

# FEDERAL COURT OF AUSTRALIA

## Howden v Australian Securities and Investments Commission [2023] FCA

907

File number(s): NSD 757 of 2023

Judgment of: **GOODMAN J**

Date of judgment: 4 August 2023

Catchwords: **PRACTICE AND PROCEDURE** – application for stay of disqualification order, order requiring payment of a pecuniary penalty and costs order pending appeal – application dismissed

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth)  
*Corporations Act 2001* (Cth), ss 79, 180, 206A, 206E, 912A, 963A, 963E, 963F, 963J, 1317G, 1324  
*Federal Court Rules 2011* (Cth), r 36.08

Cases cited: *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149; (2022) 163 ACSR 442  
*Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3)* [2023] FCA 723  
*Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786; (2022) 162 ACSR 1  
*In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd (No 2)* [2020] FCA 772  
*Viagogo AG v Australian Competition and Consumer Commission* [2021] FCA 175  
*Wooldridge v Australian Securities and Investments Commission* [2015] FCA 349; (2015) 106 ACSR 551

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Counsel for the Respondent: Ms G Walker SC with Ms P Abdiel

Solicitor for the Respondent: Australian Securities and Investments Commission

## ORDERS

NSD 757 of 2023

**BETWEEN:**           **RUSSELL HUGH HOWDEN**  
Appellant

**AND:**               **AUSTRALIAN SECURITIES AND INVESTMENTS**  
**COMMISSION**  
Respondent

**ORDER MADE BY:** **GOODMAN J**

**DATE OF ORDER:** **4 AUGUST 2023**

### **THE COURT ORDERS THAT:**

1. The appellant's interlocutory application dated 25 July 2023 be dismissed.
2. The costs of that application be reserved pending the outcome of the appeal.

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

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# REASONS FOR JUDGMENT

## GOODMAN J

### A. INTRODUCTION

1 The appellant (**Mr Howden**) applies, under r 36.08 of the *Federal Court Rules 2011* (Cth), for a stay of certain orders made by the primary judge on 5 July 2023 to give effect to her reasons for judgment on relief: *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3)* [2023] FCA 723 (**Penalty Judgment**, or **PJ**). The Penalty Judgment was a sequel to the primary judge's principal judgment delivered on 8 July 2022: *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786; (2022) 162 ACSR 1 (**Liability Judgment**).

### B. BACKGROUND

#### The BlueInc group of companies

2 Mr Howden founded the BlueInc group of companies in 2004.

#### *The corporate defendants*

3 Three of the members of that group were defendants to the proceeding before the primary judge, namely **Select AFSL Pty Ltd**, **BlueInc Services Pty Ltd** and Insurance Marketing Services Pty Ltd (together, the **corporate defendants**).

#### *Other members of the BlueInc group*

4 The other members of the BlueInc group relevant to the present application are as follows.

#### *BlueInc Group Pty Ltd*

5 BlueInc Group Pty Ltd (**BGPL**) is the holding company for all subsidiaries within the BlueInc group of companies. Since 1 April 2004, Mr Howden has been BGPL's managing director.

6 At a general level, Mr Howden has at all times been responsible for the overall management and development of the BlueInc group of companies, including BGPL and each of the entities in the BlueInc group of companies' operations in Australia and New Zealand. He has been solely responsible for managing BGPL's cash investments with a view to maximising returns, including purchases and sales of ASX listed stocks and the placement of surplus cash in term deposits and maximiser accounts. He has also been the signatory on all BGPL bank accounts.

7 Prior to 4 July 2023, Mr Howden was the sole director of BGPL. Since that date, Mr Howden’s  
daughter, Ms Kieran Howden, has been a director.

8 BGPL employs Mr Howden, Ms Howden and the group accountant.

*BlueSoft Pty Ltd*

9 **BlueSoft** Pty Ltd, formerly named NZ Holdings Pty Limited, is a wholly owned subsidiary of  
BGPL. It provides computer hosting services and access to a specialist life insurance  
administration system called “*BluePrint Admin*”.

10 From its incorporation on 29 July 2019 until 4 July 2023 (when Ms Howden became a director),  
Mr Howden was BlueSoft’s sole director.

11 In an affidavit read before the primary judge and on the present application, Mr Howden states  
he plays no role in the day-to-day running of BlueSoft, which is the responsibility of BlueSoft’s  
Chief Executive Officer, Mr Neil de Beer. However, in a further affidavit read on this  
application, Mr Howden states that he is directly responsible for identifying new clients,  
negotiating contracts with clients, and (in conjunction with Mr de Beer) managing client  
relationships, setting budgets, and approving non-budgeted expenditure.

12 BlueSoft employs seven people.

*Howden Superannuation Pty Ltd*

13 **Howden Superannuation** Pty Ltd is the trustee of a self-managed superannuation fund.  
Mr and Mrs Howden have been directors of Howden Superannuation since July 2010.

*Momentum Life Limited*

14 **Momentum Life** Limited is a company incorporated in New Zealand. It has two wholly owned  
subsidiaries, Momentum Life Administration Pty Limited and Momentum Life Services  
Limited, which provide life insurance policy administration services and life insurance  
marketing and distribution services, respectively, to Momentum Life.

15 Mr Howden was the founder of Momentum Life. From its incorporation on 16 September 2015  
until 12 August 2020, he was its Managing Director and Chief Executive Officer. On  
12 August 2020, he resigned as a director. He remained as Chief Executive Officer until he  
resigned from that position on 19 March 2021.

16 Momentum Life employs 35 people.

## **Liability Judgment**

17 The Liability Judgment extends to almost 1,400 paragraphs. For present purposes, and at the risk of over-simplification, it may be considered by reference to four broad strands of allegations and findings.

18 The first strand concerned the conflicted remuneration provisions in Division 4 of Part 7.7A of the *Corporations Act 2001* (Cth). The respondent (ASIC) alleged, and the primary judge found, that: (1) various incentives provided by Select and BlueInc Services to their sales representatives were “*conflicted remuneration*” within the meaning of that term in s 963A of the Corporations Act; (2) as a result, Select and BlueInc Services contravened various provisions of that Division; and (3) Mr Howden was involved in those contraventions within the meaning of s 79 of the Corporations Act.

19 The second strand concerned Mr Howden’s duties as a director of Select and BlueInc Services pursuant to s 180 of the Corporations Act. ASIC alleged, and the primary judge found, that Mr Howden contravened s 180 by reason of his conduct in connection with the incentives that were found to have been conflicted remuneration.

20 The third strand concerned various provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). ASIC alleged, and the primary judge found, that the corporate defendants contravened those provisions when their representatives, during telephone calls with customers, engaged in conduct that was, *inter alia*, misleading and deceptive and unconscionable.

21 The fourth strand concerned the obligations imposed upon financial services licencees under s 912A of the Corporations Act. ASIC alleged, and the primary judge found, that: (1) Select contravened s 912A by running a customer referral program known as the “*Refer a Friend Program*”; and (2) Mr Howden was involved in those contraventions within the meaning of s 79 of the Corporations Act.

## **Penalty Judgment**

22 On 4 July 2023, the primary judge delivered the Penalty Judgment. Orders giving effect to that judgment were entered on 5 July 2023. Those orders addressed the position of each of the four defendants. The orders of particular application to Mr Howden are:

- (1) declarations that Mr Howden was involved within the meaning of s 79 of the Corporations Act in each of the contraventions by:

- (a) Select of ss 963E and 963F of the Corporations Act; and
  - (b) BlueInc Services of s 963J of the Corporations Act (order 4);
- (2) a declaration that Mr Howden contravened s 180(1) of the Corporations Act by failing to exercise his powers and discharge his duties owed to Select with the degree of care and diligence that a reasonable person would exercise by:
- (a) knowing of, conceiving of, planning, promoting and/or approving various incentive programs and failing to take reasonable or any steps to ensure that Select's representatives did not accept those benefits;
  - (b) failing to take reasonable or any steps to prevent Select from engaging in contraventions of ss 963E and 963F of the Corporations Act; and
  - (c) exposing Select to a foreseeable risk of harm, being contravention of the conflicted remuneration provisions and exposure to the risk of reputational harm, litigation and/or regulatory action (order 5);
- (3) a declaration that Mr Howden contravened s 180(1) of the Corporations Act by failing to exercise his powers and discharge his duties owed to BlueInc Services with the degree of care and diligence that a reasonable person would exercise by:
- (a) knowing of, and participating in, BlueInc Services's provision of each of various incentives to its employees and failing to take reasonable or any steps to ensure that BlueInc Services did not give its employees those benefits;
  - (b) failing to take reasonable or any steps to prevent BlueInc Services from engaging in contraventions of s 963J of the Corporations Act; and
  - (c) exposing BlueInc Services to a foreseeable risk of harm, being contravention of the conflicted remuneration provisions and exposure to the risk of reputational harm, litigation and/or regulatory action (order 6);
- (4) a declaration that Mr Howden was involved, within the meaning of s 79 of the Corporations Act, in the contravention of s 912A(1)(a) of the Corporations Act by Select concerning the Refer a Friend Program (order 31);
- (5) a declaration that Mr Howden was involved within the meaning of s 79 of the Corporations Act in each of the contraventions of s 912A(1)(c) of the Corporations Act by Select when it failed to comply with the financial services laws in Chapter 7 of the Corporations Act on each occasion that:



- (a) a representative for whom it was the responsible licensee accepted conflicted remuneration in contravention of s 963E; and
  - (b) it failed to take reasonable steps to ensure that a representative of its financial services licence did not accept conflicted remuneration in contravention of s 963F (order 33);
- (6) an order pursuant to s 206E of the Corporations Act, that Mr Howden be disqualified from managing corporations for five years (order 35);
  - (7) an order pursuant to s 1324 of the Corporations Act, that Mr Howden be restrained, in respect of companies of which he is a director and which hold a financial services licence (and/or which employ representatives of a financial services licensee), from causing or permitting those companies to give conflicted remuneration to their representatives (order 36);
  - (8) an order that Mr Howden pay to the Commonwealth a pecuniary penalty pursuant to s 1317G(1) of the Corporations Act in the sum of \$100,000 (order 39); and
  - (9) an order that the defendants pay ASIC's costs, to be agreed or assessed (order 46).

23 I will refer to the orders 35, 39 and 46 as the **disqualification order**, the **pecuniary penalty order** and the **costs order** respectively.

24 The primary judge also ordered that the disqualification order was to take effect on 2 August 2023 (order 47). On 1 August 2023, I made an order by consent staying the operation of the disqualification order, the pecuniary order and the costs order (in so far as it concerns Mr Howden) until the making of orders determining the present application.

### **24 July 2023**

25 On 24 July 2023:

- (1) Mr Howden filed a Notice of Appeal;
- (2) Select and BlueInc Services entered into external administration; and
- (3) ASIC issued an invoice to Mr Howden for payment of the pecuniary penalty of \$100,000, with payment stated to be due on 2 August 2023.

## The Notice of Appeal

26 The appeal is brought against the declarations in orders 4, 5, 6 and 33; as well as the disqualification order, the pecuniary order and the costs order (in so far as it concerns Mr Howden). The grounds of appeal may be summarised as follows:

- (1) the primary judge erred in determining that the incentives were conflicted remuneration (ground 1);
- (2) thus, her Honour erred in finding that:
  - (a) Select contravened ss 963E and 963F and BlueInc Services contravened s 963J of the Corporations Act (grounds 1(a) to (c));
  - (b) Mr Howden was involved in such contraventions (ground 1(d));
  - (c) Mr Howden contravened s 180 of the Corporations Act with respect to Select (ground 2) and BlueInc Services (ground 3);
  - (d) Select contravened s 912A(1)(c) of the Corporations Act and that Mr Howden was involved in such contraventions (ground 4);
  - (e) the disqualification order and pecuniary penalty order were appropriate (grounds 5(a) and (6)(a)); and
- (3) in any event, the disqualification order and the pecuniary penalty order were manifestly excessive (grounds 5(b) and 6(b)).

## Quantum of costs

27 ASIC provided to Mr Howden's solicitors in March 2023 an estimate of its recoverable costs in the order of \$2,300,000 to \$3,100,000.

## C. RELEVANT PRINCIPLES

28 The principles applicable when considering an application for the stay of a judgment pending an appeal are well-settled and not in dispute on this application. I gratefully adopt the conspectus of principles set out by Abraham J in *Viagogo AG v Australian Competition and Consumer Commission* [2021] FCA 175 at [8] to [13]. In *Wooldridge v Australian Securities and Investments Commission* [2015] FCA 349; (2015) 106 ACSR 551, at 552 to 555 ([8] to [18]), Middleton J set out an analysis of relevant principles, in the context of an application for a stay of a disqualification order. I respectfully agree with his Honour's analysis, which is discussed further at [33] below. His Honour summarised his analysis at 564 to 565 ([18]):

Where there is an application for a stay of a disqualification order pending appeal, the relevant principles to apply can be listed as follows:

- (1) The onus is on an applicant to persuade the Court that a stay is appropriate.
- (2) The Court should not treat the disqualification order as provisional.
- (3) The Court in exercising its discretion will need to:
  - (a) make some assessment of the prospects of success of the appeal, but only to the extent necessary (which would not normally involve a detailed consideration of the merits of the appeal). If the prospects of success of the appeal are so strong or overwhelming that the interests of justice could only be served by granting a stay, a stay would be the appropriate order;
  - (b) consider the nature of the disqualification order, the seriousness of the findings and the need to protect the public (which are factors to be given significant weight); and
  - (c) consider the hardship (whether pecuniary or otherwise) to the applicant and any relevant third party if the stay is to be refused.

## **D. CONSIDERATION**

### **Arguable case on appeal**

29 Mr Howden's foreshadowed case on appeal is that the primary judge's basal finding that the incentives were conflicted remuneration was erroneous because:

- (1) the concept of conflicted remuneration in s 963A(b) of the Corporations Act depends upon the impugned benefit being one that – because of its nature, or the circumstances in which it was given to the representative – could reasonably have been expected to have influenced the financial product advice given by the sales representatives;
- (2) for there to have been a reasonable expectation of influence upon the financial product advice the sales representatives must have had a choice of financial product advice to provide (relying upon *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149; (2022) 163 ACSR 442 at [515] to [516] per Anderson J, which was delivered on 29 September 2022 and thus after the Liability Judgment);
- (3) the sales representatives in the present case did not have a choice of financial product advice in circumstances where their task was to follow a sales script and to sell a single type of insurance product. They had no discretion as to which insurance product to sell or recommend. Their job was to sell as many of that particular insurance product as possible, while following the Quality Assurance requirements in the sales script; and

(4) regardless of whether there was a choice available to the sales representatives, the incentives, could not “*reasonably be expected to influence the financial product advice given by*” the sales representatives because the incentives did not provide those representatives with an incentive to do anything other than what they were already doing.

30 Senior Counsel for ASIC, appropriately, accepted that the Notice of Appeal raised an arguable case. I am satisfied that the matters raised in the ground of appeal are arguable.

31 The written and oral submissions made on behalf of Mr Howden also included suggestions that the grounds of appeal were “*strong*”, “*substantial*”, “*much more than reasonably arguable*” and “*likely to succeed*”. Senior Counsel for ASIC resisted such suggestions. I express no view as to the prospects of success of the appeal (beyond regarding the appeal as arguable), noting that: (1) it is usually inappropriate to do so (*In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd (No 2)* [2020] FCA 772 at [25] (Katzmann J); *Wooldridge* at 555 ([18(3)(a)]); and (2) it could not be (and was not) suggested that the prospects of success on the appeal are so strong or overwhelming that the interests of justice could only be served by the grant of a stay (see *Wooldridge* at 555 ([18(3)(a)])).

### **Balance of convenience**

32 I turn now to consider the balance of convenience. I note at the outset that no submission was made that the appeal would be rendered nugatory if the stay were not granted.

### ***Disqualification order***

33 In *Wooldridge* Middleton J noted:

- (1) disqualification orders are both punitive and protective of the public and have an element of general deterrence (at [14]);
- (2) the protective nature of the orders (including the element of general deterrence) is a matter to be afforded significant weight in the exercise of the discretion (at [15]);
- (3) in contrast, the detriment that the disqualified person may suffer as a result of being unable to manage corporations should not be afforded “*too much weight*”, as the inability to manage corporations is both the purpose and the inevitable consequence of a disqualification order (at [17]);

- (4) the prejudice of not being able to act as a director is not of itself a sufficient reason to grant a stay (at [17]); and
- (5) the Court should avoid creating an impression that disqualification orders are provisional, pending an appeal (at [16]; see also at 553 [11]).

34 Against that framework, I turn to consider the evidence of Mr Howden and the submissions made on his behalf. Mr Howden's evidence and submissions posited that the disqualification order would have the consequences discussed below.

*The effect of the disqualification order on Mr Howden personally*

35 The first consequence, and the consequence identified by Senior Counsel for Mr Howden in his oral submissions as the primary reason why a stay should be ordered, is the effect on Mr Howden's ability to earn a living in his chosen field. Mr Howden's evidence was to the following effect:

- (1) the disqualification order would prevent him from earning a living in his chosen field, namely the management of financial services companies, in circumstances where he has earned a living by managing financial services companies for over 32 years. In particular he is concerned that the breadth of s 206A of the Corporations Act would significantly limit him acting as an employee or contractor in that area. Further, because he is 64 years old, he does not believe it would be easy for him to find suitable employment in another field. Thus, he believes that there is a real risk that the disqualification order would effectively force him into early retirement; and
- (2) the disqualification order would also have a detrimental impact on his standing in the insurance industry, as it would exacerbate the negative findings in the Liability and Penalty Judgments, as well as the negative publicity that he had experienced in connection with the first instance proceeding and the underlying events.

36 Submissions were made highlighting this evidence and suggesting that Mr Howden would suffer irreparable prejudice if the disqualification order was not stayed.

37 I do not accept these submissions. Mr Howden's evidence set out at [35] above is not to be afforded significant weight in the exercise of the discretion. As noted at [33(2) and (3)] above, the detriment that Mr Howden may suffer is a matter not to be afforded too much weight, in contrast to the significant weight to be afforded to the protective nature of the disqualification order.

38 Further, whilst a submission was made that the effect of the disqualification order would be to prevent Mr Howden from making a living in his chosen field, it was not suggested that he was dependent upon such earnings. There is no evidence as to his earnings (whether by way of salary, dividends or trust distributions) or of the relativity of his earnings from working in his chosen field to his total earnings; or as to his asset position. I note that a similar submission was made, unsuccessfully, to the primary judge (PJ[239]).

39 A submission was made that once the underlying reasons for the disqualification order sought to be stayed are considered, I would conclude that the protection of the public and the public interest would not be prejudiced by staying the disqualification order pending resolution of Mr Howden's appeal. In this regard, the submission noted that the primary judge:

- (1) accepted that the incentives were not implemented by the defendants knowing that to do so would be to contravene the conflicted remuneration provisions of the Corporations Act, and therefore unlawful (PJ[62]);
- (2) accepted that the contraventions of the ASIC Act could not generally be characterised as deliberate (PJ[73]); and
- (3) described Mr Howden's conduct, in relation to the contravention of s 912A, as turning a blind eye to the risks to consumers within Indigenous communities arising from the use of the program (PJ[75]). (I note that her Honour's finding was that "*Mr Howden, at the very least, turned a blind eye*" (emphasis added)); and
- (4) noted Mr Howden's submission that he had been involved in the financial services industry for nearly 40 years prior to the proceeding before the primary judge and had an unblemished record (PJ[158]).

40 I do not accept this submission for the following reasons. *First*, the reference by Middleton J in *Wooldridge* at 554 [14] to the need to consider the underlying reasons for the disqualification order is a reference to a need to bear in mind that disqualification orders have punitive and protective purposes. It is not a suggestion that the Court on a stay application should revisit the particular matters taken into account or the reasons expressed by a judge in imposing a disqualification order in a particular case. *Secondly*, the primary judge considered it necessary to impose the disqualification order *despite* the matters referred to at [39]. For example, as her Honour noted at PJ[62], the absence of knowledge that the conduct in contravention of the conflicted remuneration provisions was unlawful did not mitigate the seriousness of that

conduct. *Thirdly*, the primary judge's assessment was based upon *all* of the evidence, not merely the parts of the evidence favourable to Mr Howden.

41 A submission was also made that Mr Howden did not pose a threat to the public in circumstances where Mr Howden's activities were unconstrained during the currency of the proceeding. I do not accept this submission in circumstances where it is likely that the primary judge was aware of this matter and still made the disqualification order.

*The effect of the disqualification order on companies in the BlueInc group*

42 The second consequence of the disqualification order suggested by Mr Howden in his affidavit evidence concerns the effect upon the BlueInc group of companies. Mr Howden asserts that his disqualification would "*significantly disrupt the operations and growth*" of that group. Mr Howden's evidence in support of that assertion is that:

- (1) he has always been integral to the BlueInc group of companies' operations in Australia and New Zealand;
- (2) the BlueInc group of companies is a family-owned business, and he founded each of those companies. Without his expertise and his family's capital, the BlueInc group of companies would not have been created and would not have grown;
- (3) given the length of his experience managing financial services companies, and the breadth and depth of his experience in the BlueInc group of companies, it would be very difficult to identify a person in the short or medium term who could replace him without any loss of expertise;
- (4) given the negative findings in the Liability and Penalty Judgments, as well as the negative publicity experienced by the BlueInc group of companies in connection with the first instance proceeding and the underlying events, it will be virtually impossible to find a suitable replacement who is willing to take the role;
- (5) in his view, Ms Howden has the ability to manage the BlueInc group of companies competently and will do so diligently, however she has limited experience managing financial services companies, limited experience in the insurance industry and limited experience with the operations of the BlueInc group of companies;
- (6) if the BlueInc group of companies were to be deprived of his experience and expertise, (especially given that his experience and expertise will be virtually impossible to

replace in the short to medium term), that fact will almost certainly have a negative effect on their profitability and growth;

- (7) compounding this issue is the fact that BGPL may not be willing to continue to inject capital into BlueSoft and Momentum Life if those companies are not being managed by a person with his experience and expertise. If Mr Howden is no longer a director of BGPL, he will not have any input into such a decision. If this were to occur, it would jeopardise Momentum Life's profitability and growth, and potentially even its viability; and
- (8) if the BlueInc group of companies become less profitable or viable, the livelihoods of some or all of its employees may be jeopardised.

43 The submissions made on behalf of Mr Howden highlighted these aspects of Mr Howden's evidence.

44 I do not consider the potential effect of the disqualification order upon the companies in the BlueInc group to be of particular moment in the exercise of the discretion, for the following reasons.

45 *First*, the evidence as to Mr Howden's suggested indispensability and irreplaceability is insufficient. In particular, the evidence comes only from Mr Howden (and not from Ms Howden; anyone else within the BlueInc group; or any person with expertise in the recruitment of executives in his field of experience) and is cast at a very general level. There is also no evidence of any attempts having been made to find a replacement or of the responses (or lack of responses) to any such attempts.

46 *Secondly*, the suggested impact of Mr Howden's absence upon the profitability of the BlueInc group and the suggested possibility that BGPL (with Ms Howden as director) may not fund BlueSoft and Momentum Life and that in turn the livelihoods of employees of the latter two companies may be jeopardised is mere speculation upon speculation. This is particularly so absent evidence from Ms Howden; and absent any evidence that BlueSoft and Momentum Life require or are likely to require funding.

47 *Thirdly*, Select and BlueInc Services are in external administration.

48 *Fourthly*, there is no evidence that BGPL conducts a financial services business.



49 *Fifthly*, there is no evidence that Mr Howden’s management of BGPL’s cash investments (see [6] above) requires particular expertise that only Mr Howden possesses; or that such management cannot be carried out by Ms Howden, the employed accountant, or someone else.

50 *Sixthly*, on Mr Howden’s own evidence, Ms Howden is able, competent and diligent. Further, BlueSoft has an established Chief Executive Officer.

51 *Seventhly*, there is a tension in Mr Howden’s evidence concerning BlueSoft, as to whether he is involved in the running of its business (see [11] above). I note that an organisational chart for BlueSoft as at 19 July 2023 exhibited to Mr Howden’s most recent affidavit does not include Mr Howden. In any event, no explanation has been provided as to why the activities described in the final sentence of [11] above cannot be performed by someone other than Mr Howden. In this regard, I note that BlueSoft Services is not a financial services company.

52 *Finally*, I consider the fact that the disqualification order would prevent Mr Howden from managing the self-managed superannuation fund, of which Howden Superannuation is the trustee to be a matter of little moment, particularly when Mrs Howden is, and has since 2010 been, a director of Howden Superannuation; it is not suggested that she is incompetent or reliant upon any particular skills possessed by Mr Howden; and it is open to Mr Howden to apply to ASIC under s 206G of the Corporations Act for leave to manage Howden Superannuation.

### ***The pecuniary penalty order and costs order***

53 It is convenient to address the pecuniary penalty order and the costs order together.

54 Mr Howden provided some limited evidence as to his financial position, directed to establishing that he would have difficulty in obtaining liquid funds.

55 I am not persuaded that this evidence provides a reason to stay the pecuniary penalty order, or the costs order, for the following reasons. *First*, as Senior Counsel for Mr Howden submitted, Mr Howden’s position is not that he is unable to pay (or that the appeal would be stultified), rather that he has limited liquid assets. *Secondly*, the evidence does not purport to, and does not, set out a full view of Mr Howden’s financial position. *Thirdly*, there is no evidence that the costs order is likely to be payable before the determination of the appeal. For example, there is no evidence that any process of: (1) seeking to reach an agreement on costs, or (2) assessment, has commenced.

***Conclusion on the balance of convenience***

56 For the above reasons, the balance of convenience does not favour the granting of the stay.

**E. CONCLUSION**

57 For the reasons set out above, the interlocutory application should be dismissed with the costs of the application being reserved until the outcome of the appeal is known. I will make orders accordingly.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman.

Associate:



Dated: 4 August 2023