# SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

# AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION v MACKS (NO 2)

**[2019] SASC 17**

**Judgment of The Honourable Justice Doyle**

**22 February 2019**

## PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - COMMENCING PROCEEDINGS - GENERALLY

## PROCEDURE - JUDGMENTS AND ORDERS

## EVIDENCE - ADMISSIBILITY - JUDGMENTS AND CONVICTIONS

## CORPORATIONS - WINDING UP - LIQUIDATORS

The plaintiff (ASIC) seeks an inquiry under s 536 of the Corporations Act 2001 (Cth) into the conduct of the defendant (Mr Macks) as the liquidator of two companies. It seeks an inquiry into matters that have already been the subject of extensive investigation by ASIC, and the subject of consideration and findings in other civil proceedings brought by another person against Mr Macks.

These proceedings were commenced in March 2015, but were adjourned by consent pending the hearing and outcome of an appeal in the other proceedings. Following the delivery of judgment in the appeal in those proceedings, ASIC applied for permission to amend its originating process inter alia to confine the inquiry it seeks to three aspects of Mr Macks' conduct that remain the subject of adverse findings by the Court.

Mr Macks opposes ASIC's application for permission to amend, and brings an application to stay these proceedings on the basis that they involve an abuse of process. Argument on these two interlocutory applications was heard in conjunction with argument on whether an order should be made for an inquiry under s 536(1) of the Corporations Act, and how any such inquiry as might be ordered should be conducted (including the application of the rule in Hollington v F Hewthorn & Co Ltd [1943] KB 587.).

Held (per Doyle J):

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**Plaintiffs: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Counsel: MR M PEARCE SC WITH MS K CLARK - Solicitor: AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION**

**Defendant: MR PETER IVAN MACKS Counsel: MR M HOFFMANN QC WITH MR T BESANKO - Solicitor: LIPMAN KARAS**

**Hearing Date/s: 26/09/2018**

**File No/s: SCCIV-15-309**

**A**

1. ASIC's application to amend its originating process in the terms indicated in the proposed second originating process is allowed.

2. These proceedings, or the contemplated continuation of them in their amended form, will not entail any abuse of process by ASIC. Mr Mack's application for a permanent stay of the proceedings is dismissed.

3. There should be an inquiry by the Court under s 536(1) of the Corporations Act into the aspects of Mr Mack's conduct identified in ASIC's second originating process.

4. It will be appropriate to conduct the inquiry in a manner akin to ordinary inter partes civil proceedings. In conducting an inquiry of this nature, the findings in the other proceedings will not be admissible. It will be appropriate to apply the rule in Hollington v Hewthorn so as to exclude the findings.

*Hollington v F Hewthorn & Co Ltd* [1943] KB 587; *Viscariello v Macks* (2014) 103 ACSR 542; *Macks v Viscariello* (2017) 130 SASR 1; *Re Bernsteen Pty Ltd* [2018] SASC 76; *Hall v Poolman* (2009) 75 NSWLR 99; *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558; *ASIC v McDermott* [2016] FCA 1186; *ASIC v Dunner* (2013) 303 ALR 98; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053; *ASIC v Edge* (2007) 211 FLR 137; *Leslie v Hennessy* [2001] FCA 371; *Kennards Hire Pty Ltd v RMGA Pty Ltd* [2010] NSWSC 1387; *Re Bauhaus Pyrmont Pty Ltd* [2006] NSWSC 742; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669; *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Channel Seven Adelaide Pty Ltd v Manock* (2010) 273 LSJS 70; [2010] SASCFC 59; *PPG Development Pty Ltd v Capitanio* (2016) 126 SASR 307; *ASIC v Macks* [2018] SASC 132; *Macchia v Nilant* (2001) 110 FCR 101; *Batistatos v Roads and Traffic Authority* (NSW) (2006) 226 CLR 256; *Rogers v The Queen* (1994) 181 CLR 251; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; *Walton v Gardiner* (1993) 177 CLR 378; *Re AWB Ltd (No 10)* (2009) 76 ACSR 181; *GIS Electrical Pty Ltd v Melsom* (2002) 172 FLR 218; *Richmond Sales Pty Ltd v McDermott* (2006) 224 ALR 405; *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961; *Mickelberg v Director of Perth Mint* [1986] WAR 365; *Nicholas v Bantick* (1993) 3 Tas R 47; *Ingram v Ingram* [1956] P 390; *Roberts v Western Australia* (2005) 29 WAR 445; *Re 396 Bay Street, Port Melbourne* [1969] VR 293; *In re a Solicitor* [1993] QB 69; *R v Van Beelan* (2016) 125 SASR 253; *Chapman v Conservation Council (SA)* (2002) 82 SASR 449; *Liao v New South Wales* [2014] NSWCA 71; *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* (2001) 183 ALR 700; *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279; *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474, considered.

# AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION v MACKS (NO 2)
# [2019] SASC 17

**Civil**

1 **DOYLE J:** The plaintiff (ASIC) seeks an inquiry under s 536 of the *Corporations Act 2001* (Cth) into the conduct of the defendant (Mr Macks) as liquidator of Bernsteen Pty Ltd and Newmore Pty Ltd. It seeks an inquiry into matters that have already been the subject of extensive investigation by ASIC, and the subject of consideration and findings in other proceedings brought by Mr Viscariello against Mr Macks (*the Viscariello proceedings*).

2 These proceedings were commenced in March 2015, soon after judgment was handed down in the Viscariello proceedings. By consent, they were adjourned pending the hearing and outcome of the appeal in the Viscariello proceedings. Following the delivery of judgment in the appeal, ASIC applied for permission to amend its originating process in these proceedings *inter alia* to confine the inquiry it seeks to three aspects of Mr Macks' conduct that remain the subject of adverse findings by the Court. Mr Macks not only opposes permission to amend, but has also brought an application to stay these proceedings on the basis that they involve an abuse of process.

3 It was agreed that the argument on these two interlocutory applications be heard in conjunction with argument on two further issues; namely, whether an order should be made for an inquiry under s 536(1) of the *Corporations Act*, and how any such inquiry as might be ordered should be conducted (including the application of the rule in *Hollington v Hewthorn*[1]).

4 There is considerable overlap between the first two issues (whether to grant permission to amend, and whether to stay the proceedings for an abuse of process), given that both Mr Macks' opposition to the former, and his reasons for seeking the latter, are focussed upon the fact that the matters sought to be inquired into have already been the subject of extensive investigation by ASIC and consideration and findings by the Court in the Viscariello proceedings.

5 There is also some overlap between these matters and the third and fourth issues. In respect of the third issue, Mr Macks contends that even if he is unsuccessful on the first two issues, the Court should exercise its discretion to decline to order the inquiry sought by ASIC for reasons that are similar to those advanced in opposition to the application to amend, and in support of the application for a stay. In respect of the fourth issue, Mr Macks contends that in the event of an inquiry into his conduct, the rule in *Hollington v Hewthorn* will operate to preclude reliance by ASIC upon the findings in the Viscariello

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[1] *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

proceedings. He contends that ASIC will thus need to prove afresh the aspects of Mr Macks' conduct in respect of which the inquiry is sought. It is said that this serves to underscore the inappropriateness of subjecting Mr Macks to the proposed inquiry.

6 Before addressing the four issues that I have identified, it is appropriate to summarise the factual and procedural history relevant to my consideration of these issues.

**Background**

7 Mr Viscariello was a shareholder and the sole director of both Bernsteen and Newmore (together, *the Companies*). The Companies operated a retail business selling manchester.

8 The Companies experienced financial difficulties, and on 5 December 2001 Mr Macks was appointed as administrator of the Companies. The attempts to obtain approval to enter into a deed of company arrangement were unsuccessful, and on 21 December 2001 the creditors resolved to put the Companies into liquidation. Mr Macks was appointed the liquidator of each of the Companies.

9 Mr Viscariello was aggrieved by the decision to put the Companies into liquidation, and made various complaints about Mr Macks' conduct as administrator of those Companies.

10 Mr Macks sold some of Bernsteen's stock to Ms Hamilton-Smith (who was Mr Viscariello's then partner). Ms Hamilton-Smith defaulted under the sale agreement, and in August 2002 Bernsteen commenced proceedings in the Magistrates Court to recover the sum of $28,000 that was payable for the stock (*the Bernsteen proceedings*).

11 Ms Hamilton-Smith responded by counterclaiming against Mr Macks, and embarking upon a series of interlocutory applications and disputes. As a result, the Bernsteen proceedings became protracted. Bernsteen incurred legal expenses that significantly exceeded the debt claimed; and Mr Macks effectively lost control of the proceedings.

12 In August 2003, Ms George had obtained a judgment against Ms Hamilton-Smith for $5,000. As at June 2005, that judgment had not been satisfied. Mr Macks' legal advisors, Minter Ellison, proposed that he indemnify Ms George for the cost of presenting a petition in bankruptcy against Ms Hamilton-Smith as a way of extracting himself from the Bernsteen proceedings. This occurred. However, the proceedings in the name of Ms George to bankrupt Ms Hamilton-Smith (*the George proceedings*) also became embroiled in interlocutory applications and disputes.

13 By April 2006, Ms Hamilton-Smith had not been declared bankrupt. Both the Bernsteen proceedings and the George proceedings remained on foot, and

Bernsteen was continuing to incur substantial legal expenses. It was not until February 2007 that the two sets of proceedings were compromised.

***The Viscariello proceedings***

14 In February 2006, Mr Viscariello issued the Viscariello proceedings making various allegations of misconduct by Mr Macks in his role as administrator of the Companies. He alleged breaches of duty by Mr Macks in advising that there was no alternative to liquidation, and in selling the Companies' assets at an undervalue. In November 2008, Mr Viscariello added claims alleging that Mr Macks had breached the duties he owed as the liquidator of Bernsteen by expending the company's funds on prosecuting the Bernsteen proceedings, and by agreeing to indemnify Ms George, and initiating and maintaining the George proceedings.

15 The trial of the Viscariello proceedings was heard by Kourakis CJ. It occupied some 49 hearing days between February 2012 and February 2013. Judgment was delivered in December 2014. Kourakis CJ dismissed the claims against Mr Macks in his capacity as administrator of the Companies. However, in relation to the claims against Mr Macks in his capacity as liquidator of Bernsteen, his Honour found that Mr Macks acted in breach of the duties owed by him under ss 180 – 182 of the *Corporations Act* by continuing to prosecute the Bernsteen proceedings after June 2005, and by initiating and maintaining the George proceedings. Declarations were made to give effect to these findings of breach.[2]

16 In April 2015, Mr Macks consented to an order in the Viscariello proceedings for his removal as liquidator of the Companies. Mr Basedow of Pitcher Partners was appointed as liquidator of the Companies.

17 In late April 2015, Mr Macks filed a notice of appeal against the decision of Kourakis CJ in the Viscariello proceedings. Mr Viscariello cross-appealed.

18 The appeal was originally listed to be heard in April 2016. However, following the death of Mr Viscariello's counsel, the appeal was adjourned to enable Mr Viscariello to obtain alternative representation. The appeal was ultimately heard in February 2017. The Full Court delivered its reasons in December 2017.[3]

19 Mr Macks' appeal was successful in part. The Full Court concluded that the findings that Mr Macks breached his statutory duties by prosecuting the Bernsteen proceedings from June 2005, and by initiating and maintaining the George proceedings, should be set aside. However, the Court found that Mr Macks breached s 180 of the *Corporations Act* by failing to take steps after April 2006 to resolve the litigation against Ms Hamilton-Smith; and in particular

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2 *Viscariello v Macks* (2014) 103 ACSR 542.

3 *Macks v Viscariello* (2017) 130 SASR 1.

by failing to exercise the required degree of care and diligence as an officer of Bernsteen in applying its funds in connection with the Bernsteen proceedings and the George proceedings. The Court made a declaration to this effect.

20 Mr Viscariello's cross-appeal was dismissed.

***ASIC involvement in the Viscariello proceedings***

21 In October 2009, Mr Viscariello filed an interlocutory application in the Viscariello proceedings seeking, amongst other things, orders for an inquiry under s 536 of the *Corporations Act* (*the first s 536 application*). The application sought an inquiry in relation to Mr Macks' conduct as liquidator of the Companies, particularly in relation to the conduct of the Bernsteen and George proceedings. The application was served on ASIC.

22 ASIC sought leave to appear as *amicus curiae* in the Viscariello proceedings for the limited purpose of responding to the first s 536 application, relying upon the potential overlap between the subject matter of the proposed inquiry and its own investigations. In December 2009, the first s 536 application was adjourned *sine die*. An order was made granting ASIC permission to inspect and copy any documents on the court file in the Viscariello proceedings.

23 In March 2012, Mr Viscariello served ASIC with a further interlocutory application in the Viscariello proceedings, seeking orders for an inquiry under s 536 into Mr Macks' conduct during the liquidations of Bernsteen and Newmore (*the second s 536 application*). ASIC again sought leave to appear as *amicus curiae* at a directions hearing in relation to this application. The second s 536 application was adjourned with liberty to apply.

24 Mr Viscariello's applications for an inquiry under s 536 were ultimately dismissed by Kourakis CJ in April 2015. His Honour did so for reasons that included the existence by then of ASIC's application for an inquiry in these proceedings, and the consequential lack of utility in any similar order being made in the Viscariello proceedings.

***The ASIC investigations***

25 In around November 2009, ASIC commenced an investigation into Mr Macks' conduct as liquidator of the Companies, and in particular suspected breaches by him of ss 180 – 182 of the *Corporations Act.* Mr Macks was examined on oath in December 2009. This included questions in relation to his conduct of the Bernsteen and George proceedings.

26 In January 2010 Mr Macks was served with a notice to produce the books and records of the Companies relevant to the conduct of the Bernsteen and George proceedings. In February 2010, Mr Macks provided ASIC with various documents in response to this notice to produce. Those documents included a

memorandum dated 26 May 2002 (*the 2002 memo*) and a memorandum dated 3 August 2004 (*the 2004 memo*).

27 In April 2010, ASIC served Mr Macks with a further notice to produce. And in May 2010, Mr Macks was examined on oath for a second time. Both the notice to produce and examination sought information to assist ASIC in its investigation of Mr Macks' conduct in the liquidations of the Companies.

28 During the second half of 2010, and into 2011, ASIC corresponded with Mr Macks' solicitors variously seeking further information, notifying Mr Macks of its concerns in relation to his conduct in the liquidation of the Companies, and requesting that Mr Macks agree to take remedial action in order to address ASIC's concerns. The remedial action identified by ASIC focussed upon irregularities in relation to the minutes of a November 2005 meeting of the Companies' committees of inspection (at which a resolution approving Mr Macks' remuneration for the period 1 March 2005 to 31 October 2005 was passed), and in relation to the approval and funding of the George proceedings. The steps that ASIC required be taken by Mr Macks included convening a meeting to seek retrospective approval of his remuneration and Bernsteen's funding of the George proceedings, bringing proceedings under s 1322(4) of the *Corporations Act* seeking declaratory relief in relation to the November 2005 meeting, and submitting to a regime of supervision by another registered insolvency practitioner for a period of 18 months.

29 In August 2011, Mr Macks signed an undertaking to complete the remedial steps required by ASIC. He did so on the basis of an express reservation by ASIC of its right to pursue an alternative course of action against Mr Macks if he did not complete the steps required, if further or contrary evidence came to light, or if adverse findings were made against him in the Viscariello proceedings.

30 In late August 2011, Mr Macks commenced the 18 month period of supervision required by ASIC. It was completed in February 2013 without any issue or concern being identified by the supervising practitioner.

31 In September 2011, Mr Macks convened meetings of the Companies' committees of inspection required by ASIC. In April 2012, he issued the contemplated proceedings under s 1322(4) of the *Corporations Act* (*the s 1322 proceedings*). There was an overlap between the matters raised in the s 1322 proceedings and the matters to be considered in the Viscariello proceedings. As a result, the s 1322 proceedings were adjourned pending determination of the Viscariello proceedings. While Mr Macks (at ASIC's request) sought to re-enliven the s 1322 proceedings after completion of the Viscariello proceedings, those proceedings were ultimately dismissed in June 2018.[4] They were dismissed on the ground that, by reason of his removal as liquidator of the Companies, Mr Macks was no longer an "interested person" with standing to bring

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[4] *Re Bernsteen Pty Ltd* [2018] SASC 76.

proceedings under s 1322. They were thus dismissed without any determination of the substantive issues raised in those proceedings.

32 In August 2012, ASIC was served with a subpoena in the Viscariello proceedings that required it to produce to the Court the original documents provided to it by Mr Macks in response to the January 2010 notice to produce. ASIC produced those documents, which included the 2002 and 2004 memos.

33 In about December 2012, ASIC came to understand that the 2002 and 2004 memos were not genuine documents, but rather had been 'recreated' by Mr Macks in 2010. This understanding came from statements made about these documents in correspondence on behalf of Mr Macks, and in the evidence he gave in the Viscariello proceedings during December 2012. His evidence was to the effect that he recreated these memos because the original versions of them had become corrupted or were otherwise unable to be located.

34 In January 2013, and as a result of its above understanding, ASIC embarked upon an investigation of possible breaches of the *Corporations Act* and/or *Australian Securities Investments Commission Act 2001* (Cth) by Mr Macks in connection with his production of the 2002 and 2004 memos to ASIC (*the further investigation*). The steps taken pursuant to the further investigation included the service upon Mr Macks of a further notice to produce, and a notice requesting his reasonable assistance and information. Pursuant to the latter, Mr Macks provided the name of his executive assistant (Ms Greenwald), and the company (Knowledge Plus Pty Ltd) that maintained his firm's server, at the time the 2002 and 2004 memos were created. In April 2013, ASIC interviewed Ms Greenwald and a representative of Knowledge Plus.

***The removal of Mr Macks as liquidator of the Companies***

35 In December 2014, Kourakis CJ delivered his reasons for judgment in the Viscariello proceedings. At a series of directions hearings following the delivery of these reasons, ASIC sought leave to appear, initially by way of *amicus curiae* and then as an intervener. However the application to intervene was confined to making submissions in support of orders for the removal of Mr Macks as liquidator of the Companies. In this context, ASIC informed the Court of its intention to issue separate proceedings under s 536 of the *Corporations Act* for the purposes of seeking Mr Macks' removal from all current offices and preventing him from taking up future offices for a substantial period.

36 In April 2015, Kourakis CJ made orders (by consent) in the Viscariello proceedings removing Mr Macks as liquidator of the Companies. His Honour dismissed Mr Viscariello's applications for an inquiry under s 536.

***Investigations of Mr Basedow***

37 Mr Basedow was appointed as liquidator of the Companies, in place of Mr Macks, in April 2015. Following his appointment, he undertook his own

investigations into the conduct of Mr Macks as liquidator of the Companies. This included meeting with Mr Macks, reviewing the transcript and judgments in the Viscariello proceedings, reviewing other documents and correspondence relevant to the Companies' affairs, reporting to ASIC and conducting an examination of one of Mr Macks' employees. Mr Macks was represented at this examination. It covered various topics, including the provenance of the 2002 and 2004 memos. Mr Basedow received significant funding from ASIC ($132,248) to assist him in undertaking the above investigations.

38 In his reports to the creditors of Bernsteen in July 2016 and July 2017, Mr Basedow outlined the state of his investigations and said that he had identified potential offences by, and claims against, Mr Macks. However, he indicated that he did not intend to pursue any action against Mr Macks pending the outcome of the appeal in the Viscariello proceedings.

39 In his July 2018 report to the creditors of Bernsteen, Mr Basedow reported on the outcome of the appeal, and noted that the Full Court's confinement of the breach of s 180(1) by Mr Macks meant that the quantum of any claim against him was reduced. However, he indicated that he had sought advice about these claims.

40 In August 2018, Mr Basedow sent Mr Macks' solicitors a pre-action letter. It articulated a claim against Mr Macks on behalf of Bernsteen (and Newmore) arising out of the conduct the subject of the Full Court's finding of breach of s 180(1). Given the confidential and without prejudice nature of this letter, and the response by Mr Macks' solicitors, I do not propose to set out the detail of this correspondence in these reasons. It is sufficient for present purposes to note the existence of the foreshadowed claim by Mr Basedow, and its overlap with at least the aspect of the inquiry sought in these proceedings that relates to the Full Court's finding of a breach by Mr Macks of s 180(1) of the *Corporations Act*.

**These proceedings**

41 In March 2015, ASIC commenced these proceedings. In its originating process, ASIC sought an inquiry by the Court under s 536(1) of the *Corporations Act* into the questions of whether, as a consequence of findings made by this Court in the Viscariello proceedings regarding the conduct of Mr Macks (a) Mr Macks should continue as the liquidator of the various companies listed in the schedule to the originating process; (b) Mr Macks is a fit and proper person to be registered as a liquidator and has the capacity to adequately and properly perform his duties; and (c) the Court should cancel Mr Macks' registration as a liquidator.

42 The originating process sought relief that Mr Macks be removed as liquidator or administrator of each of the companies listed in the schedule to the originating process (under ss 473(1), 503 or 536(1)) of the *Corporations Act*); that Mr Macks' registration as a liquidator be cancelled, or alternatively that he be prohibited from holding the office of liquidator or administrator for such

period as the Court considers appropriate (under s 536(1)); an order that Mr Macks be disqualified from managing corporations for such period as the Court considers appropriate (under s 206E(1)); and such further or other orders as the Court deems appropriate. The originating process also sought interim relief removing Mr Macks as the liquidator of the Companies, and restraining him from accepting any new appointments as liquidator or administrator pending determination of these proceedings.

43 In March 2018, ASIC brought its application to amend the originating process. By this time, the Full Court had delivered judgment on the appeal in the Viscariello proceedings, and the proposed amendments had the effect *inter alia* of confining the inquiry sought to the matters that remained the subject of adverse findings against Mr Macks.

44 In particular, the application sought permission to amend the originating process to confine the inquiry sought to one in relation to the findings regarding the conduct of Mr Macks in the Viscariello proceedings "to the extent upheld or not challenged on appeal". The proposed amendments included particulars that further confined the inquiry to the following three matters:

1. The declaration (as varied by the Full Court) that Mr Macks, as liquidator of Bernsteen, contravened s 180(1) by reason that from 28 April 2006 he failed to exercise the degree of care and diligence required of him as an officer of Bernsteen in applying Bernsteen's funds in connection with the Bernsteen and George proceedings.

2. The finding of the trial judge[5] that Mr Macks fabricated a document (the 2002 memo, referred to as 'the covering note') and submitted it to ASIC in response to its enquiry in 2009 with the intention of passing it off as the original, or a true copy of the original.

3. The evidence of Mr Macks and the observations thereon of the trial judge[6] that Mr Macks reconstructed a document (the 2004 memo, referred to as 'the Monksfield memorandum'), including fabricating the initials of his colleagues, and submitted the document to ASIC in response to its inquiry in 2009.

45 The proposed amendments included the deletion of the interim relief that had originally been sought. They also included some more formal amendments to confirm that despite the March 2017 commencement of Schedule 2 of the *Insolvency Reform Act 2016* (Cth), the Court remained entitled to make the orders sought either under ss 473(1), 503 and 536 of the 'old' *Corporations Act*[7] or s 1577 of the current *Corporations Act*; and to update the schedule of company appointments attached to the originating process.

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5 *Viscariello v Macks* (2014) 103 ACSR 542 at [396].

6 *Viscariello v Macks* (2014) 103 ACSR 542 at [345], [365]-[368].

7 By reason of the transitional provisions contained in ss 1617 and 1618 of the *Insolvency Reform Act*.

46 Subsequently, ASIC also confirmed its intention to abandon the part of its application based on s 206E of the *Corporations Act*, acknowledging that this aspect of its claim was no longer appropriate given the Full Court's more limited finding of contravention by Mr Macks of the *Corporations Act*; and to include reference to s 449B of the *Corporations Act* given that Mr Macks is an administrator of two companies which are subject to a deed of company arrangement.

## The nature of an inquiry under s 536

47 Section 536 of the *Corporations Act* provides for the Court (or ASIC) to inquire into the conduct of a liquidator in connection with the performance of his or her duties, functions and powers, and for the Court to then take such action as it thinks fit. It provides as follows:

> **536 Supervision of liquidators**
>
> (1A) In this section:
>
> ***liquidator*** includes a provisional liquidator.
>
> (1) Where:
>
> (a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:
>
> (i) a requirement of the Court; or
>
> (ii) a requirement of this Act, of the regulations or the rules: or
>
> (b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;
>
> the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
>
> (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.
>
> (3) The Court may an any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

48 Authorities considering the operation of s 536 have emphasised that its purpose has a regulatory, supervisory and disciplinary focus. It is a section intended primarily to serve the public interest. As such, it may be contrasted with other sections within the *Corporations Act* which are concerned more with

the vindication of private rights, or are more narrowly focussed upon modifying or reversing particular decisions made by a liquidator.

49 In *Hall v Poolman*,[8] the New South Wales Court of Appeal said that in construing s 536 it must be borne in mind that it forms part of the regulatory system established under Australia's corporations legislation, and involves:[9]

> ... a broadly expressed supervisory jurisdiction over the conduct of persons in control of the affairs of a corporation, in circumstances where normal market forces and the exercise by shareholders of their rights to control are attenuated or non-existent. These powers are one part of a range of regulatory powers conferred on the court and/or ASIC to ensure the lawful, orderly and efficient conduct of the affairs of corporations during such a period.

50 To similar effect are the observations of Barrett J in *BL & GL International Co Ltd v Hypec Electronics Pty Ltd.*[10] In addressing the purpose for which s 536 exists, his Honour said:[11]

> As the several judicial statements about s 536 make clear, the emphasis is on regulation, supervision, discipline and correction of liquidators in the interests of honest and efficient administration of the estates of companies subject to winding up. The interest to be served is a public interest. The section is not concerned in any direct way with vindication of private rights. Rather and as Steytler J said in *GIS Electrical Pty Ltd v Melsom* [2002] WASCA 302; (2002) 172 FLR 218 at [49] echoing an observation of McLelland CJ in Eq in *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 438, it "is concerned with aspects of the conduct of liquidators which are liable to attract sanctions or control for what might be broadly described as disciplinary reasons". The pre-occupation is, as I put it in *Re Bauhaus Pyrmont Pty Ltd* [2006] NSWSC 742 at [4], with "the broader question of due administration of the winding up in the public interest".

51 Given the broadly expressed nature of the supervisory jurisdiction, it is accepted that the powers conferred by s 536 should not be narrowly construed or confined by fine distinctions.[12]

52 Authority suggests that proceedings under s 536 will normally involve three stages.[13] The first stage involves the Court deciding, upon an application being made, whether an inquiry into a liquidator's conduct is warranted. If found to be warranted, an inquiry is ordered to take place. The task of the Court at the second stage is to make a judgment about the liquidator's conduct, viewed in light of the whole of the circumstances relevant to the particular winding up and liquidator. If the Court decides that the liquidator's conduct was in some way deficient, it then embarks upon the third stage and decides whether or not to make an order in respect of that conduct.

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8 *Hall v Poolman* (2009) 75 NSWLR 99.
9 *Hall v Poolman* (2009) 75 NSWLR 99 at [53].
10 *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558.
11 *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 at [41].
12 *Hall v Poolman* (2009) 75 NSWLR 99 at [54]; *ASIC v McDermott* [2016] FCA 1186 at [11].
13 *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 at [42]-[45]; *ASIC v Dunner* (2013) 303 ALR 98 at [14].

53 The nature of any order made at the third stage will depend upon the nature of the deficiency found. It might involve the removal of the liquidator from a particular appointment or appointments. It might extend to cancellation of a liquidator's registration (and provision that a liquidator may not reapply for such registration for a specified period of time). The predominant consideration will be what is necessary or appropriate to achieve the regulatory, supervisory, disciplinary and corrective purposes for which s 536 exists.

54 While there are thus three conceptually distinct stages to the exercise of the Court's jurisdiction under s 536, the courts have on occasion combined the hearing of the application for the inquiry (the first stage) and the hearing of the inquiry itself (the second stage) into a single hearing, particularly where the parties have agreed that this is an appropriate course.[14]

55 The present proceedings involve an application under s 536(1) and hence consideration may be confined to the Court's powers under ss 536(1)(a) and (b). The Court's power under s 536(1)(a) entails a threshold requirement that it appears to the Court that the liquidator has not, or is not, faithfully performing his or her duties or observing a requirement of the Court or the corporations legislation, regulations or rules. While s 536(1)(b) does not contain this threshold, it requires a "complaint" to be made to the Court with respect to the conduct of the liquidator in connection with the performance of his or her duties. But it is established that "complaint" in this context is to be construed broadly, and may include an application for an inquiry brought by an originating process.[15]

56 In the case of both limbs of s 536(1), the threshold to the exercise of the Court's power to order an inquiry is a relatively low one.[16] It requires something less formal and stringent than demonstration of a *prima facie* case according to some evidential burden of proof. It is necessary only that there be a sufficient basis for ordering an inquiry; that is, that there is something in relation to the liquidator's conduct or performance that warrants inquiry.[17] This has been described as requiring something in the nature of a well-based suspicion indicating a need for further investigation.[18]

57 The decision whether to order an inquiry is a discretionary one. In *Leslie v Hennessy*[19] the Full Court of the Federal Court emphasised the breadth of the discretion to be exercised. Many factors will be relevant to the exercise of that

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[14] *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [10]; citing the examples of *ASIC v Dunner* (2013) 303 ALR 98 and *ASIC v McDermott* [2016] FCA 1186.

[15] *Hall v Poolman* (2009) 75 NSWLR 99 at [94]-[98]; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [7].

[16] *ASIC v Edge* (2007) 211 FLR 137 at [69]; *ASIC v McDermott* [2016] FCA 1186 at [11]; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [8].

[17] *Leslie v Hennessy* [2001] FCA 371 at [6]; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [8].

[18] *Kennards Hire Pty Ltd v RMGA Pty Ltd* [2010] NSWSC 1387 at [36].

[19] *Leslie v Hennessy* [2001] FCA 371 at [6]; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [12].

discretion, including the strength and nature of the allegations, any answers offered by the liquidator, other available remedies, the stage to which the liquidation has progressed, the likely amounts of money involved, the availability of funds to pay for any inquiry, the likely benefit to be derived from it (with the focus being on the broader public interest that s 536 is intended to serve rather than the furtherance of private claims) and the legitimate 'interest' of the applicant in the outcome.[20] The overarching consideration will be whether the proposed inquiry is likely to accord with, or assist in achieving, the supervisory and disciplinary purposes of s 536.

58 As to the nature of the inquiry to be conducted, the Court retains a broad discretion as to the procedure to be adopted.[21] While pleadings, and other processes akin to those commonly utilised in 'ordinary' *inter partes* litigation, will sometimes be appropriate,[22] that may not always be so. What is appropriate in respect of any particular inquiry will depend very much upon the particular circumstances, including the nature of the conduct to be inquired into, and the nature and extent of the available evidence and any previous investigation or consideration of that conduct.

59 While the Court is entitled to be satisfied upon the hearing of any inquiry that all available and admissible material is before it, it is acknowledged that it is not equipped to arrange the presentation of the evidence, to investigate its availability, or to effect the calling of witnesses. It has therefore been held to be appropriate that the corporate regulator assist the Court with these matters as the representative of the public interest.[23] Indeed, despite the process being described in s 536(1) as an "inquiry", it is accepted that it is intended to be structured so as to be adversarial rather than inquisitorial in nature, with the liquidator enjoying all the usual safeguards and protections.[24]

60 As to the scope of an inquiry under s 536, this also lies within the discretion of the Court. However, in most cases the inquiry will be confined to the specific subject of the complaint (or matters identified as warranting inquiry in the application for the inquiry). Certainly the section does not contemplate a detailed investigation of the whole of the liquidator's conduct simply because a specific allegation of misconduct has been made.[25] In the case of inquiries where it is

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[20] *Leslie v Hennessy* [2001] FCA 371 at [6]; *Re Bauhaus Pyrmont Pty Ltd* [2006] NSWSC 742 at [4]; *BL & GY International Co Ltd v Hype Electronics Pty Ltd* (2010) 79 ACSR 558 at [41]; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 438-439; *Commissioner of Taxation v Iannuzzi* [2018] FCA 1053 at [12].

[21] *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 687-688; *ASIC v Edge* (2007) 211 FLR 137 at [77]-[79].

[22] *Kennards Hire Pty Ltd v RMGA Pty Ltd* [2010] NSWSC 1387 at [36]; *ASIC v Edge* (2007) 211 FLR 137 at [78].

[23] *ASIC v McDermott* [2016] FCA 1186 at [12]; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 687; *ASIC v Edge* (2007) 211 FLR 137 at [77].

[24] *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 687; *ASIC v Edge* (2007) 211 FLR 137 at [77]; *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 at [43].

[25] *Leslie v Hennessy* [2001] FCA 371 at [8].

appropriate to require that the basis for the inquiry (or the scope of the intended inquiry) be articulated in pleaded form, the pleadings will no doubt guide, if not dictate, the scope of the inquiry.[26]

**The applications to amend and stay**

61 ASIC's application to amend its originating process is dated 21 March 2018, and seeks permission to amend pursuant to r 54(4) of the *Supreme Court Civil Rules 2006* (SA).

62 In its outline of argument, ASIC identifies its primary purpose for the application to amend as narrowing the scope of the inquiry sought under s 536 in light of the decision of the Full Court in the Viscariello proceedings; and confirming that it no longer seeks an inquiry into the matters upon which Mr Macks was successful in the Full Court, namely the trial judge's findings of a contravention of s 180(1) of the *Corporations Act* (insofar as it related to the period June 2005 to 28 April 2006), and that Mr Macks acted with a collateral and improper purpose. An inquiry is only sought in relation to the matters that remain the subject of findings either upheld by the Full Court (the contravention of s 180(1) after 28 April 2006, based on a failure to exercise due care and diligence rather than any deliberate improper purpose), or were not challenged on appeal by Mr Macks (the fabrication of the 2002 and 2004 memos).

63 ASIC identified three other reasons for the application, which it contends should be uncontroversial, namely to reflect amendments to the *Corporations Act* since the proceedings were commenced, to delete the claim for interim relief (on the basis that the removal of Mr Macks as liquidator of the Companies was ordered in the Viscariello proceedings in April 2015, and that the interim relief was otherwise no longer pressed by ASIC), and to update the schedule to the originating process to reflect Mr Macks' current appointments. As mentioned, ASIC also subsequently indicated that it no longer presses any claim for relief under s 206E of the *Corporations Act*.

64 In his outline of argument, Mr Macks opposes permission to amend on the following grounds.

1. The amendments sought to be made are defective or untenable.

2. ASIC has failed to adduce any evidence of the nature required on an application for permission to amend.

3. There is no apparent utility in the inquiry sought and no explanation for the delay.

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[26] *BL & GL International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 at [42].

4. ASIC's proposed pleaded reliance upon findings (which Mr Macks contends are largely unidentified) in the judgments of Kourakis CJ and the Full Court is contrary to the rule in *Hollington v Hewthorn*.

65 Further, by application dated 25 May 2018, Mr Macks seeks a permanent stay of the proceedings by reason that they are an abuse having regard to the subject matter of the inquiry sought, and the inevitability that this would involve subjecting Mr Macks to the litigation of matters that have already been the subject of litigation in the Viscariello proceedings, investigation by ASIC, and investigation and foreshadowed proceedings by his replacement liquidator (Mr Basedow). Mr Macks also complains that it is abusive to use s 536 of the *Corporations Act* to seek findings of breaches of that Act that are time barred.

66 It is convenient to commence by individually addressing some of the matters relied upon by Mr Macks before addressing the broader issues of the exercise of the Court's discretion to grant permission to amend, and the allegedly abusive nature of the proceedings.

**Contended defective or untenable nature of the amendments**

67 Mr Macks contends that the amendments sought to be made are defective or untenable in several respects.

68 The first complaint in this respect is that the proposed second originating process states that the application is made under ss 206E, 473(1), 503 and 536 of the *Corporations Act*, but then does not include any claim for relief under s 503, and does not properly identify the basis for the claim for relief under s 206E.

69 When initially filed, the originating process sought orders removing Mr Macks from his appointments as liquidator or administrator, and in the case of those appointments that he held alone (rather than jointly and severally with another) an additional order appointing a replacement liquidator or administrator. ASIC relied upon s 473(1) in respect of court appointments, and s 503 in respect of appointments in voluntary windings up. It appears from the proposed amendments to the list of appointments in the schedule to the originating process that Mr Macks no longer holds any solo appointments in voluntary windings up. It is not clear to me from that list whether any of the updated list of joint and several appointments are in respect of voluntary windings up.[27] While ASIC's reference to s 503 in the second originating process should be clarified or removed, I consider this to be a minor matter that can be easily clarified, and hence which should not stand in the way of a grant of permission to amend.

70 As to the reference in the proposed second originating process to s 206E, ASIC has already indicated that it no longer pursues any claim under that section,

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[27] Mr Geneste's affidavit sworn 27 July 2018 identifies one current appointment which is a member's voluntary liquidation.

and that it will delete reference to it should it be granted permission to amend. As a result, this aspect of Mr Macks' complaints has fallen away.

71 The other complaints made by Mr Macks under this heading relate to ASIC's articulation of the inquiry it seeks by reference to "findings made" regarding Mr Macks' conduct by the trial judge in the Viscariello proceedings and "to the extent upheld or not challenged on appeal". Mr Macks complains that this articulation of ASIC's application offends the rule in *Hollington v Hewthorn*, and is in any event hopelessly vague, embarrassing and prejudicial.

72 For related reasons, I do not accept either of these complaints.

73 ASIC acknowledges that if an order is made for an inquiry, or indeed if the issue of whether such an order should be made is to be dealt with at the same time as the second stage of the process, then it may be appropriate to require that it identify the detail of its case through some form of pleading. As explained later in these reasons, given the detail underlying the matters in respect of which inquiry is sought (particularly the allegation of breach of s 180(1)), and Mr Macks' foreshadowed intention to mount a challenge to at least some aspects of the findings relied upon by ASIC, I consider it appropriate that any inquiry be framed and conducted by reference to a pleaded articulation of the matters to be inquired into.

74 Properly understood then, the only function of the originating process, at least in the context of these proceedings, is to identify the topic(s) of the inquiry being sought, as opposed to the detail of the factual matters to be inquired into, or the process by which the inquiry is to be conducted. In circumstances where the application for this inquiry has arisen out of (or at least in connection with) findings made in the Viscariello proceedings, and where the particular findings relied upon have been sufficiently identified, I see no difficulty with the form of ASIC's proposed originating process.

75 Contrary to Mr Macks' submission, ASIC's proposed second originating process does not leave the findings upon which it relies unidentified or 'at large'. Rather, through the particulars it has provided (summarised earlier), ASIC has identified the three findings upon which it relies with sufficient clarity for present purposes, including by reference to the detailed terms of the declaration made by the Full Court (in the case of the contravention of s 180(1)) and by reference to the relevant paragraphs of the trial judge's reason (in the case of the fabrication of the 2002 and 2004 memos). I accept that Mr Macks will, in due course, be entitled to a more detailed articulation of the material facts and circumstances relied upon by ASIC as giving rise to the findings relied upon (particularly the breach of s 180(1)). But I do not consider that this is necessary at this stage of the proceedings, or otherwise renders the proposed second originating process defective or untenable.

76 Further, assuming for the moment that the rule in *Hollington v Hewthorn* applies to these proceedings, the primary work for this rule will be at the point of determining the admissibility of evidence, and in particular the admissibility of the judgments and findings sought to be relied upon by ASIC. In circumstances where ASIC accepts that, even if the findings are admissible, Mr Macks is nevertheless entitled to challenge those findings, ASIC will be required to establish or sustain the facts and findings upon which it relies. It will thus be appropriate that ASIC provide Mr Macks with the detail of the underlying facts upon which it relies. However, in the circumstances of this case, I see no difficulty with this occurring through some form of pleading at the commencement of the inquiry process (that is, the second stage), rather than in the originating process itself.

**Contended lack of evidence to explain the amendments and their timing**

77 Mr Macks contends that ASIC has not filed the evidence necessary to enliven the Court's discretion to grant permission to amend, or at least to permit a favourable exercise of that discretion. In particular, he contends that ASIC has not filed any evidence identifying the reason or purpose for the proposed amendments, or indeed for continuing with the proceedings despite the consideration of the issues that has already occurred in the context of the Viscariello proceedings and the ASIC investigations. Nor has ASIC explained the timing of, and delay in, seeking to amend and continue the pursuit of these proceedings. Mr Macks relies in support of this submission upon authorities such as *AON Risk Services Australia Ltd v Australian National University*[28] and *Channel Seven (Adelaide) Pty Ltd v Manock,*[29] and their emphasis upon the need to explain the reason for, and any delay in the timing of, applications to amend.

78 In *PPG Development Pty Ltd v Capitanio*,[30] I had occasion to consider and summarise the relevant authorities. As I said in that case, *AON Risk Services* and the cases that have applied it have made it plain that in exercising its discretion to grant permission to amend, the Court must take into account a number of factors. Those factors include:[31]

- The nature and importance of the proposed amendment, including the extent to which it raises new issues of fact or law.
- The merits of the proposed amendment, at least in the sense that the proposed amendment is arguable or tenable.
- The stage of the litigation at which the application to amend is made, and the likely impact upon, or disruption to, the progress of the proceedings (and in particular the trial).

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[28] *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.
[29] *Channel Seven Adelaide Pty Ltd v Manock* (2010) 273 LSJS 70; [2010] SASCFC 59.
[30] *PPG Development Pty Ltd v Capitanio* (2016) 126 SASR 307.
[31] *PPG Development Pty Ltd v Capitanio* (2016) 126 SASR 307 at [39].

- The explanation for the application to amend and its timing, and the fact and extent of any undue delay in this regard.
- Whether the party has had a sufficient opportunity to plead their case earlier.
- The time, cost and inconvenience associated with any delay or disruption of the proceedings.
- The uncertainty and strain of litigation on the parties and their witnesses as a result of any disruption or delay likely to be occasioned by the amendment.
- The impact of any delay and disruption upon judicial and court resources, and the access of other litigants to those public resources.
- The impact upon the public's confidence in the just and efficient administration of justice.

79 This list of factors is no more than a general guide to the relevant considerations in any particular case. The relevance and weight to be attached to these individual factors – and the potential relevance of other factors – will depend upon the circumstances of the particular case. Indeed, there are several relatively unique aspects of the present case (for example, the significant procedural background to these proceedings, and the supervisory and disciplinary nature of the jurisdiction sought to be invoked) that call for particular consideration.

80 I accept that in exercising the Court's discretion to permit amendments to be made, it must consider the explanation for the application to amend and its timing, and the fact and extent of any undue delay in this regard. However, it is difficult to generalise as to precisely what, if any, evidence will be required in relation to these matters in order to enliven the Court's discretion. In some cases detailed affidavit evidence from the party seeking to amend or his or her solicitor may be required. In other cases – for example, where the amendments and any delay are modest in nature and readily explicable – little or no evidence might be required. Further, what is ultimately sufficient by way of explanation for the amendments and their timing will of course be influenced not only by the nature and extent of the amendments and delay, but also by consideration of the other factors relevant in the particular case.

81 Here, ASIC relies upon an affidavit of Mr Thorne filed at the commencement of the proceedings, as well as two affidavits of Mr Geneste filed in support of the application to amend. The affidavit material relied upon by ASIC is voluminous, but is essentially confined to the material necessary to set out the procedural context of these proceedings (and the proposed amendments to them), as outlined at the commencement of these reasons. It is conveniently

summarised in some earlier reasons I delivered on an interlocutory ruling in these proceedings.[32]

82 Mr Macks complains that this affidavit material does not, at least not in terms, address the reasons for the application to amend or the explanation for its timing. Nor does it say anything in terms as to ASIC's reasons or motivation for seeking to amend the proceedings, or for continuing to pursue the proceedings more generally despite the Viscariello litigation and earlier ASIC investigations.

83 In my view, this complaint is of little significance in the circumstances of the present case. The very nature of the proceedings and amendments, in the context of the procedural chronology and context provided in ASIC's affidavit material, provides a clear explanation for the application to amend and its timing, and for ASIC's continued pursuit of these proceedings.

84 As Mr Geneste explains, and as is self-evident in any event, the amendments are intended to 'update' the proceedings; to confine the inquiry sought by ASIC to the findings about Mr Macks' conduct that remain after the appeal, and to address some other matters arising by reason of the effluxion of time (namely changes in the relevant legislation, changes in the appointments held by Mr Macks, and the redundancy of the interim relief that had been sought). In my view, this is all that was required by way of explanation for the fact and timing of the proposed amendments in the circumstances of this case.

85 In relation to the amendments to reflect the outcome of the Full Court appeal, they could only be made once judgment in that appeal had been delivered. The Full Court delivered its reasons on 22 December 2017, and ASIC brought its application to amend the originating process in these proceedings in March 2018. While there is no explanation for the three month period between these two dates, I do not regard that 'delay' as significant in the context of these proceedings, and indeed do not understand Mr Macks to suggest otherwise. Given the length and complexity of the Full Court's reasons, and the detail and complexity of the relevant circumstances more generally, it was perfectly reasonable for ASIC to take three months to file its application to amend.

86 In relation to the other proposed amendments to address matters arising by reason of the effluxion of time, it is true that they could have been made earlier. However, in circumstances where these proceeding were, by consent, in abeyance pending the outcome of the appeal in the Viscariello proceedings, I do not consider that the timing of these amendments requires any explanation from ASIC.

87 While I accept that the broader issue of the timing of the commencement, and attempt to amend and continue these proceedings, relative to both the

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32 *ASIC v Macks* [2018] SASC 132 at [12]-[23].

underlying conduct complained of and the pursuit of the Viscariello proceedings is a relevant consideration, I have addressed this later in these reasons.

88 The above is not to say that the proceedings are not an abuse of process, or that there should necessarily be a favourable exercise of the discretion to grant permission to amend. The point is merely that I consider that I am in a position, on the basis of the affidavit material filed by ASIC, to form a view as to ASIC's reasons and explanation for the amendments and their timing. I reject the submission that ASIC has failed to adduce evidence as to these matters sufficient to enliven the Court's discretion to grant permission to amend. However, whether these explanations are ultimately sufficient to warrant a favourable exercise of the discretion or to avoid a finding of abuse are separate matters considered later in these reasons.

**Contended lack of utility in the proceedings**

89 Mr Macks contends that the proposed amended proceedings will have no utility. In support of this contention, Mr Macks points to the fact that an inquiry is sought only in relation to matters that have already been the subject of investigation by ASIC and, more importantly, the subject of detailed considerations and findings in the Viscariello proceedings. He emphasises ASIC's position on the present application that it does not expect that the inquiry is likely to elicit any evidence beyond that which has already been considered in the Viscariello proceedings and/or in ASIC's investigations.

90 However, even accepting the factual premise for this contention, I do not think that this deprives the proposed inquiry of its utility. The utility of an inquiry under s 536 will in some cases extend to investigating and making findings in relation to evidence that has not previously been considered, and conduct that has not previously been the subject of investigation and findings. But that is not the only useful purpose that an inquiry under s 536 might serve. To the contrary, bearing in mind the supervisory and disciplinary nature of the Court's jurisdiction under s 536, an important aspect of the utility of such inquiry will usually include consideration of what, if any, disciplinary sanctions ought to be imposed so as to achieve the broader public interest that underpins the Court's jurisdiction to conduct such inquiry.

91 Thus, in the circumstances of this case, the mere fact that the relevant conduct has already been the subject of investigation and findings does not mean that the proceedings lack utility. There is no necessary difficulty with a s 536 inquiry following detailed findings in other proceedings. *BL & GY International Co Ltd v Hypec Electronics Pty Ltd*[33] is an illustration of such a case. In my view, that will be so even if there is no intention or likelihood of the inquiry eliciting any additional or different evidence. The reason for this is the

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[33] *BL & GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) ACSR 558; while the application for an inquiry was ultimately declined, that was for reasons that were unrelated to the fact that the liquidator's conduct in question had already been the subject of findings.

supervisory and disciplinary utility that may nevertheless remain in the s 536 inquiry.

92 As I have mentioned, Mr Viscariello brought two applications in the Viscariello proceedings seeking that the Court embark upon an inquiry into Mr Macks' conduct under s 536. I will return in due course to the significance of these applications to Mr Macks' position on the applications to amend and stay the proceedings more generally. However, so far as the utility of the present proceedings is concerned, the important point is simply that the Court in the Viscariello proceedings did not ever embark upon, let alone exercise, its supervisory or disciplinary jurisdiction in respect of Mr Macks' conduct, either under s 536 or otherwise. While Kourakis CJ made orders (by consent) removing Mr Macks as liquidator of the Companies, his Honour's reasons for dismissing Mr Viscariello's applications under s 536 included the fact that the Court was being invited by ASIC in these proceedings to consider the exercise of its supervisory and disciplinary jurisdiction under s 536.

93 In the above circumstances, I am satisfied that there is utility in these proceedings. The proceedings will enable the consideration and exercise of the Court's supervisory and disciplinary jurisdiction in relation to the conduct of MrMacks identified by ASIC.

94 A related contention pressed by Mr Macks is the lack of utility of the proposed proceedings in the context of the liquidations of Bernsteen and Newmore. In support of this contention, Mr Macks relies upon the Court's refusal to order an inquiry into the conduct of the trustee in bankruptcy in *Macchia v Milant*[34] on the ground that it would have no utility. The bankrupt in that case had been discharged from bankruptcy, and it was unlikely that the inquiry would produce any further information or other benefit to the bankruptcy.

95 I accept that the present proceedings will have little or no utility so far as the liquidations of Bernsteen and Newmore are concerned. Mr Macks has been removed from his offices in respect of those Companies, and there is no suggestion by ASIC that the proposed inquiry will assist in relation to the conduct or outcome of those liquidations. But the supervisory and disciplinary utility of an inquiry under s 536 need not be confined to the administration of the particular companies in respect of which the relevant misconduct occurred. While the authorities in relation to inquiries under s 536 have sometimes focussed upon this more narrow utility, the contemplated utility extends beyond this to the protection of the public interest more broadly. An inquiry under s 536 may include consideration of whether to impose disciplinary sanctions extending beyond the person's role in the administration in which the misconduct occurred. This is inherent in the potential availability of relief such as orders cancelling a person's registration as a liquidator. An inquiry under s 536 is intended to serve

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[34] *Macchia v Nilant* (2001) 110 FCR 101 at [59].

a broader public interest in respect of the conduct of administrators and liquidators more generally.

96 In this respect, the present case is readily distinguishable from *Macchia v Nilant*. In that case there was no suggestion the inquiry would serve any broader public interest. To the contrary, it was accepted that the inquiry was sought by the bankrupt with a primary objective of putting him in a position to bring a claim for damages against the trustee. The Court in that case was also satisfied that there was no apprehended improper exercise of the trustee's post-discharge powers that might have warranted his removal.[35] Here, on the other hand, the inquiry is sought not in furtherance of some private grievance. Rather it is sought by ASIC with a view to an exercise of the Court's supervisory and jurisdiction so as to protect the public more generally. It is in this respect that the inquiry has real utility, extending beyond any limited significance it might have so far as the liquidations of Bernsteen and Newmore are concerned. It is significant in this respect that in each of *ASIC v Edge, ASIC v Dunner* and *ASIC v McDermott* the inquiries were sought in support of relief going beyond the particular liquidations in which the impugned conduct had occurred.

**Contended abuse of process**

97 The Court has an inherent power to prevent an abuse of its processes,[36] for example, by ordering a permanent stay of proceedings that involve an abuse. Such an order might also be made under the *Supreme Court Civil Rules*. Rule 117, for example, empowers the Court to make "any order it considers necessary for the proper conduct of a proceeding or otherwise in the interests of justice", and would extend to ordering a permanent stay of proceedings that involve an abuse.

98 The circumstances in which proceedings might constitute an abuse are many and varied. While not intending to be comprehensive, those circumstances include cases in which:[37]

1. the Court's processes are invoked for an improper or illegitimate purpose – that is, for a purpose which is collateral or foreign to the purpose for which they are intended;

2. the use of the Court's processes is unjustifiably oppressive, vexatious or unfair to one of the parties; or

3. the use of the Court's processes would otherwise bring the administration of justice into disrepute.

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[35] *Macchia v Nilant* (2001) 110 FCR 101 at [59].

[36] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; *Rogers v The Queen* (1994) 181 CLR 251.

[37] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25]-[26]; *Rogers v The Queen* (1994) 181 CLR 251 at 286; *Walton v Gardiner* (1993) 177 CLR 378 at 392-393; *Re AWB Ltd (No 10)* (2009) 76 ACSR 181 at [264].

99 To the extent that Mr Macks relies upon the first of these categories of abuse, I do not accept that any such abuse has been made out.

100 Mr Macks' submissions at times suggested, or at least insinuated, that ASIC's conduct of these proceedings might be motivated, or be inappropriately directed in some fashion, by complaints made by Mr Viscariello in respect of Mr Macks' conduct, or pressure created by Mr Viscariello's agitation of these complaints in various legal and political forums. Mr Vicariello's agitation of his complaints about Mr Macks' conduct, in particular through his direct dealings with ASIC and through his pursuit of the Viscariello proceedings, has likely played a role in ASIC becoming aware of certain aspects of Mr Macks' conduct, and in informing the actions taken by ASIC. However, as ASIC points out, there is nothing inherently wrong with this. It is common place, and entirely appropriate, that a regulator such as ASIC be informed by complaints from persons concerned about the conduct of others. In the circumstances of this case, there is no evidence that suggests, let alone establishes, that ASIC's contact with Mr Viscariello, or reliance upon whatever information he has provided, has been in any way inappropriate. There is no evidence, for example, that suggests, let alone establishes, that ASIC is acting at the direction of Mr Viscariello, or in response to any pressure he might have created or applied, as opposed to acting upon the basis of its own, independently formed, view of what is appropriate in the circumstances.

101 In what was tantamount to a concession that an improper purpose had not been established, Mr Macks tended to resort to a submission that it was for ASIC to demonstrate the propriety of its purposes in bringing and maintaining these proceedings; and that in the absence of any evidence from a relevant officer of ASIC that expressly identified its purpose, there was a proper basis to infer an improper and abusive purpose – or, at the very least, to exercise the discretion to grant permission to amend against ASIC.

102 I do not accept this submission. In the circumstances of this case, there is ample basis in the evidence as to the background and context to these proceedings – as outlined earlier in these reasons – to infer that they have been brought quite properly in pursuit of an exercise of the supervisory and disciplinary jurisdiction of the Court under s 536. In circumstances where there is no evidential basis for suggesting that the proceedings were brought, or are being maintained, for some other improper purpose, I am satisfied that they were brought for that quite proper purpose.

103 The focus of Mr Macks' submissions in support of the contention that these proceedings are an abuse was upon the second category of abuse identified above. His contention in this respect is that these proceedings are unjustifiably vexatious, oppressive or unfair because they will involve subjecting him to a re-litigation of matters already addressed at length and in detail in the Viscariello proceedings. He submits that the vexatious, oppressive and unfair nature of the

contemplated re-litigation of issues was exacerbated by the fact that the relevant conduct occurred many years ago now, and has not only been the subject of detailed considerations and findings in the Viscariello proceedings, but also extensive investigations by ASIC. He also emphasises that he has already undertaken the remedial action required of him by ASIC; and that the whole process has been very protracted and has come at great personal expense to Mr Macks. He was only partially remunerated for his significant work in the administrations of Bernsteen and Newmore, and has incurred significant legal fees in responding to the above investigations and litigation. In addition, Mr Macks is also now facing a further claim in respect of the same conduct from Mr Basedow.

104 In considering Mr Mack's contention of abuse by re-litigation, it is relevant that ASIC does not seek in these proceedings to collaterally attack, or otherwise challenge, the findings made in the Viscariello proceedings. To the contrary, the premise of its pursuit of these proceedings is the appropriateness of those findings. That said, ASIC accepts that Mr Macks will be entitled in these proceedings to resist ASIC's allegations of misconduct, and that if he does so, the proceedings will involve a re-litigation of the matters relevant to this misconduct.

105 However, even accepting this potential for significant overlap between the Viscariello proceedings and the present proceedings, a difficulty with Mr Macks contention of abuse by re-litigation is that it tends to overlook the disciplinary and supervisory nature of these proceedings and the relief sought. The Viscariello proceedings did not involve any exercise of the Court's broad disciplinary and supervisory jurisdiction sought to be invoked in these proceedings. It seems to me that there will be a risk of some re-litigation of issues inherent in any disciplinary proceedings arising out of findings, or their significance, of misconduct made in other proceedings – at least where those findings are contested. In my view, the different nature and purpose of the disciplinary proceedings, and hence the additional function or utility they serve, will nevertheless generally prevent them being characterised as an abuse.

106 In circumstances such as the present where there is no precise overlap in the issues previously litigated, or where the parties to the earlier proceedings and the impugned subsequent proceedings are not the same, cases of abuse founded upon a concern to avoid re-litigation have been confined to those cases where it can be said that the issue(s) sought to be litigated in the subsequent impugned proceedings ought reasonably (or 'could and should') have been litigated in the earlier proceedings.[38] I do not accept that it can be said in this case that ASIC could and should have sought the relief now sought in the earlier Viscariello proceedings.

107 The earlier proceedings were brought by Mr Viscariello. ASIC was not a party. The issues raised by Mr Viscariello were on the one hand broad, but at the

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[38] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [26].

same time confined to Mr Macks' conduct in the administrations of Bernsteen and Newmore. They did not involve any invocation of the Court's broader disciplinary or supervisory jurisdiction.

108 As I have mentioned, Mr Viscariello did bring two applications under s 536 seeking to invoke the Court's disciplinary or supervisory jurisdiction. ASIC was not only aware of those applications, but appeared on them. While ASIC indicated that it wished to participate in any inquiry that might have been ordered on these applications, no such inquiry was ordered by the Court. The applications were simply adjourned.

109 Further, while ASIC appeared at the hearings in relation to the orders to be made following delivery of the trial judge's reasons, ASIC's intervention was confined to its support for an order removing Mr Macks from his position as liquidator of the Companies.

110 I do not think it can be said that ASIC 'could and should' have intervened in the Viscariello proceedings for the purposes of seeking the inquiry and relief it now seeks, or indeed more generally. Nor do I think that Mr Macks' submissions to the contrary are advanced by the fact of Mr Viscariello's two applications in the Viscariello proceedings, or ASIC's (limited) involvement in those proceedings.

111 I am not persuaded that ASIC could have (successfully) sought the inquiry and relief it now seeks in the Viscariello proceedings. It is likely the Court would have considered it undesirable to broaden the issues already in dispute in those proceedings, and preferable that the issue of any disciplinary consequences for Mr Macks be addressed subsequently or in some other proceeding or forum. Indeed, that view appears to have been implicit in Kourakis CJ's decisions to adjourn, and then ultimately dismiss, Mr Viscariello's applications for inquiries under s 536.

112 But even if ASIC *could* have successfully sought the inquiry and relief it now seeks in those earlier proceedings, I am certainly not persuaded that it *should* have done so; that is, that it was unreasonable or abusive for it to have not done so, and yet now seek to do so in separate proceedings. To the contrary, I consider that it was entirely reasonable for ASIC to have awaited the outcome of the Viscariello proceedings before deciding to pursue disciplinary proceedings such as the present proceedings, and deciding the scope of the allegations to make or pursue in those proceedings. While it is unfortunate that the Viscariello proceedings took so long, I do not think this undermines my conclusion that it was reasonable for ASIC to await their outcome before seeking to progress these proceedings.

113 ASIC cannot be expected to intervene in civil proceedings whenever they involve allegations of wrongdoing by an administrator or liquidator so as to pursue an inquiry into whether there should be disciplinary consequences for the

administrator or liquidator in the event that wrongdoing is established. Even assuming the courts would permit such intervention, it would not only risk causing a disruption to, and distraction in, those other proceedings, but would also impose a very significant burden upon ASIC's resources. ASIC might find itself unnecessarily embroiled in complicated and protracted litigation going well beyond the broader public interest which it would be seeking to protect or pursue in a s 536 inquiry.

114 The present proceedings are a useful illustration of the impracticality of requiring that ASIC pursue any disciplinary proceedings in parallel with civil proceedings that involve similar allegations of misconduct. The Viscariello proceedings became very complicated and protracted. Had ASIC been involved throughout, it would have placed a significant burden upon ASIC's resources. Its involvement would unlikely have assisted the parties or the Court in the resolution of the issues between the parties to those proceedings. As it happens, the outcome of the appeal in the Viscariello proceedings has resulted in significantly narrower findings of misconduct by Mr Macks than were alleged by the plaintiff in those proceedings. By awaiting the outcome in those proceedings, ASIC has thus not only avoided significant 'wasted' resources on its part, but has also enabled these proceedings to have a much more narrow focus than they would otherwise have had if they had proceeded in parallel with the Viscariello proceedings.

115 The above is not to say that ASIC should never intervene in civil proceedings to seek a parallel exercise of the Court's disciplinary or supervisory jurisdiction under s 536. It is merely to say that generally, and in the particular circumstances of this case, I do not think it unreasonable for ASIC to await the outcome of such proceedings before advancing a disciplinary inquiry under s 536 of the *Corporations Act*.

116 In this case, it is also relevant that ASIC at relevant times made clear its intention to give subsequent consideration to disciplinary proceedings under s 536. ASIC issued these proceedings prior to relief being finalised following the trial in the Viscariello proceedings. Further, in agreeing the earlier remedial action to be taken by Mr Macks, ASIC 'reserved its position' to take further action in the event of any adverse findings by a court. While a reservation of rights of this nature is not always sufficient to avoid a finding that subsequent proceedings are an abuse of process, it is nevertheless relevant to an assessment of whether the impact of a subsequent proceedings is unjustifiably vexatious, oppressive or unfair so far as Mr Macks is concerned. In this case, Mr Macks was always aware of the prospect of the disciplinary proceedings now brought, and did not himself urge that they be brought forward to be dealt with in parallel with the Viscariello proceedings. Indeed, when ASIC commenced these proceedings following judgment of the trial judge in the Viscariello proceedings, Mr Macks acquiesced in an adjournment pending the outcome of the appeal in the Viscariello proceedings. While this was a sensible approach on the part of

Mr Macks, it does tend to weaken his position so far as the current allegation of abuse is concerned.

117 As mentioned, in addition to the re-litigation of issues, Mr Macks relies, in support of his contention that these proceedings are unjustifiably vexatious, oppressive or unfair, upon the protracted and extensive history of the investigations, remedial action and litigation in relation to his conduct sought to be inquired into in these proceedings. I accept that the burden of the present proceedings upon Mr Macks must be assessed against this background, just as it must also be assessed in light of the fact that the alleged misconduct occurred a number of years ago now and in connection with administrations in which Mr Macks no longer has any direct involvement. There is no doubt that these proceedings will place a significant burden upon Mr Macks. However, I do not think this burden is sufficient to warrant a conclusion that the proceedings will place an unjustifiably vexatious, oppressive or unfair burden upon him when they are considered in the circumstances as a whole – including what I have concluded is the utility of this Court considering the exercise of its disciplinary and supervisory jurisdictions in support and protection of the broader public interest that s 536 is intended to protect.

118 Finally in this context, I mention Mr Macks' submission that it is an abuse for ASIC to seek an inquiry into an alleged breach of s 180(1) in respect of which ordinary proceedings would be statute-barred. Mr Macks relies in this respect upon the observations of Steytler J in *GIS Electrical Pty Ltd v Melsom.*[39] However, as ASIC points out in its submissions, those observations only support the more narrow proposition that it may not be appropriate to order an inquiry under s 536(1)(b), based on the complaint of the company's creditor, so as to review the remuneration of the liquidator of that company after it has been deregistered. To do so would be to circumvent the specific provisions of the *Corporations Act* preventing such a review after a company has been deregistered. It is an entirely different thing to suggest that it would be abusive for ASIC to seek an exercise of the Court's broader supervisory and disciplinary jurisdiction under s 536(1) based upon a finding of contravention of the *Corporations Act* by reason merely that 'ordinary' proceedings alleging that breach would be time-barred. While a claim for declaratory relief under s 1317E would, for example, be time-barred under s 1317K, ASIC does not seek such relief. The relief sought by ASIC is not time-barred, and given the broader nature of these proceedings and the relief they seek, I do not think they can be characterised as an attempt to circumvent a time bar.

119 It is for these reasons that I am not satisfied that these proceedings, or the contemplated continuation of them in their proposed amended form, entail any abuse of process by ASIC.

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[39] *GIS Electrical Pty Ltd v Melsom* (2002) 172 FLR 218 at [48].

**Permission to amend**

120 Against this background, I return to the broader issue of whether it is appropriate to exercise the Court's discretion to permit the amendments contemplated by ASIC. I have earlier set out a list of the factors generally relevant to the exercise of the Court's discretion to permit amendments. A brief consideration of each follows.

121 I have already addressed the nature, purpose and utility of the proposed amendments. They are being made for an appropriate purpose, and indeed involve a significant narrowing of the matters that would otherwise be in issue in these proceedings. As such, consideration of these factors weighs in favour of an exercise of the discretion to permit the amendments. Certainly there is nothing in my consideration of these factors that weighs against a favourable exercise of the discretion.

122 I have addressed, and rejected, the limited challenge to the merits of the proposed amendments on the grounds they are defective or untenable. While Mr Macks has also indicated an intention to challenge the underlying merit of the findings of misconduct relied upon by ASIC, and has outlined the basis for that challenge, he has not challenged their arguability in the sense necessary for this to be a consideration that would weigh against a favourable exercise of the discretion to permit the contemplated amendment. Nor in my view could there sensibly be any such challenge. While it has not been suggested by ASIC that Mr Macks' foreshadowed challenges are frivolous or vexatious, conversely I do not think it can be said that there is not at least arguable merit in the application for an order that there be an inquiry into the aspects of Mr Macks' conduct identified by ASIC.

123 As to the timing of the application to amend within the context of these proceedings, it was made about three years after the proceedings were commenced. However, because the proceedings were in abeyance pending determination of the appeal in the Viscariello proceedings, the application has nevertheless been brought at a relatively early stage in the procedural progress of these proceedings. The contemplated inquiry has not been ordered or commenced, and indeed a start date had not even been identified. Far from jeopardising a contemplated start date of the inquiry, or an inquiry that was already underway, the narrowing of the issues should assist in achieving earlier start and completion dates for the inquiry.

124 I have addressed the explanation for the application to amend, and for its timing both with the context of these proceedings and more generally relative to the timing of the conduct of Mr Macks complained of and the Viscariello proceedings. For the reasons I have explained, I consider there has been an adequate explanation.

125 In one sense, ASIC has had plenty of earlier opportunity to amend or narrow its claim. However, given that the rationale for the amendments was to reflect the outcome of the Full Court appeal, and that the application to amend was brought relatively promptly after the delivery of judgment on that appeal, I do not think this is a consideration that weighs against a favourable exercise of the discretion.

126 Similarly, I do not think that the proposed amendments will result in any delay to, or disruption of, these proceedings. Nor will the amendments add to the time, cost, inconvenience, strain and uncertainty to be experienced by Mr Macks. While the proceedings themselves will involve a significant imposition upon Mr Macks' time and resources, and will no doubt subject him to significant strain and uncertainty, the proposed amendments (to narrow the proceedings) will not. Similarly, the amendments are designed to reduce the burden on the Court's resources, not to increase them.

127 Finally, I do not think that allowing the amendments will in any way diminish the public confidence in the just and efficient administration of justice. To the contrary, I consider that the amendments are intended to ensure that the nature and scope of the inquiry sought focusses as closely as possible upon the public interest that underpins the Court's jurisdiction under s 536 of the *Corporations Act*.

128 For these reasons I would allow the proposed amendments.

**Order for an inquiry**

129 The next issue for my consideration is whether I should order that there be an inquiry under s 536. As mentioned earlier, consideration of this issue is sometimes described as the first stage of the exercise of the Court's jurisdiction under s 536, with the second and third stages being the hearing of any inquiry that might be ordered, and the consideration of any relief to be ordered as a result of findings made during the inquiry.

130 Consistently with the practice adopted in some of the cases I have mentioned earlier, ASIC suggested that I might defer consideration of this first stage for determination in conjunction with the second stage of the proceedings. This approach would be analogous to the approach sometimes adopted in respect of leave to appeal, with the question of leave being referred for hearing in conjunction with the appeal itself.

131 While this approach will often have much to commend it, I see no need to defer consideration of the first stage in the circumstances of these proceedings.

132 In some cases it may be very difficult for the Court to make any meaningful assessment of the appropriateness of an inquiry under s 536 until it has at least embarked upon the process of conducting the inquiry. This might be a function of the complexity of the matters sought to be investigated, or the paucity of the

information available to the plaintiff and the Court at the time the inquiry is sought.

133 Here, while there is undoubtedly a significant level of detail and complexity in the circumstances surrounding at least the allegation of a breach of s 180(1) of the *Corporations Act* by Mr Macks, all of the issues sought to be inquired into have already been investigated by ASIC and have been the subject of findings. In my view, the fact of the findings made by the Court in the Viscariello proceedings, and the existence of at least some evidential basis for these findings, are sufficient for me to conclude that an inquiry should be ordered.

134 In so concluding, I have borne in mind the relatively low threshold required before a court will order an inquiry. As outlined earlier, the authorities make it plain that there need only be a sufficient basis for the inquiry; that is, something in relation to the liquidator's conduct or performance that requires or warrants inquiry. My conclusion that there is a sufficient basis for inquiry in respect of Mr Macks' impugned conduct should not be understood as involving anything more than that this threshold requirement has been satisfied. It should not be understood as me having satisfied myself that ASIC has made out a *prima facie* case, let alone established the misconduct alleged. In circumstances where Mr Macks has foreshadowed a potential challenge to ASIC's allegations (and the Court's findings in the Viscariello proceedings) in the event an inquiry is ordered, I have deliberately refrained from considering these issues.

135 Even assuming the rule in *Hollington v Hewthorn* applies to an inquiry conducted under s 536 (that is, to the second stage of the exercise of the Court's jurisdiction under that section), I am not persuaded that it would prevent me having regard to the findings in the Viscariello proceedings at the first stage of the inquiry. The issue at the first stage is an interlocutory one, and insofar as it requires a consideration of the merits of the allegations of misconduct, it does not require satisfaction of any particular standard of proof. The issue is whether there is a sufficient basis to warrant inquiry; or to found a well-based suspicion. In this limited context, I do not consider that the rationale for the rule in *Hollington v Hewthorn* applies. I do not consider, for example, that the formal rules of evidence as to hearsay and opinion evidence apply – at least not with the same force. Further, and in any event, where the issue (at stage one) is akin to the existence of a basis for a suspicion, it seems to me that the very fact of the findings carry a relevance that they may not carry when the issue (at stage two) is whether the misconduct has been proved to the satisfaction of the Court conducting the inquiry.

136 If, as I have concluded, I may have regard to the findings in the Viscariello proceedings in determining the stage one issue, then they enable me to conclude that there is a sufficient basis for the inquiry sought. That is so despite the challenges to those findings foreshadowed by Mr Macks.

137 However, and in any event, even putting those findings to one side, I am satisfied there is adequate evidence before me to satisfy the low threshold required at this stage.

138 So far as the allegations of fabrication of the 2002 and 2004 memos are concerned, the evidence before me includes the cross-examination of Mr Macks in the Viscariello proceedings in which he made admissions to the effect that he recreated what he said were documents that had existed but which he believed had become corrupted or were otherwise unable to be located. In my view, these admissions provide a sufficient basis for inquiry into the allegations of fabrication of the two memos.

139 So far as the allegation of breach of s 180(1) from April 2006 is concerned, Mr Macks contends that there was simply no basis in the evidence for the Full Court's finding. He points to the Full Court's criticisms of the trial judge's findings of more extensive breaches of duty (to the effect that they involved, in some respects, a failure to afford Mr Macks procedural fairness, or were not supported by adequate reasoning), and contends that this reasoning ought to have carried through and prevented any finding of breach at all. Mr Macks attached to his submissions in these proceedings a schedule of the relevant evidence that he contends the Full Court overlooked, or at least did not adequately address.

140 As I have said, I accept that Mr Macks will be entitled to challenge the allegation of breach of s 180(1) upon the hearing of any inquiry under s 536(1). But bearing in mind the low threshold at this stage of the process, I consider that the evidence before me is adequate to establish a basis for an inquiry into the allegation of breach of s 180(1) from April 2006. In my view, that basis exists in the very fact of the disproportion between the time and expense devoted to the Bernsteen and George proceedings by that point in time, and the amounts at stake in those proceedings and any potential benefit to the creditors of Bernsteen. These basic facts, and some of the broader context, emerge from the material before me, and are in any event largely uncontroversial. They provide a sufficient basis for an inquiry into the allegation of breach of s 180(1) from April 2006.

141 A detailed consideration of the liquidations of Bernsteen and Newmore, of the circumstances leading up to the position reached in April 2006, and of the steps taken to pursue or resolve the Bernsteen and George proceedings after that date, will be essential to any conclusion about whether the breach has been established. However, the lack of evidence as to some aspects of these matters at this stage does not, in my view, stand in the way of the conclusion I have reached as to the existence of a sufficient basis for inquiry.

142 Finally, I accept that the decision at the first stage (that is, whether to order an inquiry) is a discretionary one. Even if satisfied as to the (relatively low) threshold level of merit required in the allegations of misconduct, the Court might nevertheless exercise its discretion to decline to order an inquiry. The

exercise of the discretion in this case is informed by similar matters to those which I have addressed in the context of my consideration of the allegation by Mr Macks that the proceedings are an abuse of process, and that the discretion to permit the proposed amendments should be refused, albeit viewed through the slightly different prism of whether it is appropriate to order that there be an inquiry.

143 I have mentioned earlier in these reasons the breadth of the Court's discretion to order an inquiry under s 536, and the various factors that may assist in its exercise. As to the strength and nature of the allegations, and any answers offered by the liquidator, it is relevant that the allegations in this case are relatively serious in nature and are at least of arguable merit. While it is also relevant that Mr Macks has proffered explanations for the conduct, and a basis for challenging the allegations, I do not think it is necessary or appropriate for me at this stage of the proceedings to canvass the merits of the allegations in any greater detail than I have already done.

144 In opposing an order that there be an inquiry, Mr Macks emphasises the alternative remedies available to ASIC. I have already addressed, and rejected, the suggestion that ASIC could have and should have sought the relief presently sought in the Viscariello proceedings.

145 Mr Macks also relies upon the possibility that ASIC might have sought the relief it now seeks under s 1292 of the *Corporations Act*. It appears true that ASIC could have applied to the Companies Auditors and Liquidators Disciplinary Board under that section for the relief sought in these proceedings. However, I am not satisfied that the existence of this alternative course is of much significance in the present circumstances. I am not persuaded that an application under s 1292 would have been a better or more appropriate course to follow. Assuming Mr Macks chose to contest the allegations against him – as he has foreshadowed here – there is no reason to think an application under s 1292 would have been significantly shorter or more efficient. To the extent that an application under s 1292 might have attached greater significance to the findings in the Viscariello proceedings, or otherwise have proceeded more efficiently by reason of it not involving some of the formality and procedural safeguards which Mr Macks seeks to invoke in the proceedings, I am not persuaded that Mr Macks can attach much significance to these considerations in suggesting that an application under s 1292 would have been more appropriate or suitable than an inquiry under s 536.

146 Mr Macks contends that given ASIC's focus upon the disciplinary relief it seeks, an application under s 1292 would have been a more appropriate course. However, given that Mr Macks does not concede an inability to contest the findings against him in any application under s 1292, it is difficult to see any relevant distinction between the two heads of disciplinary jurisdiction. Put another way, the foreshadowed inquiry under s 536 will only involve a broader

re-hearing as to the allegations of misconduct because Mr Macks has indicated an intention (as he is perfectly entitled to do) to challenge those allegations, not because the s 536 jurisdiction is inherently broader or different from that which exists under s 1292.

147 In summary, I do not accept that it can be said that it was unreasonable for ASIC to pursue an inquiry under s 536 rather than an application under s 1292. Indeed, there is some force in ASIC's contention that in circumstances where the allegations of misconduct are serious, have been the subject of court findings, and are to be the subject of challenge, it is perhaps more appropriate that the matter be dealt with by a court under s 536 rather than the Board under s 1292.

148 The late timing of the intended inquiry relative to the alleged misconduct and the progress of the liquidation of Bernsteen is unfortunate, and to some extent relevant. It may have some effect on the quality of the evidence to be adduced during the inquiry. But given the explanation for its timing – addressed earlier – I do not consider this to be a matter of great significance.[40]

149 I have also addressed what I consider to be the utility in the proposed inquiry, existing as it does in serving the broader public interest that underpins the Court's jurisdiction under s 536. In this respect, it is significant that the inquiry is being sought by ASIC (rather than an individual with a more narrow or private purpose), and in circumstances where it can be assumed it is willing, and adequately resourced, to ensure the Court receives the assistance it needs to conduct the inquiry.

150 For all of these reasons, I am satisfied that the proposed inquiry will accord with, and assist in achieving, the supervisory and disciplinary purposes of s 536. I have reached this conclusion despite the imposition it will be upon Mr Macks' time and resources; and despite the background of the ASIC investigations and the Viscariello proceedings, and the foreshadowed claim by Mr Basedow. Accordingly, I propose to order that the inquiry proceed.

**The rule in Hollington v Hewthorn**

151 ASIC has framed the scope of the inquiry it seeks by reference to certain findings made in the Viscariello proceedings. It has also foreshadowed an intention to tender the judgments in those proceedings as evidence of the misconduct inherent in those findings. Mr Macks contends that evidence of those findings will be inadmissible as contrary to the rule in *Hollington v Hewthorn.* He has also foreshadowed a challenge to the allegations that he engaged in the misconduct inherent in those findings.

152 In certain situations it might constitute an abuse by a party against whom adverse findings have been made to seek to challenge those findings in other

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[40] cf the inadequately explained delays in *Richmond Sales Pty Ltd v McDermott* (2006) 224 ALR 405 at [49]-[52], and *GIS Electrical Pty Ltd v Melsom* (2002) 172 FLR 218 at [64]-[66].

proceedings. ASIC does not go so far as to suggest that it would be an abuse for Mr Macks to challenge the allegations of misconduct in these proceedings. Nor does ASIC suggest that the findings in the Viscariello proceedings are otherwise conclusive of the allegations of misconduct in these proceedings. ASIC's position is merely that the findings should be admissible in any inquiry in these proceedings, and constitute some evidence of misconduct. ASIC accepts that the onus will remain on it to establish the misconduct, and that the ultimate weight to be afforded to the findings will need to be assessed in light of the evidence and submissions of the parties in their entirety.

153 While questions of admissibility will not fall to be determined until trial, the admissibility of the findings in the Viscariello proceedings has a potential impact upon the way in which the inquiry in these proceedings is to be conducted. For this reason, and against this background, I consider it appropriate to consider the rule in *Hollington v Hewthorn* and its potential operation in the inquiry that I propose to order in these proceedings.

154 In *Hollington v Hewthorn*[41] it was held that a criminal conviction is not admissible in subsequent civil proceedings as evidence of the material facts upon which it was based. Thus, in that case, the defendant's criminal conviction for careless driving was not admissible in subsequent civil proceedings alleging negligence by the defendant in respect of the same driving.

155 The decision in that case has come to be understood as reflecting a broader principle – sometimes referred to as the rule in *Hollington v Hewthorn* – that adversary proceedings bind only the parties to them, and that the findings made in such proceedings (whether criminal or civil) are not admissible in subsequent proceedings between different parties.[42]

156 This broad formulation of the rule reflects the maxim *res alios acta alteri non debet*,[43] namely that adversary proceedings should only bind the parties to them. Its rationale lies in the notion that in the context of the subsequent proceedings, findings made in the earlier proceedings offend two exclusionary rules of evidence: the rule against hearsay, and the rule excluding evidence of an opinion on a matter which does not call for expertise. In other words, the rationale for excluding evidence of findings in the earlier proceedings is that it is no more than hearsay evidence of the opinion of the judge or jury in the earlier proceedings.

157 While its rationale is thus readily understandable, the rule has been criticised on the basis that, at least in some contexts, its operation involves taking

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[41] *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

[42] As the parties are not the same, the principles of *res judicata* and issue estoppel (and their criminal law analogues *autrefois convict* and *autrefois acquit*) would not apply so as to bind the parties to the outcome and findings of fact in those earlier proceedings.

[43] Literally, things done between others ought not to affect another; or, in the present context, a transaction between two parties, in judicial proceedings, ought not to be binding upon a third.

too rigid or technical an approach to the principles that underpin it; and that by extending these principles too far, the rule produces outcomes that offend commonsense. This is said to be particularly so in the case of convictions obtained in accordance with the criminal standard of proof and following a trial where the defendant (against which the conviction is later sought to be tendered in civil proceedings) was present and had every opportunity and incentive to contest the allegations against them. It is said that such findings should be at least admissible (albeit not conclusive) in subsequent civil proceedings.

158 It was reasoning along these lines that led to the rejection of the operation of the rule in *Hollington v Hewthorn*, at least in respect of the admissibility of criminal convictions in subsequent civil proceedings, in New Zealand in *Jorgensen v News Media (Auckland) Ltd*[44] and in Western Australia in *Mickelberg v Director of Perth Mint*.[45]

159 The operation of the rule in that particular context has also been statutorily abolished in various jurisdictions, including in South Australia through the introduction of s 34A of the *Evidence Act 1929* (SA). That section provides that where the commission of an offence is in issue, or relevant to an issue in civil proceedings, a conviction or finding by a criminal court that the person committed the offence is evidence of the commission of the offence and admissible in proceedings against that person.

160 In addition to this partial judicial and parliamentary abrogation of the rule in *Hollington v Hewthorn*, further inroads have been made into the scope of its operation by the recognition of other limits or exceptions to the rule.

161 There is an apparent exception to the operation of the rule in the case of the admissibility of earlier criminal convictions of a witness in the course of cross-examination of that witness as to credit. Implicit in the use of convictions in this context is an acceptance that such convictions are at least *prima facie* justified and/or evidence of the facts upon which they were based.[46]

162 The rule has also been held to not operate in, or extend to, subsequent civil proceedings where the very fact of the earlier criminal conviction (as opposed to the conduct resulting in that conviction) is relevant to a fact in issue. Reasoning to this effect was significant in the courts justifying the admission of evidence of a previous criminal conviction in *Ingram v Ingram*[47] (a matrimonial cause involving a petition for dissolution of marriage, where the fact of the conviction of the defendant wife for espionage was held to be relevant to why the marriage broke down (given the inferences a reasonable spouse might draw from the

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[44] *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961.

[45] *Mickelberg v Director of Perth Mint* [1986] WAR 365; see also *Nicholas v Bantick* (1993) 3 Tas R 47 at 72 (Cox J, Green CJ and Underwood J not deciding).

[46] *Ingram v Ingram* [1956] P 390 at 404, 406; *Roberts v Western Australia* (2005) 29 WAR 445 at [145]; *Cross on Evidence* (11th Aust edition) at [5195].

[47] *Ingram v Ingram* [1956] P 390.

conviction, and the potential impact of such a conviction upon that spouse)); and in *Re 396 Bay Street, Port Melbourne*[48] (where an earlier conviction for the sale of liquor without a licence at the relevant premises was held to be relevant to whether the police officer applying for a declaration in respect of the unauthorised sale of liquor from those premises had reasonable grounds for suspecting that liquor had been sold without a licence).

163 It has also been held that the rule need not be applied in subsequent proceedings before a tribunal which is not strictly bound by the rules of evidence.[49]

164 All of that said, and despite the significant criticism and confinement of the operation of the rule, it continues to survive at least in some contexts.[50]

165 For example, it was recently applied by the Full Court of this Court in *R v Van Beelan*,[51] in the context of the use in subsequent criminal proceedings of a finding (as opposed to conviction) in earlier criminal proceedings. The finding in question related to the misleading nature of a prosecution expert witness' evidence in earlier criminal proceedings involving a different defendant. In rejecting the findings as inadmissible, Vanstone and Kelly JJ said:[52]

> The respondent relied on the decision of the English Court of Appeal in *Hollington v F Hewthorn* ... which held that a judgment could not be treated as prima facie evidence of the facts upon which it was founded in circumstances where the later proceedings were not between the same parties. That case concerned a narrower question – being the use to which a conviction could be put and what facts were essential to the finding of a conviction – but *applies with greater force to other less rigorously obtained findings*. In essence, assertions made in such judgments are hearsay and fall to be excluded for that reason. If proof of the facts asserted is required, then they must be proved in the usual way ...
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> ...
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> In our view, the respondent's position is the correct one. The [findings] referred to by [counsel for the respondent] are simply not admissible as proof of their truth.

166 In *Chapman v Conservation Council (SA),*[53] the rule was treated by this Court as operating to prevent a judgment *in personam* in earlier civil proceedings being treated as "evidence of the truth either of the decision or of its grounds as between strangers or as between a party and a stranger," albeit subject to certain exceptions.

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48 *Re 396 Bay Street, Port Melbourne* [1969] VR 293.
49 *In re a Solicitor* [1993] QB 69 at 78-79.
50 *Cross on Evidence* (11th Aust edition) at [5195].
51 *R v Van Beelan* (2016) 125 SASR 253.
52 *R v Van Beelan* (2016) 125 SASR 253 at [109]-[111] (emphasis added).
53 *Chapman v Conservation Council (SA)* (2002) 82 SASR 449 at [243].

167 Similarly, and despite the rejection of the rule in the context of the admissibility of criminal convictions in subsequent criminal proceedings in *Mickelberg v Director of Perth Mint*, the rule was applied by the Western Australian Court of Appeal in *Roberts v Western Australia*[54] in rejecting the admissibility, in subsequent criminal proceedings, of findings made in earlier civil proceedings. McLure J commenced her analysis of the issue by observing that if, as was held in *Hollington v Hewthorn*, a criminal conviction is inadmissible in subsequent civil proceedings, it must follow that a finding in civil proceedings is inadmissible as evidence of its truth in subsequent criminal proceedings.

168 After mentioning the Court's decision not to follow *Hollington v Hewthorn* in *Mickelberg v Director of Perth Mint*, her Honour noted the position that now exists under the *Evidence Act 1995* (Cth).[55] Under that Act, while s 92(2) provides for the admission of evidence of criminal convictions in subsequent proceedings, s 91 provides that evidence of a decision, or finding of fact, in other proceedings is otherwise inadmissible. Her Honour noted that the rationale for the general prohibition against the admissibility of findings in earlier civil proceedings was explained in the following passage from the relevant report of the Australian Law Reform Commission:[56]

> ... It is recommended that a civil judgment not be admissible to prove the facts on which it is based. Its probative weight is considerably less than that of a conviction. It is founded upon the evidence chosen by the parties, who are not obliged to make available all known relevant evidence, as is a Crown Prosecutor. Further, the standard of proof is merely upon balance of probabilities and so there may be little to distinguish a successful or unsuccessful action by a plaintiff. The disadvantages of admitting evidence of a civil judgment (the potential for waste of time and costs in investigating the judgment, and the greater likelihood of challenge to the evidence) outweigh the minimal probative value of the evidence.

169 McLure J held that the admissibility of findings made in earlier civil proceedings had not previously been considered by the Western Australian Supreme Court. In her Honour's view, the "strong policy and commonsense considerations that justify the admission of a conviction in subsequent civil proceedings do not apply" where a finding against a person in civil proceedings was sought to be tendered as evidence of its truth in subsequent criminal proceedings. On this basis, her Honour concluded that the earlier civil findings sought to be relied upon in that case were inadmissible.

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[54] *Roberts v Western Australia* (2005) 29 WAR 445 at [141]-[150] (McLure J; Templeman and Jenkins JJ not considering the issue); cf where there is a positive finding of discreditable conduct of a witness relevant to their credit (at [79], [151]).

[55] See also the equivalent sections in the *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), *Evidence Act 2008* (Vic), *Evidence Act 2011* (ACT) and *Evidence (National Uniform Legislation) Act 2011* (NT).

[56] Australian Law Reform Commission, Evidence Interim Report No 26 (1985), p445.

170 Findings made in earlier civil proceedings have also been held to be inadmissible in subsequent proceedings (by reason of the operation of the rule in *Hollington v Hewthorn*) in other courts around Australia.[57]

171 Finally, I mention the decision of the English Court of Appeal in *Secretary of State for Trade and Industry v Bairstow.*[58] The plaintiff brought proceedings against the defendant seeking a disqualification order under the *Company Directors Disqualification Act 1986* (UK) on the ground that he was unfit to be concerned in the management of a company. The plaintiff sought to rely upon findings made in earlier civil proceedings brought by the defendant (for wrongful dismissal from his role as managing director of a company) that he had been guilty of misconduct and neglect in the performance of his duties. Despite the judicial criticism of the rule in the English Courts,[59] and its statutory abrogation in that jurisdiction in the case of criminal convictions, the Court of Appeal accepted that the rule in *Hollington v Hewthorn* continued to operate in the context of findings in earlier civil proceedings. The Court applied the rule in concluding that the findings of misconduct in the earlier wrongful dismissal proceedings were inadmissible in the subsequent proceedings seeking a disqualification order against the defendant.[60]

172 In my view, it is appropriate for me to approach the present case on the basis that findings made in earlier civil proceedings are not generally admissible in later civil proceedings involving one or more different parties. While the operation of, and rationale for, the rule in *Hollington v Hewthorn* has been subjected to significant criticism in the context of the admissibility of criminal convictions in later civil proceedings, those criticisms do not apply with the same force in the context of the admissibility of findings made in civil proceedings in later civil proceedings.

173 In criminal proceedings, the high standard of proof, the obligations upon the prosecutor in terms of adducing available and relevant evidence, and the obvious incentive of defendants to contest such evidence to the extent reasonably possible, together enable some generalisation as to the rigour with which convictions (and the findings that underpin them) have been reached in criminal proceedings – and hence give force to the criticism that an application of the rule in *Hollington v Hewthorn* in such circumstances is to take an approach that is contrary to commonsense, and that involves too rigid or technical an approach to the principles that underpin that rule.

174 In civil proceedings, on the other hand, it is more difficult to generalise about the rigour with which findings have been made, and hence the inherent

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[57] *Liao v New South Wales* [2014] NSWCA 71 at [168]; *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)* (2001) 183 ALR 700 at [45]-[49].

[58] *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1.

[59] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 543, and *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 702.

[60] *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 at [15]-[27].

probative value of those findings. This flows from the lower standard of proof applicable to such proceedings, and the fact that the nature and extent of the evidence available to the court will often depend upon forensic choices made by the parties. The parties do not always have an incentive to fully contest all issues, or to put all available evidence before the Court. For these reasons, I do not think it can be asserted with the same confidence that the inadmissibility of earlier civil proceedings offends commonsense or otherwise results in an unduly rigid or technical approach to the principles that underpin the rule in *Hollington v Hewthorn*.

175 I observe that the above leads to the somewhat paradoxical result that, by reason of its statutory or judicial abrogation in various jurisdictions, the rule in *Hollington v Hewthorn* does not generally operate in the context it was applied in the case that gave it its name (that is, in the context of the admissibility of criminal convictions in later civil proceedings), but nevertheless continues to operate in the broader circumstances in which it subsequently came to be applied. So be it.

176 Turning to the present case, the previous findings sought to be relied upon by ASIC were made in the Viscariello proceedings. The first is the finding of breach of s 180(1) of the *Corporations Act* inherent in the declaration made by the Full Court. This finding and declaration represents a narrowed version of the findings of breach, and declarations ordered, by the trial judge. The second and third findings sought to be relied upon are the findings by the trial judge that the 2002 and 2004 memos were fabricated (or at least recreated). These findings were not challenged in the Full Court appeal.

177 While Mr Macks was one of the parties to the Viscariello proceedings, and hence had an opportunity to challenge the evidence advanced in support of these findings, the lack of identity between the parties in the Viscariello proceedings and the present proceedings means that there can be no suggestion of the findings giving rise to some form of *res judicata,* or otherwise being binding by reason of some issue estoppel. Nor has ASIC suggested that it would involve any abuse of process for Mr Macks to pursue his foreshadowed challenge to the conclusiveness of the findings in these proceedings. Rather, ASIC contends merely that the findings are admissible in these proceedings, and thus provide *some* evidence, but not necessarily conclusive evidence, of the conduct inherent in the findings. Mr Macks, on the other hand, contends that the findings are inadmissible by reason of the continued residual operation, at least in South Australia, of the rule in *Hollington v Hewthorn*.

178 In relation to the declaration of contravention of s 180(1) of the *Corporations Act*, I observe that it was a declaration made pursuant to the general powers of this Court under s 31 of the *Supreme Court Act 1935* (SA). It was not a declaration of contravention of a civil penalty provision of the *Corporations Act* under s 1317E of that Act. This distinction may be significant

because declarations under that section have a particular status that may affect their admissibility and significance in subsequent proceedings. In particular, s 1317F provides that a declaration under that section is conclusive evidence of the matters in s 1317E(2) (which include the conduct that constituted the contravention). However, under s 1317J, a declaration under s 1317E may only be sought in proceedings brought by ASIC and so was not available in the Viscariello proceedings.

179 It may thus be the case that a declaration under s 1317E has an *in rem* character to it that gives rise to different considerations in relation to its admissibility. But as the declaration here was made in an exercise of the Court's general powers, it seems to me that the situation is no different from any other *in personam* finding made in civil proceedings, and hence falls foursquare within the residual operation of the rule in *Hollington v Hewthorn* that I have described.

180 ASIC contends that even if the rule in *Hollington v Hewthorn* has the residual operation I have described, this case nevertheless falls within an exception to, or outside the limits of, that rule. In support of this, ASIC relies upon a general exception or limit to the rule in the context of disciplinary proceedings, which it says is illustrated by the decisions in *In re a Solicitor*,[61] *Re 396 Bay Street Port Melbourne*[62] and *Ziems v The Prothonotary of the Supreme Court of NSW*.[63]

181 I have already mentioned the first two of these cases. While the disciplinary nature of the jurisdiction being exercised by the courts in those two cases appears to have played some part in the courts' decisions to admit evidence of previous criminal convictions, and hence not apply the rule in *Hollington v Hewthorn*, I consider that they are only ultimately authority for the more narrow propositions that the rule does not apply in the case of a tribunal not bound by the rules of evidence (*In re a Solicitor*) and does not apply in circumstances where the fact of the conviction (as opposed to merely the conduct underpinning it) is relevant to a matter in issue (*Re 396 Bay Street, Port Melbourne*).

182 In *Ziems v The Prothonotary of the Supreme Court of NSW*, the appellant barrister was convicted of manslaughter and received a sentence of imprisonment. The Supreme Court of NSW then removed the barrister's name from the roll of barristers on the ground of his conviction and sentence. On the barrister's appeal to the High Court, all members of the Court proceeded on the basis that the earlier conviction was admissible before the Supreme Court. The issue was whether the conviction should have been treated as conclusive of the barrister's fitness to practice and hence the issue of disbarment. The majority (Fullagar, Kitto and Taylor JJ; Dixon CJ and McTiernan J dissenting) allowed the appeal, holding that while the fact of conviction and sentence was a matter of

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61 *In re a Solicitor* [1993] QB 69 at 78-79.

62 *Re 396 Bay Street, Port Melbourne* [1969] VR 293.

63 *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.

relevance – indeed great importance – to the matter in issue (namely disbarment for want of fitness to practice), it was not conclusive of that issue. The minority would have upheld the Supreme Court's conclusion that it was conclusive.

183 It is not clear to me the extent to which this case confines or intrudes upon the operation of the rule in *Hollington v Hewthorn*. In part that is because none of their Honours expressly considered the rule; and it is also in part a product of the divergent reasoning of the various members of the Court (including within those constituting the majority).[64] While the case at the very least implicitly accepts the admissibility of earlier criminal convictions in later disciplinary proceedings where the disciplinary jurisdiction in question is such that the fact of the conviction is a relevant matter, I am not satisfied that the case is necessarily authority for any broader exception or limit to the rule in *Hollington v Hewthorn*. In particular, I am not satisfied that it is authority for the admissibility of the earlier conviction as probative of the conduct underlying the conviction (as opposed to the fact of the conviction), let alone authority for some broader exception to the rule applicable in all proceedings with a disciplinary aspect to their character.

184 In *Ziems v The Prothonotary of the Supreme Court of NSW* the nature of the disciplinary jurisdiction exercised by the Supreme Court appears to have been treated as a 'show cause' type jurisdiction, where the only real issue was whether the conviction itself provided a basis for disbarment. While the majority accepted that the significance of the conviction needed to be assessed in the totality of the circumstances, it was not a case in which the nature of the barrister's conduct that led to the conviction was itself directly in issue.

185 Kitto J identified the narrow nature of the issue in those proceedings in the following passage from his reasons:[65]

> In the present case it is not for conduct, but because of a conviction, that the appellant has been disbarred. The Supreme Court, in my opinion, was right in refusing to go behind the conviction, since it had not called upon the appellant to show cause in respect of anything else. If the issue before the court had been whether the appellant's conduct on the occasion to which the conviction related had in fact been such as to disqualify him from continuing a member of the Bar, that conduct would have had to be proved by admissible evidence. ... The appellant was being called upon to answer a case relating, not to his conduct, but to his conviction and sentence.

186 The minority identified the issue in similarly narrow terms.[66] While the other members of the majority reasoned that it was relevant to consider the

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64 Similar difficulty was experience by Basten JA in *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [40]-[45].

65 *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 27 at 298-299 (Kitto J).

66 *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 27 at 286 (Dixon CJ) at 287 (McTiernan J).

barrister's conduct more broadly,[67] this was only so as to put the conviction in its proper context.

187 It is also noteworthy that *Ziems v The Prothonotary of the Supreme Court of NSW* involved an earlier criminal conviction, and not merely an adverse finding in earlier civil proceedings.

188 In the present case, the earlier findings were findings made in civil proceedings rather than a criminal conviction. Further, the jurisdiction of this Court under s 536 of the *Corporations Act* is not of the same narrow 'show cause' nature. While there is an overall disciplinary and supervisory purpose to the jurisdiction, it is a power to conduct an inquiry for those purposes. The inquiry (which is the second stage of the exercise of the jurisdiction under s 536) is not generally confined to an inquiry as to what, if any, disciplinary sanction should be imposed. It does not generally treat earlier findings as a given, with the inquiry being directed merely to the significance or consequences of those findings. Rather, it encompasses an inquiry into the nature of the impugned conduct of the relevant liquidator or administrator. Given the nature of the inquiry, and the authorities that have emphasised that it is intended to be adversarial in nature and to entail the usual procedural safeguards so far as the person the subject of the inquiry is concerned, the jurisdiction appears intended to be broader than, and quite different from, the more narrow exercise of the disciplinary jurisdiction in *Ziems v The Prothonotary of the Supreme Court of NSW*.

189 As explained earlier, it is my view that findings in earlier civil proceedings are relevant and admissible at the first stage of proceedings under s 536(1). The issue at that stage is the relatively low threshold requirement of whether there exists a sufficient basis for, or well-based suspicion indicating the need for, investigation. At that stage, and on that issue, not only is the issue an interlocutory one which is not concerned with the proof of conduct to any particular standard of proof, but also there is a closer analogy with those authorities that have held that the rule in *Hollington v Hewthorn* does not apply in cases where the fact of a conviction or finding may itself be relevant.

190 However, different considerations apply at the second stage; that is, in conducting the inquiry. The issue at that stage is not merely whether there is a well-based suspicion of misconduct; nor is it confined to consideration of the appropriate disciplinary consequences assuming the existence of misconduct. Rather, it involves consideration of the defendant's conduct, and in particular whether the defendant engaged in the misconduct alleged.

191 Bearing in mind the broad discretion that the Court has in determining the manner in which to conduct an inquiry under s 536(1), it is difficult to generalise

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[67] *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 27 at 288-289 (Fullagar J); at 302 (Taylor J).

about the operation that the rule in *Hollington v Hewthorn* might have in the context of a particular inquiry. It might depend upon considerations such as the way in which the Court frames the issues to be investigated; the nature of the issues to be investigated; the extent to which the allegations of misconduct are to be challenged; and the nature of the earlier finding(s) sought to be relied upon. In some cases, the inquiry might proceed on the basis of accepted misconduct reflected in an earlier criminal conviction, and take a form much more akin to the narrow 'show cause' style disciplinary jurisdiction in *Ziems v The Prothonotary of the Supreme Court of NSW*. In other cases, the complexity or contested nature of the alleged misconduct might make it appropriate to conduct the inquiry in a manner akin to ordinary *inter partes* civil proceedings. The rule in *Hollington v Hewthorn* might not operate in the former, but operate in the latter.

192 Focussing on the present proceedings, it is significant in my view that the findings sought to be relied upon were made in earlier civil (rather than criminal) proceedings. While Mr Macks was a party in those proceedings, he has foreshadowed an intention to challenge the finding of breach of s 180(1), and to rely in support of that challenge upon various matters that he contends the Full Court either overlooked or at least did not adequately address. And in relation to the allegations of fabrication of the 2002 and 2004 memos, he contends that the true character of his conduct in relation to these memos requires a consideration of a range of surrounding circumstances. In my view, given the importance of understanding the detail of Mr Macks' conduct, and the circumstances in which it occurred, I consider that it will be appropriate to conduct the inquiry in a manner akin to ordinary *inter partes* civil proceedings.

193 In conducting an inquiry of this nature, I am not presently satisfied that the findings in the Viscariello proceedings will be admissible. Rather, my present thinking is that it will be appropriate to apply the rule in *Hollington v Hewthorn* so as to exclude the findings made in the Viscariello proceedings. I do not consider that an application of the rule in the present context will offend commonsense, or otherwise over-extend the rationale for, or principles underpinning, the rule. The focus of the inquiry will be Mr Macks' conduct, and in particular the proper characterisation of that conduct. In circumstances where the detail of the surrounding circumstances will be the key to a proper characterisation of Mr Macks' conduct, I consider that the findings of breach and fabrication in the Viscariello proceedings will be of limited assistance. And, to the extent it is relevant, I do not consider that exclusion of the findings will unduly prejudice ASIC. It has indicated that it will be in a position to tender the detail of the evidence from the Viscariello proceedings relevant to the allegations of misconduct, including the admissions of Mr Macks upon which it relies.

194 For completeness, I should add that I am also not presently satisfied that it would be appropriate to invoke some general evidentiary aid to proof so as to overcome the application of the rule in *Hollington v Hewthorn* in the circumstances of this case.

195 While ASIC contended that s 59J of the *Evidence Act 1929* (SA) might provide a basis for admission of the findings upon which it relies, I am not satisfied it would be appropriate to invoke that section. The authorities in relation to this section are generally to the effect that it is intended for use in dispensing with formal proof in circumstances where a matter is not genuinely in dispute, or is otherwise formal or peripheral in nature, and where its operation would not prejudice either of the parties. Here there is a contest as to at least the finding in relation to breach of s 180(1), and the true nature and character of Mr Macks' conduct is the central issue to be inquired into.

196 Similarly, I am not presently persuaded that it would be appropriate to invoke s 52 of the *Evidence Act*. The judgments containing the findings do not appear to me to satisfy the requirement in s 52(2); and I am also not persuaded that the findings would have more than slight evidentiary weight in the circumstances I have explained, or that it would be in the interests of justice to admit evidence of them.

**Procedure to be adopted**

197 Given my view as to the likely inadmissibility of the findings in the Viscariello proceedings, and Mr Macks' foreshadowed intention to contest the allegations of misconduct upon which ASIC relies, I consider it appropriate that the conduct of the inquiry in these proceedings commence by ASIC filing some form of pleading in which it identifies the detail of the material facts upon which it relies in support of its allegations. I will hear the parties further as to whether this should take the form of a statement of claim or a less formal points of claim, and as to the time within which it is to be filed. Further consideration of subsequent procedural steps will be best addressed at future directions hearings in the ordinary course, once the true extent of the matters in dispute has been clarified.

**Conclusion**

198 For the reasons above, I will make orders:

1. Allowing the plaintiff's application to amend its originating process in the terms indicated in the proposed second originating process exhibited to the affidavit of Mr Geneste sworn 27 July 2018.

2. Dismissing the defendant's application for a permanent stay of the proceedings.

3. Ordering that there be an inquiry by the Court under s 536(1) of the *Corporations Act* into the aspects of the defendant's conduct identified in the plaintiff's second originating process.

4. Providing for the filing of a pleading by the plaintiff setting out the material facts upon which it relies in support of its allegations of misconduct by the defendant.

199 I will hear from parties as to the precise terms of the orders to be made, including as to further procedural orders that might be made, and on the issue of costs.