FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Padbury Mining Limited

[2016] FCA 990

File number(s):	WAD 303 of 2015
Judge(s):	**SIOPIS J**
Date of judgment:	19 August 2016
Catchwords:	**CORPORATIONS** – director's duty – the directors of a public company caused the company to provide to the Australian Stock Exchange (ASX) an announcement which was misleading or deceptive – the announcement was released to the public by the ASX – trading in the shares was influenced by the announcement – the company failed to make continuous disclosure of price sensitive information – the directors of the company authorised the making of the announcement – contraventions by the directors of s 180(1) and s 674(2A) of the *Corporations Act* – the directors and the Australian Securities and Investments Commission proposed a minute of consent orders – disqualification of the directors from managing a corporation – pecuniary penalties – whether penalties proposed were appropriate.
Legislation:	*Corporations Act 2001* (Cth) ss 180(1), 206C, 206C(1), 206C(2), 206C(2)(b), 206G, 674, 674(2), 674(2A), 1041H, 1317E, 1317G, 1317G(1)(b)(iii) *Evidence Act 1995* (Cth) ss 191,
Cases cited:	*Commonwealth of Australia v Director, Fair Work Building Inspectorate* (2015) 326 ALR 476 *Australian Competition and Consumer Commission v REIWA Inc* (1999) 161 ALR 79 *NW Frozen Foods Pty Limited v Australian Competition and Consumer Commission* (1996) 71 FCR 285 *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460
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ORDERS

WAD 303 of 2015

IN THE MATTER OF PADBURY MINING LIMITED (ACN 009 076 242)

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**PADBURY MINING LIMITED (ACN 009 076 242)** First Defendant
	GARY WAYNE STOKES Second Defendant
	TERENCE MARTIN QUINN Third Defendant

JUDGE: **SIOPIS J**

DATE OF ORDER: **19 AUGUST 2016**

BY CONSENT, THE COURT DECLARES THAT:

Against the First Defendant (Padbury Mining Limited)

1. That the First Defendant contravened sub-section 1041H(1) of the *Corporations Act 2001* (Cth) (*Corporations Act*) by causing or procuring the publication of an announcement by the ASX to the market on 11 April 2014 (*Oakajee Funding Announcement*), which contained a representation that the First Defendant had secured funding in the amount of $6 billion to construct a deep water port and associated rail network at Oakajee (*Secured Funding Representation*), which was misleading and deceptive and likely to mislead or deceive in that the availability of the funding was dependent upon the satisfaction of conditions precedent by the First Defendant that it was not in a position to satisfy at the time of the publication of the Oakajee Funding Announcement.

2. Pursuant to section 1317E of the *Corporations Act*, that the First Defendant contravened sub-section 674(2) of the *Corporations Act* by not notifying Australian Stock Exchange Limited in the period between the release of the Oakajee Funding Announcement at or about 9:40 am AEST and at or about 2:15 pm AEST on 11 April

2014 the Funding Conditions Precedent Information (as defined in paragraph 22 of the statement of claim).

3. Pursuant to section 1317E of the *Corporations Act*, that the First Defendant contravened sub-section 674(2) of the *Corporations Act* by not notifying Australian Stock Exchange Limited in the period between the release of the Oakajee Funding Announcement at or about 9:40 am AEST and at or about 2:15 pm AEST on 11 April 2014 the Funder Identity Information (as defined in paragraph 31 of the statement of claim).

Against the Second Defendant (Gary Wayne Stokes)

4. Pursuant to section 1317E of the *Corporations Act*, that the Second Defendant contravened sub-section 674(2A) of the *Corporations Act* in that he was involved in the First Defendant's contravention of sub-section 674(2) referred to in the declaration in paragraph 2 above.

5. Pursuant to section 1317E of the *Corporations Act*, that the Second Defendant contravened sub-section 674(2A) of the *Corporations Act* in that he was involved in the First Defendant's contravention of sub-section 674(2) referred to in the declaration in paragraph 3 above.

6. Pursuant to section 1317E of the *Corporations Act*, that the Second Defendant as a director of the First Defendant contravened sub-section 180(1) of the *Corporations Act* in that he failed to discharge his duties to the First Defendant with the degree of care and diligence that a reasonable person would exercise, if he or she was the managing director of a corporation in the First Defendant's circumstances and occupied the office held by the Second Defendant, and had the same responsibilities within the corporation, by authorising or otherwise approving the release of the Oakajee Funding Announcement and thereby causing or otherwise permitting the First Defendant to make the Secured Funding Representation in contravention of section 1041H of the *Corporations Act*.

Against the Third Defendant (Terence Martin Quinn)

7. Pursuant to section 1317E of the *Corporations Act*, that the Third Defendant contravened sub-section 674(2A) of the *Corporations Act* in that he was involved in

the First Defendant's contravention of sub-section 674(2) referred to in the declaration in paragraph 2 above.

8. Pursuant to section 1317E of the *Corporations Act*, that the Third Defendant contravened sub-section 674(2A) of the *Corporations Act* in that he was involved in the First Defendant's contravention of sub-section 674(2) referred to in the declaration in paragraph 3 above.

9. Pursuant to section 1317E of the *Corporations Act*, that the Third Defendant as a director of the First Defendant contravened sub-section 180(1) of the *Corporations Act* in that he failed to discharge his duties to the First Defendant with the degree of care and diligence that a reasonable person would exercise, if he or she was the executive director and chairman of a corporation in the First Defendant's circumstances and occupied the office held by the Third Defendant, and had the same responsibilities within the corporation, by authorising or otherwise approving the release of the Oakajee Funding Announcement and thereby causing or otherwise permitting the First Defendant to make the Secured Funding Representation in contravention of section 1041H of the *Corporations Act*.

AND BY CONSENT, THE COURT ORDERS THAT:

Against the Second Defendant (Gary Wayne Stokes)

10. Pursuant to section 1317G of the *Corporations Act*, that by reason of his contraventions of sub-sections 180(1) and 674(2A) of the *Corporations Act* the Second Defendant pay to the Commonwealth of Australia a pecuniary penalty in the sum of $25,000.

11. Pursuant to section 206C of the *Corporations Act* that the Second Defendant be prohibited from managing a corporation for a period of three years from the date of these orders.

Against the Third Defendant (Terence Martin Quinn)

12. Pursuant to section 1317G of the *Corporations Act*, that by reason of his contraventions of sub-sections 180(1) and 674(2A) of the *Corporations Act* the Third Defendant pay to the Commonwealth of Australia a pecuniary penalty in the sum of $25,000.

13. Pursuant to section 206C of the *Corporations Act* that the Third Defendant be prohibited from managing a corporation for a period of three years from the date of these orders.

Against the Second Defendant and Third Defendant

14. That the Second Defendant and Third Defendant pay ASIC's costs of the proceedings in the fixed sum of $200,000.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SIOPIS J:

1 The first defendant, Padbury Mining Limited (Padbury), is a public company whose shares are and were, at all material times, listed on the Australian Stock Exchange (ASX).

2 In 2013 and early 2014, Padbury was a mining exploration company with mining tenements in the mid-west region of Western Australia and it had an objective to develop and construct a deep water port at Oakajee and an associated railway network. In 2011, Padbury's wholly owned subsidiary, Midwest Infrastructure Pty Ltd, had acquired the engineering drawings and other the intellectual property rights for a design to build a deep water port at Oakajee and an associated railway network.

3 On 8 April 2014, Padbury entered into an agreement (the shareholders agreement), with a number of parties, pursuant to which Superkite Pty Ltd (Superkite), undertook, subject to a number of contractual pre-conditions, to provide $6 billion to a subsidiary of Padbury as funding for the construction of the Oakajee project.

4 On 11 April 2014, Padbury made an announcement (the ASX Oakajee funding announcement) to the ASX that it had successfully secured funding of $6 billion for the development and construction of the Oakajee project. However, the ASX Oakajee funding announcement failed to disclose the contractual pre-conditions upon which the provision of the funding depended, and, also, the identity of the party or parties that had undertaken the $6 billion funding obligation. The ASX Oakajee funding announcement was released to the market at 9:40 am AEST.

5 At all material times, the second defendant, Mr Gary Wayne Stokes, and third defendant, Mr Terence Martin Quinn, were executive directors of Padbury. Mr Stokes was the managing director and Mr Quinn was the chairman. Each of Mr Stokes and Mr Quinn continues to hold those offices at Padbury.

6 Each of Mr Stokes and Mr Quinn was involved in the drafting of the ASX Oakajee funding announcement and authorised the release of that announcement.

7 Before making the ASX Oakajee funding announcement, the ASX, at Padbury's request, placed a halt on the trading of Padbury's shares. At that time, the shares were trading at the price of $0.02 per share. After the announcement, the shares in Padbury commenced trading

at $0.045 a share and, thereafter, until the trading in the shares was again halted later in the day at 2.15 pm, the shares traded within a range of $0.032 and $0.052 per share. During the period between the making of the announcement and the second trading halt 209,366,987 shares in Padbury were traded.

8 On 29 April 2014, the parties to the shareholders agreement, being the agreement pursuant to which the funding obligation arose, signed a deed of termination and release to terminate the shareholders agreement. Funding for the Oakajee project was never obtained and the project has never been constructed.

9 The Australian Securities and Investments Commission (ASIC) commenced this proceeding against each of Padbury, Mr Stokes and Mr Quinn in which ASIC sought the following relief:

(a) against Padbury:

(i) a declaration that in contravention of s 1041H of the *Corporations Act 2001* (Cth) by making the ASX Oakajee funding announcement Padbury had engaged in conduct that was misleading or deceptive or likely to mislead or deceive; and

(ii) a declaration that by failing, during the period between the release of the announcement and the second trading halt, to make disclosure of the contractual pre-conditions to the $6 billion funding obligation, and the identity of the party or parties that had undertaken to provide that funding, Padbury had in each respect contravened s 674(2) of the *Corporations Act*.

(b) against each of Mr Stokes and Mr Quinn:

(i) a declaration that each was involved in Padbury failing to make the disclosures referred to in para 9(a)(ii) above and each had thereby contravened s 674(2A) of the *Corporations Act* and each had also caused or otherwise permitted Padbury to contravene s 674(2) of the *Corporations Act*.

(ii) a declaration that by authorising or otherwise approving the release of the funding announcement, and so causing Padbury to contravene s 1014H of the *Corporations Act*, each had contravened s 180(1) of the *Corporations Act* in that he had failed to discharge his duties to Padbury with the degree of care

and diligence that a reasonable person would exercise if he or she was the managing director or executive director and chairman respectively in Padbury's circumstances and had the same responsibilities within that corporation.

(iii) an order pursuant to s 206C of the *Corporations Act* that each of Mr Stokes and Mr Quinn be prohibited from managing a corporation;

(iv) that a pecuniary penalty be imposed upon each of Mr Stokes and Mr Quinn.

AGREED STATEMENT OF FACTS

10 The parties have executed an agreed statement of facts under s 191 of the *Evidence Act 1995* (Cth) for the purposes of this proceeding. This agreed statement of facts was tendered at the penalty hearing. The parties also produced to the Court a minute of consent orders and each of the parties has made submissions in support of the Court making the proposed orders set out in the minute of consent orders.

11 In short, the minute of consent orders proposes that the Court make declarations to the effect that each of the defendants has contravened the *Corporations Act* in the manner claimed by ASIC in its originating application and further that the Court make orders that:

(a) pursuant to s 206C of the *Corporations Act* each of Mr Stokes and Mr Quinn be prohibited from managing a corporation for a period of three years from the date of these orders;

(b) that by reason of his contravention of s 180(1) and s 674(2A) of the *Corporations Act* that each of Mr Stokes and Mr Quinn pay to the Commonwealth of Australia a pecuniary penalty in the sum of $25,000; and

(c) that Mr Stokes and Mr Quinn pay ASIC's costs of this proceeding in the fixed sum of $200,000.

12 I set out below a summary of the agreed facts, but in making the decision on penalty I have had regard to the entirety of the agreed statement of facts.

13 During the period before and leading up to the making of the impugned ASX Oakajee funding announcement, there was a contract for services on foot between Padbury and Graham Anderson Pty Ltd (GDA Corporate) pursuant to which GDA Corporate provided

Padbury with the services of Mr Graham Anderson and Mr Leonard Math to act as joint company secretary as well as providing other company secretarial services and accounting services.

14 Under its engagement letter with Padbury, GDA Corporate was, inter alia, to liaise with ASIC, ASX, company solicitors and auditors, all other relevant external consultants or professional bodies in relation to company secretarial matters, the maintenance of the company share registry, and compliance with all corporate governance matters. GDA Corporate was also to provide the services set out in Padbury's corporate governance statement that applied for the year ended 30 June 2014 which stated that:

> The Company Secretary has been nominated as the person responsible for communication with the ASX. This role includes responsibility for ensuring compliance with the continuous disclosure requirements with the ASX Listing Rules and overseeing and coordinating information disclosure to the ASX.

15 During late 2013, Padbury was engaged in discussions aimed at procuring financing for the construction of the Oakajee project.

16 On 11 December 2013, Mr Stokes on behalf of Padbury executed a draft non-binding term sheet for the provision of funding for the construction of the Oakajee project from Alliance Super Holdings Pty Ltd (Alliance Super Holdings). That company was a related company to Superkite and Alliance Capital Holdings Pty Ltd (Alliance Capital Holdings).

17 On 3 April 2014, there was a board meeting of Padbury which was attended by Mr Stokes, Mr Quinn, Mr William Han, a non-executive director (by telephone) and Ms Amy Pascoe, an employee of GDA Corporate, at which a draft of the shareholders agreement as well as a paper on funding for the Oakajee project was discussed. On that day, GDA Corporate contributed to the drafting of a proposed ASX announcement about the progress of the Oakajee project. After the draft announcement had been approved by Mr Stokes, GDA Corporate provided an announcement from Padbury titled: "Project Update – Oakajee Port" to the ASX for release to the market. The announcement stated that:

(1) Padbury was continuing its negotiations with potential investors and engineering procurement and construction companies (EPCs) interested in the Oakajee project; and

(2) significant interest had been expressed by South Korean EPCs in the Oakajee project and Padbury was in the process of negotiating heads of agreement to provide the successful contractor with an exclusive opportunity to participate in the design and construction of the Oakajee project.

18 In the meanwhile, Mr Stokes had been working on preliminary versions of the ASX Oakajee funding announcement. On 1 April 2014, Mr Stokes provided Mr Quinn with a copy of a preliminary draft of the announcement. On 8 April 2014, Mr Stokes provided Mr Quinn with two further drafts of the preliminary announcement.

19 On 8 April 2014, the directors of Padbury resolved by circular resolution that Padbury execute the shareholders agreement between Midwest Infrastructure, Padbury, Alliance Super Holdings and Superkite and that Mr Math and Mr Anderson "prepare and release the appropriate announcement in compliance with the ASX Listing Rules following execution" of the shareholders agreement.

20 Later that day, Mr Stokes and Mr Quinn signed the shareholders agreement on behalf of Padbury and Midwest Infrastructure. The shareholders agreement provided for funding in a total of about $6.5 billion for the Oakajee project to be supplied by Superkite, as an equity contribution, in the following three tranches: USD 470 million, USD 3.45 billion and USD 2.55 billion.

21 The shareholders agreement contained terms to the effect that it was a condition precedent to the obligation of Superkite to make each of the three equity contributions referred to above, that Padbury procure a bank to provide a demand guarantee to Superkite's bank.

22 Thus, in respect of the first equity contribution of USD 470 million, Padbury was within 30 days from the date of the shareholders agreement, to procure a bank to provide a demand guarantee to Superkite's bank to the value of USD 94 million. It was also a term of the shareholders agreement that the conditions precedent could not be waived by any party without the consent of each party.

23 There was also a provision that in the event that the condition precedent was not satisfied within 40 business days of the date of execution of the shareholders agreement, any party could terminate the shareholders agreement.

24 Secondly, there was a requirement that Padbury procure a bank to provide a demand guarantee to Superkite's bank to the value of USD 690 million within 10 months from the date that the first demand guarantee was credited to Superkite's account, as a condition precedent to the requirement that Superkite make its second equity contribution of USD 3.45 billion.

25 Thirdly, there was a requirement that Padbury procure a bank to provide a demand guarantee to Superkite's bank to the value of USD 510 million within one year and 30 days from the date of the second demand guarantee was credited to Superkite's account, as a condition precedent to the requirement that Superkite make its third equity contribution of USD 2.55 billion.

26 On 8 April 2014, each of Mr Stokes, Mr Quinn and Padbury knew that the shareholders agreement contained the abovementioned material terms.

27 On 9 April 2014, the ASX granted Padbury a trading halt following a request by Padbury pending a material announcement regarding the execution of a project financing agreement.

28 On or about 10 April 2014, Mr Stokes prepared a further draft of the ASX Oakajee funding announcement in consultation with Mr Quinn concerning the execution of a project financing agreement for the development of the Oakajee project, namely, the shareholders agreement. The announcement was entitled: "Oakajee Funding Secured". Materially, the announcement stated:

a. "Highlights" – "100% equity funding secured to construct port and rail at Oakajee";

b. "Padbury Mining (ASX:PDY) is pleased to announce that it has secured the funding necessary to construct a $6 billion deep water port and associated rail network at Oakajee";

c. "The funding is to be provided by private Australian equity investors and is contained within an executed Shareholders Agreement between the parties";

d. "The funding will be provided in three tranches";

e. "Securing funding means that the Midwest can exploit its mineral assets";

f. "The Oakajee project will be developed by Midwest Infrastructure Pty Ltd (MWI), a fully owned subsidiary of Padbury Mining…Funding negotiated for the project will be 100% equity funded";

g. "Padbury has been engaged with the Western Australian Government for some time and the securing of this funding will enable MWI to significantly increase that engagement";

h. "It has been an enormous challenge on many fronts but today's announcement will see this game changing project finally come to fruition [Mr Stokes] said"; and

i. "This is an exciting day for Padbury and its shareholders," said Terry Quinn, the company's Executive Chairman, "and fully vindicates the vision that Padbury management espoused back in 2011 when it acquired the IP".

29 On 10 April 2014 at about 5:07 pm, Mr Stokes emailed the ASX Oakajee funding announcement to GDA Corporate and copied the email to Mr Quinn and instructed Mr Math, Ms Pascoe and Mr Anderson to provide the ASX Oakajee funding announcement to the ASX for release by the ASX in the pre-open phase of the market on 11 April 2014. The ASX Oakajee funding announcement did not name Superkite as the proposed funder, nor did it refer to the contractual pre-conditions upon which the funding depended.

30 Mr Math replied to the email two minutes later saying: "Will do and well done!!". On 10 April 2014, each of Mr Stokes and Mr Quinn authorised or otherwise approved the ASX Oakajee funding announcement for release to the ASX.

31 At about 6:30 pm on 10 April 2014, Mr Quinn sent an email to Mr Matthew Knox of Minter Ellison in the following terms:

> What if the ASX wants us to name the investor?
>
> What's the go?
>
> We know of a public Asx company called Athena resources AHN is code who raised private funds without naming the investor…Just 2 weeks ago…Should be same for us!!!
>
> Comments tonight

32 At 8:19 pm on 10 April 2014, Mr Knox sent an email to Mr Quinn in the following terms:

> As you would appreciate, it is quite unusual for the investor identity not to be disclosed in a material announcement for a listed company. The announcement itself will have increased speculation by referring to the investor as the "silent" investor and wanting to remain undisclosed. There is a risk that their identify [sic] (or lack of it) becomes the focus not the news about the deal itself.
>
> We could get to a technical position which says that as long as Padbury is very confident about the standing of the investor (including its financial ability and credibility to do a deal of this nature) then it may not be strictly required to disclose who it is; however, isn't that academic as Padbury will need to disclose all material information to shareholders when it seeks shareholder approval? That will, in our view, include details about the identity of the investor and their track record in delivering projects of this nature.

Please let me know if you want to discuss further.

33 At 8:22 pm, Mr Quinn forwarded Mr Knox's email to Mr Stokes.

34 Early on 11 April 2014, Mr Math uploaded the ASX Oakajee funding announcement on to the ASX platform. At 7:29 am, he emailed Mr Stokes, Mr Quinn, Ms Pascoe and Mr Anderson saying that the ASX Oakajee funding announcement had been lodged, and that after speaking with the ASX, the trading halt would be lifted.

35 At about 9:40 am AEST on 11 April 2014, the ASX released the ASX Oakajee funding announcement to the public.

36 In the period between the release of the ASX Oakajee funding announcement at or about 9:40 am AEST on 11 April 2014 and at or about 2:15 pm AEST on 11 April 2014, each of Mr Stokes, Mr Quinn and Padbury was aware that the announcement had not identified the party which had agreed to provide the $6 billion funding under the shareholders agreement.

37 In reliance on Mr Knox's advice (in respect of which ASIC made no admission as to the reasonableness thereof), Padbury did not disclose the identity of the party providing or otherwise responsible for procuring the funding the subject of the ASX Oakajee funding announcement prior to, or during the period, between the release of the announcement at 9:40 am AEST to 2:15 pm AEST on 11 April 2014, when trading in the shares was halted.

38 At about 10:10 am on 11 April 2014, shares in Padbury commenced trading on the ASX at a price of $0.045 per share.

39 During the period 10:10 am to about 1:10 pm on that day, the shares traded at a price range between $0.032 and $0.052 per share. In the period referred to, 209,366, 987 shares in Padbury were traded.

40 At about 2:15 pm AEST on 11 April 2014, the ASX granted Padbury a trading halt following a request by Padbury pending an announcement disclosing the material terms of the shareholders agreement, including the names of the parties, details of any shareholder approvals and the details of any security.

41 On or about 11 April 2014, immediately prior to being placed in a trading halt, the shares in Padbury traded on the ASX at a price of about $0.033 per share.

42 On or about 29 April 2014, the parties to the shareholders agreement signed a deed of termination and release to terminate the shareholders agreement.

43 On 30 April 2014, the ASX released to the market an announcement from Padbury titled: "Deed of Termination and Release".

MISLEADING CONDUCT ADMISSIONS

44 The statement of agreed facts also contains admissions by each of the defendants.

45 Padbury admitted that in causing the publication of the ASX Oakajee funding announcement, it had represented to actual or potential investors in Padbury that it had secured funding in the amount of $6 billion to construct the Oakajee project.

46 Padbury went on to admit that that representation was misleading or deceptive or likely to mislead or deceive, because at the time of making the representation:

(a) Superkite was not required to make each of the equity contributions comprising the funding, unless Padbury had procured the issue of each of the demand guarantees referred to in [21]-[25] above; and

(b) (i) Padbury did not have sufficient available funds to procure the issue by a bank or any other financial institution to Superkite of any of the demand guarantees which it was obliged to procure under the shareholders agreement as a pre-condition to Superkite making its equity contributions; and

(ii) Padbury had not secured any commitment from any EPCs in South Korea, or any other entity, to provide funding that would enable Padbury to procure the issue by a bank or any other financial institution of any of the demand guarantees in the near future or at all.

47 Padbury went on to admit specifically that it had contravened s 1041H of the *Corporations Act*.

48 Further, each of Mr Stokes and Mr Quinn admitted that by his conduct in authorising the publication of the ASX Oakajee funding announcement, he had permitted or caused Padbury to engage in conduct that was misleading or deceptive or likely to mislead or deceive in relation to financial products in contravention of s 1041H of the *Corporations Act*.

CONTINUOUS DISCLOSURE ADMISSIONS

49 Padbury also admitted that it had contravened s 674(2) of the *Corporations Act* in two respects.

50 First, Padbury admitted the existence of the conditions precedent in the shareholders agreement was information which during the period 9:40 am to about 2:15 pm on 11 April 2014 was not generally available; and was information that was likely to influence persons who commonly invested in securities in deciding whether to acquire shares in Padbury; and that the information was such that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of Padbury shares.

51 Padbury also admitted that during the period in question, Padbury was aware of the existence of the conditions precedent in the shareholders agreement. Padbury also admitted that it was, accordingly, obliged pursuant to s 674(2) of the *Corporations Act* and r 3.1 of the ASX Listing Rules to notify the ASX immediately of that information and that, during the period in question, it did not do so. Padbury went on to admit that it had, accordingly, contravened s 674(2) of the *Corporations Act*.

52 Secondly, Padbury made the same admissions, mutatis mutandis, in relation to the failure to disclose the identity of the party or parties responsible for providing the funding under the shareholders agreement; and went on to admit that it had, accordingly, in this respect also contravened s 674(2) of the *Corporations Act*.

53 Each of Mr Stokes and Mr Quinn also made admissions in relation to each of the two continuous disclosure contraventions committed by Padbury. Each admitted that he had procured each of the two continuous disclosure contraventions by Padbury referred to above and was, therefore, involved in each contravention within the meaning of s 674(2A) of the *Corporations Act*. Each also admitted that he had permitted or caused Padbury to contravene s 674(2) of the *Corporations Act*.

SECTION 180(1) OF THE *CORPORATIONS ACT* ADMISSIONS

54 Each of Mr Stokes and Mr Quinn also made admissions in relation to the allegation that he had breached s 180(1) of the *Corporations Act*.

55 Each of Mr Stokes and Mr Quinn admitted that on 10 April 2014, when he authorised or otherwise approved the release of the ASX Oakajee funding announcement, he ought reasonably to have been aware that:

(a) if Padbury released a statement concerning the funding of the Oakajee project that was misleading or deceptive or likely to mislead or deceive, it would be harmful or potentially harmful to Padbury in that:

(i) in providing the statement, Padbury would contravene, or risk contravening, s 1041H of the *Corporations Act*, and

(ii) if the misleading or deceptive nature of the statement was revealed it would be harmful to Padbury's reputation and would jeopardise market perceptions of Padbury, including its ability to procure funding necessary to develop the Oakajee project; and would expose Padbury to litigation and regulatory action; and

(b) if Padbury released a statement which failed to disclose information falling within the ambit of s 674 of the *Corporations Act*:

(i) Padbury would contravene or risk contravening s 674 of the *Corporations Act*; and

(ii) if that failure was revealed it would be harmful to Padbury's business reputation, would jeopardise market perceptions of Padbury, including its ability to procure finance for the construction of the Oakajee project and would expose Padbury to litigation and regulatory action.

56 Each of Mr Stokes and Mr Quinn also admitted that it was necessary for the proper discharge of his duties to Padbury to satisfy himself that the ASX Oakajee funding announcement did contain the information prescribed by s 674(2) and did not contain representations that were misleading or deceptive or likely to mislead or deceive actual potential investors in Padbury.

57 Further, each of Mr Stokes and Mr Quinn admitted that on 10 April 2014, when he authorised or otherwise approved the release of the ASX Oakajee funding announcement, he ought reasonably to have been aware that:

(a) the ASX Oakajee funding announcement conveyed or was capable of conveying the secured funding representation;

(b) the shareholders agreement contained the demand guarantee conditions precedent;

(c) as at that time, Padbury did not have the funds necessary or was not otherwise in a position to procure the issue of any of the three demand guarantees referred to in the conditions precedent;

(d) Padbury had not obtained any third party verification about the capacity of Superkite to meet its funding obligations under the shareholders agreement; and

(e) the ASX Oakajee funding announcement did not disclose the existence of the conditions precedent nor the identity of the party or parties responsible for providing the funding under the shareholders agreement.

58 Each of Mr Stokes and Mr Quinn admitted that by reason of the foregoing matters, he failed to discharge his duties to Padbury with a degree of care and diligence that a reasonable person would exercise if he or she was the managing director or executive director and chairman respectively, of a corporation in Padbury's circumstances, and had the same responsibilities within the corporation.

59 Each of Mr Stokes and Mr Quinn admitted that he had thereby contravened s 180(1) of the *Corporations Act*.

60 Each of Mr Stokes and Mr Quinn also agreed that his contravention of s 180(1) and the contraventions of s 674(2A) of the *Corporations Act* were serious within the meaning of s 1317G(1)(b)(iii) of the *Corporations Act*.

THE APPROACH TO PROPOSED CONSENT ORDERS

61 The High Court in the case of *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476 affirmed that, in civil penalty proceedings, a regulatory authority and a defendant could make, and the Court could entertain, submissions on the appropriate penalty; and that the Court could make orders pursuant to a proposed minute of consent orders. The High Court confirmed that, in considering whether to make orders proposed by the parties in a minute of consent orders, the Court has regard to the public interest, which includes the recognition of the benefit of the settlement of enforcement proceedings.

62 In the case of *Australian Competition and Consumer Commission v REIWA Inc* (1999) 161 ALR 79 at 86, French J (as his Honour then was) observed:

> The Court has a responsibility to be satisfied that what is proposed is not contrary to the public interest and is at least consistent with it...Consideration of the public interest, however, must also weigh the desirability of non-litigious resolution of enforcement proceedings.

63 The following observations of Burchett and Kieffel JJ in *NW Frozen Foods Pty Limited v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 291 are also germane:

> There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters and investigating officers of the ACCC to turn to other areas of the economy that await their attention.

64 Further, in having regard to the public interest, the Court has regard to the appropriateness of the penalties which are proposed in the minute of consent orders.

65 In assessing the appropriateness of the penalty, the Court will have regard to whether the penalty agreed upon by the parties is within an appropriate range, and it is not necessary for the Court to come to the view that the Court would itself have imposed the same penalties. I observe that the parties have agreed, appropriately, in my view, to treat the contravening conduct of Mr Stokes and Mr Quinn as a single course of conduct.

THE PROPOSED DECLARATIONS

66 I now turn to the declarations proposed to be made in the minute of consent orders which are referred to in [9] above.

67 In my view, it is appropriate to make the declarations for the following reasons. First, the making of the declarations resolves a significant legal controversy and identifies the unlawful conduct in which each of the defendants has engaged. Further, the making of the declarations records the Court's disapproval of the contravening conduct and informs investors and members of the public of the contravening conduct and identifies the nature thereof. Also, the making of the declarations serves to vindicate ASIC's claims that the defendants have engaged in contravening conduct and also assists ASIC in performing its duties as a regulator of corporate conduct; and also serves to deter other corporations and directors from engaging in unlawful conduct.

68 I will, accordingly, make the declarations proposed in the minute of consent orders.

THE ORDERS PROHIBITING EACH OF MR STOKES AND MR QUINN FROM MANAGING CORPORATIONS

69 The minute of consent orders proposes that each of Mr Stokes and Mr Quinn be prohibited from managing a corporation for a period of three years.

70 In a case, such as this case, where both pecuniary penalties and disqualification orders are sought, the Court generally considers the disqualification issue before considering the issue of pecuniary penalties.

71 I deal, therefore, first with the question of the proposed disqualification order for each of Mr Stokes and Mr Quinn. In determining whether to make a disqualification order, the Court has regard to, first, whether the order should be made, and, secondly, the duration of any such disqualification.

72 Section 206C(1) of the *Corporations Act* provides that on application by ASIC, the Court may disqualify a person from managing a corporation for a period that the Court considers appropriate if:

> (a) a declaration is made under:
>
> > (i) s 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
> >
> > (ii) …; and
>
> (b) the Court is satisfied that the disqualification is justified.

73 Section 206C(2) of the *Corporations Act* provides that in determining whether the disqualification is justified, the Court may have regard to:

> (a) the person's conduct in relation to the management business or property of any corporation; and
>
> (b) any other matters the Court considers appropriate.

74 The nature and seriousness of the contravening conduct is plainly a consideration to which the Court will have regard in determining whether to make a disqualification order and also the length of any such disqualification.

75 It is well settled that, in imposing a period of disqualification, the purpose of the disqualification is to protect the public and, also, to act as both a specific and a general

deterrent. Further, regard should be had to, among other considerations, the parity principle. However, it must be remembered that, ultimately, each case must be considered on its own facts.

76 The case of *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460 (*Gillfillan*) is, in my view, instructive in assessing whether the disqualification order of three years proposed in respect of each of Mr Stokes and Mr Quinn is an appropriate penalty.

77 In that case, the New South Wales Court of Appeal made orders under s 206C of the *Corporations Act* disqualifying the Australian based non-executive directors of James Hardie Industries Limited from managing a company for three years.

78 The Australian based non-executive directors were found to have contravened s 180(1) of the *Corporations Act* by approving a misleading draft ASX announcement relating to the adequacy of the funding of the company's Asbestos Compensation Foundation. Mr Brown and Ms Hellicar were among the Australian based non-executive directors.

79 Sackville AJA delivered the leading judgment and considered the position of Mr Brown and Ms Hellicar, and then each of the other Australian based non-executive directors. I refer below to that part of Sackville AJA's judgment that dealt with the position of Mr Brown and Ms Hellicar.

80 Sackville AJA referred to the fact that the declaration of contravention made in respect of each of Mr Brown and Ms Hellicar was on the basis that each ought to have known that the draft ASX announcement was misleading. Sackville AJA went on to find that, notwithstanding that Mr Brown and Ms Hellicar had not acted dishonestly, their conduct, nevertheless, represented a departure from the standards to be expected of officers of a public company which was "very serious indeed" (*Gillfillan* at [232]).

81 In this case, also, the agreed facts are that each of Mr Stokes and Mr Quinn ought to have been aware of facts and matters which rendered the draft ASX Oakajee funding announcement misleading. As was the case with Mr Brown and Ms Hellicar, this is not a case of dishonesty on the part of Mr Stokes and Mr Quinn. Nevertheless, Mr Stokes and Mr Quinn have recognised that their conduct in approving the ASX Oakajee funding announcement, which was of critical importance to the company's future and the market perception thereof, was a serious departure from the standards expected of directors of a public company in a like situation.

82 In *Gillfillan*, Sackville AJA observed of the conduct of Mr Brown and Ms Hellicar at [234]:

> If there were no other factors to take into account, I would conclude that the departures from the standard of care and diligence reasonably expected of directors of the contraventions justify a substantial period of disqualification, notwithstanding the absence of dishonesty. A penalty of this kind is required to mark disapproval of the conduct, to demonstrate that the law upholds appropriate standards of corporate conduct, and to act as a deterrent to other company directors who might be tempted to forego their responsibilities on critical matters…

83 Sackville AJA also observed that the conduct of Mr Brown and Ms Hellicar had led to the creation of a false market in which shares were traded at inflated prices.

84 Sackville AJA went on to say that the contraventions of Mr Brown and Ms Hellicar were sufficiently serious to justify a penalty of five years disqualification before having regard to personal mitigating circumstances. However, Sackville AJA proceeded to find that, taking into account their personal mitigating circumstances, a period of three years disqualification was appropriate for each of Mr Brown and Ms Hellicar. Among the factors to which Sackville AJA had regard were their good character and the reputational damage that the directors had suffered and would continue to suffer.

85 In my view, in this case, for the reasons referred to by Sackville AJA, the seriousness of the contraventions of each of Mr Stokes and Mr Quinn, would also, before having regard to personal mitigating circumstances, justify disqualification for five years. However, in my view, there are personal mitigating circumstances which result in a three year period of disqualification being regarded as an appropriate penalty of disqualification.

86 In this case, the directors have cooperated with ASIC at an early stage of the proceedings and, in so doing, they have recognised the seriousness of their contravening conduct and have thereby exhibited contrition in respect thereof.

87 By contrast, I observe that there was no early cooperation forthcoming from Mr Brown, Ms Hellicar and indeed the other Australian based non-executive directors with ASIC. Instead, protracted litigation ensued between the Australian based non-executive directors and ASIC which went all the way to the High Court. Also, there was limited contrition exhibited, at least, by Mr Brown and Ms Hellicar. (See *Gillfillan* at [250].)

88 In my view, in assessing the period of disqualification, considerable weight is to be placed on the early cooperation and contrition exhibited by Mr Stokes and Mr Quinn in this case. That

cooperation has saved ASIC the expense and time that would otherwise have been directed to potentially protracted litigation, and has, thereby, released those resources to be used by ASIC to pursue other regulatory endeavours.

89 I find, therefore, that the disqualification period proposed by the parties of three years is an appropriate period in respect of each of Mr Stokes and Mr Quinn. I will, accordingly, make orders for the disqualification of each of Mr Stokes and Mr Quinn for the period of three years.

90 I also observe that at the hearing, Mr Stokes foreshadowed that, in the event that the proposed disqualification orders were made, he would move for an order under s 206G of the *Corporations Act*, that he have leave to manage GW Stokes Pty Ltd on condition that GW Stokes Pty Ltd not engage in activities other than as trustee of GW Stokes Super Fund. The ACCC indicated that it would not oppose the making of such an order.

PECUNIARY PENALTY

91 I now deal with the proposed order that each of Mr Stokes and Mr Quinn pay a pecuniary penalty of $25,000.

92 Section 1317G of the *Corporations Act* provides that a court may impose a penalty if, as in this case, there has been a declaration made under s 1317E of the contravention of a civil penalty provision and the contravention is serious.

93 It is recognised that the purpose of imposing a pecuniary penalty on a person is deterrence, both general and specific.

94 In assessing the appropriateness of the amount of the pecuniary penalty in the circumstances of this case, the case of *Gillfillan* is again instructive. At [330], Sackville AJA observed:

> I accept that a pecuniary penalty should be imposed on the appellants only if an order of disqualification is an inadequate or inappropriate remedy…However, I think that the seriousness of each contravention warrants an additional pecuniary penalty, even if of a relatively modest amount.

95 In my view, the same considerations apply to the facts of this case. In *Gillfillan*, Sackville AJA went on to impose a pecuniary penalty of $25,000 in respect of each of Mr Brown and Ms Hellicar and the other Australian based non-executive directors.

96 Accordingly, I am of the view that the imposition of a pecuniary penalty of $25,000 on each of Mr Stokes and Mr Quinn, in addition to the disqualification period, is an appropriate penalty. I will, accordingly, make orders for the payment of a pecuniary penalty in the terms sought by the parties.

97 Mr Stokes and Mr Quinn are to pay ASIC's costs fixed in the sum of $200,000.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate:

Dated: 19 August 2016