FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq) [2016] FCA 1488

File number:	VID 161 of 2014
Judge:	**DAVIES J**
Date of judgment:	8 December 2016
Catchwords:	**CORPORATIONS** – whether the requirements for the imposition of a pecuniary penalty under s 1317G of the *Corporations Act 2001* (Cth) are met – whether contravention of s 674(2) of the *Corporations Act 2001* (Cth) was "serious" – whether disqualification from managing corporations under ss 206C and 206E is "justified" – whether compensation order should be made against a director – whether causal nexus between company's loss and damage and contraventions – whether direction to be made that the liquidator is not acting unreasonably in treating shareholders as creditors in the liquidation
Legislation:	*Corporations Act 2001* (Cth), ss 206C, 206E, 674(2), 674(2A), 729, 1041I, 1317DA, 1317G, 1317H, 1317HA, 1325
Cases cited:	*ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376; (2004) ATPR 41–983 *ASIC v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511 *ASIC v The Cash Store Pty Ltd (in liquidation) (No 2)* [2015] FCA 93 *ASC v Donovan* (1998) 28 ACSR 583 *ASIC v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303 *ASIC v Lindberg* [2012] VSC 332; (2012) 91 ACSR 640 *ASIC v McDonald (No 12) & Ors* [2009] NSWSC 714; (2009) 259 ALR 116 *ASIC v Newcrest Mining Ltd* [2014] FCA 698; (2014) 101 ACSR 46 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476

	Registrar of Aboriginal and Torres Strait Islander Corporations v Murray [2015] FCA 346 *Re HIH Insurance Limited; ASIC v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80
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Registry:	Victoria
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
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Counsel for the Plaintiff:	M Pearce QC with N Moncrief
Solicitors for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First Defendant:	P Corbett QC with W Forrester
Solicitors for the First Defendant:	King and Wood Mallesons

ORDERS

VID 161 of 2014

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Plaintiff
AND:	**SINO AUSTRALIA OIL AND GAS LIMITED (IN LIQ)** First Defendant
	TIANPENG SHAO Second Defendant
	RUIYU HE (and others named in the schedule) Third Defendant
JUDGE:	**DAVIES J**
DATE OF ORDER:	**8 DECEMBER 2016**

THE COURT ORDERS THAT:

1. Pursuant to section 1317G(1A) of the *Corporations Act 2001* (Cth) (**"the Act"**), the First Defendant pay a pecuniary penalty of $800,000.
2. Pursuant to section 206C and section 206E, the Second Defendant be disqualified from managing corporations for a period of 20 years.
3. The Second Defendant pay compensation to the First Defendant pursuant to sections 729, 1041I, 1317H, 1317HA and 1325 of the Act, in an amount of $5,539,758.

THE COURT DIRECTS THAT:

4. Pursuant to section 479(3) of the Act, the Liquidator of the First Defendant would not be acting unreasonably in treating the persons set out in exhibit PDM-7 to the affidavit of Peter Damien McCluskey dated 28 October 2016, as being admitted as creditors in the liquidation, but ranked behind the First Defendant's unsecured creditors (in accordance with section 563A of the Act), for the amounts set out in the final column of exhibit PDM-7 (and only those amounts).

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

REASONS FOR JUDGMENT

DAVIES J:

1 This judgment is to be read in conjunction with *ASIC v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 934 (**"*ASIC v Sino*"**). In that judgment, declarations of contravention of the *Corporations Act 2001* (Cth) ("**the Act**") were made against the first defendant ("**Sino**" or "**the company**") and the second defendant ("**Mr Shao**"), the former executive director and chairman of the company. The Court declared, amongst other things, that:

(a) Sino had contravened ss 728(1)(a), 728(1)(b), 728(1)(c), 1041H and 674(2) of the Act; and

(b) Mr Shao:

(i) had contravened s 674(2A) of the Act; and

(ii) committed nine contraventions of s 180(1) of the Act.

The Court also found that Mr Shao failed to take reasonable steps to prevent the contraventions of the Act by Sino, within the meaning of s 206E of the Act.

2 ASIC now seeks:

(a) an order pursuant to s 1317G(1A) of the Act that Sino pay a pecuniary penalty of $800,000; and

(b) an order pursuant to s 206C and s 206E that Mr Shao be disqualified from managing corporations for a period of 20 years.

3 A related application has been made on behalf of Sino by the liquidator, Mr Peter McCluskey ("**the liquidator**"), for a compensation order against Mr Shao in the amount of $5,539,758 pursuant to ss 729, 1041I, 1317H, 1317HA and/or 1325 of the Act.

4 In addition, the liquidator has sought a direction from the Court pursuant to s 479(3) of the Act that the liquidator would not be acting unreasonably in admitting shareholders of the company as creditors in the winding up.

Pecuniary penalty against Sino

5 Section 674(2) of the Act is a "financial services civil penalty provision": s 1317DA and s 1317E, item 14 of the Act. The contravention of that section empowers the Court pursuant to s 1317G of the Act to impose a pecuniary penalty on the company of an amount up to

$1 million (s 1317G(1B)) if a declaration of contravention by the company has been made under s 1317E (s 1317G(1A)(a)) and the contravention is "serious" (s 1317G(1A)(c)(iii)).

The requirements for the imposition of a pecuniary penalty are met

6 In *ASIC v Sino* the Court held that the company had contravened s 674(2) of the Act by failing, between 13 December 2013 and 1 April 2014, to notify the ASX that circumstances had arisen as a consequence of which its profit forecast of $13.66 million for the financial year January to December 2013 would not be achieved and made a declaration of contravention pursuant to s 1317E of the Act.

7 The authorities establish that a contravention is "serious" for the purposes of s 1317G if the conduct is grave or significant (*ASC v Donovan* (1998) 28 ACSR 583, 608) or weighty, important, grave, considerable (*ASIC v Lindberg* [2012] VSC 332; (2012) 91 ACSR 640, [133] and [135]). Conduct leading to market distortion, or inaccurate information in the market, has been recognised in other cases as "serious": *ASIC v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303, [34] (Goldberg J); *ASIC v McDonald (No 12) & Ors* [2009] NSWSC 714; (2009) 259 ALR 116, [310] (Gzell J); *ASIC v Newcrest Mining Ltd* [2014] FCA 698; (2014) 101 ACSR 46 (Middleton J). In the present case, the company had known for several months prior to releasing Appendix 4E on 1 April 2014 that its profits would be substantially impacted by circumstances that had arisen and would lead to a significant profit downgrade. This was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the company's shares and Sino's contravention of s 674(2) can readily be characterised as "serious".

The appropriate penalty

8 It is well established that the principle purpose of imposing a pecuniary penalty is to act as a specific deterrent to the contravener and as a general deterrent to others engaging in the type of conduct that is the subject of the contravention: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476, [55]. The company is now in liquidation which means that specific deterrence is of limited relevance as any pecuniary penalty imposed would not be admissible to proof: s 553B of the Act. However this does not mean that an order for a pecuniary penalty should not be made. It is still appropriate for a court to impose a penalty on an insolvent company to serve as a warning and measure of the court's disapproval of the contravening conduct: *ACCC v Fila*

Sport Oceania Pty Ltd [2004] FCA 376; (2004) ATPR 41–983, [23]–[25]; *ASIC v The Cash Store Pty Ltd (in liquidation) (No 2)* [2015] FCA 93, [12].

9 In *ASIC v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511, French J (as his Honour then was) set out at [99] 13 factors to be taken into account in imposing a penalty in respect of a failure of the continuous disclosure obligation:

> 1. The extent to which the information not disclosed would have been expected to and (if applicable) did affect the price of the contravening company's shares (s 674(2)(c)).
> 2. The extent to which the information, if not generally available, would have been discoverable upon inquiry by a third party (s 676(2)).
> 3. The extent (if any) to which acquirers or disposers of the company's shares were materially prejudiced by the non-disclosure (s 1317G(1A)).
> 4. The extent to which (if at all) the contravention was the result of deliberate or reckless conduct by the corporation.
> 5. The extent to which the contravention was the result of negligent conduct by the corporation.
> 6. The period of time over which the contravention occurred.
> 7. The existence, within the corporation, of compliance systems in relation to its disclosure obligations including provisions for and evidence of education and internal enforcement of such systems.
> 8. Remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention.
> 9. The seniority of officers responsible for the non-disclosure and whether they included directors of the company.
> 10. Whether the directors of the corporation were aware of the facts which ought to have been disclosed and, if not, what processes were in place at the time, or put in place after the contravention to ensure their awareness of such facts in the future.
> 11. Any change in the composition of the board or senior managers since the contravention.
> 12. The degree of the corporation's cooperation with the regulator including any admission of contravention.
> 13. The prevalence of the particular class of non-disclosure in the wider corporate community.

A number of these factors have a significant bearing on the penalty to be imposed on Sino.

10 Whilst it is not possible to say that the withholding of the information had any particular effect on the company's share price, the contravention has caused material prejudice to

shareholders. It may reasonably be inferred that had disclosure been made as required by the law, many (if not all) shareholders who purchased on-market after the float would not have purchased their shares and thereby avoided the loss of their investments. The liquidator has assessed the total likely losses suffered by the company's shareholders at around $9,240,000 (which would be reduced to between $5.54 million and $6.02 million if the shareholders are permitted to prove as creditors in the liquidation).

11 Responsibility for the contravention has been shown to lie with Mr Shao, the company's managing director, chairman and chief executive officer at the relevant time. Mr Shao was the only board member who had direct knowledge of, and involvement in, the business of Huaying, Sino's operating subsidiary in China. Although he knew months beforehand that Sino's projected year-end profit would be impacted adversely by circumstances arising in relation to Huaying's operations, he failed to bring this to the attention of the other members of the board. Mr Shao's explanation was that he did not understand Australia's legal requirements. If he did not understand Australia's legal requirements, his lack of knowledge demonstrated a lack of diligence and care by him in informing himself properly and fully about the company's legal obligations and a serious lack of appreciation of the importance of continuous disclosure. Mr Shao's lack of understanding was manifested in the company's non-acceptance that the company had breached the continuous disclosure obligation and the failure to take appropriate remedial and disciplinary steps after the breach was brought to the company's attention. Mr Shao continued to occupy the company's most senior position for some months and showed little awareness of the seriousness of his lack of understanding concerning the company's compliance obligations and the failure in governance. It is also relevant that the governance issues did not improve, or did not substantially improve. In May 2015, the company's own solicitors advised it that the management of the company was dysfunctional and that:

> ...the China management are incompetent, wilfully disregarding governance obligations and/or are dishonest. The practical problem is that because of distance and in your case language the non-executive Board are unable to change management behaviour.

12 I accept ASIC's submission that these matters justify a heavy penalty. A significant penalty reflects the seriousness of the contravention and although the company is now in liquidation, general deterrence is an important factor in this case, given the increasing trend in entities from emerging markets seeking and obtaining listing on the ASX, particularly from the Asia Pacific region. I accept ASIC's submission that the penalty should be in an amount that gives

the strong message that it is vital that people contemplating entry into the Australian market must familiarise themselves with and understand the rules of the market, and adhere to those rules. Disregard of the law through ignorance or lack of proper understanding is not an excuse and will not be tolerated.

13 In light of these considerations, I consider that a penalty of $800,000 is justified.

DISQUALIFICATION OF MR SHAO

14 ASIC seeks an order disqualifying Mr Shao from managing corporations for a period of 20 years.

15 The Court has the power pursuant to s 206C(1) of the Act to disqualify a person from managing corporations where a declaration is made under s 1317E that the person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.

16 The Court also has the power pursuant to s 206E(1) of the Act to disqualify a person from managing corporations for a period that the Court considers appropriate:

(a) if a person has at least twice been an officer of a company that contravened the Act while the person was an officer of that company and, on each occasion, the person failed to take steps to prevent the contravention (s 206E(1)(a)(i)) or the person has at least twice contravened the Act while an officer of the company (s 206E(1)(a)(ii)); and

(b) the Court is satisfied that the disqualification is justified: s 206E(1)(b).

17 The Court has already made nine declarations under s 1317E of the Act that Mr Shao contravened s 180(1) of the Act, being a civil penalty provision, so the threshold requirements for a disqualification order under s 206C and s 206E(1)(a)(ii) have been met.

18 The Court has also found that ASIC has met the requirements of s 206E(1)(a)(i). It has made declarations that the company committed 20 contraventions of the Act whilst Mr Shao was a director. It also found that Mr Shao failed to take reasonable steps to prevent the contraventions of the Act in that he:

(a) failed to confirm the accuracy of statements contained in the prospectus documents by reading and understanding the prospectus documents himself before signing off;

(b) failed to educate himself about disclosure requirements under Australian law;

(c) failed to accept the advice of the two resident Australian directors with respect to the transfer of the funds raised by the initial public offering to China;

(d) failed to ensure that false and misleading information was not provided to the company's auditors;

(e) was not candid and frank with his fellow directors; and

(f) failed to consider the interests of the minority shareholders.

19 The question for the Court is whether the disqualification is justified.

20 In *Re HIH Insurance Limited; ASIC v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80, Santow J at [56] summarised the principles applicable to disqualification orders under ss 206C and 206E. These were recently restated by Gordon J in *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [220] as follows:

> What then are the Santow principles? They were distilled in *ASIC v Adler* at [56] to include:
>
> (1) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.
>
> (2) Disqualification orders are designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.
>
> (3) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.
>
> (4) A disqualification order is protective against present and future misuse of the corporate structure.
>
> (5) The order has a motive of personal deterrence, though it is not punitive.
>
> (6) The objects of general deterrence are also sought to be achieved.
>
> (7) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.
>
> (8) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty.
>
> (9) In assessing the appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.

(10) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.

(11) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.

(12) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 are influential. The criteria were character of the offenders, nature of the breaches, structure of the companies and the nature of their business, interests of shareholders, creditors and employees, risks to others from the continuation of offenders as company directors, honesty and competence of offenders, hardship to offenders and their personal and commercial interests and offenders' appreciation that future breaches could result in future proceedings.

(13) Factors which lead to the imposition of the longest periods of disqualification (of 25 years or more), were large financial losses, high propensity that defendants may engage in similar activities or conduct, activities undertaken in fields in which there was potential to do great financial damage, lack of contrition or remorse, disregard for law and compliance with corporate regulations, dishonesty and intent to defraud and previous convictions and contraventions for similar activities.

(14) In cases in which the period of disqualification ranged from 7 to 12 years, the factors included serious incompetence and irresponsibility, substantial loss, defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty, continued, knowing and wilful contraventions of the law and disregard for legal obligations and lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.

(15) The factors leading to the shortest disqualifications, that is disqualification for up to three years, were although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated, the defendants had no immediate or discernible future intention to hold a position as manager of a company and the defendant had expressed remorse and contrition, acted on the advice of professionals and had not contested the proceedings.

Many of these factors apply in the present case, justifying the Court making a disqualification order for a lengthy period.

21 Mr Shao's contraventions can be categorised into five separate breaches of s 180(1), namely:

(a) approving the replacement prospectus and each subsequent prospectus document without understanding the English text and without obtaining Chinese language translations of them and causing or permitting the company to contravene s 728 of the Act in respect of false representations made in the prospectus documents;

(b) failing to acquaint himself with the disclosure requirements for publicly listed companies under Australian law and causing or permitting the company to contravene s 674 of the Act in relation to its continuous disclosure obligations;

(c) failing to disclose to the board that circumstances had arisen which would significantly affect the company's profit forecast;

(d) attempting to transfer the proceeds from the initial public offering to China without proper documentation and without complying with Chinese regulatory requirements; and

(e) causing or permitting the company to contravene s 1041H of the Act in relation to making misleading representations to the company's auditors.

22 ASIC's submissions neatly explained why a lengthy disqualification period is justified and necessary. ASIC submitted as follows:

> 82. The following three aspects of Mr Shao's conduct demonstrate the seriousness of his contraventions:
>
> (a) According to the Replacement Prospectus, one of SAO's principal activities, which was said to be of extreme importance to its ability to trade, was "Enhanced Oil Recovery" services. Mr Shao permitted SAO to release its prospectus documents with eight prominent and false statements to the effect that SAO holds patents for Enhanced Oil Recovery.
>
> (b) Mr Shao failed to disclose to the Board and to the ASX, that circumstances had arisen a consequence of which was that the profit forecast of $13.66 million given in the Replacement Prospectus would not be achieved (and in fact would be downgraded by approximately 40%).
>
> (c) Mr Shao sought to transfer AUD$7.5 million to an account in China of its subsidiary without providing the Board of SAO with a proper explanation for the transfer and without complying with Chinese regulatory requirements necessary to ensure that the funds would be recoverable by SAO.
>
> 83. The above three matters are significant because they had the potential directly to affect the public. The first two had the potential to cause investors to subscribe and subsequently to trade in shares in SAO without being able to make informed investment decisions. The lack of disclosure could thereby have distorted the market for SAO shares and such distortion can be an indicator of seriousness in continuous disclosure cases. The third matter had the potential to cause SAO to lose its major liquid asset, namely the funds raised by the float. These contraventions should therefore be regarded as serious.
>
> 84. Adding to the seriousness is Mr Shao's degree of involvement in these contraventions, as demonstrated by the Court's finding that:

(a) Mr Shao was managing director, chairman of the Board and chief executive officer of SAO and the managing director and chairman of the Board of the operating subsidiary, Huaying;

(b) he signed the Replacement Prospectus and the director's declaration attached to each subsequent replacement prospectus before lodgement;

(c) he knew, even before listing, that the actual profit would be impacted by each of the circumstances alleged by ASIC;

(d) he admitted that the difference between the profit forecast published by the company on 26 April 2013 and the actual profit reported on 1 April 2014 (being a difference greater than 10%) was information that a reasonable person would expect to have a material effect on the price or value of the company's securities and was market sensitive information;

(e) he sought the authorisation of Mr Johnson (one of the two Australian resident directors) to transfer almost all of the float proceeds out of Australia to a bank account of SAO in China of which neither Mr Johnson nor Mr Faulkner had any knowledge.

23 Considerations of public and personal deterrence are particularly important having regard to the nature and extent of Mr Shao's contraventions. Other factors bearing on the Court's exercise of power to impose a period of disqualification are that:

(a) Mr Shao cannot be said to have any understanding of the proper role of the company director and the duty of due diligence that is owed;

(b) Mr Shao's conduct has caused or contributed to substantial losses suffered by the company's shareholders;

(c) Mr Shao has not led any evidence of contrition for his failures, he has failed to show any understanding of the seriousness of his conduct and he has not accepted responsibility for the findings made against him by the Court.

24 ASIC submitted that an appropriate length of disqualification for each of the five groups of contravention would be six years, making a total of 30 years, reduced to 20 years in total applying the totality principle (which requires the court to review, and if necessary adjust, the aggregate to ensure that it is just and appropriate for all the contraventions): *Mill v R* [1988] HCA 70; (1988) 166 CLR 59, 63. Applying the Santow principles to Mr Shao, the matters referred to by ASIC justify the length of disqualification sought by ASIC. The period of disqualification under s 206E should be served concurrently with the disqualification ordered under s 206C of the Act.

THE COMPENSATION CLAIM

25 The liquidator seeks on behalf of the company compensation from Mr Shao pursuant to ss 729, 1041I, 1317H, 1317HA and, further or alternatively, s 1325 of the Act. Each section entitles the company to compensation for loss and damage caused by a contravention of the relevant sections of the Act. Mr Shao was served with the application but has not challenged the making of a compensation order against him.

26 Section 729(1) of the Act relevantly states:

> A person who suffers loss or damage because an offer of securities under a disclosure document contravenes subsection 728(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on disclosure document		[operative]
	These people...	**are liable for loss or damage caused by...**
1	the person making the offer	any contravention of subsection 728(1) in relation to the disclosure document
2	each director of the body making the offer if the offer is made by a body	any contravention of subsection 728(1) in relation to the disclosure document
3	a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered	any contravention of subsection 728(1) in relation to the disclosure document
4	an underwriter (but not a sub-underwriter) to the issue or sale named in the disclosure document with their consent	any contravention of subsection 728(1) in relation to the disclosure document
5	a person named in the disclosure document with their consent as having made a statement: (a) that is included in the disclosure document; or (b) on which a statement made in the disclosure document is based	the inclusion of the statement in the disclosure document
6	a person who contravenes, or is involved in the contravention of, subsection 728(1)	that contravention

Note: Item 2—***director*** includes a shadow director (see section 9).

27 Given the finding of the Court that Sino contravened s 728 of the Act, Mr Shao as a director of the company is liable for a compensation order under s 729 of the Act.

28 Section 1041I of the Act relevantly states:

(1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

...

29 Given the declarations that Mr Shao contravened s 180(1) of the Act by causing or permitting Sino to contravene s 1041H, s 1041I of the Act is also engaged.

30 Section 1317H of the Act relevantly states:

Compensation for damage suffered

(1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

...

31 Section 1317HA of the Act relevantly states:

Compensation for damage suffered

(1) A Court may order a person (the liable person) to compensate another person (including a corporation), or a registered scheme, for damage suffered by the person or scheme if:

(a) the liable person has contravened a financial services civil penalty provision; and

(b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

...

32 By virtue of Mr Shao's contraventions of s 180 of the Act, Mr Shao has contravened a civil penalty provision in relation to the company and is liable to pay compensation under s 1317H and by virtue of Mr Shao's contravention of s 674(2A), Mr Shao has contravened a financial services civil penalty provision and is liable to pay compensation under s 1317HA of the Act.

33 Section 1325(1) of the Act relevantly provides:

> Where, in a proceeding instituted under, or for a contravention of, subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of conduct of another person that was engaged in in contravention of subsection 201P(1), Chapter 5C, 6CA or 6D, subsection 798H(1) or Part 7.10, the Court may, whether or not it grants an injunction, or makes an order, under any other provision of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (5)) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

34 Given that the Court has found that Mr Shao was involved in Sino's contraventions of ss 674, 728 and 1041H of the Act, s 1325 is also engaged.

35 The relevant principles to apply were considered in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; (2014) 221 FCR 1. At [254]–[256], White J stated:

> Sections 729, 1041I and 1325 of the Corporations Act, and s 12GF of the ASIC Act, which entitled the Seligs to recover damages for the respective contraventions are expressed in similar, but not identical, terms. Section 729 allows a person who suffers loss or damage "because" an offer of securities under a disclosure document contravenes s 728(1) to recover the amount of the loss or damage from the contravener. Section 1325 is expressed in (relevantly) similar terms. Section 1041I permits a person who suffers loss and damage "by" conduct of another which contravenes identified provisions, including ss 1041E and 1041H, to recover the amount of loss and damage from the contravener. Section 12GF is expressed in similar terms. These provisions are, in turn, similar to s 82 of the former *Trade Practices Act 1974* (Cth) (the TPA) and s 236 of the *Australian Consumer Law*.
>
> The words "because" and "by" indicate the requirement for a causal connection between the contravention in question and an applicant's loss and damage.
>
> As is well-established, causation is essentially a question of fact to be determined in a practical way having regard to common experience: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; 99 ALR 423; *Henville v Walker*. In that determination, policy considerations, value judgments and the concepts of remoteness and reasonable foreseeability may all play a role.

(*Wealthsure Pty Ltd v Selig* was appealed to the High Court but not on this point: *Selig v Wealthsure Pty Ltd* [2015] HCA 18.) In other cases, causation under these provisions has been put in terms of a "but for" test: see eg *Agricultural Land v Jackson (No 2)* [2014] WASC 102 at [451]–[452]. However expressed, it is necessary that there be a causal nexus between Sino's loss and damage (if proven) and Mr Shao's contraventions if the liquidator is to succeed on his compensation claim.

36 I am satisfied that Sino has suffered loss and damage as a result of Mr Shao's contraventions.

37 It may readily be concluded that Mr Shao's contraventions led to the company being placed into liquidation. At [86] of *ASIC v Sino* [2016] FCA 934, the Court held that:

> In this case, Mr Shao's conduct as a director of Sino has exposed it to the imposition of civil penalties for its contraventions of the Act, to the cost and trouble of this legal proceeding and ASIC's investigation leading to its placement into provisional liquidation and ultimately, into liquidation, and the company's interests were plainly jeopardised by Mr Shao's conduct. A director properly discharging his or her duties to the company would have taken steps to avoid this detriment to the company and by failing to do so Mr Shao has breached his duties to the company.

38 Mr Johnson and Mr Faulkner, two non-executive directors on Sino's board at the relevant time (the other board member being Mr Shao) both gave evidence that had they known that information in the replacement prospectus concerning the patents, material contracts and financial information of Sino was inaccurate, they would not have voted in favour of a resolution for Sino to proceed with the initial public offering on the basis of the content of the replacement prospectus and would not have consented to the publication of that prospectus. It is reasonable to infer that the initial public offering would not have proceeded as it did had Mr Johnson and Mr Faulkner been made aware of the false and misleading statements in the replacement prospectus.

39 Had the initial public offering not proceeded, shares would not have been issued to shareholders pursuant to that capital raising, the company would not have been investigated and charged by ASIC, which led to the eventual winding up of the company, the company would not have suffered the expense of administration, provisional liquidation and now liquidation and would not have been faced with the liability to shareholders, being the difference between the subscription price and the amount available to be returned to them in the winding up. The company will suffer loss and damage to the extent of that liability and it is the amount or value of that liability that the liquidator seeks from Mr Shao by way of compensation.

40 The liquidator has estimated that the company's liability to shareholders will be in the amount of $5,539,758. That amount is calculated as follows.

41 The liquidator has estimated that the potential pool of funds that will be available for distribution to the shareholders will be somewhere between around $3.23 million and $3.7 million. If the shareholders are admitted to proof of the full amount of the subscription pursuant to the capital raising, which the liquidator considers to be the appropriate course of action (being a total of approximately $9,243,433), the shareholders will suffer a loss

between around $5.54 million and $6 million. The amount claimed by way of compensation is the difference between the estimated claims of the shareholders in respect of their investments (calculated at $9,243,433) and the estimated funds that will be available for distribution to shareholders (calculated at $3,703,675), being the amount of $5,539,758.

42 I am satisfied that a compensation order in that amount should be made against Mr Shao.

DIRECTIONS

43 The liquidator has also sought directions from the Court pursuant to s 479(3) of the Act that he would not be acting unreasonably in treating the shareholders as creditors in the liquidation for the amounts calculated by the liquidator to be their respective losses, without undertaking a formal proof of debt process in relation to those persons. The reason advanced by the liquidator for admitting those shareholders as creditors without going through the formal proof of debt process is to avoid the time and expense involved and to expedite the process.

44 The Court undoubtedly has the power to make such a direction, which I consider to be justified in the present case. The directions sought will not prejudice the rights of other creditors in the ordinary course of the winding up and the proposed cause of action is in the interests of reducing the costs of the liquidation and maximising the potential return to unsecured creditors of the company.

CONCLUSION

45 Accordingly, the orders sought by ASIC and separately by the liquidator will be made.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 8 December 2016

SCHEDULE OF PARTIES

VID 161 of 2014

Plaintiffs

Plaintiff:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Defendants

First Defendant:	SINO AUSTRALIA OIL AND GAS LIMITED (IN LIQ)
Second Defendant:	TIANPENG SHAO
Third Defendant:	RUIYU HE
Fourth Defendant:	HSBC BANK AUSTRALIA LIMITED
Fifth Defendant:	WRIXON GASTEEN
Sixth Defendant:	ZHANHAU YUAN
Seventh Defendant:	GUANGBIN ZHONG
Eighth Defendant:	YU LU
Ninth Defendant:	TIANXIANG SHAO