 CLR 612 at 623.

¹⁵⁹ *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268 at 1273; [1980] 3 All ER 409 at 412 per Lord Denning; *Ballabil Holdings v Hospital Products* (1985) 1 NSWLR 155 at 160 per Street CJ.

¹⁶⁰ [1982] QB 558 at 585-586.

Those considerations alone require the discharge of order 6, but there are also these matters which militate against its maintenance. Damages, if the MUA succeeds, do have the potential to be substantial but just how substantial will depend upon many factors and I do not purport to state a catalogue of them when I refer to the following:

- (i) proof at the trial of the MUA's case in accordance with the principles governing a grave allegation such as conspiracy¹⁶¹;
- (ii) the extent to which industrial action, even protected industrial action might, in any event, have brought the employers to their knees financially;
- (iii) the extent to which redundancy payments may operate to reduce damages;
- (iii) the obligation of the MUA to mitigate their loss;
- (v) whether competition might have forced the Patrick group out of business;
- (vi) in an assessment of exemplary damages the degree to which the conduct of the MUA has been a contributing factor; and
- (vii) whether, having regard to the return on, and cost of, shareholders' and financiers' capital, the applicants would have been able to, or indeed would have wished to remain in this, rather than embark upon some other business, or might have decided to make a return of capital to the shareholders and to cause a voluntary winding up of the business.

In short, self evidently, this is a troubled industry in which the futures of some employers and employees would in any event be matters for conjecture. There is no obligation upon any person or corporation to remain in a particular business so long as each takes proper care of his, her or its legal obligations in going out of it. Business people and corporations must be entitled to set a rate of return at a level that they need to achieve to justify the effort and capital employed in a business, in default of which they are entitled to discontinue that business and use their capital and effort elsewhere.

- 198 Despite all the ingenuity that Courts of Equity may and should bring to the moulding of injunctions to remedy (or halt) unlawful activities, there are situations in which the impracticability and inappropriateness of the supervision by the Court of orders intended to achieve that end are such that the parties must be left to their remedies in damages. In my opinion, this is such a case. This is a case, in which, to put the matter another way, the orders are of insufficient certainty to justify their

¹⁶¹ cf *Rejpek v McElroy* (1965) 112 CLR 517 at 521-522 per Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ.

making. The grounds for the grant of the Mareva injunction were not made out. The orders purport, as a practical matter, to create new, and destroy former contractual rights and obligations. They go beyond the preservation of the status quo. Furthermore, the fact that they are seriously flawed, as a matter of principle, in some respects in view of their interdependence would, for that reason alone point to a serious error in the exercise of his Honour's discretion generally at first instance and they suffer from the defect that if the applicants were to succeed at the trial, restoration to their prehearing position would be a practical impossibility.

199 It is unnecessary for me to consider any further the other grounds argued by the applicants. For the reasons I have given, and, because the orders under challenge, orders 1 to 6, are so interdependent, I would discharge all of them. Accordingly, the orders I would make would be, application for special leave allowed, appeal allowed, set aside the orders of the Full Court of the Federal Court, in lieu thereof order that the appeal to that court be allowed, and the orders of North J 1 to 6 set aside and discharged.

200 It would follow from the way in which I would determine the case, the first and second respondents would have to pay the costs of the applicants and the administrator in this Court, the costs in the Federal Court, if any, to be dealt with by that court.