FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Cassimatis (No 9) [2018] FCA 385

File number:	QUD 574 of 2010
Judge:	**DOWSETT J**
Date of judgment:	22 March 2018
Catchwords:	**CORPORATIONS** – where the respondent directors contravened s 180(1) of the *Corporations Act 2001* (Cth) ("the Act") by causing or permitting inappropriate financial advice to be given to persons with certain characteristics – where the applicant seeks declarations and orders as to penalties and other relief – consideration of declarations pursuant to s 1317E, pecuniary penalties pursuant to s 1317G, disqualification orders pursuant to ss 206C and 206E, and injunctions pursuant to s 1324 of the Act
Legislation:	*Corporations Act 2001* (Cth) ss 180(1), 206C, 206E, 911A, 911B, 912A, 913A, 913B, 914A, 920A, 920B, 945A, 1041E, 1101B, 1317E, 1317G, 1324, 1325A *Evidence Act 1995* (Cth) s 50(1) *Federal Court Rules 2011* (Cth) rr 39.04, 39.05
Cases cited:	*Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 106 ACSR 181 *Australian Securities and Investments Commission v Cassimatis (No 7)* [2016] FCA 624 *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 *Australian Securities and Investments Commission v Gramax Investment Club Pty Ltd* [2005] FCA 1708 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 *Australian Securities and Investments Commission v Ingleby* (2013) 39 VR 554 *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640 *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116

Australian Securities and Investments Commission v Preston [2005] FCA 1805

Australian Securities and Investment Commission v Rich (2004) 220 CLR 129

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300

Davis v Insolvency and Trustee Service Australia (No 2) (2011) 190 FCR 437

Dubbo Refrigerating Co v Rutherford (1898) 14 WN 180

Foster v Australian Competition and Consumer Commission (2006) 149 FCR 135

Gilfillan v Australian Securities and Investments Commission (2012) 92 ACSR 460

JT Stratford & Son Ltd v Lindley [1969] 3 ALL ER 1122

Markarian v R (2005) 228 CLR 357

McDougall; Australian Securities and Investments Commission v Fuelbanc Australia Limited (2007) 162 FCR 174

Mesenberg v Cord Industrial Recruiters Pty Ltd (1996) 39 NSWLR 128

Morley v Australian Securities and Investments Commission (2010) 81 ACSR 285

Morley v Australian Securities and Investments Commission (No 2) (2011) 83 ACSR 620

Queensland North Australia Pty Ltd v Takeovers Panel (No 2) (2015) 236 FCR 370

Re Idylic Solutions Pty Ltd (2013) 93 ACSR 421

Re McDougall (2006) 229 ALR 158

Shafron v Australian Securities and Investments Commission (2010) 81 ACSR 285

Shafron v Australian Securities and Investments Commission (No 2) (2011) 83 ACSR 620

Date of hearing:	1 February 2017
Date of last submissions:	8 February 2017 and 15 February 2017 (Applicant) 13 February 2017 (Respondents)
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords

Number of paragraphs:	173
Counsel for the Applicant:	Mr S Cooper
Solicitor for the Applicant:	Australian Securities and Investments Commission
Solicitor for the Respondents:	Mr S Russell of Russells

ORDERS

QUD 574 of 2010

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**EMMANUEL GEORGE CASSIMATIS** First Respondent
	JULIE GLADYS CASSIMATIS Second Respondent
JUDGE:	**DOWSETT J**
DATE OF ORDER:	**22 MARCH 2018**

THE COURT ORDERS THAT:

1. within 7 days the parties provide agreed draft orders giving effect to these reasons.

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

REASONS FOR JUDGMENT

DOWSETT J:

INTRODUCTION

1 In *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, (the "judgment") Edelman J found that the respondents, directors of Storm Financial Pty Ltd ("Storm"), had each committed one contravention of s 180(1) of the *Corporations Act 2001* (Cth) ("the Act"). Their relevant conduct was allowing Storm to provide the "Storm model" of financial advice to a group of investors who were particularly vulnerable financially. In doing so, the respondents caused or permitted Storm to contravene ss 945A(1)(b), 945A(1)(c), 912A(1)(a) and 912A(1)(c) of the Act and exposed Storm to the risk of losing its Australian Financial Services Licence ("AFSL"). His Honour concluded that no criminal conduct had been proven.

2 Edelman J did not decide all matters in dispute in these proceedings. At [837] his Honour said:

> This trial was concerned only with liability. All issues concerning remedies sought by ASIC against Mr and Mrs Cassimatis were deferred to a separate hearing. These subsequent issues include (i) the form of any declarations to be made; (ii) whether the contraventions were serious or materially prejudiced the interests of Storm (s 1317G) and, if so, the amount of any penalties; (iii) any disqualification orders to be made (including the alternative basis upon which such orders were sought under s 206E); (iv) any orders restraining Mr and Mrs Cassimatis from holding an AFSL or providing financial services; and (v) costs. The parties should now confer in relation to directions for the listing of a hearing in relation to these issues.

3 Since delivering his reasons for judgment, Edelman J has been appointed to the High Court of Australia. In those circumstances, I must now deal with those outstanding matters.

4 The applicant ("ASIC") seeks:

- declarations as to the respondents' contraventions;
- the imposition of pecuniary penalties;
- disqualification orders; and
- orders restraining the respondents from holding an AFSL or providing financial services.

5 The respondents submit that I should only make declarations as to contraventions.

BACKGROUND

6 Mr and Mrs Cassimatis were the founders, sole shareholders, and executive directors of Storm, a financial advisory company. Storm primarily provided advice in accordance with the "Storm model". Edelman J described the Storm model in detail. Below, I provide a brief description. Shortly before the global financial crisis in 2008, Storm's annual revenue was $77 million. It held $120 million in consolidated gross assets. In early 2009 Storm went into administration and then, liquidation. I am presently concerned solely with Mr and Mrs Cassimatis' conduct.

The Storm model

7 The Storm model of advice was recommended to almost 90% of Storm's clients. In effect it advised clients to borrow against the value of his, her or their home to secure a loan, and to use those loan moneys to invest in funds based on the ASX300 (a market capitalization weighted index made up of the 300 largest companies listed on the Australian Securities Exchange). Storm also encouraged further investment "steps", based on movements in the share market. For example, a rise or fall of 10% in the market might trigger a recommendation for further investment. Edelman J found that it was a risky strategy, inappropriate for some investors.

Mr and Mrs Cassimatis' role in Storm

8 His Honour found that Mr and Mrs Cassimatis exercised an "extraordinary degree of control over every aspect of the Storm model and Storm's operations". Edelman J identified eight elements of such control.

9 Firstly, Mr and Mrs Cassimatis controlled the executive committee and the company board. Such control was "extensive to the point that it substantially stifled much possibility of dissent or contradiction, as they would have been aware". For example, executive committee members did not propose resolutions or vote on issues. Rather, they were informed about decisions which had already been made by Mr and Mrs Cassimatis. Similarly, at board meetings, non-executive directors discussed issues, but did not raise new issues. His Honour found that the independent non-executive directors were "passive at these meetings".

10 Secondly, "even apart from management level decisions", Mr and Mrs Cassimatis asserted a high level of control over all aspects of Storm's finances. The Chief Financial Officer could

not generally make any payment without the approval of Mrs Cassimatis. For some time only Mr and Mrs Cassimatis had the authority to sign cheques. Later, other people were authorized to do so, but only in their absence and when immediate payment was necessary.

11 Thirdly, Mr and Mrs Cassimatis had "considerable control over the financial advisers and the process for giving advice concerning the Storm model". The advice was prepared centrally by Storm in a process over which Mr and Mrs Cassimatis had control. His Honour noted one instance where an adviser had not sent an advice to clients because he did not think that they should receive it. After discovering this conduct, Mr Cassimatis said to him that he should not "assume the advice is not appropriate for the clients, we are the specialists and you should present it as it is sent to you".

12 Fourthly, Mr and Mrs Cassimatis had significant control over the education workshops which were an essential part of the Storm process. A potential client had to attend such a workshop before the receipt of any advice. The slides for these presentations were approved by Mr and Mrs Cassimatis. Mr Cassimatis trained presenters concerning the material to be presented.

13 Fifthly, Mr and Mrs Cassimatis asserted significant control over the preparation of clients' "predicted cashflows". Mr Cassimatis "was the main designer of the spreadsheet and formulae". Mrs Cassimatis was the "head of the cashflow team and had the ultimate authority to sign off on all the documents".

14 Sixthly, presentations to external parties were led by Mr Cassimatis, with contributions by Mrs Cassimatis.

15 Seventhly, the process of giving advice was tightly controlled by Mr and Mrs Cassimatis. As a general rule, new advisers gave advice jointly with Mr Cassimatis.

16 Eighthly, Mr and Mrs Cassimatis developed Storm's relationships with external bodies, for example with banks for raising capital for business operations, and with the entities responsible for the funds in which Storm typically recommended investment.

17 The extent of Mr and Mrs Cassimatis' control is a weighty consideration in assessing the degree of culpability which they must bear for the mismanagement of Storm.

THE PRIMARY JUDGE'S FINDINGS

18 Edelman J found that Mr and Mrs Cassimatis breached duties owed to Storm by exercising their powers in ways which caused or permitted inappropriate advice to be given to 11

identified individuals, referred to as the "relevant investors". In permitting or allowing the Storm model to be provided to the relevant investors, the respondents contravened s 180(1) of the Act in that Mr and Mrs Cassimatis exposed Storm to the real risk of facing regulatory action which could have resulted in the loss of its AFSL, putting the very existence of the company in jeopardy.

The relevant investors

19 Although the trial was concerned with Storm's dealings with many more investors, Edelman J ultimately found that the respondents had breached s 180(1) in connection with the 11 relevant investors. However his Honour accepted that there were probably other investors who, had they been identified, would have fallen into that category. The relevant investors had five key characteristics, namely he, she or they:

- was or were over 50 years of age;
- was or were retired or close to retirement;
- had few assets (other than a family home);
- had little income; and
- had little or no prospect of rebuilding his, her or their financial position in the event of a significant loss.

20 In his Honour's view a risky strategy such as the Storm model, was not appropriate for persons having these characteristics

The relevant duties

21 Section 180(1) of the Act provided:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

22 Edelman J found that the respondents had failed to discharge their respective duties pursuant to s 180(1). Pursuant to s 1317E and s 1317G, they were liable to the imposition of pecuniary

penalties. Pursuant to s 206C and/or s 206E, they might be disqualified from managing corporations. ASIC asserts that pursuant to s 1324 they might be restrained from holding an AFSL or from providing financial services under an AFSL.

23 Section 945A of the Act provided:

> (1) The providing entity must only provide the advice to the client if:
>
> (a) the providing entity:
>
> (i) determines the relevant personal circumstances in relation to giving the advice; and
>
> (ii) makes reasonable inquiries in relation to those personal circumstances; and
>
> (b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and
>
> (c) the advice is appropriate to the client, having regard to that consideration and investigation.
>
> (2) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1), it is a defence if:
>
> (a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and
>
> (b) the representative's failure to comply with subsection (1) occurred because the representative was acting in reliance on that information or those instructions; and
>
> (c) the representative's reliance on that information or those instructions was reasonable.

24 Section 912A(1) relevantly provided:

> A financial services licensee must:
>
> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and
>
> (b) comply with the conditions on the licence; and
>
> (c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) subject to subsection (4)-have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained (including by complying with section 921D), and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and

(h) subject to subsection (5)—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

25 The thrust of the findings made by Edelman J was that the respondents, by their conduct, had exposed Storm to the possible consequences of its having breached s 945(1)(b) and (c) and s 912A(1)(a) and (c).

26 At [22]-[23] his Honour summarized his findings as to contravention as follows:

22. For the reasons explained in detail later, a reasonable director with Mr and Mrs Cassimatis' responsibilities, and in Storm's circumstances, would have realised that the application of the model to people in the pleaded circumstances was likely to involve inappropriate advice. The reasonable director would have taken some alleviating precautions to prevent the giving of that advice. I reach this conclusion for the detailed reasons given later, but with a strong awareness that it is made in the context that a director's powers to act are, of the very nature of corporations, ones which often require risks to be taken.

23. Mr and Mrs Cassimatis should have been reasonably aware that the application of the Storm model would be likely to (and did) cause contraventions of s 945A(1)(b) and s 945A(1)(c). The contraventions of s 945A(1)(b) occurred because Storm did not give such consideration to the subject matter of the advice and did not conduct such investigation of the subject matter of the advice as was reasonable in the circumstances. The contraventions of s 945A(1)(c) occurred because Storm provided financial advice which was not appropriate to the investors having regard to the consideration and investigation of the subject matter of the advice that ought to have been undertaken. Those contraventions were not merely likely to occur. They were contraventions which could have (and did have) devastating consequences for many investors in that class and the discovery of those breaches would have threatened the continuation of Storm's Australian Financial Services Licence (AFSL) licence and Storm's very

existence.

27 At [831] his Honour noted:

> ... ASIC pleaded that Mr and Mrs Cassimatis failed to take reasonable steps to prevent the contraventions by Storm (which I have found to be contraventions of s 945A(1)(b) and s 945A(1)(c)) because they failed to take any steps to prevent Storm from providing advice in accordance with the Storm model to the relevant investors. ASIC submitted, and I accept, that the same matters which established the breach by Mr and Mrs Cassimatis of their obligations under s 180(1) also established this failure to take reasonable steps. As ASIC submitted, it was Mr and Mrs Cassimatis' conduct in creating and overseeing the operation of the Storm model which caused it to be applied to clients for whom it was not suitable; Mr and Mrs Cassimatis took no steps to implement any system that would restrict the cash flow team, those preparing the SOAs, or the advisers, from giving advice to clients in the position of the relevant investors to invest in accordance with the Storm model.

28 At [833] his Honour expressed his ultimate conclusion:

> My conclusion is that Mr and Mrs Cassimatis each contravened s 180(1) of the *Corporations Act* by exercising their powers in a way which caused or "permitted" (by omission to prevent) inappropriate advice to be given to the relevant investors. Those relevant investors were members of a class of investor, as pleaded by ASIC, who (in summary terms) were retired or close to retirement, had few assets, little income, and little or no prospect of rebuilding their financial position in the event of suffering significant loss. A reasonable director with the responsibilities of Mr or Mrs Cassimatis would have known that the Storm model was being applied to clients such as those who fell within this class and that its application was likely to lead to inappropriate advice. The consequences of that inappropriate advice would be catastrophic for Storm (the entity to whom the directors owed their duties). It would have been simple to take precautionary measures to attempt to avoid the application of the Storm model to this class of persons.

CONSEQUENCES FOR THE RELEVANT INVESTORS

29 As already indicated, the relevant investors were characterized as being particularly vulnerable to suffering large losses. Such losses were incurred during the global financial crisis, in the aftermath of which Storm advised some of them to sell their shareholdings. Some of the relevant investors lost their family homes, or incurred lengthy postponements of their planned retirements. His Honour found that by failing to give reasonable consideration to the circumstances of the relevant investors, Storm provided inappropriate advice which exposed the relevant investors to these devastating consequences.

30 In brief, Edelman J found that there were four key reasons why Storm contravened s 945A (and s 912A), namely that Storm did not:

- give reasonable consideration to, or conduct reasonable investigation of alternative investment strategies for the relevant investors;
- adequately determine the objective of the advice which it gave, which objective required measurement and, where possible, "quantification";
- conduct an adequate sensitivity analysis before advising the relevant investors; and
- give reasonable consideration to the income of the relevant investors in all their circumstances.

31 Edelman J considered that the advice was not suitable for the relevant investors for three reasons. Firstly, the relevant investors were inappropriately classified as "balanced investors" and advised as such (exposing them to the stock market to a greater degree than was appropriate in their circumstances). The expert evidence revealed, and Edelman J concluded that:

- the relevant investors were instead likely to be "conservative investors", for whom a lesser exposure to volatile growth assets like shares was suitable;
- an adviser could not reasonably have concluded that a relevant investor was a balanced investor because he or she was approaching retirement, or was retired, and the loss of his or her home would be catastrophic;
- even if such an investor had an unusual appetite for risk, it was inappropriate, having regard to his or her circumstance; and
- he or she should have been treated and advised as a conservative investor.

32 Secondly, the advice was not suitable because the family home was "inappropriately treated as an asset in the investment portfolio" of each relevant investor. Such treatment was inappropriate because, being retired or approaching retirement, having little income and few assets other than his or her home, and little or no prospect of rebuilding his or her finances in the event of suffering significant loss, he or she could not reasonably tolerate any chance of having to sell the house.

33 Thirdly, the advice was "inappropriate in any event". Edelman J concluded that the circumstances of each relevant investor meant that double geared investment (which was concentrated in the share market) was not appropriate for him or her as it involved high risk. The expert evidence of Mr McMaster, on which Edelman J relied, demonstrated that the Storm model performed so poorly during the global financial crisis because of:

- the concentration of assets in the share market;
- the high levels of debt relative to assets; and
- the absence of financial capacity to maintain the position during a downturn.

34 His Honour noted that, "[t]o these reasons must be added the possibility of a significant market fall". While the extent of the global financial crisis could not have been reasonably foreseen at the time at which the advice was given, "a significant downturn", such as a 22% fall, "was a possibility". The experts agreed that a person, retired or nearing retirement, should not generally be advised to invest in high risk investments.

TWO PRELIMINARY ISSUES

35 Notwithstanding the length of the trial and the primary Judge's detailed reasons, both ASIC and the respondents seek, in effect, to depart from, expand upon or vary the issues which were ventilated at the trial.

ASIC's interlocutory application

36 By application dated 27 January 2017, ASIC seeks a direction under s 50(1) of the *Evidence Act 1995* (Cth) (the "Evidence Act") that evidence from the "Phormula Database" be given in summary form, which evidence it seeks to tender. Phormula was software used by Storm to generate draft advice recommendations for clients. From late 2007, information obtained from clients concerning their circumstances was entered into the Phormula database. ASIC now seeks to rely upon an affidavit by Terrence Michael Potter, sworn on 28 October 2016, after the delivery of the primary Judge's reasons on 26 August 2016. Mr Potter is a chartered accountant and a director of Axiom Forensics Pty Ltd ("Axiom"). He specializes in "insolvency and reconstruction accountancy". His affidavit deals with various aspects of the database.

37 In 2009 Axiom was employed by ASIC in connection with these proceedings. At that stage, it was asked to develop a model for measuring the loss suffered by clients who had been advised by Storm. For that purpose Axiom had access to the Phormula database. Since his Honour's judgment, Mr Potter and his staff have produced from the database a spreadsheet showing:

- the various ages of Storm investors as at the date of their respective first investments; and

- the amount invested by each "client code".

38 A "client code" identifies an individual investor or group of related investors, including married couples and/or associated companies and trusts. From the spreadsheet, the data has been categorized by the age of each natural person, the lowest age category being 49 or younger and the highest, 80 and older. From that information, "pie charts" have been produced which demonstrate the distribution of client codes by age and Storm investments by age. Mr Potter asserts that the database discloses 3,126 client codes representing 5,329 "individual entities". I should say that in the first-mentioned client code, the oldest group is "75 and older", not "80 and older".

39 ASIC points out that in s 206C and s 206E (which deal with disqualification from managing corporations) the Court may have regard to the relevant person's conduct and other matters that it considers appropriate. In its submissions at paras 58-63, ASIC seems to submit that the evidence of Mr Potter relates to the primary Judge's observation that the relevant investors were not the only investors who had all of the relevant characteristics which they shared. ASIC then submits that 35% of the client codes contained persons who were aged 50 or over at the time of their first investments. It then submits that the likelihood of, "devastating consequences for many vulnerable investors" and the, "not insignificant size of the class of potentially vulnerable investors" made other contraventions of s 945A likely and that such other contraventions may well have been discovered, causing adverse consequences for Storm. However there is no reason to believe that all of the investors who were aged over 50 at the time of their first investments had all of the other characteristics which made the relevant investors vulnerable.

40 Apart from any question under s 50 of the Evidence Act, the primary question is as to the relevance of this evidence. Section 50 provides:

> (1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
>
> (2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:
>
> (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and
>
> (b) given each other party a reasonable opportunity to examine or copy

the documents in question.

(3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

41 Whether or not s 50 helps in this regard, I am not satisfied that Mr Potter's evidence takes the case any further than does the view expressed by Edelman J that there were probably other investors who showed all of the characteristics of the relevant investors. For that reason alone, the evidence is irrelevant and should not be received. It is not necessary that I consider the other grounds upon which the respondents relied in challenging its admissibility. I observe only that had I concluded that the affidavit had any relevance, I would probably have rejected its admission pursuant to s 135(c), having regard to the evident complexity of the documents upon which it is based and the respondents' not unreasonable assertion that if the affidavit evidence were admitted, they would wish to investigate those documents. The associated further cost and delay would simply not have been justified.

The respondents' interlocutory application

42 By application dated 17 January 2017, the respondents seek to withdraw an admission in their defence that Storm provided advice to Mr and Mrs Madden, two of the relevant investors. As a result of the admission, no evidence was led at trial in relation to the dealings between Storm and them. Edelman J found that Mr and Mrs Madden had been given inappropriate advice by Storm in contravention of the Act. The respondents now submit that "it was just a mistake by both parties that Mr and Mrs Madden were included in the trial at all". They claim that the advice provided to Mr and Mrs Madden was provided not by Storm, but by a wholly owned subsidiary, Victorian Families Retirement and Investment Group Pty Ltd ("Victorian Families").

43 The respondents note that the matter was raised before Edelman J in submissions in reply, but that "the evidence had closed, and we weren't able to take the matter any further". They did not make an application to withdraw the admission whilst the matter was before his Honour, but now "frankly concede that we should have". The respondents submit that the alleged error is significant, because it "reduces the number of relevant investors from six to five, or from 11 to nine", the former figure relating to the number of client codes, and the latter, to the number of investors.

44 ASIC resists the application on two grounds. Firstly, it asserts that there was evidence which it could have adduced at the trial concerning that issue. ASIC contends that this evidence would have demonstrated that, "in truth that advice was provided by Storm", albeit that the written advice contained the name and AFSL number of Victorian Families. ASIC notes that Mr Madden, himself, deposed to having invested in Storm and to having been a client of Storm, and that there were numerous references to Storm in the initial advice given to the Maddens, amongst other matters. Overall, ASIC's submission is that the evidence supports the allegations that while, "Mr and Mrs Madden may have been Victorian Families' clients when Storm acquired Victorian Families, … they subsequently became clients of, and received advice from Storm". (See paras 4-23 of ASIC's submissions in reply.)

45 Secondly, ASIC submits that even if the Court is persuaded that the advice was provided by Victorian Families, as a matter of discretion, leave to withdraw the admission should not be granted. ASIC contends that Mr and Mrs Madden were representatives of a class of investors with the characteristics of the relevant investors. ASIC submits that it could have replaced Mr and Mrs Madden with other investors who shared the relevant characteristics. The failure by the respondents to withdraw their admission prior to judgment meant that ASIC was denied this opportunity. Finally, ASIC submits that regardless of which entity provided the advice, such advice clearly reveals that it was prepared using Storm's advice template and, "the Court should infer that Mr and Mrs Cassimatis caused the Storm model to be applied to clients advised by Victorian Families". As a consequence, it submits that there would be no injustice to the respondents in refusing leave to withdraw the admission.

46 In his judgment, Edelman J said, concerning this aspect of the case:

> Although Mr and Mrs Cassimatis admitted that Mr and Mrs Madden were clients of Storm, in their closing submissions Mr and Mrs Cassimatis said that the Maddens were "not a client of Storm, but a client of [Victorian Families], which operated under a different ASFL". No evidence was tendered by Mr and Mrs Cassimatis in support of this submission. No application was made by Mr and Mrs Cassimatis for leave to withdraw their admission that Mr and Mrs Madden were clients of Storm: see *Turner & Townsend Pty Ltd v Berry* [2012] FCA 111 [14] (Jagot J). ASIC relied on this admission, together with others in relation to the Schedule generally, in its forensic decision not to call masses of evidence in relation to the many Schedule investors. ASIC also referred to some matters which might have supported Mr and Mrs Madden being clients of Storm, including their authorisation for the dispersal of funds in accordance with the advice they had received, including a payment to Storm of the fees for that advice, and a letter signed by Mr Cassimatis to Mr and Mrs Madden on 8 October 2008 advising them to switch their investment to cash. However, none of these matters was the subject of evidence, presumably because Mr and Mrs Cassimatis did not seek leave to withdraw their admission.

47 The matter is no longer simply a question as to whether the respondents should be allowed to withdraw their admission. The primary Judge has made findings, based upon that admission, the respondents not having sought to withdraw it. Had they applied to the primary Judge for leave to withdraw the admission, and had his Honour refused the application and proceeded to make findings based on it, the respondents could have, at some stage, appealed against that refusal. If successful, the consequence may have been that any judgment or order based upon such admission would have been set aside. It is difficult to see why they should not be held to the decision which they made.

48 Three questions arise, namely:

- whether I have power to set aside a finding of fact made by the primary Judge;
- if so empowered, whether it is appropriate to allow the application in the circumstances; and
- if the application is successful, the consequence for the purposes of the present proceedings.

49 As to power, in *Davis v Insolvency and Trustee Service Australia (No 2)* (2011) 190 FCR 437 at 439-440, the Full Court (Keane CJ, Besanko and Perram JJ) said:

> 4. It is a well established principle that "[a] superior court of justice ... has full power to rehear or review a case until judgment is drawn up, passed and entered": *Texas Company (Australasia) Ltd v Federal Commissioner of Taxation* (1940) 63 CLR 382 at 457 per Starke J, cited with approval in *DJL v Central Authority* (2000) 201 CLR 226 at [34] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. The Federal Court, by reason of s 5(2) of the *Federal Court of Australia Act 1976* (Cth), is a superior court of record and, therefore, subject to the necessary factual precondition of the orders having not been entered, has such a power. Additionally, the Court is empowered to vary or set aside a judgment or order before it has been entered under O 35 rule 7(1) of the *Federal Court Rules*.
>
> 5. The entry of orders in the Federal Court is governed by O 36 r 3(1) which states that orders may be entered by authentication (defined in r 7) either by a Registrar (under r 3(2)) or a Judge of the Court (under r 5). In these proceedings, the orders made on 3 December 2010 have not been entered and, therefore, the Court retains the power to review its own decision. It is important to note that entry of the Court's orders onto its computerised system "Casetrack" (which has occurred in this case) does not constitute the entry of orders for the purposes of the Court's rules. So much was recently made clear by the High Court in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [152].

> 6. The principles surrounding the Court's power to review its own judgment before its perfection are clear: "[w]hat must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing." (*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303 per Mason CJ). Because of the importance of the public interest in the finality of litigation, it is a jurisdiction "to be exercised with great caution" (at 302). The onus is on the applicant to demonstrate that he or she has not been heard: *Autodesk* at 302 citing *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684 per Mason ACJ, Wilson and Brennan JJ.

50 I should say that the proposition identified by the Full Court as flowing from the decision of the High Court in *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 was advanced only by Mason CJ and Deane J, both of whom dissented in the ultimate outcome. Of the majority, Brennan and Dawson JJ considered that a court could recall a judgment, at least prior to formal entry, where a person, without fault on his or her part, had not had an opportunity to be heard as to why that judgment should not be pronounced. Their Honours seem to have had in mind a situation in which the Court decides the case on a basis which has not been argued (at 308 per Brennan J). Their Honours concluded that *Autodesk* was not such a case. Gaudron J agreed with Brennan and Dawson JJ that the appeal should be dismissed but considered that a court could vacate a judgment, "if the interests of justice so require" (at 328).

51 The rules referred to in the Full Court's decision were those in force prior to the adoption of the *Federal Court Rules 2011* (Cth). The relevant rules are now rr 39.04 and 39.05. Clearly, the Full Court was addressing a broad discretionary power, going beyond the circumstances contemplated in r 39.05. At para 8 of the respondents' supplementary submissions they submit:

> Because the judgment is interlocutory, a number of avenues existed and exist to correct the error. The respondents:-
>
> (a) may have applied before judgment for leave to amend their Defence (and withdraw the admission);
>
> (b) may have sought leave to appeal to the Full Court;
>
> (c) may have applied for leave to correct the judgment under the slip rule;
>
> (d) have sought the consent of ASIC to withdraw the admission;
>
> (e) have applied for leave to amend their pleading; and

(f) have submitted, on the present hearing that the erroneous finding should be ignored when deciding the questions of penalty and costs.

52 The respondents do not seem to distinguish between amending a pleading, correcting an error in a judgment or order and upsetting a finding of fact. They chose to allow the matter to proceed on the basis of their admission. For that reason alone, it would generally be inappropriate to allow the respondents to withdraw the admission.

53 However the wide power discussed in *Davis* and *Autodesk* would permit the Court to revisit any aspect of the proceedings before Edelman J. Only in limited circumstances would such an approach be justified. According to Mason CJ and Deane J, there must have been a misapprehension concerning the facts or the law, and such misapprehension must not have been attributable solely to the respondent's neglect or default. That is not the present case. In view of ASIC's submissions, it is not clear that there was any misapprehension at trial concerning the facts or the law. Further, if there was any error it was attributable solely to the neglect or default of the respondents, at least as far as the evidence goes, such neglect or default lying in failure to apply to withdraw the admission prior to the delivery of his Honour's reasons. If I were to adopt the approach taken by Brennan and Dawson JJ in *Autodesk*, the respondents would also fail as it cannot be said that they had not been heard, nor that any failure to be heard was without fault on their part. The respondents must have known of the relationship between Storm and Victorian Families, or have had the means of ascertaining such information. They no doubt received appropriate advice from, and gave appropriate instructions to their solicitors concerning the admission made in connection with the Maddens, or at least they must be treated as having done so. I can only infer that they decided not to apply to the primary Judge for leave to withdraw the admission. It is difficult to understand why they did not do so. One is inclined to suspect that they, or their legal advisers, saw some forensic benefit in taking the course that they did. I need not speculate about that matter. In the circumstances, the need for finality in litigation displaces any inclination to give the respondents another chance with respect to the case as it concerns the Maddens. I refuse the application.

54 In any event I do not consider that Mr and Mrs Cassimatis are likely to suffer any injustice by their being held to their admission. I seriously doubt whether the withdrawal of the admission would have any material bearing on penalties or other relief.

DECLARATORY RELIEF

55 Section 1317E of the Act requires that the Court record its findings as to infringement in the form of declarations. Pursuant to s 1317E(2), a declaration of contravention must specify:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention; and

(e) if the contravention is of a corporation/scheme civil penalty provision, the corporation or registered scheme to which the conduct related.

56 The respondents do not oppose the making of such declarations.

57 I make the following declarations:

(1) Emmanuel George Cassimatis contravened s 180(1) of the *Corporations Act 2001* (Cth) by exercising his powers as a director of Storm Financial Pty Ltd, so as to cause or permit inappropriate financial advice to be given to the persons identified in the schedule to this order, causing Storm Financial Pty Ltd to contravene s 945A(1)(b), s 945A(1)(c), s 912A(1)(a) and s 912A(1)(c) of the said Act, or by failing to exercise his powers so as to prevent such contraventions; and

(2) Julie Gladys Cassimatis contravened s 180(1) of the *Corporations Act 2001* (Cth) by exercising her powers as a director of Storm Financial Pty Ltd, so as to cause or permit inappropriate financial advice to be given to the persons identified in the schedule to this order, causing Storm Financial Pty Ltd to contravene s 945A(1)(b), s 945A(1)(c), s 912A(1)(a) and s 912A(1)(c) of the said Act, or by failing to exercise her powers so as to prevent such contraventions.

58 The schedule to the orders will contain the names of the relevant investors.

OTHER RELIEF

59 ASIC seeks pecuniary penalties pursuant to s 1317G(1) which provides:

> (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and

(aa) the contravention is of a corporation/scheme civil penalty provision; and

(b) the contravention:

(i) materially prejudices the interests of the corporation or scheme, or its members; or

(ii) materially prejudices the corporation's ability to pay its creditors; or

(iii) is serious.

60 ASIC also seeks orders disqualifying each respondent from managing a corporation for an appropriate period pursuant to s 206C which provides:

(1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:

(a) a declaration is made under:

(i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or

(ii) section 386-1 (civil penalty provision) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* that the person has contravened a civil penalty provision (within the meaning of that Act); and

(b) the Court is satisfied that the disqualification is justified.

(2) 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 that the Court considers appropriate.

(3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

61 ASIC makes a similar application under s 206E which relevantly provides:

(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:

(a) the person:

(i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

(ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or

(iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and

(b) the Court is satisfied that the disqualification is justified.

...

(2) 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 that the Court considers appropriate.

...

62 The claim under s 206E was added at a late stage in the proceedings, apparently because of a concern, on the part of ASIC, that it might not satisfy the requirements of s 206C. In the event, however, Edelman J made findings which led to the engagement of both sections.

63 ASIC also seeks injunctive relief pursuant to s 1324 of the Act. That section relevantly provides:

(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

(a) a contravention of this Act; or

(b) attempting to contravene this Act; or

(c) aiding, abetting, counselling or procuring a person to contravene this Act; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

(f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

...

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of:

(a) ASIC; or

(b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;

grant an injunction, on such terms as the Court thinks appropriate, requiring the first mentioned person to do that act or thing.

(3) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.

...

(6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person engages in conduct of that kind.

(7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:

(a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and

(b) whether or not the person has previously refused or failed to do that act or thing; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person refuses or fails to do that act or thing.

(8) Where ASIC applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.

...

64 ASIC seeks to restrain each respondent from holding an AFSL or from providing financial services under any AFSL, for a period of ten years.

WHETHER RELIEF (OTHER THAN DECLARATIONS) SHOULD BE GRANTED

65 ASIC submits that declarations are not a sufficient penalty in the circumstances of this case, as they will not, by themselves, achieve the aim of protecting the public. It submits that the other relief sought is justified by the seriousness of the contravening conduct, the duration of that conduct, and the need for general deterrence. It also points to the effect of the conduct upon third parties who dealt with Storm, namely the relevant investors. For them Storm's advice has had devastating consequences. ASIC submits that the respondents prejudiced Storm's interests by exposing it to the risk that it would be found to have contravened provisions of the Act which, in turn, may have exposed it to penalties, litigation at the suit of disappointed investors, loss of its AFSL and/or other regulatory action. At [774] Edelman J observed that:

> Although many of the relevant investors suffered significant, life-altering, losses after the GFC, these losses were neither necessary nor sufficient for Storm's breach of s 945A of the *Corporations Act*. Further, although losses of this nature, whether due to the GFC or any other large market fall, might have been one way that the application of the Storm model to vulnerable investors became clear to many people outside Storm, the discovery of these breaches by Storm was not necessarily dependent upon these losses. It is not necessary to speculate upon the different ways that the breaches might have come to the attention of ASIC, whether by an adviser, a client, a competitor, a bank, or otherwise. The short point is that the likelihood of breaches, and the not insignificant size of the class of potentially vulnerable investors (retirees, with limited income and few assets) was such that the breaches were likely to be discovered at some point. At the very least, a reasonable director with Mr and Mrs Cassimatis' responsibilities, and in Storm's circumstances, should have realised that discovery of the likely breaches was a real possibility. And the consequences of discovery were catastrophic for Storm.

66 ASIC also submits that the respondents' contraventions were serious.

67 The respondents submit that whatever risk of prejudice there may have been, it did not lead to any loss by Storm. No regulatory proceedings have been taken, and none of the relevant investors has commenced proceedings. This approach necessarily equates the proposition "materially prejudices the interest of" to the proposition "causes loss to". The word "prejudice", according to the *New Shorter Oxford English Dictionary* relevantly means "[a]ffect adversely, or unfavourably". I have no difficulty in concluding that to expose Storm to the very real risks to which I have referred was to affect its interests adversely or unfavourably. This conclusion is easily drawn when one is dealing with the interests of a corporation, the business of which is offering financial advice and investment opportunities, and the prejudice is a threat to its capacity to do so.

68 The respondents submit that their contraventions of s 180(1) were not, separately or collectively, serious. In this respect, the respondents' submissions are misconceived. More importantly, the submissions bespeak a refusal to acknowledge, even at this stage, the obvious seriousness of their misconduct.

69 The respondents sought to discount the seriousness of their respective breaches of s 180(1) by comparing them to breaches of other provisions of the Act which breaches were also dealt with under s 1317G. This submission seems to depend upon the fact that s 1317G applied to a wide range of contraventions, with the same maximum penalty of $200,000. The relevant question is, however, whether the respondents' contraventions were, in all the circumstances, serious. In my view, to offer investment advice to vulnerable investors without regard to their vulnerability is, of itself, serious misconduct.

70 In circumstances where the conduct of Mr and Mrs Cassimatis exposed Storm to the potential loss of its AFSL, and thereby to a threat to its very existence "this case is fundamentally about directors failing in their duties in a way that went to the very core of the company's business." It is not easy to identify the characteristics of the notionally most serious example of particular misconduct. However it is fair to say that the respondents established and maintained a system by which inappropriate investment advice was given to vulnerable people. Whilst this conduct was not dishonest, it was a serious breach of the respondents' duties as directors. The relevant prejudice must be to Storm, its members and creditors. However the prejudice to vulnerable investors necessarily exposed Storm to the possibility of adverse claims, proceedings for breaches of the Act and prejudice to its holding of an AFSL. There can be no doubt that the respondents' contraventions were serious.

PECUNIARY PENALTIES

71 At paras 38-44 of its written submissions, ASIC offers the following summary of the considerations relevant to the imposition of a pecuniary penalty:

> 38. Although the pecuniary penalty has a punitive character, its principal purpose is to act as a personal deterrent and a deterrent to the general public against a repetition of like conduct. The deterrent effect is aimed at preventing a corporate structure being used in a manner which is contrary to proper commercial standards to the detriment of the company, its shareholders, creditors, investors and others dealing with it. Any penalty should be no greater than is necessary to achieve this deterrent effect.
>
> 39. The capacity of a person to pay a pecuniary penalty, any hardship occasioned to that person by a pecuniary penalty and whether the order will prejudice the person's rehabilitation are relevant in determining whether a penalty should

be ordered and, if so, the amount of the penalty.

40. General deterrence remains an important factor in determining a pecuniary penalty, notwithstanding the detriment suffered by the respondent.

41. The likely consequences of a disqualification order are relevant considerations. Where the disqualification order does not have significant consequences for the defendant it is likely to be only marginally relevant. On the other hand, in *ASIC v Beekink*, the Full Court of the Federal Court halved the amount of the pecuniary penalty it would have ordered to account for the impact of a one year disqualification imposed on a solicitor.

42. The size of the penalty is a question of discretion. The circumstances of one case should not dictate the size of the penalty in different circumstances in another case.

43. In *ASIC v Beekink*, the Full Court of the Federal Court identified three difficulties in attempting to classify the amount of a pecuniary penalty by reference to common factors in other cases. Firstly, the breaches tend to take a wide variety of forms. Secondly, the value of money erodes over time. Thirdly, in recent years the courts have been more concerned with the need for the imposition of higher civil penalties to reflect community expectations of the standards to be imposed on company directors.

44. Here again, the balance to be struck by the Court in approaching the exercise of the discretion to impose a pecuniary penalty should favour the protection of the public interest. While the process of fixing the quantum of a penalty is, of course, not an exact science it has been said that in determining the appropriate amount the Court should not leave room for any impression of weakness in its resolve to achieve the deterrent objective of the imposition of a civil penalty.

(Footnotes omitted.)

72 In these circumstances, I should impose a penalty of some substance. The maximum penalty is $200,000 for each contravention. In *Markarian v R* (2005) 228 CLR 357 at [30]-[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ) said:

> 30 Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance. In their book *Sentencing*, Stockdale and Devlin observe that:
>
> > "A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ...
> >
> > A change in a maximum sentence by Parliament will sometimes be helpful [where it is thought that the Parliament regarded the previous penalties as inadequate]."

> 31 It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for Hulme J here to look first to a maximum penalty, and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case. ...
>
> (Footnotes omitted.)

73 ASIC submits that the imposition of a pecuniary penalty is primarily for the purpose of deterring the offender and potential offenders from similar misconduct. In this case, the desired effect is to deter the use of a corporate structure in a way which is contrary to proper commercial standards. ASIC accepts that in fixing the amount of any penalty, I should have regard to the respondents' respective capacities to pay and any hardship which may be caused to them by such imposition. It may also be necessary to take into account the financial consequences upon the respondents of any other orders. Any penalty must reflect the circumstances of the relevant infringement and should be consistent with penalties previously imposed for broadly similar misconduct. However I accept that it is frequently difficult to draw meaningful comparisons.

74 I accept that the respondents played dominant roles in designing the Storm model and closely supervising its execution. I accept that in not recognizing the risks to vulnerable clients, they failed to discharge their duties as directors. I also accept that quite apart from the effects of their conduct on Storm's interests, at least some of the relevant investors suffered significant loss. I infer from the primary Judge's reasons that the respondents focussed on managing Storm's profitability and paid too little attention to the interests of vulnerable investors. I act upon the primary Judge's finding that there were probably vulnerable investors other than the 11 relevant investors. However I am unable to say any more than that. It follows that the respondents cannot be heard to assert that the 11 relevant investors were the only adversely affected investors. On the other hand, ASIC cannot rely upon any other demonstrated examples of the respondents' misconduct which caused loss.

75 ASIC contends that the respondents' lack of admissions, contrition or insight led to the extended nature of the proceedings. However it seems to me that ASIC must bear its own share of responsibility for that matter, having regard both to the earlier defective pleadings

and the prosecution of aspects of the case upon which it was eventually unsuccessful. Nonetheless, the respondents' refusal to accept the seriousness of their misconduct demonstrates a lack of insight and contrition which may weigh against them in the imposition of penalties and in the formulation of other orders.

76 ASIC also submits that "Mr and Mrs Cassimatis' previous earnings and current lifestyle are such that they cannot claim that they will suffer hardship as a result of the imposition of a penalty" of $70,000 each, the pecuniary penalty sought by ASIC. The basis for this submission is that since Storm went into liquidation, the respondents have travelled overseas on a regular basis. Apart from this allegation, and a suggestion by the respondents' solicitor that they do not have the money to fund an appeal from Edelman J's decision, I have little or no information about the respondents' current financial circumstances.

77 The respondents submit that the absence of actual dishonesty is a mitigating factor. It is probably more useful to focus on the actual characteristics of the relevant conduct than upon the absence of characteristics. The absence of dishonesty should be seen as absence of a possible circumstance of aggravation. The respondents submit that the case is unusual in that only breaches of s 180 have been established. Again, it may be better to focus on the conduct as it was, rather than as it was not.

78 At para 43 of their submissions, the respondents identify a number of other considerations said to go in mitigation of the seriousness of their conduct and the penalties imposed. Apart from matters previously discussed, those considerations include:

- ASIC's conduct in investigating and dealing with the respondents' misconduct;
- that ASIC would not, in any event, have taken any serious action against Storm;
- that ASIC could and should have dealt with the respondents' conduct by giving a "strong warning"; and
- that Storm had adequate insurance in place in respect of any claims by relevant investors.

79 The first consideration seems to have two aspects. The respondents assert that ASIC took steps to deter customers and potential customers from investing with Storm. In my view, any criticism of the way in which ASIC performed its functions in this regard cannot be relevant to penalty, at least in the absence of actionable misconduct. The respondents do not raise any such case. This Court cannot properly be asked, in proceedings of the present kind, to assess

the way in which ASIC performed its functions, other than in connection with the trial of the substantive issues and these present proceedings.

80 The second aspect relates to the way in which ASIC commenced and conducted the proceedings. First, it is said that ASIC alleged that the respondents were, in effect, guilty of dishonesty or serious misconduct. Secondly, ASIC claimed that Storm had committed offences against the Act, as opposed to contraventions, resulting in pecuniary penalties. As to the assertion that ASIC had alleged dishonesty on the part of the respondents, ASIC certainly alleged that their conduct demonstrated that they did not care whether particular statements were true, or ought reasonably to have known that statements were false in material particulars, or were materially misleading. These matters may be relevant to costs, but not to penalty.

81 The second consideration is the assertion that ASIC would not, in any event, have taken, "any serious action" against Storm. The submission is primarily based upon a "regulatory guide" concerning enforceable undertakings, which guide was issued by ASIC. It suggests that ASIC would, in many cases, accept an enforceable undertaking not to continue the relevant misconduct, or recommence such conduct in the future. There is no suggestion that Storm ever offered such an undertaking. Whilst it was open to ASIC to suggest such a course, I see no basis for assuming that it should, or would have proceeded in that way. Nothing in the regulatory guide suggested that in any particular case, it would so proceed. The submission is, in effect, an invitation to the Court to review ASIC's conduct. I see no basis for doing so. Further, to the extent that the respondents submit that Storm's conduct deserved only "[mild] administrative action", they again overlook the seriousness of the consequences of such conduct for the relevant investors, and therefore for Storm. I see no basis for inferring that had ASIC dealt with Storm, it would have sought only an enforceable undertaking. Similar comments apply to the third consideration, that any action by ASIC would have involved only a "strong warning".

82 The fourth consideration is that Storm had substantial insurance cover, which cover would have been sufficient to meet any claims by the relevant investors. The adequacy of such cover may have depended upon whether or not there were other claims. In any event, it in no way mitigates the seriousness of the respondents' conduct that Storm had insurance cover, presumably for loss incurred as the result of contraventions of the Act. A claim under such a policy might, itself, have prejudiced Storm's interests, in that it might have resulted in higher

premiums and/or reputational damage. The obtaining of such insurance cover was a proper exercise of the directors' duties. However it did not excuse or mitigate breaches of other duties. The respondents' submission boils down to the assertion that a director's breach of duty is less serious if the company is insured against loss brought about by such breach. Nothing in the Act supports such a proposition and, as a matter of policy, it is unacceptable.

83 I do not accept the assertion in para 43(p) that this case is "singularly unsuitable" for the imposition of a pecuniary penalty. Such a submission cannot be supported by reference to the terms of the Act.

84 Many of the submissions made in paras 44-53 repeat, or are based on earlier submissions which I have, in general, rejected. In effect, the respondents submit that traditional purposes of judicial punishment such as retribution, deterrence, rehabilitation and community protection have little or no relevance in this case. I do not accept that submission. It is essential that any significant infringement of the law be properly identified and condemned. It is more important that offenders and potential offenders be deterred from similar misconduct. If there is a chance that they may again be involved as officers of companies, steps should be taken to ensure that in such an event, they will not again fail in their duties. This objective is, in part, achieved by rehabilitation and in part by deterrence.

85 The respondents submit that the absence of contrition is irrelevant, given that they do not accept the primary Judge's decision but cannot afford to appeal against it. Whilst that may explain their lack of contrition, it does not follow that they should be treated as if they were contrite.

86 Although the respondents said very little about it in their submissions as to penalty, it is clear that Edelman J considered that the respondents had made significant efforts to assist some of the persons who suffered loss as a result of Storm's conduct. See the judgment at [820]-[834]. I take that matter into account, as well as the orders of disqualification which I propose to make pursuant to s 206C and s 206E of the Act.

87 ASIC has helpfully provided references to decisions involving breaches of s 180 and/or associated provisions of the Act. In particular, it has referred to cases arising out of the involvement of the Australian Wheat Board ("AWB") in the supply of wheat to Iraq (the "AWB cases") and to the cases concerning James Hardie Industries Ltd and its officers (the "James Hardie cases") in connection with its asbestos compensation fund. In each case the

litigation concerned misconduct which has become notorious. The present case is notorious, but perhaps not quite so notorious. It is a little difficult to compare the seriousness of the conduct in this case with that in the AWB cases and that in the James Hardie cases. The AWB cases primarily involved harm to Australia's standing as a trading partner. The James Hardie cases involved the possibility that victims of asbestos-related disease might not be compensated for their injuries. Any such comparison would be an entirely subjective exercise. Further, many of those cases involved agreed facts and/or agreed proposed penalties.

88 The decision in *Australian Securities and Investments Commission v Ingleby* (2013) 39 VR 554 concerned payments made by AWB, ostensibly for inland transport. In fact, the amounts were largely to go to members of the Iraqi government, contravening the United Nations Oil-for-Food Programme. Ingleby was the Chief Financial Officer of AWB. He was accused of failing to act with due care and diligence in co-authorizing certain payments. Ingleby's conduct was not contrary to any Australian law, save for s 180 of the Act. He agreed to a statement of facts and joined in submissions which provided for a pecuniary penalty of $40,000 and a 15 month disqualification. The Judge at first instance imposed a pecuniary penalty less than the agreed figure. The Court of Appeal considered that the agreed facts were inadequate and inconsistent with Ingleby's actual involvement. The agreed statement said nothing about any harm caused, including to Australia's reputation as an ethical partner in international trade. The Court of Appeal took a more severe view of the misconduct than was demonstrated by the agreed statement. The members of the Court seemed to doubt the appropriateness of the agreed figure but were reluctant to go beyond it. Hence the penalty was increased to $40,000. This decision suggests that a penalty significantly above $40,000 would be appropriate in the present case.

89 In *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, Lindberg, the Chief Executive Officer and Managing Director of AWB, admitted to four contraventions of s 180(1). One contravention involved the failure to make proper enquiries. The other three involved failure to inform the Board of various matters. Lindberg had no knowledge of the relevant unlawful conduct. His contraventions were negligent, not involving deliberately wrongful acts, dishonesty or other moral turpitude. Although AWB had suffered detriment as a result of the conduct of some of its officers, it seems that Lindberg's conduct was not shown to have caused harm. He was rather dealt with on the

basis that his misconduct was serious. The parties proposed an agreed pecuniary penalty of $100,000 and an agreed period of disqualification of three years.

90 In my view, the respondents' misconduct was more serious than that of Lindberg. Their conduct brought about Storm's unlawful conduct. Lindberg's conduct did not bring about AWB's unlawful conduct. Robson J imposed a pecuniary penalty of $100,000 and disqualified Lindberg from managing corporations for a period of two years. His Honour seems to have accepted the agreed disqualification period of three years but reduced it to reflect delay in the Court's dealing with the matter. The distinction between the pecuniary penalty imposed on Ingleby and that imposed on Lindberg must be attributable to the latter's more senior position in the organization.

91 As to the James Hardie cases, the relevant decisions are *Gilfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460 and *Morley v Australian Securities and Investments Commission (No 2)* (2011) 83 ACSR 620. The decision in *Gillfillan* has a rather complex history. The original decision was upset by the Court of Appeal of New South Wales in *Morley v Australian Securities and Investments Commission* and *Shafron v Australian Securities and Investments Commission*, (both reported at (2010) 81 ACSR 285) and *Morley v Australian Securities and Investments Commission (No 2)* and *Shafron v Australian Securities and Investments Commission (No 2)* (both reported at (2011) 83 ACSR 620). The decisions of the Court of Appeal in the *Shafron* matters were upset by the High Court on appeal. The matter was remitted to the Court of Appeal for further consideration. See *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345. It was reconsidered in *Gillfillan.*

92 The James Hardie cases involved the repeated breach of stock exchange disclosure requirements by the issue of misleading statements. In *Morley (No 2)*, the Court of Appeal ordered that Morley pay a pecuniary penalty of $20,000 and be disqualified from involvement in corporate management for a period of two years. Morley was the Chief Financial Officer of James Hardie. He was found to have contravened in one respect, in that he had failed to inform the Board of the limited nature of reviews of a cashflow analysis conducted by external accountants. The results of the reviews were used to demonstrate that the relevant Hardie foundation had sufficient funding. The Court of Appeal considered that Morley's conduct departed to a high degree from the standard of care prescribed by s 180(1),

even if explained as negligent or an honest mistake. The Court treated his misconduct as serious.

93 As to disqualification, the Court said at [125]-[128]:

> 125 Accepting that the need for personal deterrence is low, nonetheless general deterrence is in our view an important consideration given the nature and significance of the cash flow analysis contravention. As well, it is necessary that relief be granted appropriate to mark significant failure in performance of the duties of a senior executive of a large public corporation and to maintain public confidence in the law's upholding of corporate standards.
>
> 126 In a picturesque phrase, in *Re One.Tel (In liquidation); Australian Securities and Investments Commission v Rich* [2003] NSWSC 186; (2003) 44 ACSR 682 at [26] Bryson J observed that "[n]o-one should be sacrificed to the public interest". That was taken up in *Australian Securities and Investments Commission v Beekink* at [113]. Protection of the public, including by general deterrence, is at the heart of disqualification orders, and a delinquent officer against whom a disqualification order is made is not sacrificed. The phrase is a reminder that the public interest and the need to protect the public from repeated conduct or like conduct of others is balanced against the hardship to the officer. In our view, the balance requires a period of disqualification.
>
> 127 Mr Morley drew attention to the warning by Santow JA, in *Vines v Australian Securities and Investments Commission* at [202]-[203], that excessive pecuniary penalties could lead to "self-protective defensive postures" by officers, deleterious to undertaking measured commercial risk. In the context of his submissions, Mr Morley transposed the warning also to disqualification. We see no question of measured commercial risk in Mr Morley's contravention.
>
> 128 In our opinion, a disqualification order should be made, but not for the period of the judge's order. The judge's order should be set aside, and Mr Morley should be disqualified from managing corporations for a period of 2 years. That period should date from 27 August 2009, when the judge's order came into effect.

94 In *Gillfillan*, on remittal from the High Court, the Court of Appeal considered the orders to be made against five Australian non-executive directors, two American non-executive directors and the Company Secretary and General Counsel, Shafron. The misconduct of the Australian non-executive directors involved reliance on management in deciding to release the relevant documents. The American non-executive directors approved the documents without asking for copies and not abstaining. The Australian non-executive directors were each ordered to pay pecuniary penalties in the amount of $25,000. They were each disqualified for three years, although this period was to be treated as served, or to be served in ways which reflected the consequences of the delay in the appeal process. Each of the American

non-executive directors was ordered to pay a pecuniary penalty of $20,000 and was disqualified for a period of one year and 11 months, such period expiring about three years and three months after the original orders.

95 Shafron had contravened the Act on three occasions, each contravention involving a failure to advise the Board of matters relevant to its consideration of the draft announcements. He was ordered to pay a pecuniary penalty of $75,000 and was disqualified for a period of seven years.

96 I was also referred to the decision of *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116. However the pecuniary penalty there imposed and the period of disqualification far exceed anything suggested in the present case. The other cases to which I have been referred also offer little assistance.

97 In my view the pecuniary penalty imposed upon Shafron and that imposed in *Lindberg* offer the best guidance for present purposes. Both cases involved conduct by senior officers, but no findings of dishonesty. In Lindberg's case, there seems to have been no allegation of actual knowledge on his part. Shafron's misconduct was failure to bring matters to the attention of the Board. If Lindberg in fact had no knowledge of the relevant misconduct, then the pecuniary penalty and period of disqualification imposed on him reflect his overall responsibility for the affairs of AWB and his failure to have mechanisms in place to prevent or identify misconduct. Save for Lindberg's senior position in AWB, Shafron's misconduct was more serious. Shafron was presumably a lawyer, giving advice based upon his legal knowledge and understanding. It seems that in Lindberg's case, a high premium was placed on deterrence.

98 In my view the respondents' misconduct was more serious than that of either Lindberg or Shafron. It continued over a lengthy period of time, was entirely initiated by them and executed under their supervision. I am inclined to think that the penalty sought by ASIC is on the low side, having regard to the cases to which I have been referred. However there are only a handful of them. In those circumstances, it is better that I adopt the figure as suggested by ASIC. In the case of each respondent I impose a pecuniary penalty of $70,000.

DISQUALIFICATION – S 206C, S 206E

99 It is common ground that the Court may make a disqualification order against each respondent pursuant to each of the above sections. ASIC seeks disqualification of each respondent for seven years. This was the period for which Shafron was disqualified.

100 In *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, Santow J summarized the principles to be recognized in considering an application for disqualification as follows:

> (i) 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 ... ;
>
> (ii) The banning order is 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 ... ;
>
> (iii) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors ... ;
>
> (iv) The banning order is protective against present and future misuse of the corporate structure ... ;
>
> (v) The order has a motive of personal deterrence, though it is not punitive ... ;
>
> (vi) The objects of general deterrence are also sought to be achieved ... ;
>
> (vii) 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 ... ;
>
> (viii) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty ... ;
>
> (ix) In assessing an 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 ... ;
>
> (x) 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 ... ;
>
> (xi) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming ... ;
>
> (xii) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs v Ekamper* (1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:
>
> - 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.

... ;

(xiii) Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications 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 such as in management and financial consultancy;
- 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.

... ;

(xiv) In cases in which the period of disqualification ranged from 7 years to 12 years, the factors evident and which lead to the conclusion that these cases were serious though not "worst cases", 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.

... ;

(xv) The factors leading to the shortest disqualifications, that is disqualifications for up to 3 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 respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings.

(Citations omitted.)

101 Following the High Court's decision in *Australian Securities and Investment Commission v Rich* (2004) 220 CLR 129, it is clear that a disqualification order has a punitive aspect, notwithstanding proposition (v) identified above. For that reason I have, in imposing pecuniary penalties, taken into account the periods of disqualification which I intend to impose.

102 ASIC submits that in this case, relevant considerations in connection with any period of disqualification include:

- protection of the public;
- specific deterrence;
- general deterrence; and
- the lack of contrition.

103 The respondents' submissions were substantially the same as those concerning penalty. I have dealt with those submissions. In the present case, I consider it necessary and appropriate that the public be protected from exposure to the consequences of any reasonably likely future contraventions by the respondents, and that they and other potential contraveners be deterred from such misconduct.

104 I know very little about the respondents and their business activities. I accept that their misconduct was serious, but not dishonest. However, as I have said, absence of dishonesty should be treated as absence of an aggravating factor rather than as a mitigating factor. In Shafron's case, the material misconduct appears to have occurred in 2001. Judgment on liability was given on 23 April 2009. The initial disqualification was imposed by order dated 27 August 2009. The appellate process was concluded by the orders in *Gillfillan* made on 12 November 2012. The parties jointly submitted that the penalty and disqualification period

should be as originally ordered, so that the period of disqualification was to date from the original orders.

105 In the present case, the respondents' misconduct seems to have occurred between 2006 and 2008. These proceedings were commenced in 2010 and were heard in May and June 2016. Reasons for judgment were delivered on 26 August 2016. The considerable delay between the commencement of proceedings and trial appears to have been at least partly attributable to ASIC's difficulties in pleading its case. See the transcript of proceedings in the Full Court on 21-22 May 2014. Further, ASIC failed at trial on a number of aspects of its case. It is reasonable to infer that prosecution of those aspects of the case substantially delayed its resolution. There was no suggestion that in *Shafron*, any delay was attributable to ASIC.

106 In my view the respondents might well complain that it is unfair that a period of disqualification should commence seven or eight years after the commencement of proceedings, and 12 years or more after the misconduct in question. A period of disqualification which might have been appropriate in 2010 or 2012 may no longer be appropriate. Quite apart from anything else the respondents are years older, and their respective capacities and opportunities to launch new ventures, or otherwise engage in gainful employment are probably more limited. These considerations lead me to conclude that notwithstanding my view that the respondents' misconduct was more serious than that of Shafron, I should nonetheless fix the period of disqualification at seven years, the period sought by ASIC, upon the basis that such delay should be seen as a consideration leading to a reduction in the length of the appropriate period. I also take into account the efforts made by the respondents to assist some investors who suffered as a result of Storm's conduct. I order that each respondent be disqualified from managing corporations for a period of seven years, commencing on the date of publication of these reasons.

INJUNCTIVE RELIEF

107 At paras 29-35 of its written submissions, ASIC submits that s 1324 of the Act empowers the Court to restrain the right of each respondent to apply for an AFSL or to provide financial services pursuant thereto. The respondents challenge ASIC's claim that such relief may be granted pursuant to s 1324. In effect they submit that:

- s 1324 authorizes injunctions restraining conduct which would breach a provision of the Act, and that the relief sought would restrain lawful conduct;

- as ASIC is the sole administrator of the "AFSL system", the respondents would have to apply to it for any AFSL, ASIC being then bound to determine each application in accordance with law;
- the findings offer no basis for restraining either respondent from providing financial services as employees; and
- there is insufficient reason for granting such relief.

108 In order to consider these submissions, it is necessary that I consider the AFSL regime.

109 Section 911A(1) provides:

> Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.
>
> ...

110 Sections 911A(2) and 911B provide that an unlicensed person may provide financial services on behalf of the holder of an AFSL (a "financial services licensee"). Sections 913A and 913B regulate the application for, and grant of an AFSL. Those sections provide:

> **913A Applying for a licence**
>
> A person may apply for an Australian financial services licence by lodging an application with ASIC that:
>
> (a) includes the information required by regulations made for the purposes of this paragraph; and
>
> (b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.
>
> ...
>
> **913B When a licence may be granted**
>
> (1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):
>
> (a) the application was made in accordance with section 913A; and
>
> (b) ASIC has no reason to believe that the applicant is likely to contravene the obligations that will apply under section 912A if the licence is granted; and
>
> (c) the requirement in whichever of subsection (2) or (3) of this section applies is satisfied; and
>
> (ca) the applicant has provided ASIC with any additional information requested by ASIC in relation to matters that, under this section, can

be taken into account in deciding whether to grant the licence; and

(d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.

...

(2) If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame or character.

(3) If the applicant is not a single natural person, ASIC must be satisfied:

(a) that:

(i) if the applicant is a body corporate—there is no reason to believe that any of the applicant's responsible officers are not of good fame or character; or

(ii) if the applicant is a partnership or the trustees of a trust-there is no reason to believe that any of the partners or trustees who would perform duties in connection with the holding of the licence are not of good fame or character; or

(b) if ASIC is not satisfied of the matter in paragraph (a)-that the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired.

(4) In considering whether there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:

(a) any conviction of the person, within 10 years before the application was made, for an offence that involves dishonesty and is punishable by imprisonment for at least 3 months; and

(b) whether the person has held an Australian financial services licence that was suspended or cancelled; and

(c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and

(d) any other matter ASIC considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

(5) However, ASIC may only refuse to grant a licence after giving the applicant an opportunity:

(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and

(b) to make submissions to ASIC in relation to the matter

111 Section 914A authorizes ASIC to impose conditions on an AFSL.

112 These provisions demonstrate that any person may apply for an AFSL. It is for ASIC to determine whether such a licence should be granted, and whether to impose conditions upon it.

113 ASIC effectively seeks injunctions which would prevent each respondent from applying for an AFSL and implicitly prevent ASIC from granting any such licence to either respondent. ASIC also seeks to restrain each respondent from providing financial services pursuant to another person's AFSL. Such relief would seem to be inconsistent with Parliament's intention that any person may apply for an AFSL, and that ASIC is to decide whether such licence should be granted, with or without conditions. Similarly, Parliament contemplated other persons acting on behalf of a financial services licensee.

114 Section 920A authorizes ASIC to make banning orders, although that power seems to be limited to financial services licensees. However s 920B seems to be wide enough to permit a banning order against a person acting on behalf of a financial services licensee. The Court has similar powers. ASIC has not, as far as I know made banning orders against the respondents, and does not ask me to make such orders.

115 Sections 1101B(1) and 1101B(4) provide:

> (1) The Court may make such order, or orders, as it thinks fit if:
>
> (a) on the application of ASIC, it appears to the Court that a person:
>
> (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or
>
> (ii) has contravened a condition of an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or
>
> (iii) has contravened a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or
>
> (v) has contravened a condition on an exemption from the requirement to hold an Australian market licence or an Australian CS facility licence; or
>
> (vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; or
>
> ...
>
> (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:

(a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:

(i) a provision or provisions of this Chapter; or

(ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or

(iii) a condition on an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or

(v) a condition of an exemption from a requirement to hold an Australian market licence or Australian CS facility licence; or

(vi) a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or

(b) an order giving directions about complying with a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility to a person (or the directors of the body corporate, if the person is a body corporate) who contravened the provision; and

(c) an order requiring a person to disclose to the public or to specified persons, in accordance with the order, specified information that the person to whom the order is directed possesses or to which that person has access, if the person:

(i) contravened a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules of a licensed market or a condition relating to the disclosure or provision of information; or

(ii) was involved in such a contravention; and

(d) an order requiring a person to publish advertisements in accordance with the order at that person's expense, if the person:

(i) contravened a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules of a licensed market, or a condition relating to the disclosure or provision of information; or

(ii) was involved in such a contravention; and

(e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and

(f) an order restraining a person from providing any financial services

that are specified in the order; and

(g) an order appointing a receiver of property (see subsection (9)) of a financial services licensee; and

(h) an order declaring a contract relating to financial products or financial services to be void or voidable; and

(i) an order directing a person to do or refrain from doing a specified act, if that order is for the purpose of securing compliance with any other order under this section; and

(j) any ancillary order considered to be just and reasonable in consequence of the making of an order under any of the preceding provisions of this subsection.

...

116 ASIC makes no application pursuant to s 1101B.

117 I have already set out the terms of s 1324. The section seems to authorize an injunction restraining conduct of the kind identified in s 1324(1). In *Re McDougall* (2006) 229 ALR 158, Young J applied cases concerning s 80 of the *Trade Practices Act 1974* (Cth) (the "Trade Practices Act") in construing the width of the power conferred by s 1324 of the Act. In so doing, his Honour referred particularly to the decision of the Full Court in *Foster v Australian Competition and Consumer Commission* (2006) 149 FCR 135. His Honour seems to have proceeded on the basis that s 80(1) of the Trade Practices Act was in the same form as s 1324(1) of the Act. However the wording of s 1324(1) differs in one material respect from that of s 80(1). Section 80(1) empowers the Court to grant an injunction "in such terms as the Court determines to be appropriate". However s 1324(1) empowers the Court to grant an injunction "on such terms as the Court thinks appropriate, restraining the [relevant person] from **engaging in the conduct** and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing". (Emphasis added.) The reference to "the conduct" is plainly to the conduct which constituted, constitutes or would constitute the misconduct identified in paras (a)-(f) of s 1324(1).

118 I accept that the injunctive relief contemplated by s 1324 is not limited by constraints or considerations relevant to the grant of injunctive relief in equity. I accept also that the section should be given a wider, rather than a narrower construction, given that it is remedial in the sense that it is designed to minimize the risk of further damage to members of the public and otherwise. However I can see no basis for construing s 1324 as authorizing the grant of an injunction which restrains conduct beyond that identified in s 1324(1), particularly when the

relevant conduct is lawful. The relief sought by ASIC in these proceedings would remove existing rights and impose new obligations. Yet nothing in the section expressly or impliedly authorizes such conduct.

119 Other provisions of the Act contemplate the Court's granting relief which may involve the creation of new obligations or the truncation of existing rights. Section 1101B is an example of this. The Court is, by that section, empowered to make, "such order, or orders, as it thinks fit", provided that certain conditions have been satisfied. The formula is similar to that in s 80 of the Trade Practices Act. Section 1325A also uses that formula. Section 1324 does not goes so far. If it did so, it would make those broader provisions, and many others, virtually otiose. As I have said, I accept that s 1324 should be given a broad construction. However it does not follow that it should be construed as permitting the Court to make any order which it considers appropriate. Where Parliament intended to confer such broad powers, it did so expressly, as one would expect where rights and obligations are affected.

120 ASIC cites two decisions in support of its submission that s 1324(1) authorizes injunctions in the form sought. The decisions are that of Ward JA, sitting at first instance in *Re Idylic Solutions Pty Ltd* (2013) 93 ACSR 421, and that of White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 106 ACSR 181. At [64] Ward JA seems to have accepted that s 1324 authorized the grant of an injunction preventing a person from contravening the Act, an observation which is clearly correct. However her Honour was primarily concerned with the decision of Young J in *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128. His Honour had there suggested that s 1101B of the Act might provide the only basis for imposing sanctions for contraventions to which that section applied, suggesting that no such relief could be granted pursuant to s 1324(1). Ward JA did not accept that proposition. White J, in *ActiveSuper*, adopted a similar approach. In neither case was there any consideration of the limits upon the injunctive relief available pursuant to the terms of s 1324.

121 Ward JA noted that not infrequently, injunctive relief was granted pursuant to both s 1101B and s 1324. In most of the injunctions which her Honour granted in *Idylic Solutions*, that formula was adopted. If s 1101B authorized the relevant injunction it is difficult to see how the reference to s 1324 added anything to the order. Orders 23, 24 and 26 purport to restrain unlawful conduct. However orders 25 and 27 restrain otherwise lawful conduct. In neither case is there any suggestion that the restrained conduct was of the kind contemplated by

s 1324(1). At [88] Ward JA referred to three decisions of single Judges of this Court, in which orders were made pursuant to s 1324. Those cases were:

- *McDougall*; *Australian Securities and Investments Commission v Fuelbanc Australia Limited* (2007) 162 FCR 174;
- *Australian Securities and Investments Commission v Gramax Investment Club Pty Ltd* [2005] FCA 1708; and
- *Australian Securities and Investments Commission v Preston* [2005] FCA 1805.

122 *McDougall* was a decision of Heerey J. The relevant injunctions appear at [69]. The first injunction restrained the operating or promotion of a scheme which was not registered. The second injunction restrained carrying on business concerning a managed investment scheme, or being directly or indirectly knowingly concerned in, or party to the promotion, establishment of, and carrying on of business of a managed investment scheme, but in each case, only to the extent that the relevant scheme was required to be registered, but was not. The third injunction restrained the relevant respondent from carrying on a business in relation to financial products or financial services unless he held an AFSL. In each case, the restrained conduct was unlawful and was, in fact, the conduct in which the relevant party had previously engaged.

123 In *Gramax*, Emmett J granted injunctive relief restraining conduct which was expressly identified as being in contravention of the Act. Although the orders in *Preston* do not appear on the Court website, Finkelstein J made it clear at [13] that the injunction in question restrained contravening conduct.

124 In my view, s 1324(1) authorizes the injunctive restraint of unlawful conduct, particularly that described in subparas 1324(1)(a)-(f). If such an order is made, then the Court may also order that the relevant person do certain things. Section 1324(2) authorizes an injunction compelling the performance of acts required under the Act. In my view, s 1324 as a whole empowers the Court to restrain unlawful conduct, to make supplementary orders in support of any such restraint and to compel the discharge of statutory obligations. It does not provide a general power to restrain lawful action, or to compel conduct where there is no lawful obligation to perform such conduct.

125 In those circumstances, I decline to grant the injunctive relief sought.

COSTS

126 This litigation has been protracted. It has, over the years, been managed by at least four Judges. There have been numerous interlocutory hearings and one appeal to the Full Court. The parties have not explained in detail the various aspects of these interlocutory and appellate proceedings. Although I have been involved in its case management and sat on the appeal, it is not practicable that I seek to identify for myself the detailed history of the whole matter.

ASIC's submissions concerning costs

127 ASIC, in its written submissions, concedes that it was not successful on all issues at trial but asserts that it should have its costs of the proceedings, save to the extent that costs orders have already been made. ASIC then submits that costs should be dealt with by an award in a particular amount, without taxation. However it gives no indication as to how I might go about that exercise, particularly as it seems that even now, the parties find co-operation to be difficult.

128 ASIC submits that it has established that the respondents contravened s 180(1) of the Act, and that Storm contravened the Act. ASIC submits that it succeeded on identified matters which, "occupied the majority of the preparation of the case", namely:

- the nature of the Storm model;
- the degree of control which Mr and Mrs Cassimatis exercised over Storm's business;
- whether Storm gave reasonable consideration to, and conducted reasonable investigation of, the subject matter of the advice provided to the relevant investors;
- whether the advice which Storm provided to the relevant investors was appropriate; and
- whether a director in the position of Mr or Mrs Cassimatis would have reasonably foreseen the contraventions of s 945A by Storm.

129 The difficulty with those submissions is that they are based on ASIC's subjective opinions as to the issues which occupied most time in preparation and as to the importance of the issues on which it failed. These matters can only be resolved by detailed reference to the transcript, probably in the context of a taxation.

130 ASIC then submits that none of the issues on which it failed was unreasonably raised, nor was there anything untoward about its conduct of the trial. It further submits that in some respects, any apparent failures reflected its attempts to limit its case, for which attempts it should not be punished in costs.

131 ASIC concedes that the respondents should be allowed to set off against any award of costs in its favour, amounts recoverable pursuant to orders made in their favour in connection with proceedings in the Full Court and in connection with ASIC's application for leave to amend to plead a case under s 206E of the Act.

The respondents' submissions concerning costs

132 The respondents seek:

- the costs thrown away as a result of the grant of leave to add the claim for relief pursuant to s 206E;
- "a proportion" of the costs of the proceedings; and
- the costs of the trial.

133 The costs "thrown away" in connection with the s 206E application are different from the costs in connection with the s 206C application which are already the subject of an order. In effect, the respondents submit that as a result of ASIC's having belatedly raised a claim pursuant to s 206E, all of the costs by the respondents in applying (unsuccessfully) for summary dismissal of ASIC's original claim (based on s 206C) have been thrown away.

134 The respondents' submissions reflect the complex nature of the interlocutory proceedings. It is therefore necessary that I summarize aspects of the history of the action.

135 On 13 May 2011, the respondents applied to strike out parts of the amended statement of claim, apparently filed on 21 April 2011. The application was successful, and a further amended statement of claim in (two volumes) was filed on 3 August 2011. On 21 February 2012, the respondents applied for summary dismissal of ASIC's claim or, in the alternative, for orders striking out various paragraphs of the pleading. Reeves J heard this application in two parts. On 28 June 2013 his Honour dismissed para 1 of the application (in which the respondents applied for summary dismissal), on the ground that the respondents had not established that ASIC had no reasonable prospects of success. Reeves J subsequently ordered that the respondents pay ASIC's costs of the application for summary dismissal. In effect,

the respondents now seek to have that order vacated, and that they have an order for the costs of that application. Alternatively, they seem to seek an order that they recover those costs as part of the costs thrown away by virtue of ASIC's application to add a claim pursuant to s 206E, or as part of their costs of the proceedings generally.

136 Subsequently, Reeves J heard the balance of the application. Concerning the application, his Honour said at [100]-[101] of his reasons ([2013] FCA 1008):

> 100 Insofar as the parties to these proceedings and their lawyers are concerned, I would make these observations. Many of the Cassimatises' objections to ASIC's FASC, in my view, fell within the expression "pedantic and pettifogging in nature" used by Martin CJ in *Barclay*. The objection about the meaning of paragraph 193 of the FASC is a good example. In my view, that objection had all the hallmarks of, what I will describe as, opportunistic, self-serving, incomprehension. In view of the Cassimatises' claim to be in "straitened financial circumstances" (see the letter at [91] above), one would have thought that they had every incentive to avoid their time and resources being wasted on these sort of objections. Quite apart from this incentive, they are obliged by Part VB of the *Federal Court of Australia Act 1976* (Cth) to achieve the just, quick, inexpensive and efficient resolution of these proceedings.
>
> 101 On the other hand, the need for most, if not all, of the particulars that ASIC will be ordered to provide to the Cassimatises should have been obvious to its lawyers on a fair and open-minded (as distinct from a technical and unbending) reading of its FASC. If it had undertaken that exercise when it first was asked to do so before this application was filed, the time and resources that have been wasted on this application may have been avoided. Similarly, if ASIC had given the elaborate explanation about its pleading in paragraph 1992(e) that it eventually gave in submissions in this application, this waste may have been avoided. Its failure to adopt this more sensible approach to this application is inconsistent with its Part VB obligations mentioned above. And, in this respect, it is worth emphasising ASIC's role as a model litigant: see, for example, *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501; [2012] HCA 17 at [239].

137 His Honour struck out numerous paragraphs, gave leave to amend in order to replead the matters dealt with in those paragraphs, and ordered that ASIC provide particulars of other paragraphs. His Honour made no order as to costs.

138 On 3 December 2013 a second further amended statement of claim was filed, presumably giving effect to the orders made by Reeves J.

139 On 22 July 2013 the respondents sought an extension of time in which to seek leave to appeal, and leave to appeal from the orders of Reeves J made on 28 June 2013 (dismissing the application for summary dismissal). On 20 November 2013, Rangiah J gave leave to

appeal, ordering that the costs of the application be the parties' costs in the appeal. The grounds of appeal focussed on the correctness of the decision concerning the application for summary dismissal of the s 206C case. It seems that the parties proceeded upon the basis that there might be utility in the appeal, notwithstanding the delivery of the second further amended statement of claim. The appeal was heard by the Full Court (Dowsett, Rares and Barker JJ) on 21 and 22 May 2014. On appeal the respondents (the appellants on appeal) submitted at ts 2, ll 39-45:

> In terms of the structure, your Honour, there's, broadly speaking, three issues on the appeal. The first is whether the exercise of the discretion by his Honour, not to determine the primary basis for the summary [dismissal] application, miscarried. The second was if the exercise of that discretion did miscarry, should this court determine that issue itself, and the third is, well, if this court does decide that issue, should it be determined in favour of my client or my learned friend's client – my clients or my learned friend's client.

140 In the course of submissions by counsel for ASIC, members of the Court drew attention to the apparent absence from the statement of claim as it then stood of any clear identification of the relevant duty, breach of which was said to attract the operation of s 180(1). On 22 May 2014, counsel for the respondents urged the Court to consider its application for summary dismissal, notwithstanding the issues which had been raised concerning ASIC's pleading. The Court declined to do so. It ordered that ASIC file and serve a third further amended statement of claim that:

- identified the content and source of the duty or power, as the case may be, referred to in subsection 180(1) of the Act that the appellants are alleged to have exercised without reasonable care or diligence; and
- contained the material facts relied on to establish how and when the appellants are alleged to have failed to exercise reasonable care or diligence.

141 The Court further ordered that:

- ASIC pay the respondents' costs of and resulting from the amendments, including any costs thrown away; and
- the costs of the appeal be costs in the proceeding below.

142 The appeal was otherwise dismissed.

143 On 15 August 2014 ASIC filed its fourth amended statement of claim, apparently pursuant to the Full Court's order. On 30 September 2014 another fourth amended statement of claim was filed, pursuant to that order and the order of Rangiah J made on 16 September 2014. There is no apparent explanation for this irregularity, but it seems to have emerged from case management hearings conducted by Rangiah J.

144 On 27 May 2016, shortly before the commencement of the trial, ASIC applied for leave to amend to add a claim to relief pursuant to s 206E. This involved amendment of both the originating application and, to a limited extent, the fourth amended statement of claim. The application was granted. On 4 June 2016, Edelman J ordered that ASIC pay the respondents' costs of ASIC's application for leave to amend and of any amendment to the respondents' defence occasioned by the amendment.

145 In the course of argument, Edelman J had expressed the provisional view that ASIC should pay the respondents' costs thrown away by the amendment, "which costs would include the costs of the summary [dismissal] application." His Honour's view was based upon the respondents' submission that had they known that a claim under s 206E was to be made, they would not have brought the application for summary dismissal. The respondents asked Edelman J to make six orders, the two mentioned above (which his Honour made), and the following orders, namely that:

- ASIC pay the respondents' costs of the application for summary dismissal dated 12 February 2012;
- ASIC pay the respondents' costs of the application for leave to appeal against the orders dismissing the summary dismissal application;
- ASIC pay the costs of the notice of appeal filed on 6 December 2013; and
- all such costs (including those ordered by Edelman J) be taxed on an indemnity basis.

146 His Honour declined to make these orders.

147 As I have said, his Honour had, at one stage, expressed the view that in connection with the s 206E application, the respondents should recover the costs of the summary dismissal application, presumably including the costs of the appeal. However, having heard submissions to the contrary on behalf of ASIC, his Honour concluded that these questions and, presumably, the application for taxation on an indemnity basis, should be considered after substantive judgment in the proceedings had been given. These matters are addressed in

his Honour's reasons in *Australian Securities and Investments Commission v Cassimatis (No 7)* [2016] FCA 624 at [11]-[14]. Although his Honour did not reserve these questions, he clearly intended to do so.

148 The respondents seek to rely on his Honour's preliminary view that the costs thrown away by the s 206E amendment should include the costs of the summary dismissal application. However it is clear that the observation was made in passing, and that his Honour resiled from it. In those circumstances, the respondents can derive no support from such "provisional view". They must argue for the costs orders associated with the summary dismissal application, having regard to all of the circumstances of the case, including the orders already made and the ultimate outcome at trial.

Existing costs orders

Costs of the summary dismissal application

149 In my view all questions of costs associated with the application for summary dismissal were disposed of by the order of Reeves J that the respondents pay ASIC's costs of the application. I cannot see how any further order concerning the costs of those proceedings can be made unless his Honour's order is vacated. The order must be understood as a determination that the respondents should recover none of their costs from ASIC. Unless that order is varied or set aside, no further order can be made concerning those costs.

150 The Rules provide for varying or setting aside orders before entry (r 39.04) and after entry (r 39.05). As I understand it, the order as to costs made by Reeves J has not been entered, so that any application to vary or set aside the order should be made pursuant to r 39.04. In order to have the order set aside, the respondents must satisfy the test identified in *Autodesk* (supra).

151 I do not understand the respondents to assert that Reeves J erred in making the order, given that the application for summary dismissal was unsuccessful, a result which has subsequently been justified by the ultimate outcome in the case. Nor has there been any suggestion that the decision involved any misapprehension as to any factual or legal matter. The respondents rather assert that they should have the costs of the application for summary dismissal because ASIC subsequently made the s 206E application. In effect the respondents submit that had they known that ASIC would seek relief under both s 206C and s 206E, they would not have made the application, and so would not have incurred the costs of such application.

152 As matters of fact, Edelman J accepted that had the respondents' solicitor known that there was to be a claim for relief pursuant to s 206E, he would have advised against the application. His Honour also accepted evidence from the respondents that they would have accepted and acted upon that advice. His Honour found that ASIC had not made any application to raise a claim pursuant to s 206E prior to April 2016 by virtue of a failure to consider that possibility. It was not the case that ASIC had decided to raise such a case but failed to act upon that decision, nor that it had concealed any such intention.

153 Reduced to its essentials, the respondents' proposition is that they were entitled to assume that ASIC would not, at a later stage, seek to add an additional claim to relief. The history of litigation demonstrates the folly of any such assumption. Upon the basis of that assumption, they made an application which failed on the merits. That failure more or less inevitably led to the order for costs made by Reeves J. If the respondents relied upon an assumption made by their solicitor, it is a matter between them and their solicitor. It has nothing to do with ASIC. I see no basis for setting aside the order made by Reeves J. It follows that all attempts by the respondents to recover the costs of the application for summary dismissal must fail, whether they be raised in connection with the costs of the appeal, the costs of the s 206E application or the costs of the proceedings generally, including the trial.

Costs of the appeal

154 Pursuant to the order of the Full Court, the costs of the appeal, including the costs of the application for an extension of time and for leave to appeal are the parties' costs in the proceedings. The meaning of that order is that:

> [T]he costs of those interlocutory proceedings are to be awarded according to the final costs in the action. If the plaintiff wins, and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the plaintiff. Vice versa, if the defendant wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the plaintiff.

155 See *JT Stratford & Son Ltd v Lindley* [1969] 3 ALL ER 1122 at 1123. Of course, the appeal was, in some senses, not an interlocutory application, but there can be no doubt that the Full Court intended that the costs of the appeal be disposed of in that way. The appeal was concerned with ASIC's s 206C case. The respondents failed on that issue at trial.

156 In *Dubbo Refrigerating Co v Rutherford* (1898) 14 WN (NSW) 180, a defendant had been largely successful at first instance, but the plaintiff had nonetheless obtained a verdict. In

preparation for trial, a commission to take evidence in New Zealand had been issued, and evidence taken, that evidence being favourable to the defendant. The costs of the commission were to be costs in the cause. The Chief Justice held, Stephen and Cohen JJ concurring:

> "Costs in the cause" merely means costs not now disposed of; after the trial they have to be disposed of with the costs of the trial, which are themselves costs in the cause, according to certain settled principles of law which the Prothonotary has followed. Issues are divisible, and if some issues are found for the defendant, although the plaintiff may be the successful party in the action, still the defendant gets the costs of those issues upon which he has succeeded, although they may at first have been costs in the cause. Here the Prothonotary is entitled to assess the costs of these commissions in favour of the party who was successful upon the issue to which the evidence in question was directed, and he has done so. If a plaintiff takes out a commission, and examines a witness whose evidence turns out at the trial to be absolutely immaterial, is the defendant to pay the costs merely because the plaintiff is entitled to the general costs of the action? So here, why should the defendant have to bear the cost of witnesses whom he called to establish his case, and who were in fact instrumental in establishing it? The evidence of these witnesses was within the same category exactly as if the witnesses had been present at the trial, and I am of opinion that the Prothonotary has acted upon the proper principle in allowing them to the defendant.

157 It follows that ASIC should have its costs of the appeal, including those of the application for an extension of time and leave to appeal, as part of its costs in the action as a whole.

Costs of the proceedings

158 I turn to the costs of the proceedings other than those in respect of which orders have been made. The respondents concede that ASIC "did enjoy some success" in those proceedings. In my view, it was substantially successful, although it failed on some not insubstantial issues, which issues seem to have taken up significant amounts of time at the trial and, presumably, in the course of the proceedings more generally. ASIC succeeded in establishing that each respondent breached s 180(1), thereby engaging ss 1317E and 1317G. Sections 206C and 206E were also engaged.

159 ASIC's approach to the award of costs of the proceedings, including the trial is to rely upon its overall success, pointing to the decision of the Full Court in *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 at [10]. Unsuccessful prosecution of an issue may not always lead to a successful party being deprived of the costs of such issue. However, where there are plainly discrete issues, upon which it failed, the interests of justice may dictate that it not recover such costs, and that it pay the other side's costs.

160 Much of the respondents' submissions concerning costs seems to invite an award of costs in their favour in order to punish ASIC for its conduct of the matter. See their submissions on costs at paras 97-126. To the extent that those paragraphs allege that the costs incurred in connection with some steps taken in the proceedings should not be recovered as against the respondents, it is a matter for taxation. There can be no discounting of the costs awarded simply to reflect the respondents' views of the way in which ASIC conducted the proceedings.

Unreasonable rejection of the respondents' offers

161 The respondents submit that relevant to the exercise of this discretion as to costs are offers to settle made by them on 14 April 2016 and 25 May 2016, and ASIC's failure to accept either offer.

162 On 19 February 2016, the matter was set down for trial commencing on 30 May 2016 and continuing until 30 June 2016. The offer made on 14 April 2016 came quite late. In the offer, the respondents suggested that it was being made, "before intensive trial preparation begins". I am inclined to doubt that intensive preparation for a trial to occupy one month would start six weeks before the trial commenced. Indeed, the orders made by Edelman J on 19 February 2016 demonstrate that much was to be done on or before 15 April 2016. The offer, in full, was follows:

> ...
>
> We are instructed to raise with the Commission the prospect of settling the case, before intensive trial preparation begins. Given the extensive cost to date for both sides, it seems sensible to seriously consider a settlement prior to both sides undertaking substantial further costs to take the matter to trial.
>
> From our understanding, and ASIC's public stance on the matter, ASIC's goals are:
>
> 1. to obtain financial penalties from the Cassimatises;
>
> 2. to ban the Cassimatises from managing corporations for a period of time in the future;
>
> 3. to ban the Cassimatises from working in the financial services sector for a period of time in the future.
>
> Our clients instruct us that they believe ASIC has already achieved those goals.
>
> The financial strain to date of the ASIC proceedings have completely drained materially all of our clients' resources. We are instructed that there are no material assets to which ASIC could gain access by success at trial, including in any bankruptcy administrations.
>
> ASIC's searches will verify that and our clients are prepared to swear to that.

The result is that, even if ASIC succeeds in the case, it will recover nothing. It risks incurring not only the substantial costs of a trial, but an adverse costs order in the millions of dollars should our clients succeed, as we and they expect.

Consequently, the only benefit for the Commonwealth if it succeeds could be orders keeping our clients out of financial services and banning them from managing corporations, in each case for a defined period of time.

ASIC does not allege dishonesty. None of ASIC's 50 odd witnesses suggest any dishonesty. No shareholders are alleged to have suffered loss. No insolvency is alleged. Even if all of ASIC's evidence is accepted, precedent compels the conclusion that the absolute most which ASIC can expect, if it is successful in this regard, is a ten year ban in relation to financial services and five years in relation to the management of corporations.

We will argue, we believe successfully, that between the date of Storm's collapse and the trial, the Cassimatises have already served over seven years of both of these terms. Realistically, we believe ASIC is unlikely to be accommodated any further in regard to managing corporations, and only up to a maximum of a further three, perhaps five years in relation to financial services.

However, in the interests of settling the matter, our clients are prepared to give ASIC substantially the benefit of a complete victory at the trial - together with a saving of its own costs of the trial, and eliminating ASIC' risk of an adverse costs order. This is an exercise in pragmatism on their part.

Our clients therefore offer to resolve the proceedings as follows:-

1. Our clients will give and ASIC will accept an Enforceable Undertaking in the following terms:-

   (a) they will never apply for an AFSL;

   (b) they will never apply to become Authorised Representatives of the holder of any AFSL;

   (c) they will, for a period of three years from the date of the undertaking, not manage any corporation, save for those of which they are currently registered as directors (with appropriate undertakings that those companies will not issue any further securities to any person).

2. The proceedings are to be discontinued, with no order as to costs.

This would represent an outcome for ASIC far superior to that which it can expect from any judgment in the proceedings. We add, for what it is worth, that this offer represents a result which, on our advice, is impossible for ASIC to achieve.

This offer is open for acceptance until 5.00 pm on Friday, 22 April, 2016.

...

163 I have already expressed my view concerning the stage at which the offer was made. However I should make a number of other points about the offer. First, it presumes to identify ASIC's "goals" in prosecuting the proceedings and to offer the opinion that they already had been achieved. I see no basis for accepting this proposition. It was always for

ASIC to identify its goals and whether they had been achieved. Second, the letter asserted that the respondents were without assets, a fact to which they were willing to swear. However ASIC was not obliged to accept either the assertion or any authentication of its veracity. Third, the letter purported to identify the "absolute most" which ASIC could reasonably expect by way of banning orders or injunctive relief. There was no obligation on ASIC to accept that assessment, particularly given the notorious difficulty in assessing such matters. Further, ASIC has been successful in having pecuniary penalties imposed. Finally, the offer, as identified, was said to give ASIC "substantially the benefit of a complete victory at the trial", such offer being "far superior" to anything which ASIC could expect in any judgment. The respondents seem to have assumed that because they, or their lawyers had particular views about the case, it was unreasonable for ASIC to take different views.

164 The absence of any offer to pay a pecuniary penalty or costs are sufficient reasons for me to conclude that ASIC's failure to accept the offer was not unreasonable. However there is another reason for coming to that conclusion. The whole tone of the letter bespeaks a lack of insight into the seriousness of the misconduct and a lack of contrition. Were the content of the letter to become public knowledge, ASIC's acceptance of the offer would suggest acceptance of such content, leading in turn to serious doubts about ASIC's conduct of the matter.

165 I turn to the offer of 25 May 2016. The letter read as follows:

> ...
>
> We refer to our letter dated 14 April, 2016, in which we communicated an offer to settle on behalf of our clients. ASIC rejected that offer.
>
> ASIC has now foreshadowed an application to seek relief under s.206E of the Act.
>
> While this is a surprising move, at this late stage and while our clients intend to oppose that application for leave to amend the pleadings and the Application, it must be acknowledged that the bar set by section 206E is lower than that set by sections 180 and 206C.
>
> Accordingly, for the reasons set out in our letter of 14 April, 2016, we are instructed to offer to resolve the proceedings as follows:-
>
> 1. Our clients will give and ASIC will accept an Enforceable Undertaking in the following terms:-
>
> (a) They will donate the sum of $50,000 to a financial literacy course or the like, as ASIC may nominate;
>
> (b) they will never apply for an AFSL;
>
> (c) they will never apply to become Authorised Representatives of the

holder of any AFSL;

(d) they will, for a period of five years from the date of the undertaking, not manage any corporation, save for those of which they are currently registered as directors (with appropriate undertakings that those companies will not issue any further securities to any person).

2. The EU may recite that:-

(a) Storm contravened section 945A of the Act in respect of the Part E Investors as alleged in the Fourth Further Amended Statement of Claim;

(b) ASIC had reasonable concerns that the respondents failed to take reasonable steps to prevent the contraventions.

3. The proceedings are to be discontinued, with no order as to costs.

If accepted, this offer would, like our clients' offer of 14 April, 2016, represent an outcome for ASIC far superior to that which it can expect from any judgment in the proceedings.

This offer is open for acceptance until 5.00 pm on Friday, 27 May, 2016.

166 On its face the offer seems to have been made in response to ASIC's indication that it proposed to amend to add a claim pursuant to s 206E. The respondents indicated that the "bar set by s 206E" was lower than that set by s 180 and s 206C. They implied that they were therefore making a more generous offer than that previously made. My comments concerning the first offer apply broadly to the second offer. For some reason the respondents seem to have thought that they could meet any requirement for a pecuniary penalty by applying to pay money to charity. It is somewhat arrogant to seek to avoid the imposition of a statutory pecuniary penalty by making an apparently altruistic charitable gift. The only other changes from the earlier offer were an extension of the proposed disqualification period from three to five years, the offer of an acknowledgment that Storm had breached s 945A of the Act, and the statement that ASIC had "reasonable concerns" that the respondents had failed to take reasonable steps to prevent Storm's contraventions. There was no admission of any contravention by the respondents of s 180(1). Indeed the proposed acknowledgements would, in effect, have highlighted the absence of any acknowledgment of such contraventions by the respondents and of their failure to take reasonable steps as required by s 206E. Once again, there was no offer concerning costs.

167 On 26 May 2016, ASIC responded to both offers. By that letter, ASIC asserted that:

- it had "no interest" in compromising the matter by way of enforceable undertakings; and
- any resolution of the matter by agreement would have to be sanctioned by the Court "in light of the time and resources which have been expended by the Commission in prosecuting the proceeding".

168 In the letter ASIC's counsel indicated that he would relay any further offers of settlement to ASIC and suggested (without instructions) that any settlement would need to involve a pecuniary penalty "well in excess of $50,000". I understand the reference to sanction by the Court to mean that any pecuniary penalty, any period of disqualification or any other term would have to be imposed by the Court.

169 It was for ASIC to decide the appropriateness of any offer of settlement. Whilst there are circumstances in which a costs order may reflect an unreasonable refusal to settle, I see no basis for concluding that ASIC acted unreasonably in this case. The respondents merely assert unreasonableness without attempting to justify that assumption.

170 It follows that the offers and their refusal have no relevance for present purposes.

171 ASIC is entitled to the costs of the proceedings with respect to those issues upon which it was successful, but limited to the case as it concerned the relevant investors. As to the other issues in the case, ASIC failed to prove that:

- Storm was guilty of any criminal contravention of s 945A;
- Mr Bleckley, Mr Laymore, Mr and Mrs Sodegeld, Mr Jones and Mr McConnell were retail investors;
- Storm had contravened s 945A(1)(a); and
- Storm had contravened s 1041E.

172 Concerning costs I propose to order that:

- the respondents pay the applicant's costs of, and incidental to the proceedings, save to the extent that any such costs have been dealt with in other orders, and excluding costs relating solely to one, or any combination of the following issues:
    - the allegation of criminal conduct by Storm;

- the allegation that Mr Bleckley, Mr Laymore, Mr and Mrs Sodegeld, Mr Jones and Mr McConnell were retail investors;
- the allegation that Storm had contravened s 945A(1)(a); and
- the allegation that Storm had contravened s 1041E;

(the "respondents' issues");

- the applicant pay the respondents' costs of, and incidental to the respondents' issues; and
- the parties have liberty to apply.

173 I see no reason for ordering that costs be taxed other than on a party and party basis. The respondents' application to the contrary appears to have been based on ASIC's rejection of their offers to settle. I have dealt with that matter.

I certify that the preceding one hundred and seventy-three (173) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate: 

Dated: 22 March 2018