

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Blumenthal [2024]

FCA 384

File number: NSD 1533 of 2023

Judgment of: **STEWART J**

Date of judgment: 12 April 2024

Date of publication of reasons: 17 April 2024

Catchwords: **CORPORATIONS** – where parties jointly seek agreed declarations and penalty orders in relation to admitted contraventions of the *Corporations Act 2001* (Cth) – where contravening conduct concerned breaches by the defendant of his directors’ duties and provision preventing a person from creating a false or misleading appearance of active trading – where disqualification and pecuniary penalty sought – where contravening conduct serious – where application made for leave pursuant to s 206G of the Corporations Act for disqualified person to manage particular corporations – where suitable limitations proposed with respect to such leave

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 91, 93AA
Corporations Act 2001 (Cth) ss 912A, 180(1), 181(1), 206C, 206G, 1041B(1)(b), 1317E, 1317G, 1322
Crimes Act 1914 (Cth) s 4AA
Evidence Act 1995 (Cth) s 191

Cases cited: *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25
ASIC v Employsure Pty Ltd [2023] FCAFC 5; 407 ALR 302
ASIC v Forex Capital Trading Pty Ltd [2021] FCA 570
ASIC v Westpac Banking Corporation (No 3) [2018] FCA 1701; 131 ACSR 585
Australian Building & Construction Commissioner v Pattinson [2022] HCA 13; 274 CLR 450
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3; 262 CLR 157

Gillfillan v ASIC [2012] NSWCA 370; ACSR 460
Minister for Industry, Tourism and Resources v Mobile Oil Australia Pty Ltd [2004] FCAFC 72; 26 ATPR 41-993
Nenna v ASIC [2011] FCA 1193; 198 FCR 32
Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler [2002] NSWSC 483; 42 ACSR 80
Vines v ASIC [2007] NSWCA 126; 63 ACSR 505

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 72

Date of hearing: 11 April 2024

Counsel for the Plaintiff: G P Craddock SC

Solicitor for the Plaintiff: Corrs Chambers Westgarth

Counsel for the Defendant: P English

Solicitor for the Defendant: Quinn Emanuel Urquhart & Sullivan

ORDERS

NSD 1533 of 2023

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **ADAM BLUMENTHAL**
Defendant

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **12 APRIL 2024**

RE ORIGINATING PROCESS DATED 15 FEBRUARY 2024

THE COURT DECLARES THAT:

1. On the facts stated in the amended statement of agreed facts (at annexure AIR-4 to the affidavit of Anna Inglis Ross affirmed 26 March 2024), pursuant to s 1317E of the *Corporations Act 2001* (Cth), during the relevant period (18 March 2021 to 15 November 2021), the defendant contravened:
 - (a) the duties he owed as a director of **EverBlu** Capital Pty Ltd ACN 612 793 683, pursuant to s 180(1) of the Corporations Act by:
 - (i) engaging in conduct that was in breach of a number of EverBlu's policies, being the Dealing Manual, Document Retention Policy, Conflicts of Interest Policy, Personal Dealing Policy and Compliance Framework; and
 - (ii) causing EverBlu to be in breach of its obligations under s 912A of the Corporations Act, through his involvement in EverBlu's breaches of its general obligations, which jeopardised EverBlu's interests including by creating a real risk of regulatory action;
 - (b) the duties he owed as a director of **Creso** Pharma Ltd ACN 609 406 911, pursuant to s 180(1) of the Corporations Act, by causing Creso to engage Aldo Sacco and Tyson Scholz to provide consultancy, promotional and marketing services to Creso and, in the absence of sufficient due diligence and

documentation and the imposition of measurable deliverables, authorising and co-ordinating Creso's payment of invoices totalling:

- (i) \$2,013,000 to two companies controlled by Mr Scholz; and
 - (ii) \$1,237,500 to a company controlled by Mr Sacco;
- (c) the duties he owed as a director of Creso, pursuant to s 181(1)(a) of the Corporations Act, by failing to avoid the conflict of interest between the advantage he stood to gain and the interests of Creso in circumstances where he benefitted from Creso's payments to Mr Scholz, as such payments enhanced Mr Scholz's ability to repay loans advanced by Anglo Menda Pty Ltd ACN 608 554 052, and where he failed to:
- (i) disclose to the board of Creso his financial relationship with Mr Scholz from May 2021 to the end of the relevant period (noting disclosure of the relationship was made by Mr Blumenthal to the board of Creso in September 2022); and
 - (ii) exclude himself from the approval of Mr Scholz's invoices by the board of Creso in July, September and November 2021;
- (d) s 1041B(1)(b) of the Corporations Act by directing or causing certain single client bids (of significant volume) to purchase Creso shares to be disaggregated into two bids through the EverBlu Suspense Account designated 'SUSP_EVB' and/or the relevant client's account, intending to represent to the market that there were more individual bidders for Creso shares than in fact existed, so as to likely have had the effect of creating, or causing the creation of, a misleading appearance with respect to the number of market participants actively trading Creso shares.

THE COURT ORDERS THAT:

2. Pursuant to s 206C of the Corporations Act, the defendant is disqualified from managing corporations for a period of 5 years.
3. Pursuant to s 1317G of the Corporations Act, the defendant is ordered to pay to the Commonwealth of Australia – within 90 days from the date of this Order – a pecuniary penalty in the amount of \$850,000 in respect of his civil penalty contraventions of his director's duties as a director of EverBlu and Creso pursuant to ss 180(1) and 181(1)(a) (as applicable), and his contraventions of s 1041B(1)(b) of the Corporations Act.

4. The defendant is ordered to pay – within 90 days from the date of this Order – the plaintiff’s litigation costs in the amount of \$100,000.

THE COURT NOTES THAT:

5. On 14 December 2023, the defendant entered into a Court Enforceable Undertaking with the plaintiff, pursuant to s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth) by which the defendant has undertaken (amongst other things):
 - (a) to not act as a responsible manager, or perform any function as an officer, of an entity carrying on a financial services business for a period of 5 years; and
 - (b) if at the end of the 5 year period he wishes to re-enter the financial services industry, to complete training deemed appropriate by the plaintiff and provide the plaintiff with documentary evidence of the completion of such training.
6. The defendant has undertaken to pay at least \$150,000 towards the plaintiff’s investigation costs (which may be ordered by the plaintiff pursuant to s 91 of the ASIC Act) within:
 - (a) 90 days from the date of this Order; or
 - (b) 30 days from the date of the order issued in accordance with s 91, whichever date is later.

RE INTERLOCUTORY PROCESS DATED 12 MARCH 2024

THE COURT DECLARES THAT:

7. Pursuant to s 1322(4)(a) of the Corporations Act, the defendant’s application dated 12 March 2024 and made pursuant to s 206G(1) of the Corporations Act is not invalid by reason of non-compliance with s 206G(2).

THE COURT ORDERS THAT:

8. Pursuant to s 206G(1) of the Corporations Act, and subject to the conditions below, the defendant has leave during the period of disqualification the subject of Order 2 above to manage the affairs of the following two companies:
 - (a) **Phillip Street** Holdings Pty Ltd (ACN 615 424 783) as trustee for the Phillip Street Trust (and no other trust), provided that Phillip Street:
 - (i) continues to act only as trustee for the Phillip Street Trust;
 - (ii) does not engage any employees;

- (iii) does not incur any debt for the purposes of its permitted activities, including investing in listed and unlisted companies, save where Stewart J's reasons for judgment in these proceedings and Court Enforceable Undertaking 031914829 dated 14 December 2023 have been provided in advance to any prospective lender; and
 - (iv) the eligible beneficiaries of the Phillip Street Trust are limited to the defendant and members of his immediate family;
 - (b) **Oakphil** Pty Ltd (ACN 674 979 170) as trustee for the Oakphil Family Trust (and no other trust), provided that Oakphil:
 - (i) continues to act only as trustee for the Oakphil Family Trust;
 - (ii) plays no role in managing the affairs of Oakley Capital Partners Pty Ltd (ACN 663 165 839); and
 - (iii) the eligible beneficiaries of the Oakphil Family Trust are limited to the defendant and members of his immediate family.
- 9. Until such time as the defendant is no longer disqualified from managing corporations under Pt 2D.6 of the Corporations Act, the defendant's ability to manage the affairs of Phillip Street and Oakphil:
 - (a) is limited to the following activities:
 - (i) those required by, or incidental to, maintaining their status as a registered company;
 - (ii) buying, holding and selling shares; and
 - (iii) acting as trustee of the relevant trust and doing things that are reasonably incidental to so acting; and
 - (b) does not extend to:
 - (i) providing Financial Services;
 - (ii) carrying on a Financial Services business; or
 - (iii) performing any function which would amount to the defendant being involved in the carrying on of a Financial Services business (including as an officer, manager, employee, contractor or a Responsible Manager of an entity carrying on a Financial Services business).

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

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 The plaintiff, the Australian Securities and Investments Commission (**ASIC**), and the defendant, Adam Blumenthal, jointly sought agreed declarations and penalty orders in relation to contraventions by Mr Blumenthal of various provisions of the *Corporations Act 2001* (Cth). The contraventions took place in the period from 18 March 2021 to 15 November 2021, which is referred to as the relevant period.

2 One of the orders that was sought was an order under s 206C of the Corporations Act that Mr Blumenthal be disqualified from managing corporations for a period of five years. Against the event that I was to make that order, Mr Blumenthal applied by way of interlocutory process for orders under s 206G that he be given leave to manage the affairs of two family companies. During the course of the hearing, in response to queries raised by me, Mr Blumenthal sought amended orders. ASIC did not oppose the relief (as amended) sought under the interlocutory process.

3 I was satisfied that orders substantially in the form of the orders jointly sought by the parties and in the amended form sought by Mr Blumenthal under the interlocutory process should be made. My reasons for being so satisfied, briefly stated, follow.

4 The parties helpfully filed and tendered an amended statement of agreed facts under s 191 of the *Evidence Act 1995* (Cth). For simplicity, I shall refer to it as the statement of facts. They also tendered an enforceable undertaking executed by Mr Blumenthal and accepted by ASIC on 14 December 2023 under s 93AA of the *Australian Securities Investments Commission Act 2001* (Cth) (**ASIC Act**).

5 My reasons draw heavily on the statement of agreed facts and the joint written submissions filed by the parties.

The material facts

6 During the relevant period, Mr Blumenthal was one of two directors of **EverBlu** Capital Pty Ltd. The other director was not resident in Australia and was not active in EverBlu. Mr Blumenthal was also the chairman and an Authorised Representative and Responsible Manager of EverBlu. He oversaw and participated in the corporate advisory and stockbroking services

provided by EverBlu as holder of an Australian Financial Services Licence (**AFSL**). He was also indirectly, through a corporate vehicle owned by him, a part owner of EverBlu and, with the other director, the controlling mind of EverBlu.

7 **Anglo Menda** Pty Ltd was a corporation of which Mr Blumenthal was the sole director and shareholder. Anglo Menda was an Authorised Representative of EverBlu.

8 **Creso** Pharma Ltd (now known as Melodiol Global Health Ltd) was listed on the Australian Securities Exchange (**ASX**) from 20 October 2016 to 12 June 2023, ie covering the relevant period. During the relevant period, Mr Blumenthal was a substantial shareholder, non-executive director and chairman of Creso. As at 28 February 2021, Mr Blumenthal’s total shareholding in Creso – which was indirectly held through various corporate vehicles owned by him – was valued at approximately \$30 million.

9 From at least July 2017, EverBlu provided corporate advisory services to Creso. EverBlu led Creso’s initial public offering.

10 EverBlu maintained a suite of internal policies that included procedures directed towards compliance with its AFSL and the general law. By those policies, Mr Blumenthal was prohibited from providing general advice or accepting client instructions in relation to a company of which he was a director and accepting client instructions in relation to a company under “Restriction”. Creso was a company under “Restriction” during the relevant period.

11 On 23 March 2021, Mr Blumenthal was placed on the “Chinese Wall” Register (which recorded EverBlu’s representatives in possession of non-public information and imposed strict limitations and conditions on the use of that information) with respect to Creso. The addition of Mr Blumenthal to that register generated an automated “Chinese Walls Register Entry Acknowledgement”, which required him to acknowledge that he would, amongst other things, not take orders from clients to buy or sell Creso shares and, in the event of receiving such an order, he would “pass the phone to another adviser”.

12 Contrary to several of EverBlu’s policies, Mr Blumenthal personally and through a Designated Trading Representative (**DTR**) entered, amended and cancelled multiple client orders for Creso shares directly through client accounts. He also directed the DTR to enter, amend and cancel multiple client orders for Creso shares through the Suspense Account and subsequently book the resulting trades from the Suspense Account to one or more client accounts, each of which was held in the name of individuals known to Mr Blumenthal.

- 13 The Suspense Account, styled ‘SUSP_EVB’, was an account typically used for temporary entries in the absence of some information that was needed to properly assign an order to a particular client account.
- 14 During the relevant period, trades placed through EverBlu accounted for approximately 27% of all market volume for trading in Creso shares. Approximately 75% of those trades were conducted through the Suspense Account.
- 15 In all, six EverBlu clients’ accounts were ultimately allocated Creso shares bought or sold through the Suspense Account. Mr Blumenthal loaned money to three of those six EverBlu clients via Anglo Menda for the purpose of funding the purchase of those Creso shares.
- 16 A substantial portion of the trades allocated to the six clients were conducted under Mr Blumenthal’s instructions to the DTR during the relevant period when Mr Blumenthal was subject to the “Chinese Wall” restriction. It is not alleged that the relevant trade instructions were not provided by each of the clients identified, but rather that they were given effect in breach of EverBlu’s policies.
- 17 On 14 occasions during the relevant period, Mr Blumenthal either by himself or by direction to the DTR disaggregated single client orders for the purchase of Creso shares. That was done using the Suspense Account, save for three occasions when some bids were placed via the Suspense Account and some via the client account of Tyson Scholz. At the time of receiving the client orders, Mr Blumenthal had sought and obtained from the relevant EverBlu clients their authorisation to execute the orders in a manner that he considered appropriate.
- 18 The trades were disaggregated with the intention, on the part of Mr Blumenthal, of representing to the market that there were more individual bidders for Creso shares than in fact existed, so as to create, or cause the creation of, a false or misleading appearance with respect to the market for Creso shares. The parties are agreed that the conduct was likely to have had the effect of creating, or causing the creation of, a misleading appearance with respect to the number of market participants actively trading Creso shares.
- 19 As mentioned, Mr Blumenthal was, indirectly, a substantial Creso shareholder and a member of its board. Notwithstanding his obligations to adhere to EverBlu’s relevant policies which prohibited such conduct, Mr Blumenthal used his capacity as a broker at EverBlu to place trades for Creso shares in the disaggregated manner referred to above.

20 In or around March 2021, Mr Blumenthal caused Creso to separately engage Mr Scholz and Aldo Sacco to provide Creso with promotional and marketing services. Mr Sacco was also engaged by Creso to consult and to provide market data, market research and market intelligence, which services were to be provided to Mr Blumenthal on behalf of Creso. Mr Sacco was also to promote Creso via his professional and social media network. Both Mr Sacco and his main trading entity were clients of EverBlu.

21 The agreement between Creso and Mr Sacco was not in writing. Mr Sacco did not provide Mr Blumenthal with any formal reports detailing the services he provided.

22 During the relevant period, Mr Sacco, via his company Nandil Pty Ltd, issued invoices to Creso totalling \$1,237,500 for his marketing and promotional services. Those invoices were paid by Creso after having been approved by Creso's board of directors on Mr Blumenthal's recommendation.

23 Prior to his engagement by Creso, Mr Scholz was an existing EverBlu client. During the relevant period, via his companies SV4T Investments Pty Ltd and EWOLF Enterprises Pty Ltd, Mr Scholz issued invoices to Creso totalling \$2,013,000. Those invoices were paid by Creso after having been approved by Creso's board of directors on Mr Blumenthal's recommendation.

24 During the relevant period, Mr Blumenthal, via his company Anglo Menda, loaned Mr Scholz \$7,125,460 to fund the purchase of Creso shares, whilst Mr Scholz was providing Creso with marketing and promotional services. Mr Blumenthal charged Mr Scholz \$712,546 in interest on the loans. The financial relationship between Mr Blumenthal and Mr Scholz was not disclosed to the board of Creso from May 2021 to the end of the relevant period. Disclosure of the relationship was made by way of letter from Mr Blumenthal to the board of Creso in September 2022. Also, Mr Blumenthal failed to exclude himself from the board of Creso when the board decided to approve the payment of Mr Scholz's invoices to Creso.

25 I am satisfied that in engaging Mr Scholz and Mr Sacco on behalf of Creso, Mr Blumenthal failed to:

- (1) carry out adequate due diligence as to the capacity of those persons to perform the contracted services with Creso;
- (2) document the contracted services in writing;

- (3) require measurable deliverables such that the service provision could be objectively assessed;
- (4) require detailed invoices documenting the services provided;
- (5) keep any record of the services being provided to Creso by Mr Sacco and Mr Scholz; and
- (6) assess whether the contracted services provided by Mr Sacco and Mr Scholz represented value for money for Creso.

The contraventions

26 Mr Blumenthal admitted, and I am satisfied, that the conduct summarised above and set out in further detail in the statement of facts amounts to contraventions of the following provisions of the Corporations Act:

- (1) Section 1041B(1)(b) (ie conduct that has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance with respect to the market for, or the price for trading in, financial products on a financial market in Australia) by directing or causing single client bids of significant volume to purchase Creso shares to be disaggregated into two bids intending thereby to represent to the market that there were more individual bidders of Creso shares than in fact existed;
- (2) Section 180(1) (ie as a director or other officer of a corporation failing to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in that position) in respect of:
 - (i) EverBlu by engaging in conduct that was in breach of a number of EverBlu's policies and causing EverBlu to be in breach of its obligations under s 912A of the Corporations Act through his involvement in EverBlu's breaches of its general obligations, which jeopardised EverBlu's interests including by creating a real risk of regulatory action; and
 - (ii) Creso by causing it to engage Mr Scholz and Mr Sacco to provide consultancy, promotional and marketing services to it and, in the absence of sufficient due diligence, documentation and imposition of measurable deliverables, authorising and coordinating its payment of invoices totalling more than \$3 million; and

(3) Section 181(1)(a) (ie as a director or other officer of a corporation failing to exercise their powers and discharge their duties in good faith and in the best interests of the corporation) by failing to avoid the conflict of interest between the advantage he stood to gain and the interests of Creso, in circumstances where he benefited from Creso's payments to Mr Scholz by enhancing Mr Scholz's ability to repay loans advanced by Anglo Menda, and where he failed to disclose his conflict of interest to the board of Creso and exclude himself from the board's approval of Mr Scholz's invoices.

The agreed penalty, disqualification and costs

27 ASIC and Mr Blumenthal agreed that for the contraventions of ss 1041B(1)(b), 180(1) and 181(1)(a) of the Corporations Act, the Court should make declarations of contravention pursuant to s 1317E and an order for a pecuniary penalty pursuant to s 1317G. ASIC and Mr Blumenthal agreed that an aggregate penalty of \$850,000 for the many contraventions is an appropriate amount for the Court to order Mr Blumenthal to pay.

28 By reason of the ss 180(1) and 181(1)(a) contraventions, the parties also agreed that the Court should make an order pursuant to s 206C of the Corporations Act disqualifying Mr Blumenthal from managing corporations for five years.

29 Mr Blumenthal also agreed to pay ASIC's litigation costs in the sum of \$100,000.

30 I note that Mr Blumenthal entered into the enforceable undertaking and he has undertaken to pay at least the sum of \$150,000 towards ASIC's investigation costs to be directed by ASIC pursuant to s 91 of the ASIC Act.

31 By the enforceable undertaking, Mr Blumenthal has undertaken that he will not provide Financial Services (as defined in Div 4 of Pt 7.1 of the Corporations Act), carry on a Financial Services business or perform any function involved in the carrying on of such a business including as an officer, manager, employee, contractor or a Responsible Manager of an entity carrying on a Financial Services business for a period of five years. The undertaking also provides that in the event that Mr Blumenthal intends to re-enter the Financial Services industry after the five-year period has elapsed, he undertakes to complete further professional training in areas deemed appropriate by ASIC prior to such re-entry.

32 Mr Blumenthal has not been found by a court to have engaged in similar conduct in the past.

Disqualification analysis

33 In *Gillfillan v ASIC* [2012] NSWCA 370; ACSR 460 at [330] it was said that a pecuniary penalty should be imposed only if an order for disqualification is an inadequate or inappropriate remedy. That means that the Court should consider disqualification before considering penalty: *ASIC v Forex Capital Trading Pty Ltd* [2021] FCA 570 at [112].

34 There are two preconditions, relevant here, to the making of an order for disqualification pursuant to s 206C of the Corporations Act. First, a declaration of contravention of a corporations/scheme civil penalty provision must have been made pursuant to s 1317E: s 206C(1)(a)(i). I accept that I should make such declarations in this case.

35 Secondly, the Court must be satisfied that the disqualification is justified: s 206C(1)(b). In order to determine whether disqualification is justified, the Court may have regard to “the person’s conduct in relation to the management, business or property of any corporation” (s 206C(2)(a)), together with “any other matters that the Court considers appropriate” (s 206C(2)(b)).

36 The principles which guide the exercise of the Court’s power to order disqualification pursuant to s 206C of the Corporations Act, were identified in *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq)*; *ASIC v Adler* [2002] NSWSC 483; 42 ACSR 80 (known as the “Santow principles”) to which I have had regard.

37 Mr Blumenthal has committed corporation/scheme civil penalty contraventions in relation to two companies. He was the chairman of each of them.

38 The contraventions are interrelated. They each had their source in Mr Blumenthal’s large shareholding in Creso, his position as the chairman of a financial services licensee with a capacity to employ trading strategies, and his intention of presenting a false or misleading picture to the market for Creso shares. The contraventions concerned fundamental obligations by a senior officeholder in each corporation and, in the case of EverBlu, a senior officeholder who oversaw and participated in the stockbroking services that it provided.

39 I accept that I should also have regard to the s 1041B(1)(b) contraventions (pursuant to s 206C(2)(b)), as those contraventions go “hand in hand” with the ss 180 and 181 contraventions and also go to the heart of the financial system and the necessity for public confidence in it.

40 The agreed disqualification order here serves both specific and general deterrence, directed towards Mr Blumenthal and similarly placed professionals. It should be set at a level that both deters Mr Blumenthal and similarly placed professionals, and also demonstrates to the broader community that serious consequences are imposed for contraventions to ensure there can be confidence in the financial system.

41 I am satisfied that there is ample basis to order the five year disqualification from managing corporations which ASIC and Mr Blumenthal have agreed. Such an order is entirely justified and appropriate.

Pecuniary penalty analysis

42 The applicable principles are well rehearsed, were common ground in this case, and need not be restated.

43 Section 1317G of the Corporations Act provides that the Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision. The preconditions are, first, that a declaration of contravention has been made pursuant to s 1317E: s 1317G(1)(a).

44 In relation to corporations/scheme civil penalty provisions (being ss 180(1) and 181(1): s 1317E(3)), the second precondition is that they must “materially [prejudice] the interests of the corporation” (s 1317G(1)(b)(i)), “materially [prejudice] the corporation’s ability to pay its creditors” (s 1317G(1)(b)(ii)) or be “serious” (s 1317G(1)(b)(iii)).

45 In relation to financial services civil penalty provisions (being s 1041B(1): s 1317E(3)), the second precondition is that they must “materially [prejudice] the interests of acquirers or disposers of the relevant financial products” (s 1317G(1)(c)(i)), “materially [prejudice] the issuer of the relevant financial products, or if the issuer is a corporation, scheme or fund, the members of that corporation, scheme or fund” (s 1317G(1)(c)(ii)) or be “serious” (s 1317G(1)(c)(iii)).

46 I am satisfied that the ss 180(1) and 181(1)(a) contraventions in this matter satisfy each of ss 1317G(1)(b)(i) and (iii), and that the s 1041B(1)(b) contraventions here satisfy s 1317G(1)(c)(iii). With regard to whether the contraventions were serious, there was a significant degree of departure by Mr Blumenthal from the requisite standard of care and diligence. See *Vines v ASIC* [2007] NSWCA 126; 63 ACSR 505 at [105] and [229].

47 Section 1317G(3) provides that the pecuniary penalty applicable to the contravention of a civil penalty provision by an individual is the greater of: (a) 5,000 penalty units; and (b) three times the benefit obtained or detriment avoided if the Court can determine that value. The parties were agreed, and I cannot gainsay, that the value cannot be determined in this case. Accordingly, the maximum penalty is 5,000 penalty units per contravention.

48 The dollar value of a penalty unit is fixed by s 4AA of the *Crimes Act 1914* (Cth). During the relevant period, the dollar value was \$222. Accordingly, the maximum penalty for each of Mr Blumenthal's contraventions is \$1,110,000. The theoretical maximum penalty for all of Mr Blumenthal's contraventions (which total 18 in number) is therefore \$19,980,000. However, in cases where the total applicable maximum penalty is not meaningful, as here, the appropriateness of a given penalty may be best assessed by reference to other factors: *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [157].

49 Civil penalties are imposed primarily, if not solely, for the purpose of deterrence: *Australian Building & Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 at [15]. A penalty must have the necessary "sting or burden" to secure "the specific and general deterrent effects that are the *raison d'être* of its imposition": *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 at [116]. Where the parties have jointly proposed a penalty, as here, the question is whether that figure is within the permissible range of appropriate penalties: *Minister for Industry, Tourism and Resources v Mobile Oil Australia Pty Ltd* [2004] FCAFC 72; 26 ATPR 41-993 at [51].

The s 1041B(1)(b) contraventions – misleading the market

50 There were 14 contraventions of s 1041B(1)(b). It is not appropriate to treat the multiple contraventions as one for the purpose of determining the statutory maximum: *ASIC v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 at [132]. However, the course of conduct principle is applicable in relation to the s 1041B(1)(b) contraventions because the facts and elements of the contraventions are the same – there is a significant interrelationship between the legal and factual elements of each contravention: *ASIC v Employure Pty Ltd* [2023] FCAFC 5; 407 ALR 302 at [51]. Although each is a contravention in its own right, they are individual instances of the putting into effect of a trading strategy with the intention of informing the market of active trading in Creso shares by more bidders than actually existed.

Applying the course of conduct principle, there is a legitimate basis for holding that the need for deterrence, both personal and general, can be encompassed in the one penalty.

51 The context in which the s 1041B(1)(b) contraventions occurred includes Mr Blumenthal's senior position at EverBlu and directorship of Creso. The contraventions were serious, deliberate, repeated and occurred over a period of around eight months. These are matters that justify the need for a significant penalty.

52 As against that, Mr Blumenthal's acknowledgment of wrongdoing and his cooperation with ASIC stand to his credit and indicate that the object of specific deterrence in setting an appropriate penalty has less of a role than it would otherwise have. After detection of the wrongdoing, at a relatively early stage Mr Blumenthal demonstrated a realisation that his conduct was wrong. That included by his informing and apologising to the board of Creso, agreeing to the enforceable undertaking, negotiating and agreeing the statement of facts, and agreeing to appropriate orders.

The s 180(1) contraventions – as a director of EverBlu

53 The contravention of directors' duties by Mr Blumenthal as a director of EverBlu is serious. There are at least two reasons, as jointly submitted by the parties, why that is so.

54 First, it was Mr Blumenthal's conduct that placed EverBlu in contravention of its obligations. For example, EverBlu breached its general licensee obligations to do all things necessary to ensure financial services were provided efficiently and fairly (s 912A(1)(a)), it did not have in place adequate arrangements for the management of conflicts of interest (s 912A(1)(aa)), and it did not comply with the financial services laws (s 912A(1)(c)). EverBlu accepted its contraventions and also concluded an enforceable undertaking under s 93AA of the ASIC Act.

55 Secondly, the contraventions played a role in Mr Blumenthal's methodology of seeking to create a false or misleading appearance of active trading in Creso shares. To do so, Mr Blumenthal had to disregard the requirements of EverBlu's various policies that were in place to protect against such conduct.

The s 180(1) contraventions – as a director of Creso

56 The contraventions of directors' duties by Mr Blumenthal as a director of Creso are also serious. There were two such contraventions, one for Mr Scholz's and one for Mr Sacco's respective engagements. Given the similarity of the tasks they each performed on behalf of

Creso, and Mr Blumenthal's common intention and method in acquiring their services, the parties submitted that the totality principle is engaged with respect to these two contraventions. That is an acceptable approach.

57 It is not suggested that Mr Scholz and Mr Sacco did not provide (as applicable) consultancy, promotional and marketing services to Creso. However, they charged Creso a combined total of \$3,250,500 with there being no metrics put in place to enable the Creso board to assess the value obtained for the money paid. The invoices did not set out the services actually performed. No reports from Mr Scholz and Mr Sacco were sought or provided.

The s 181(1)(a) contraventions – as a director of Creso

58 The failure to put the Creso board in a proper position to make an informed choice as to Mr Scholz's engagement is compounded by Mr Blumenthal's failure to inform the board that he had a direct conflict of interest with respect to Mr Scholz given that Creso's payments to Mr Scholz enhanced Mr Scholz's capacity to repay loans advanced by Anglo Menda (the sole director and ultimate shareholder of which was Mr Blumenthal). Mr Blumenthal also failed to exclude himself from the approval of Mr Scholz's invoices by the Creso board.

Conclusion

59 As mentioned, Mr Blumenthal agrees that he should be disqualified from managing corporations for five years and I am satisfied that an order to that effect should be made. Thus, the risk of further contraventions by him during that period is mitigated. This consideration should be considered together with that of the extra-curial consequences to which Mr Blumenthal is subject, namely his enforceable undertaking to not provide financial services, carry on a financial services business or perform any function involved in the carrying on of a financial services business, for a period of five years, arising from the same factual circumstances.

60 The parties agreed, and I am satisfied, that the circumstances of the case necessitate more than disqualification. The contraventions are serious and interrelated, including because the contravention of s 180 relating to Mr Blumenthal's role as a director of EverBlu enabled the contraventions of s 1041B(1)(b), which contraventions involved contravention of s 180(1) and s 181(1) by Mr Blumenthal as a director of Creso. There is also the object of general deterrence that must guide the proper outcome.

61 I am satisfied that the agreed quantum reflects a balancing of relevant factors including (1) the seriousness of the contraventions, (2) the period of contravening conduct, (3) the difficulty of detection of such contraventions, (4) the risks posed to the two corporations, one of which was listed, (5) Mr Blumenthal’s cooperation with the regulator once the contraventions came to light and the remorse he has since shown, and (6) the extra-curial measure of deterrence represented by Mr Blumenthal’s entry into the enforceable undertaking. That quantum, ie \$850,000, is within an acceptable or appropriate range in all the circumstances.

Exception to disqualification under s 206G

62 Section 206G(1) of the Corporations Act states that “a person who is disqualified” may apply for leave to manage a corporation. In order to seek orders under s 206G contemporaneously with the hearing of the principal proceeding, Mr Blumenthal sought relief pursuant to s 1322 of the Corporations Act from the requirement of s 206G(2) that the application be served on ASIC at least 21 days prior to commencing the proceeding for s 206G relief. ASIC did not oppose that relief.

63 Such relief is competent in these circumstances: *Nenna v ASIC* [2011] FCA 1193; 198 FCR 32 at [43]-[44]. Mr Blumenthal provided ASIC with both an application and an affidavit in support of the application in draft in advance of the hearing for ASIC’s consideration. The parties agreed that leave pursuant to s 1322 is justified and that Mr Blumenthal’s proposed s 206G orders are appropriate. No purpose would be served in not granting the relief, and there is no appreciable prejudice or risk in doing so. I am accordingly satisfied that it should be granted.

64 The parties submitted, and I accept, that there are two primary risks that should guide relief in the form of an exception to disqualification under s 206C under s 206G. They are the risks that the person’s involvement in the management of corporations would pose, first, to the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards and, secondly, individuals that deal with companies, including consumers, creditors, shareholders and investors. See Santow principles (1) and (3).

Phillip Street Holdings Pty Ltd

65 The first company in respect of which Mr Blumenthal seeks an exception is Phillip Street Holdings Pty Ltd. He is the sole director and secretary of that company. It is a non-operating holding company that solely acts as trustee for the Phillip Street Trust. Mr Blumenthal and his family members are the eligible beneficiaries under the Trust. The sole activity of the Trust is

investing in listed and unlisted companies. It has no employees. It receives dividends or distributions from companies that it is a shareholder of but plays no role in managing the affairs of any of those companies.

66 As director of the company, Mr Blumenthal is responsible for making decisions as to the companies in which the trust invests. He has no ability to exercise powers in relation to the companies in which it invests. He is the only person who makes investment decisions on behalf of the Trust.

Oakphil Pty Ltd

67 The second company in respect of which Mr Blumenthal seeks an exception is **Oakphil** Pty Ltd. He is the sole director and secretary of that company. It is a special purpose non-operating holding company that acts solely as trustee for the Oakphil Family Trust. Mr Blumenthal and his family members are the primary beneficiaries under the Trust. Its sole activity is its investment in Oakley Capital Partners Pty Ltd. The Trust holds all the shares in Oakley Capital Partners.

68 Oakley Capital Partners is an Authorised Representative of Alpha Securities Pty Ltd which is the holder of an AFSL.

69 The Oakphil Family Trust, like the Phillip Street Trust, has no employees.

70 The concern that I raised with Mr Blumenthal's counsel during the hearing was that it appeared to me that as the sole director and secretary of Oakphil that holds all the shares in Oakley Capital Partners, the proposed exception from disqualification by way of leave to allow Mr Blumenthal to "manage the affairs of" Oakphil would give him effective control of Oakley Capital Partners, an Authorised Representative of a company holding an AFSL (Alpha Securities). Notwithstanding that the proposed exemption would prohibit Oakphil from managing the affairs of Oakley Capital Partners, I was concerned that Mr Blumenthal could nevertheless be too closely associated and involved with the provision of financial services products through the work of Oakley Capital Partners as an Authorised Representative of the holder of an AFSL.

71 To meet that concern, Mr Blumenthal proposed further limitations on what he can do in relation to Oakphil. Those additional limitations are reflected in order 9 of the orders that I made. I am satisfied that they give the necessary protection to the public, and reinforce what Mr Blumenthal has already undertaken not to do in the enforceable undertaking.

72 For those reasons I was satisfied that the leave that was sought under s 206G, subject to the conditions that I ordered, should be granted.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate: 

Dated: 17 April 2024