SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Gognos Holdings Ltd & Anor* [2017] QSC 207
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (Applicant) **v** **GOGNOS HOLDINGS LTD ACN 129 570 181** (First Respondent) **DYNAMIC AGRI TECH LTD ACN 060 891 796** (Second Respondent)
FILE NO/S:	SC No 9696 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	25 September 2017
DELIVERED AT:	Brisbane
HEARING DATES:	7 to 11 August 2017, further written submissions on 17 August 2017
JUDGE:	Bowskill J
ORDERS:	1. **The first respondent be wound up under section 461(1)(k) of the *Corporations Act 2001* on the basis that it is just and equitable to do so.** 2. **Michael John Hill and William James Harris of McGrath Nicol be appointed as joint and several liquidators of the first respondent.** 3. **The second respondent be wound up under section 461(1)(k) of the *Corporations Act 2001* on the basis that it is just and equitable to do so.** 4. **Michael John Hill and William James Harris of McGrath Nicol be appointed as joint and several liquidators of the second respondent.**
CATCHWORDS:	CORPORATIONS – WINDING UP - OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – where the companies have contravened the *Corporations Act 2001* by failing to lodge financial reports, report annually to members, hold annual general meetings and keep and produce accurate accounting records, and the contraventions are continuing – where the companies made untrue statements to the ASX and

misleading representations to investors, and there has been mismanagement in the conduct of the affairs of the companies – where the companies are not clearly solvent – where the companies did not contest, but did not concede most of the allegations as to past conduct – where the companies relied on recent changes to the directors of both companies, the provision of a $400,000 line of credit facility to reactivate the business of the companies, and undertakings to have the outstanding accounts prepared and audited, and by former directors not to seek or obtain office as directors for five years, in opposing the winding up orders – whether there is and remains a well-founded and justified lack of confidence in the conduct and management of the companies' affairs, giving rise to a real risk to the public interest that warrants protection – whether the companies should be wound up on the just and equitable ground

Corporations Act 2001 (Cth) ss 461(1)(k), 462(2)(e), 464(1), 201A, 319, 314, 250N, 286(1)

ASIC v Green Pacific Energy Limited (2006) 59 ACSR 142
Australian Securities and Investments Commission v ABC Fund Managers (2001) 39 ACSR 443
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2) (2013) 93 ACSR 189
Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd [2016] FCA 371
Australian Securities and Investments Commission v Chase Capital Management Pty Ltd (2001) 36 ACSR 778
Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2) [2016] FCA 544
Australian Securities and Investments Commission v Great Northern Developments Pty Ltd (2010) 242 FLR 444
Australian Securities and Investments Commission v Storm Financial Ltd (2009) 71 ACSR 81
Australian Securities Commission v AS Nominees Limited (1995) 62 FCR 504
Bowen v Stott [2004] WASC 94
Chapman v Rogers: ex parte Chapman [1984] 1 Qd R 542
Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd (2004) 9 VR 549
Hempseed v Ward [2013] QSC 348
Holborow v MacDonald Rudder [2002] WASC 265
In re Fildes Bros Ltd [1970] 1 WLR 592
Jeffrey v Associated National Insurance Co Ltd [1984] 1 Qd R 238
Kallinicos v Hunt (2005) 64 NSWLR 561
Manning v Cory & Sumner [1974] WAR 60
Mitchell v Burrell [2008] NSWSC 772
Paino v MDN Mortgages Pty Ltd [2009] NSWSC 898
Pearlbran v Win Mezz No 19 Pty Ltd [2009] QSC 292
Re Faymere Pty Ltd, Supreme Court of Queensland, Master

Weld, No 180 of 1985, 12 November 1986, unreported
Trinick as Liquidator of Forgione Family Group Pty Ltd (in liq), in the matter of Forgione Family Group Pty Ltd (in liq) v Forgione (2015) 106 ACSR 600
Van Reesema v Flavel (1992) 7 ACSR 225
Watkins v Christian [2009] QCA 101

COUNSEL: M Brady QC with K Slack for the applicant
T Hale SC with S McNeil and J Fitzgerald for the respondents

SOLICITORS: Australian Securities and Investments Commission for the applicant
Diamond Conway Lawyers for the respondents

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Introduction

[1] The Australian Securities and Investments Commission (**ASIC**) applies under ss 461(1)(k), 462(2)(e) and 464(1) of the *Corporations Act 2001* (Cth) for an order that the respondents, Gognos Holdings Ltd (**Gognos**) and Dynamic Agri Tech Ltd (**DAT**), be wound up, on the ground that it is just and equitable to do so.

[2] ASIC contends it is just and equitable to wind up the companies because there is a well-founded and justified lack of confidence in the management and conduct of the affairs of the companies, in circumstances where:

(a) both companies have contravened provisions of the *Corporations Act* by failing to lodge financial reports, report annually to members, hold annual general meetings and keep and produce accurate accounting records; these contraventions have not been remedied, despite ASIC's investigation and these proceedings, and are continuing;

(b) in addition, Gognos has contravened the Act in that it has failed to comply with the office holder requirements;

(c) Gognos and DAT made statements to the Australian Stock Exchange (ASX), about Gognos' performance under a payment deed (to satisfy listing pre-conditions) for which there was no proper or reasonable basis, and DAT made a statement to the ASX, about payment of an instalment by Gognos, which was untrue;

(d) persons on behalf of Gognos (principally Mr Maurice Manasseh, a (now former) director of Gognos and DAT) made representations to potential investors, about DAT listing on the ASX, and the financial benefit shareholders might derive from an ASX listing by DAT, based on promised product sales orders, and promised share subscriptions, which there is no realistic basis to believe will ever be received – demonstrating a need for investor protection;

(e) there are issues arising from conflicting explanations for inter-company transactions, variable share price offers and deficient record keeping;

(f) there has been a demonstrable lack of directorial rigour in the management and administration of the affairs of the companies, both in the past and in the context of recent events; and

(g) the companies are unviable, and not clearly solvent.

[3] ASIC's case was set out in detail in its submissions filed on 7 April 2017. The respondents' position, when their submissions in response were prepared at that time[1] was that they "strenuously refuted" ASIC's allegations; in so far as those allegations concerned contraventions of the *Corporations Act* it was said any such issues had either already been remedied, or would be by the time of the trial.

[4] However, at the trial, the respondents did not contest most of the factual matters alleged by ASIC, at least in so far as conduct up until July 2017 is concerned. Instead, the respondents relied on the following recent changes to contend that there is no basis – indeed it was submitted that it might be thought to be "irrational"[2] – to wind up the companies:

(a) new directors have been appointed to both companies, such that it is "under new management", and they would not be trying to defend the actions of the former directors;

(b) those former directors, Mr Manasseh and Mr De Andrade, have resigned and provided undertakings not to seek or obtain office as directors of the companies for a period of five years;

(c) of Mr Manasseh, the driving force behind the two companies, and the person largely responsible for inducing the investment of almost $7.7 million by shareholders in Gognos, in opening it was submitted he has been "cast adrift", effectively "thrown under the bus",[3] and the investors/shareholders have "struck back" and "taken over the management of … both companies";[4]

(d) the preparation of the outstanding accounts for both companies has progressed – although is not yet finalised;[5]

(e) consequently, the companies will, in the foreseeable future, be able to lodge audited financial reports, and hold AGMs;

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1 Respondents' submissions, dated 21 April 2017, but not filed until 4 August 2017.

2 T 5-32.

3 T 2-22.

4 T 1-8.

5 T 1-9.

(f) Mr Lissa, one of the new directors, through his company Property Magic Australia Pty Ltd, has offered to advance $400,000 to "reactivate" the companies; and

(g) the companies should be allowed to continue to operate with these arrangements in place, to enable investors the opportunity to recover their investments.

[5] ASIC contends that the recent changes do not provide an answer to its application and submits the court ought to have a justified *and current* lack of confidence in the management of the affairs of the companies. ASIC submits that the respondents' attempts "to distance themselves from the multifarious sins of their past and of the present time, has failed".[6]

[6] For the reasons set out in detail below, I am satisfied that it is just and equitable that the companies be wound up.

Legal principles

[7] The applicable legal principles were not in issue between the parties.

[8] The application is brought under s 461(1)(k) of the *Corporations Act,* which confers a discretion on the court to order the winding up of a company if the court is of the opinion that it is just and equitable to do so.

[9] ASIC's standing to bring the application, in connection with its investigation of the companies' affairs, was not disputed. Nor was it in issue that considerations of public interest properly inform ASIC's decision to apply to wind up a company on the just and equitable ground. In this regard, and in the circumstances of this case, the observations of Finn J in *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 at 530 are apt:

> "As a matter of obligation in our system of government the ASC, like all other agencies of government, is required to act in the public interest within its sphere of responsibility; cf the observations of McHugh JA in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191. For this reason, when bringing an application under the *Corporations Law,* s 464 to wind up a company, the ASC cannot be seen quite in the same light as an ordinary creditor or contributory when so applying. Its powers and purposes are not those of the private applicant. And it does not, or at least should not, have a private self-interest to pursue.
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> In bringing winding-up proceedings the ASC may well appear on occasions to be little more than the surrogate of other persons who are

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6 ASIC's written address (11 August 2017) at [12].

> interested in the relevant company's affairs either as creditors or contributories. But this will not always be so. **It can be the case, as here, that those interested in the company have not the desire or else the incentive to wind it up. They may, as here, positively oppose that step: cf *Re Walter L Jacob & Co Ltd*. It is in just such circumstances that the ASC's public interest responsibility is most pronounced** …"[7]

[10] His Honour also said (at 532) that "there is a distinct public interest in the ASC securing compliance with the *Corporations Law* as such. Its statutory object requires that of it".[8]

[11] The approach which Finn J adopted in that case (at 531) and which I adopt here, was that outlined by the English Court of Appeal in *Re Walter L Jacob & Co Ltd* (1988) 5 BCC 244 at 251:

> "where the reasons put forward by the petitioner are founded on considerations of public interest, the Court, if it is to discharge its obligation to carry out the balancing exercise, must itself evaluate those reasons to the extent necessary for it to form a view on whether they do afford sufficient reason for making a winding-up order in the particular case."[9]

[12] The opinion of the court, the basis of the exercise of discretion under s 461(1)(k), is one which must be formed at the time of hearing, and therefore having regard to the facts and circumstances of the companies which exist at that time;[10] although the past conduct remains relevant, as part of the overall factual matrix to be considered.

[13] I gratefully adopt the following summary of general principles from the decision of Moshinsky J in *Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2)* [2016] FCA 544 at [14]-[21]:[11]

> "14 The classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case: *Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [96].

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7 Emphasis added.

8 See also *Australian Securities and Investments Commission v Storm Financial Ltd* (2009) 71 ACSR 81 at [67] per Logan J.

9 See also *ASIC v Green Pacific Energy Limited* (2006) 59 ACSR 142 at [139] per Greenwood J.

10 *In re Fildes Bros Ltd* [1970] 1 WLR 592 at 597; *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* (2004) 9 VR 549 at [487].

11 Recently adopted by Barker J in *Australian Securities and Investments Commission v AGKM Green Pty Ltd* [2017] FCA 846 at [42]-[53].

15 Generally speaking, a company may be wound up on just and equitable grounds where there is a justified lack of confidence in the conduct and management of the company's affairs such as to give rise to a real risk to the public interest that warrants protection: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [55].

16 Warren J (as her Honour then was) identified three factors of central significance in *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at 469-470:

> First, there needs to be a lack of confidence in the conduct and management of the affairs of the company. Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company.

17 The first principle was explained by Sifris J in *Galanopoulos v Moustafa* [2010] VSC 380 at [32]:

> If, after examining the entire conduct of the affairs of the company, the conclusion is that there is a lack of confidence in the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company, that is sufficient to conclude that it is just and equitable that the company be wound up.

18 In respect of the second principle (risk to the public interest warranting protection), Gordon J said in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189 at [23]:

> [A] risk to the public interest may take several forms. For example, a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law. Again, there is an overlap between matters which would pose a risk to the public interest for the purpose of s 461(1)(k) and which are relevant to the appointment of a provisional liquidator. (Citations omitted.)

> 19 If a company is solvent, that may point against a winding up on the just and equitable ground, but it is not a bar. A case in which there have been numerous contraventions of the Act is one in which it is 'precisely the situation where a solvent company should be wound up': *Australian Securities and Investments Commission v Planet Platinum* [2015] VSC 682 at [95].
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> 20 In *Planet Platinum*, Efthim AsJ observed that a director cannot rely passively on others to advise him or her of the company's obligations, and cannot abrogate his or her responsibility to manage the company by asserting that someone else has been requested to do so on behalf of the company: [104]-[105]. His Honour held that the manner in which a company has been managed may justify its winding up even where the company is solvent: [106].
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> 21 Conversely, if there is good reason to believe that a company is either cash flow insolvent or balance sheet insolvent, whether or not the formal elements of s 459A of the Act have been satisfied, such circumstances can be taken into account under the just and equitable ground in any event as one of the factors to consider: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [58]."

[14] The respondents submitted that, in addition to the recent changed circumstances, which ought to allay any concerns the court might otherwise have in light of the past conduct relied upon by ASIC, the court could be satisfied by undertakings, from Mr Manasseh and Mr De Andrade, not to seek or obtain office as directors of either company for five years; or potentially other, "more rigorous" (but largely unspecified) undertakings;[12] as well as an undertaking to attend to the finalisation and audit of the financial accounts within a specified time period, during which the winding up application could be adjourned.

[15] The respondents also emphasised the need for the court to take into account the wishes of investors/shareholders in considering whether it is just and equitable that the companies be wound up.[13] In this regard, as well as in support of the solution proffered by the respondents that undertakings could be given, and the winding-up application adjourned for a period of time, particular reliance was placed on *Australian Securities and Investments Commission v Great Northern Developments Pty Ltd* (2010) 242 FLR 444 at [127].

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12 T 2-22, 2-24, 5-27, 5-41 to 5-43 (suggesting, on the last day of the trial, during submissions, an undertaking could be obtained from Mr Manasseh to resign as a director of Dynamic Fodder) and 5-63.

13 T 5-36.

[16] I accept that the wishes of investors, and the impact on them of a winding up order being made, are matters to be taken into account. Although that cannot be the overriding consideration – all factors must be taken into account: *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at [80].

[17] *Great Northern Developments* was a very different case from this one. In that case the application was brought by ASIC on the basis *only* of alleged contraventions of the *Corporations Act.* There were no allegations of mismanagement of the company, nor in relation to the solvency or otherwise of the company. The company was a property developer which raised finance by issuing debentures and promissory notes to investors. In relation to the debentures, ASIC alleged that the company had contravened s 727 (requiring a company which makes an offer of securities to lodge a disclosure document) and s 283AA (requiring a company that offers debentures to appoint a trustee and enter into a trust deed). There was a substantial dispute as to whether the company was offering securities (debentures) within the meaning of the Act, and therefore whether it was required to comply with ss 283AA and 727. White J found that it was, but that if it had entered into a trust deed, on his Honour's construction of s 708(14), a disclosure document would not be required (see at [40]). ASIC had also alleged contravention of s 601ED, on the basis the company was operating a managed investment scheme; but that argument was rejected by White J. At the hearing, the company, through its counsel, offered an undertaking to enter into a trust deed and appoint a trustee, should it be found that it had contravened s 283AA. White J accepted the contraventions of ss 727 and 283AA were serious, but said they did not warrant an order for winding up the company (at [127]). There was no allegation that the company was insolvent, nor any allegation that any investor was misled or that any promises to investors had not been honoured. White J was satisfied that, if the undertaking was honoured, there was no reason to think the company would commit further breaches of the Act (at [129]). It is in that context that his Honour said (at [130]):

> "The investors oppose a winding-up order. I am satisfied that a winding-up would not be in their interests. The public interest in ensuring compliance with the Act will be met by making the declarations of contravention of ss 283AA and 727 and accepting GND's undertaking…"

[18] The present case is more comparable to *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371. In that case, Beach J was satisfied the winding up orders sought by ASIC should be made, in circumstances where the companies were cash flow insolvent; his Honour had little confidence in the management of either company; the financial records of the companies were described as being in an unsatisfactory state, with substantial breaches of s 286 having occurred; the companies had been knowing participants in schemes that had facilitated the misappropriation of investors' funds; and the orders

were considered necessary in the public interest and to protect investors (his Honour observing that there was a chance for some potential recovery of the moneys presently lost at the behest of and after a full investigation of a liquidator) (at [10]-[15]). Beach J noted, at [16], that:

> "… investors … oppose liquidation. They would rather that a further opportunity be given to allow potential deeds of company arrangement to be put in place with a white knight taking over the developments and injecting value back into their investments. But in the events that have transpired, this is little more than wishful thinking. But even if that prospect had a sliver of reality, it does not outweigh the above concerns."

[19] *Australian Securities Commission v AS Nominees Ltd* was also a case, unlike *Northern Developments,* where investors *had* been misled. Finn J said to order the winding of the companies in that case was "the appropriate expression of the lack of confidence one must have in the directors of these companies in their conduct and management of the affairs of their companies". His Honour also said, at 533:

> "The one concern I have had in deciding to make this order is as to its possible effects on the beneficiaries of the trusts. I am persuaded, however, that short of granting no relief at all – and that is not an available option – the appointment of a liquidator is likely to provide the greatest protection to the beneficiaries that is possible in the circumstances. It is to be expected that further legal proceedings by or against the companies could ensue from any order I make.
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> Finally I should indicate that the respondents have submitted that rather than make such an order I should accept undertakings from them as to their future conduct, these undertakings being designed to redress – or at least address – past wrongs. I need not labour here why I regard such a course as inappropriate. The lack of confidence there must be in the management of these companies (and this has been exacerbated by the change in Ample's board), the degree to which the respondents have transgressed, and the need for effective external administration, provide reason enough for my refusal to entertain it."

[20] In *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 the Court was similarly urged to accept undertakings as to future conduct, rather than wind up the companies. In relation to this submission, Warren J (as her Honour then was) referred with approval to what Finn J said in *AS Nominees* (see at [126]), having earlier commented that the circumstances of the matter before her Honour might be said to be worse than in *AS Nominees,* and also said (at [130]):

> "… Having found that the public interest is invoked in the circumstances of this matter and given the serious ongoing breaches, indeed flagrant breaches of the requirements of the Corporations Act with respect to

> record and account keeping, I consider it entirely inappropriate that the defendants be allowed to continue. In the exercise of the discretion it would in my view be entirely contrary to the public interest to allow anything else."

[21] That reflects the view I have formed in this case, for the reasons set out below.

Factual background

ASIC's investigation

[22] In May 2015 ASIC commenced an investigation into suspected contraventions of the *Corporations Act* by Gognos, its officers and representatives, in the period from June 2011 and continuing. This was expanded, both in terms of the scope of the suspected contraventions, and to include the related company, DAT, in February 2016.[14]

[23] The investigation commenced following complaints from shareholders and investors in Gognos, including Mr Zwar, the solicitor who now acts for the respondents, Mr Blasenstein and Mr Moses, from whom the court heard evidence, and a number of others.[15] The s 19 examinations were conducted in December 2015. This application was filed in September 2016.

The business of the companies

[24] Gognos and DAT are both unlisted public companies. The companies have been run for the purpose of fundraising to pursue a business venture with the initial goal of listing DAT on the ASX and the broader goal of DAT carrying on a business manufacturing and selling a specific type of animal fodder production system internationally.

[25] The company now known as DAT emanates from a company incorporated in 1993 (Kilkenny Gold NL, later called Didasko Limited). One of the early directors of DAT, Mr John De Andrade, was an investor in a company called Almighty Fodder Ltd, which had developed the "technology to grow fodder in a machine".[16] Mr De Andrade, an engineer, then became involved in the development of it, and also became a director. In about 2008, Almighty Fodder ran into some difficulties, eventually being placed into liquidation, and Mr Manasseh, through DAT, took over the business of Almighty Fodder.[17]

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14 Keily (exhibit 1) [5] and [6].

15 Keily T 1-63.

16 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 13; exhibit MFK5 (s 19 examination of De Andrade) at p 5.

17 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 13-14; exhibit MFK5 (s 19 examination of Dr Andrade) at pp 6-7 and 9; exhibit MFK1 (s 19 examination of Lissa) at pp 10-12.

[26] Gognos was incorporated in 2008, initially as a more general investment company, of which Mr Nigel Purves, Mr Terry Shanahan and Mr Garry Lissa were directors, with Mr Manasseh, although not an office holder, sourcing investments for the company.[18] In fact Gognos' only business activity has been to raise funds, by way of the issue of shares to members of the public, to be used by DAT, in order to expand the business and operations of DAT, and to fund a proposed initial public offering (IPO) and listing of DAT on the ASX.[19]

[27] The business of DAT was, or was intended to be, the manufacture and distribution of "animal fodder production units", described in the replacement prospectus for DAT (dated 25 October 2010) as:

> "a hydroponic fodder production unit housed inside a purpose built 12 metre unit constructed of stainless steel, aluminium and glass. This unit is designed to grow fresh green organic fodder for foraging animal needs in a wide range of climatic conditions."[20]

[28] The respondents invited the court to find the business of the companies involves a real product which is innovative and has been enthusiastically received, attracting "a great deal of worldwide interest in the UAE and Argentina and otherwise".[21] I accept that the fodder unit is a real product, and also accept that those involved with the companies, including Mr Lissa, Dr Manfield and Mr Zwar, are enthusiastic about it and its potential. I decline to go so far as to find that it has been enthusiastically received or attracted a great deal of worldwide interest, because this could only be based on the assertions to that effect by those centrally and intimately involved in the company, by reference to the purported orders placed for fodder units, about which, given the circumstances (that none have been proceeded with, and there has only been a sale of one unit, in 2011, with none since 2012), there is, objectively, necessarily some circumspection.

The investment model

[29] The model used by Gognos and DAT was that:[22]

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18 Keily (exhibit 1), exhibit MFK4 (s 19 examination of Purves) at pp 9-11 and 15-16; exhibit MFK6 (s 19 examination of Manfield) at p 12; exhibit MFK1 (s 19 examination of Lissa) at pp 8-10 and 28-29; exhibit MFK2 (s 19 examination of Manasseh) at pp 11-13.

19 Keily (exhibit 1) at [122]; respondents' written submissions (11 August 2017) at [25]. See also the letter from DAT to Gognos dated 27 November 2009 (exhibit MFK70 to Keily (exhibit 1)) and MFK2 (s 19 examination of Manasseh) at p 9.

20 Keily (exhibit 1), exhibit MFK76, at pp 1677 and 1687.

21 T 5-24; respondents' submissions in support of this and other factual findings (17 August 2017).

22 See [19] of ASIC's written address. I have considered the parts of the s 19 examinations of Manasseh (MFK2) and Manfield (MFK6), as well as exhibits MFK160, 161, 162 (to Keily, exhibit 1), which are referred to in the footnotes to [19] of the written address, and am satisfied this is an accurate summary. The respondents did not submit otherwise in any event.

(a) investors were told that DAT would shortly (or within a certain limited period) list on the ASX;

(b) shares of Gognos were sold to investors on the basis that upon a listing of DAT on the ASX, each share would be "converted" into three DAT shares;

(c) for accounting purposes, investor-provided funds were recorded as being loaned to either DAT or its subsidiary, Dynamic Agri Tech Finance Pty Ltd (**DAT Finance**), and then loaned by either of those companies to **Dynamic Fodder** Pty Ltd.

[30] DAT is part of what was referred to as the "Dynamic group", which comprises DAT, DAT Finance and Dynamic Fodder. Dynamic Fodder acted as the "treasury" for the companies, being the only company within the group with a bank account.

[31] As at 30 September 2015, Gognos had 115 shareholders who had invested a total of $7,717,975 for 25,098,568 shares on issue.[23]

[32] Almost all the money investors paid to acquire shares in Gognos (apart from administrative costs associated with Gognos itself) was paid to Dynamic Fodder to fund the operations of DAT, including to pay costs associated with the attempted float. The money paid by an investor was first paid into Gognos' account, then transferred to Dynamic Fodder, or to a third party to pay the expenses of Gognos or one of the companies in the Dynamic group.[24] According to Mr Manasseh, the intention was not that that money would ever be repaid to Gognos, but rather that Gognos would be repaid in the form of shares in DAT, once DAT floated.[25]

[33] The investors have nothing to show for their investments. As Senior Counsel for the respondents acknowledged, "The money's gone. There's no doubt about that."[26]

[34] Although there are some investors who oppose the winding up of the company, on the basis that if the companies are wound up they will lose their money, ASIC submits that the fact is they have already lost their money. The respondents urge the court to give them the opportunity to turn things around, to try to recover something for the investors.

Office holders of Gognos

[35] As at 23 March 2017[27] and 4 August 2017[28] the directors of Gognos were recorded as being Maurice Showa Manasseh (appointed on 31 December 2013), John Charles De

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23 Keily (exhibit 1) at [257] and exhibit MFK145.

24 Keily (exhibit 1) at [279] and [281]-[284], exhibit MFK2 (s 19 examination of Manasseh) at pp 26-27, 42 and 134, and exhibit MFK6 (s 19 examination of Manfield) at pp 12-14.

25 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 135-136.

26 Respondents' oral submissions at T 5-31.

27 Keily (exhibit 2), exhibit MFK193.

Andrade (appointed on 22 January 2014) and Dominic Ka Kuen Sum (appointed on 12 January 2017, and who resides in Hong Kong). Mr Manasseh was also the secretary.

[36] As at 6 August 2017, and currently, the directors are recorded as Mr Sum; and Barry John Davis, Michael Zwar and Gary Lissa, each appointed on 31 July 2017.[29]

[37] Mr Zwar is a solicitor, and long-term associate of Mr Manasseh. Mr Lissa is an accountant, also a long-term associate of Mr Manasseh, as well as having provided accounting advice to the company for many years. Mr Zwar and Mr Lissa gave evidence at the trial; but there was no evidence from Mr Sum or Mr Davis; nor from Mr Manasseh or Mr De Andrade.

[38] Mr Manasseh and Mr De Andrade are shown as ceasing as directors on 31 July 2017.[30]

[39] The former directors of Gognos were Nigel Charles Purves (between February 2008 and December 2013); Mr Lissa (between February 2008 and April 2012); and Terence John Shanahan, who is recorded as having been a director between 6 February 2008 and 12 January 2017,[31] but who in fact died on 29 November 2013.[32]

[40] Although Mr Manasseh only became a director of Gognos in December 2013, as Mr Lissa said there is no doubt he was a shadow director prior to this.[33]

[41] Mr Manasseh was the secretary of Gognos from 31 December 2013 to 31 July 2017. Mr Zwar is now the secretary of Gognos.[34] Dr Russell Manfield thought he was the company secretary of Gognos, having signed a form to that effect,[35] but he is not.

Office holders of DAT

[42] As at 23 March 2017, the directors of DAT were Mr De Andrade (appointed on 12 November 2009), Matthew Thomas O'Leary (appointed on 24 September 2010) and Mr Manasseh (appointed on 12 November 2009).[36]

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28 Keily (exhibit 3), exhibit MFK199.

29 Zwar (exhibit 16), exhibit MZ-1.

30 Ibid.

31 Ibid.

32 Keily (exhibit 1), exhibit MFK26.

33 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 58.

34 Keily (exhibit 3), exhibit MFK199 (company extract as at 4 August 2017); Zwar (exhibit 16), exhibit MZ-1.

35 T 3-45 to 3-46.

36 Keily (exhibit 2), exhibit MFK194.

[43] As at 4 August 2017, ASIC's records show the following as the directors: Mr O'Leary; and Mr Lissa, Mr Zwar and Mr Davis, each appointed 17 July 2017.[37]

[44] Mr De Andrade and Mr Manasseh are recorded as ceasing as directors on 17 July 2017.[38]

[45] The current secretary is Dr Russell Manfield, appointed 21 April 2015. Dr Manfield was also the secretary from 20 October 2008 to 6 October 2011, and for part of this time he was also a director. Dr Manfield resigned as a director in October 2011, consequent upon his personal bankruptcy at that time.[39] His bankruptcy ended on 16 December 2014.[40]

[46] There are a large number of former directors of DAT, but recent former directors of DAT include Dr Manfield (who was a director between October 2008 and November 2009, and then again from March 2010 to October 2011), Mr Purves (between October 2008 and March 2010); and purportedly, Alexander Richard Martin, who is described as being a director between 24 September 2010 and 24 September 2010.[41] The anomaly of coincident dates is explained by Mr Martin lodging, in September 2014, a notification of his resignation, with effect from 24 September 2010, on the basis that his consent to join the board of the company was "procured pursuant to false, misleading and deceptive representations", particularised as a representation that the company he was agreeing to join was a "newly-incorporated and newly-listed entity on the Australian Stock Exchange".[42]

[47] Dr Manfield is an engineer, who in December 2015 described his role with DAT as doing "the technical stuff", working in with Mr Manasseh "who does the financial stuff".[43] Mr Manasseh was responsible for bringing in the money.[44] He did this by, in Dr Manfield's words, "tapping the Jewish network", the Jewish community of which Manasseh is a member.[45] According to Dr Manfield, neither Mr De Andrade nor Mr O'Leary were involved in the day to day management of DAT; that was the role of Dr Manfield and Mr Manasseh.[46] Mr Manasseh described Mr O'Leary as a

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37 Keily (exhibit 3), exhibit MFK200.

38 See also Keily (exhibit 3), exhibits MFK204 and MFK205.

39 Keily (exhibit 1) at [20]; Manfield (exhibit 23) at [3] and [4].

40 Keily (exhibit 1), exhibit MFK9.

41 Ibid.

42 Keily (exhibit 1) at [19] and exhibit MFK8.

43 Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at pp 4-5.

44 Ibid at p 11.

45 Ibid at pp 12 and 34.

46 Ibid at pp 18-19.

farmer, and as "the one who had the technology in the first place".[47] There was no evidence from Mr O'Leary.

[48] It emerged during Mr Zwar's cross-examination at the trial that the new directors of both Gognos and DAT may not have been properly appointed, having regard to each company's constitution. This is discussed below.

Relationship between the companies

Dynamic group

[49] DAT is the ultimate holding company for DAT Finance, owning 100% of its issued shares. As at 19 September 2016, the director and secretary of DAT Finance was Mr Manasseh, who was appointed 15 January 2009.[48] Mr Purves and Dr Manfield were formerly directors of DAT Finance. I proceed on the basis Mr Manasseh is still a director of DAT Finance, as it does not appear an updated company search forms part of the material before the court. Mr Manasseh said, at his s 19 examination, that he "had nothing to do with" this company, and was not aware he was a director of it.[49] In any event, DAT Finance is a dormant company, which Dr Manfield said would have been wound up by now if they had the money to pay the legal fees for that.[50]

[50] DAT Finance is the ultimate holding company for Dynamic Fodder, owning 100% of its issued shares. The current, sole director of Dynamic Fodder is Mr Manasseh, who was appointed on 4 February 2009. The previous directors were Dr Manfield and Mr Purves. The current secretaries are Dr Manfield and Mr Manasseh.[51]

[51] Dynamic Fodder is the trading entity within the Dynamic Group, or as Mr Manasseh described it, the "company that does the everyday work for the company" DAT.[52]

[52] One set of consolidated financial accounts is prepared for the three companies within the Dynamic group; and another for Gognos.

DAT and Gognos

[53] DAT has issued 72,900,000 shares, of which Gognos owns about 30.6 million, comprising:

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47 See also Keily (exhibit 1), MFK5 (s 19 examination of De Andrade) at p 12; and MFK6 (s 19 examination of Manfield) at p 18.

48 Keily (exhibit 1), exhibit MFK11.

49 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 30.

50 Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at pp 5-7; see also MFK2 (s 19 examination of Manasseh) at p 131.

51 Exhibit 11, company extract as at 7 August 2017.

52 Keily (exhibit 1), exhibit MFK2 (Manasseh's s 19 examination) at p 48; and MFK6 (Manfield's s 19 examination) at p 13. See also Keily (exhibit 1) at [58] and [59].

(a) 2,513,720 fully paid ordinary DAT shares; and

(b) 28,116,008 partly paid ordinary DAT shares.[53]

[54] There are inconsistent and somewhat confusing documentary explanations for the circumstances in which Gognos acquired its shares in DAT.

[55] The material includes reference to a Share Sale and Purchase Agreement entered into in October 2009, under which, it seems, Gognos agreed to sell the shares it then held in DAT Finance (then called Dynamic Agri Tech Pty Ltd) to DAT (then called Didasko), in exchange for being issued with 30,629,728 *fully paid* shares in DAT. The Share Sale and Purchase Agreement also provided for another company, Inquisitor Pty Ltd, associated with Mr Purves, to sell its shares in DAT Finance to DAT, in exchange for the issue of just over 13 million fully paid shares in DAT.[54] The final structure of the acquisition was later changed, "to provide an injection of capital into [DAT] within the foreseeable future and provide a new trading business to the Company".[55] Documents lodged with ASIC in 2010 show:

(a) in January 2010, DAT having a total of 48 million ordinary shares which are fully paid in the amount of just over $46.5 million; and

(b) in July 2010, a request for correction, among other things, so that the share structure is 19,883,992 fully paid ordinary shares and 28,116,008 partly paid shares; the amount paid on all shares on issue reduced to $10,223,156.08; and the amount unpaid on these shares increased to $13,778,846.92.[56]

[56] Beyond the statement referred to in Dr Manfield's letter to the ASX (referred to in footnote 55 above), the material does not explain how or why this change came about. In any event, Gognos was issued with the shares referred to in paragraph [53] above. The amount unpaid on the shares is the subject of a payment deed between Gognos and DAT, which is discussed commencing at paragraph [103] below.

[57] Another possible explanation for the acquisition of the shares arises from documentation which purports to evidence the loan of $1.6 million from Gognos to DAT Finance in 2009, which was to be repaid in the form of Gognos receiving the

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53 Keily (exhibit 1) at [29] and [132].

54 Keily (exhibit 1) at [134]-[135] and exhibit MFK62. Although objection was taken by the respondents to [135], on the basis that it purported to give secondary evidence as to the content of a document, in the absence of any contrary submission from the respondents as to the meaning and effect of the Share Sale and Purchase Agreement, I am satisfied this is a correct statement as to the apparent effect, at least in part, of this agreement.

55 Keily (exhibit 1), exhibit MFK69, letter Dr Manfield to Mr Seeto of the ASX, dated 24 August 2010, at points 8-10.

56 Keily (exhibit 1) at [144] and exhibits MFK67 and MFK68.

shares referred to in paragraph [53] above.[57] According to Mr Manasseh, notwithstanding he (and Dr Manfield and Mr Purves) signed a letter dated 23 September 2009 referring to the fact of the loan of $1.6 million having been made, and that it had been repaid by the issue of the shares, this in fact never happened.[58]

[58] There is then another level of confusion, because there appears to be a further financing agreement between Gognos and DAT Finance in 2010, pursuant to which Gognos is said to have loaned DAT Finance $1.8 million (comprised of an earlier loan of $1.6 million and then a further loan of $200,000), taking a fixed and floating charge over the assets of DAT Finance to secure the loan.[59] As Mr Keily, the ASIC investor, observes at [346] of his affidavit, it is not apparent whether the $1.6 million loan referred to in the 2010 agreement is the same as that referred to in the 2009 letter, or whether there was a further loan.[60] Mr Lissa, who was a director of Gognos in this period, and provided accounting advice to Gognos, was not able to explain this.[61] Mr Manasseh did not seem able to explain it either, other than to say the money was never paid by Gognos "in one hit", "it was in dribs and drabs", and it never went to DAT Finance really – it all went to Dynamic Fodder.[62] It was never repaid.

[59] At some point, the purported loan from Gognos to DAT Finance was apparently assigned to a company called ACN 147 783 462 Pty Ltd, which I do not understand to be related to either Gognos or any of the Dynamic group companies. This company does not appear to have paid anything for the assignment of the debt. Again, neither Mr Manasseh nor Mr Lissa could provide a clear explanation.[63] Gognos continues to hold the charge over DAT Finance's assets,[64] but that security is meaningless since DAT Finance has no assets and is a dormant company.[65]

[60] The material also includes a Deed of Agreement dated November 2013 between DAT and Gognos, which refers to a loan of $1.6 million, and further loans from Gognos as at 30 June 2013 totalling almost $6 million (including the $1.6 million).[66] This

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57 Keily (exhibit 1) at [335]-[341], and exhibits MFK166 (letter signed by each of Dr Manfield, Mr Purves and Mr Manasseh) and MFK167 (share capital history of DAT), cf and cn at pp 2048 and 2058.

58 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 144-145.

59 Keily (exhibit 1), exhibit MFK168.

60 The letter of 23 September 2010 (Keily (exhibit 1), exhibit MFK166) suggests there were two separate transactions; whereas Mr Lissa seemed to indicate they would have to be the same: MFK1 (s 19 examination of Lissa) at p 86.

61 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at pp 74-76 and 81-88.

62 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 131-133; see also exhibit MFK1 (s 19 examination of Lissa) at pp 92-93 and 95.

63 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 139-141; exhibit MFK1 (s 19 examination of Lissa) at pp 82-84.

64 Keily (exhibit 1) at [348], [359] and exhibit MFK169.

65 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 76.

66 Keily (exhibit 1), exhibit MFK176.

agreement contemplates dealing with the loan moneys to that point by way of a "debt to equity swap", converting Gognos' partly paid shares in DAT into fully paid shares and, in consideration of Gognos continuing to fund DAT, DAT would issue a further 35 million ordinary shares to Gognos. Both of these were expressed to be "subject to shareholder approval". This never happened – Mr Manasseh described this arrangement as having been "scrapped".[67]

[61] The agreement also provided for payment of an annual consultancy fee to Gognos of $500,000, which would only be payable on completion of an IPO. That fee has never been paid, although does appear in the draft accounts of Gognos as "income" (this is discussed further below).

[62] The documentation purporting to evidence the treatment of moneys transferred from Gognos to DAT (or DAT Finance), via Dynamic Fodder, is confusing to say the least. I am not alone in that view, as it is apparent from the s 19 examinations that the office holders of the companies did not have a clear, if any, understanding either.[68] To use Mr Lissa's words, "It's messy. It's messy".[69] The bottom line, for present purposes, is that investors paid just over $7.7 million to Gognos. That money went to Dynamic Fodder, to fund the operations of DAT. In the books, that was recorded in various ways as a loan to DAT or DAT Finance, with the intention being that the "loans" would be repaid by the issue of shares in DAT once it floated. There are conflicting explanations for how Gognos came to own its current shares in DAT. There was no attempt by the respondents, either by evidence or in their submissions, to explain these matters.[70]

Failed listing

[63] It was a central element of the fundraising scheme that DAT would be listed on the ASX, and that people who invested in Gognos would receive three shares in DAT, for every one share held in Gognos, when DAT floated.

[64] On 27 July 2010 solicitors for DAT wrote to the ASX seeking in-principle approval for an ASX listing proposed for August 2010.[71] A prospectus in relation to the IPO for DAT was lodged with ASIC in September 2010.[72] On 25 October 2010 a replacement prospectus was lodged.[73] Following this, between November 2010 and 10 August 2011, ten supplementary prospectuses were lodged by DAT with ASIC,

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67 Keily (exhibit 1) at [376]-[378] and [380]; exhibit MFK2 (s 19 examination of Manasseh) at p 142.

68 See also Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at pp 58-60 and 64.

69 Exhibit MFK1 (s 19 examination of Lissa) at p 96.

70 Cf the respondents' original submissions (21 April 2017) at [162]-[165], which provides no explanation, and which were not relied upon in any event.

71 Keily (exhibit 1), exhibit MFK71.

72 Keily (exhibit 1) at [148] and [161].

73 Keily (exhibit 1) at [165] and exhibit MFK76.

the main reason for which seems to have been to extend the closing date of the offers under the replacement prospectus.[74]

[65] On 6 October 2011, DAT withdrew its application to list on the ASX, as it was unable to raise the minimum subscription to list, which at that time was $4.55 million.[75] DAT has lodged no further prospectuses since 2011.

[66] The evidence supports the submission of ASIC that the fates of the companies, Gognos and DAT, are interdependent, in that DAT is entirely dependent on Gognos investors for funding; and Gognos is entirely dependent on DAT successfully listing on the ASX in order to return any value to shareholders.[76] The evidence also supports a finding that a float of DAT cannot happen in the foreseeable future (apart from anything else, it has to have at least three years of unqualified audits, which is unlikely in the foreseeable future).[77]

Recent events

[67] As already noted, at trial the respondents opposed ASIC's application, not on the basis of an active challenge to any of the matters relied upon by ASIC in terms of past conduct, but on the basis of recent changes in the management of the companies, advances in the preparation of the companies' accounts, and the provision of the $400,000 facility. I will address the evidence concerning the recent changes below, but propose to first deal with the other bases of ASIC's application. Although the respondents did not contest the majority of ASIC's case, based on conduct prior to 17 July 2017, they did not concede those matters.[78] It is therefore necessary to address them by reference to the evidence; which is required in any event as part of the task of the court in evaluating the overall factual matrix.

Contraventions of the *Corporations Act*

Contraventions of the Act by Gognos

[68] I am satisfied on the evidence that Gognos has contravened, and in the respects indicated below, continues to contravene, the *Corporations Act* in various ways. I also accept that these provisions, which Gognos (and, as discussed below, DAT) has

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74 Keily (exhibit 1) at [149] and [168]. I note that there was an objection taken to [168], on the basis that it was secondary opinion as to the content of documents. Having reviewed the exhibits MFK78, 79, 80, 81, 82, 83, 84, 85, 86 and 87, I am satisfied the summary in Keily at [168] – as to the apparent main objective of the supplementary prospectuses – is a fair one.

75 Keily (exhibit 1) at [150], [173] and MFK93 and MFK87 (tenth supplementary prospectus), referring to the minimum subscription amount of $4.55 million.

76 ASIC's written address at [23]-[24].

77 Zwar at T 3-7; Manfield at T 3-68; Lissa at T 4-13.

78 T 5-34.

contravened are important provisions, aimed at ensuring the affairs of companies are appropriately regulated for the protection of shareholders and the public.[79]

Failure to comply with the office holder requirements

[69] Section 201A(2) of the Act requires a public company to have at least three directors, at least two of which must ordinarily reside in Australia.

[70] I accept the analysis of ASIC that from 27 April 2012 until at least 12 January 2017 Gognos did not have three directors as required by s 201A.[80] Relevantly, in that period:

(a) from 27 April 2012 to 29 November 2013 only Mr Purves and Mr Shanahan were directors (as noted above, Mr Shanahan remained recorded on ASIC's records as a director until 12 January 2017, but in fact he was deceased);

(b) from 29 November 2013 to 30 December 2013 only Mr Purves was a director;

(c) from 31 December 2013 to 21 January 2014 only Mr Manasseh was a director;

(d) from 22 January 2014 to 11 January 2017 only Mr Manasseh and Mr De Andrade were directors.

[71] The evidence from Mr De Andrade, given in his s 19 examination, was that he was not involved in or familiar with the affairs of Gognos, and that he was a director in "name only" to satisfy the minimum number of directors required.[81]

[72] On 12 January 2017 Mr Sum (a Hong Kong resident) was appointed a director – which, together with Mr Manasseh and Mr De Andrade, brought the number of directors to three.

[73] Although issues with the validity of the newest appointments emerged during the trial, for present purposes it seems the issue has resolved, such that there are now the requisite number of directors.

Failure to lodge financial reports with ASIC

[74] Section 292 of the *Corporations Act* requires that a financial report (as to which see s 295) and a directors' report be prepared for each financial year by all public companies. Section 319(1) requires the company to lodge the report with ASIC, within four months of the end of the financial year (s 319(3)). Contravening that requirement is an offence of strict liability (s 319(2)). Gognos has contravened, and continues to contravene, these provisions.

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79 ASIC's written address at [94].

80 ASIC's written address at [96]-[98].

81 Keily (exhibit 1), exhibit MFK5 (s 19 examination of De Andrade) at pp 57-60, 65-68 and 88.

[75] Financial reports for Gognos for the years ended 30 June 2010, 2011 and 2012 were all lodged past the deadline for lodgement.[82] The 2012 financial report was lodged over 12 months late, following commencement of an ASIC prosecution against Gognos.[83] Financial reports for the years ended 30 June 2013, 2014, 2015 and 2016 have not been lodged at all.[84]

[76] In the past, various reasons were put forward to ASIC to explain why the financial reports had not been prepared on time, or at all, including that preparation (and audit) of them was dependent on information being supplied by third parties – which seems to be a reference to DAT[85] – and also a lack of funds. By letter dated 2 March 2016 Mr Lissa, in his capacity as the accountant for Gognos, advised ASIC that "[a]t this point in time the company has no funds available to arrange for the completion and lodgement of the outstanding financial reports".[86] More recently, in a letter dated 5 June 2017, Mr Lissa advised ASIC that "there are no resources available at present to satisfy the notice requiring the company lodgement of financial statements and reports".[87] Lack of funds seems to have been the reason the work was not done prior to this also.[88]

[77] It seems something of an impasse developed, because Gognos' auditor (Mr Haines) was unable to complete outstanding audits of Gognos' accounts, as he required audited financial reports for DAT.[89] But the auditor of DAT (Mr Wildermuth) also required financial information, regarding Gognos, that he was not provided with.[90] With no money for either company to pay for the records to be prepared, and audited, they were left in limbo, to use Mr Lissa's word.[91]

[78] The audit of the 2013 financial statements for Gognos has not been completed, and Mr Haines has done no work in relation to the audits of the financial statements for Gognos for the 2014 or 2015 years (because the 2013 audit needs to be done first), and has not been paid for any of the 2013 audit work that his firm did for Gognos.[92]

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82 Keily (exhibit 1) at [79].

83 Keily (exhibit 1) at [95]-[97].

84 Keily (exhibit 1) at [78]; Keily (exhibit 2) at [8].

85 See, for example, Keily (exhibit 1), exhibits MFK31 (2010 report), 34, 36, 39 (2011 report), 46 (2013 report) and 50 (2015 report). See also MFK54 (letter from Lissa to ASIC dated 7 October 2015). See also Keily (exhibit 2) exhibit MFK196 (2016 report).

86 Keily (exhibit 1), exhibit MFK50; see also MFK52 (letter from Mr Lissa dated 31 May 2016, to similar effect).

87 Keily (exhibit 3), exhibit MFK202.

88 See Keily (exhibit 1) exhibit MFK1 (s 19 examination of Lissa) at pp 12-13.

89 Haines (exhibit 6) at [23] and [25].

90 Haines (exhibit 6) at [29]; Wildermuth (exhibit 9) at [20]-[27]. See also Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 41.

91 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 41. See also MFK2 (s 19 examination of Manasseh) at pp 163-164.

92 Haines (exhibit 6) at [31], [32] and [34].

He has not rendered any bills for that work, because, he said, "the work was not complete to our level".[93] Mr Haines has nevertheless indicated he is prepared to do the audit of the 2013 and 2014 accounts for Gognos, as well as being the auditor for DAT, if the records are made available to him.

[79] Draft accounts for Gognos have now been prepared, by Mr Lissa, for the financial years 2013 to 2016. Mr Lissa estimates it will take the auditor three to four months to complete the audit of Gognos and DAT; and that this will cost between $70,000 and $100,000.[94] The company cannot presently pay those fees. According to Mr Zwar, those who are funding the litigation will pay the auditor's costs.[95]

Failure to report to members annually

[80] Section 314(1)(a) of the *Corporations Act* requires a company to provide, annually, a financial report, directors' report and auditor's report on the financial report to members. As already noted, there has been no financial report for any of 2013, 2014, 2015 or 2016 prepared, and no auditor's report. There has been no reporting to members. Contravention of this provision, in the past and continuing, is established.

[81] It was previously contended, on behalf of the respondents, that Mr Manasseh had personally kept "Gognos investors" up to date by telephone or in person.[96] That submission was not maintained at the hearing; nor was there evidence to support it.[97] But in any event, such informal communication could not satisfy the statutory obligation in s 314.

Failure to hold AGMs

[82] Section 250N requires a public company to hold an annual general meeting, within 18 months of its registration and then annually, within five months of the end of its financial year. Contravention of this provision is also an offence of strict liability (s 250N(2A)).

[83] There has *never* been an AGM of Gognos.[98]

Failure to keep and produce accurate accounting records

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93 T 2-5.

94 Lissa (exhibit 26) at [30] and [31].

95 T 2-81; although cf submissions on the respondents' behalf which seemed to indicate Mr Lissa would bear those costs: T 5-29.4; 5-50.20.

96 Respondents' submissions (21 April 2017) at [65].

97 Other than from Mr Shellim, one of the investors called by the respondents, who referred to being kept up to date from time to time by Mr Manasseh (exhibit 30 at [16]).

98 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 16; and MFK2 (s 19 examination of Manasseh) at pp 21-23. See also the evidence of Manfield (exhibit 23) at [27].

[84] Section 286(1) of the *Corporations Act* requires a company to keep written financial records that:

(a) correctly record and explain its transactions and financial position and performance; and

(b) would enable true and fair financial statements to be prepared and audited.

[85] Failure to comply with this provision is also a strict liability offence (s 286(3)).

[86] This is the only one of the contraventions alleged by ASIC that the respondents maintained their submissions in relation to, arguing that Gognos has kept, and produced to ASIC, financial records.[99] In part, Gognos' submission is on the basis that s 286 does not oblige a company to "produce" "accurate" records, but merely requires a company to "keep" financial records. That submission is rejected because the obligation under s 286 requires the financial records that are kept to "correctly" record and explain a company's transactions and financial position and performance, and to enable "true and fair" financial statements to be prepared – fundamental to that obligation is that the financial records that are kept are accurate.

[87] The obligation under s 286 is a present, and continuing one – not one that can be met by retrospective action.[100] The obligation is one to keep accurate accounting records, so as to disclose the financial position of the company at all times and at any time. The preparation of documents in the course of this proceeding, in order to remedy non-compliance with s 319 (among other things) does not cure what is plainly, on the evidence, a failure over a number of years to comply with s 286.

[88] The evidence of Mr Lissa also supports a finding that Gognos has contravened s 286. In response to a notice issued by ASIC to Gognos requiring production of all management accounts showing the financial position of Gognos between 1 July 2012 and 1 September 2014, Mr Lissa, on behalf of Gognos, advised that "there are no management accounts since 1 July 2012".[101] Draft financial records that were produced, in response to ASIC's request for production of financial statements for the 2013 to 2015 financial years, were described by Mr Lissa as something he had "just run off" so that he had something to give ASIC, but which he said were "nowhere near complete"[102] and, in relation to the drafts for the 2013 year, "out of date".[103]

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99 See the respondents' submissions (21 April 2017) at [70]-[79].

100 See, for example, *Van Reesema v Flavel* (1992) 7 ACSR 225 at 229, referring to *Manning v Cory & Sumner* [1974] WAR 60 at 62; and *Trinick as Liquidator of Forgione Family Group Pty Ltd (in liq), in the matter of Forgione Family Group Pty Ltd (in liq) v Forgione* (2015) 106 ACSR 600 at [205].

101 Keily (exhibit 1) at [112] and [113] and MFK54.

102 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 43.

103 Keily (exhibit 1), exhibit MFK54 (letter from Lissa to ASIC dated 7 October 2015).

[89] The failure to lodge financial reports, as required by s 319, also demonstrates the failure to comply with s 286 – such records as were kept were seemingly not such as to enable true and fair financial statements to be prepared and audited.

[90] Apart from relying on their written submissions in relation to this matter, the respondents did not address the matter any further in the evidence during the hearing. I accept the submissions for ASIC that contravention of s 286 by Gognos has been established.[104]

Contraventions of the Act by DAT

[91] DAT has, similarly, contravened ss 319, 314, 250N and 286 of the *Corporations Act.*

Failure to lodge financial reports

[92] DAT is in an even worse position than Gognos. The financial report for 2008 was lodged almost two years' late, and the 2009 financial report was lodged one year late. The last financial report to be lodged was that for the 2010 financial year.[105] No financial reports for the years 2011 to 2016 have been audited, or lodged with ASIC.[106]

[93] Mr Wildermuth was the auditor for the Dynamic group between December 2008 and April 2016.[107] He resigned as auditor of the group in April 2016, due to personal health reasons. Although a draft audit report for the year ended 30 June 2011 was prepared, he could not complete the audit for that year, because he was waiting for various documents and information. The draft report indicated the Dynamic group had an operating loss before tax of $2,249,270 and a negative cash flow from operating activities of $2,247,896. An explanation of the going concern of the consolidated group noted that "the consolidated entity does not have a source of income and is reliant on equity capital or loans from third parties to meet their operating costs. These conditions indicate a material uncertainty that may cast significant doubt about the consolidated entity's ability to continue as a going concern" (at [21]). The draft report also recorded interest bearing, unsecured loans at call of $2,281,170 to the group from Gognos (at [22]). He has done no work for the 2012 to 2015 years. His firm is owed $25,620 in outstanding fees.

[94] Draft financial statements have now been prepared for Dynamic Fodder (as the trading entity for the Dynamic group, which includes DAT) for the financial years ended 2011 to 2016.[108] As already noted, Mr Lissa estimates it will take three to four

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104 ASIC's written address at [117]-[127].

105 Keily (exhibit 1) at [40] and [42].

106 Keily (exhibit 2) at [12].

107 Wildermuth (exhibit 9).

108 Scotney (exhibit 31) at [9], [12] and [19], and exhibit FS1.

months for Dynamic Fodder / DAT's and Gognos' accounts to be audited, at a cost of $70,000 to $100,000.

Failure to report to members annually

[95] There has been a failure by DAT to report to members annually, as required by s 314. That Mr Manasseh was liaising with some members personally and by telephone[109] is not in any way sufficient to meet this important obligation.

Failure to hold AGMs

[96] Contravention of s 250N of the Act by DAT is established on the evidence. DAT has not held an AGM since at least 2010.[110] Dr Manfield explained the failure to hold AGMs as a "funding issue"; Mr Manasseh explained it on the basis that there was "nothing to tell", because "all the shareholders who I know will speak to me every time".

Failure to keep and produce accurate records

[97] This again was the only one of the alleged contraventions which the respondents maintained their submissions in relation to,[111] although it was not a matter addressed during the hearing, either in terms of evidence or argument.

[98] The evidence establishes that, in response to a notice issued by ASIC requiring production of various financial documents and books for DAT for the 2011 to 2015 financial years, the only documents produced were those related to Dynamic Fodder, not DAT.[112] As noted above, DAT is part of a group of companies comprising DAT, Dynamic Fodder and DAT Finance. Of those, Dynamic Fodder is the trading entity, and the only one that has a bank account. The evidence was that only one set of consolidated accounts is produced for the group – in Dynamic Fodder's name. ASIC submits that even in those circumstances, each company remains obliged to keep written financial records that correctly record and explain its transactions and financial position and performance, relying on *Re Faymere Pty Ltd,*[113] in which Master Weld observed, at p 14:

> "I would not conclude that there is any impropriety in related or associated companies conducting their affairs through a single bank account **where appropriate accounting records are kept which enable**

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109 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 83.

110 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 54 and exhibit MFK6 (s 19 examination of Manfield) at p 67.

111 Respondent's submissions (21 April 2017) at [87]-[100].

112 Keily (exhibit 1) at [46] and [47].

113 Supreme Court of Queensland, Master Weld, No. 180 of 1985, 12 November 1986, unreported.

> **the isolation of accounting and financial analysis of the affairs of each of the companies to be made**."[114]

[99] I accept ASIC's submissions in this regard.[115] No authority was cited by the respondents to support the contention that production of Dynamic Fodder's financial records was sufficient to meet DAT's obligation under s 286. Accordingly, I find DAT has also contravened s 286.

Contraventions are continuing

[100] The contraventions of the Act by both Gognos and DAT are continuing. Notwithstanding ASIC's investigation commenced over two years ago; and the application for winding up was filed in September 2016, the contraventions have not been remedied.

[101] I accept that the preparation of the accounts of both companies has advanced. But it remains concerning that, despite the considerable passage of time, they have still not been completed, and are not yet up to date. Also concerning is the fact that these public companies have not been able to prepare financial accounts, and have them audited, for so many years, because of an inability to pay the fees for that to occur, notwithstanding the investment of over $7.7 million from members of the public.[116]

[102] The respondents submit it is in the public interest that the financial statements are audited and the accounts are completed.[117] That is accepted – but it should have happened some time ago, which would have resulted in AGMs being held, and information being provided to shareholders. The need for that to occur is not an answer to the winding up application, given all the other circumstances.

Representations to the ASX

[103] At some time between 24 August and 25 October 2010[118] Gognos and DAT entered into a payment deed, under which Gognos agreed to pay DAT the amount outstanding on its partly paid shares[119] – a total amount of $13,776,843.92 – in the following instalments:

(a) $4,779.721.36 by 31 December 2010;

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114 Emphasis added.

115 ASIC's written address at [137]-[142].

116 ASIC's written address at [246].

117 T 5-29.

118 The timing is not clear, but I reach this finding on the basis of the following. The payment deed bears the date 2010 (Keily (exhibit 1), exhibit MFK99); it is referred to, as a draft, in correspondence from DAT to the ASX dated 24 August 2010 (Keily (exhibit 1), exhibit MFK69); and is referred to as something "Gognos has entered into" in cl 11.3.3 of the replacement prospectus, which is dated 25 October 2010 (Keily (exhibit 1), exhibit MFK76). See also MFK100 (letter Gognos to the ASX dated 1 December 2010, referring to the deed).

119 As to which, see the discussion at paragraphs [55]-[56] above.

(b) $4,779,721.36 by 31 December 2011; and

(c) $4,217,401.20 by 30 December 2012.

[104] The evidence supports a finding that DAT and Gognos entered into the payment deed to satisfy the ASX that DAT was suitable to be listed, as one of the pre-conditions for listing imposed by the ASX was that DAT enter into a payment deed in respect of the partly paid shares.[120]

[105] Statements that Gognos intended to make the payments to DAT,[121] and that DAT expected Gognos to make the payments, albeit the date for payment of the first instalment was increasingly revised to a later date,[122] were made on a number of occasions, in particular in the various supplementary prospectuses that were lodged. The balances of Gognos' bank accounts as at each of those revised later dates[123] indicates there was no reasonable basis on which to make such statements.

[106] The situation becomes worse, however, because in a letter dated 27 April 2011 from DAT to the ASX, signed by Dr Manfield, DAT stated that it had received the payment of $4,779.721.36, which Gognos was due to pay by 31 December 2010, "in cleared funds".[124]

[107] This statement was clearly false. This finding is supported by:

(a) Mr Keily's analysis of Gognos' accounts, referred to in his affidavit (exhibit 1) at [197].

(b) Mr Manasseh's answers, given in his s 19 examination,[125] that although he was not aware of the payment deed, he could say that Gognos did not have the ability to pay $4.8 million to anybody, unless DAT floated – in Mr Manasseh's words, "no-one got any money".

(c) Mr Lissa's statement, in his s 19 examination, that Gognos did not pay any of the scheduled instalments, because it had "no funds to do it".[126]

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120 See Keily (exhibit 1), exhibits MFK 69 (letter DAT to the ASX dated 24 August 2010); MFK71 (letter McCullough Robertson, solicitors for DAT, to the ASX, dated 27 July 2010 at [19]-[21]); MFK73 (letter ASX to McCullough Robertson, dated 14 September 2010); also, Keily (exhibit 1) at [195] and MFK101 (email ASX to Tim Wiedman of McCullough Robertson).

121 For eg, Keily (exhibit 1), exhibit MFK100.

122 For eg, Keily (exhibit 1), exhibits MFK84, MFK85, MFK86 and MFK87.

123 Keily (exhibit 1) at [193]. As at 31 January 2011 the combined cash balance in Gognos' bank accounts was $92,459.67. After this, and up to 30 September 2011 (the revised date in the tenth supplementary prospectus), the balances never rose above $61,000.

124 Keily (exhibit 1), exhibit MFK90.

125 Keily (exhibit 1), exhibit MFK2 at pp 146 to 148.

126 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at pp 99 and 101.

(d) The statements – in the eighth, ninth and tenth supplementary prospectuses – that payment of the first instalment had been deferred to the revised "closing dates", 20 May 2011,[127] 15 July 2011,[128] and then 30 September 2011[129] – all of which post-date the letter of 27 April 2011, in which it was said that the first instalment had been received in cleared funds.

(e) Dr Manfield saying, in his s 19 examination, that DAT never received any of the instalments, because "the spirit" of the repayment plan was that the payment was predicated on the listing going ahead.[130]

(f) Dr Manfield's evidence in cross-examination at trial. In his affidavit, Dr Manfield said that each of the instalments, other than the first one, were conditional upon DAT listing on the ASX. Dr Manfield said he signed the 27 April 2011 letter (MFK90) "in full knowledge that the sum of $4,779,721.36 had already been received from Gognos".[131] But in cross-examination, after some prevarication from Dr Manfield about the wording of the 27 April 2011 letter, when it was put to him that in fact the money was not paid, his response was that:

> "And that sum wasn't paid, was it? --- Well, it was paid. That – the amount of money that Gognos had advanced to DAT in the lead up to the listing attempt, it totalled around about that number - $4.7million. Those funds had already been received"; and
>
> "Well, I suggest to you that, in fact, when one looks at the records, Gognos had only several thousand dollars in its bank account in the lead up to the end of December 2010? --- That may well have been the case, but my point is that the investors – the people who are invested in Gognos, that money had substantially passed on to DAT to around about that – that figure at the time of the float. So, in fact, that figure had been received – as it says here, it's cleared funds – by DAT."[132]

[108] Dr Manfield's explanation in this regard lacks credibility. It is clear none of the instalments under the payment deed were paid by Gognos to DAT. That the money received by Gognos from investors was passed onto DAT, as seems to have been the case, is not the same thing as a particular payment provided for under a deed entered into to satisfy one of the listing requirements of the ASX.

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127 Exhibit MFK85.

128 Exhibit MFK86.

129 Exhibit MFK87.

130 Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at pp 61 and 62.

131 Manfield (exhibit 23) at [28].

132 T 3-56.

[109] As well as revealing concerning conduct in the past, in terms of a willingness of DAT to make statements to the ASX that were not correct, Dr Manfield's treatment of it now, as a person with a proposed continuing central role in the conduct of the affairs of both companies, gives rise to ongoing concern.

[110] This issue was another matter in respect of which the respondents made no submissions at the hearing; although it was not conceded.

Representations to potential investors

[111] The next matter relied upon by ASIC is that, despite the fact that DAT withdrew its application to list on the ASX in October 2011, and that it has not lodged another application for listing since, persons on behalf of Gognos – principally Mr Manasseh – continued to make representations to investors to induce them to invest, about the financial benefits shareholders might derive from an ASX listing by DAT. ASIC contends that Mr Manasseh made representations to investors that significant funds were expected to be received from overseas, in the form of promised product sales, and promised share subscriptions, which would facilitate an ASX listing.[133]

[112] In his s 19 examination, when Mr Manasseh was asked what the "sales pitch was to the investors" after the prospectus was withdrawn in 2011, he said "[w]e told them that we were going to float very shortly, because we had documentation to prove that we were working to float", "[b]ecause we had a lot of people from overseas – were going to put money into the company". He said he would "show them the orders we have and I show them the commitment from people overseas who are going to give us the money".[134] Even after the withdrawal of the prospectus, he was still actively raising funds from people.[135]

Product sales orders

[113] Gognos and DAT engaged the services of a sales agent in Argentina, Mr Dov Libman, to generate sales of the fodder units. According to Mr Lissa, Mr Libman "has been attempting for a period in excess of five years to negotiate concluded sales with individuals and governments and statutory authorities in Argentina".[136]

[114] According to invoices produced to ASIC in the course of its investigation, the following sales orders have previously been given to DAT or Dynamic Fodder:

(a) Invoice dated 20 May 2013, directed to Gobierno de la Provincia de Buenos Aires, for the supply of 100 units, at a cost of US$160,000 each, making a total

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133 ASIC's written address at [153].

134 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 35-36, 60 and 62.

135 Ibid, at p 62.

136 Lissa (exhibit 26) at [9]; also Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 77-78.

of US$16 million. The invoice requires a minimum deposit of US$8 million (50% of the total invoice amount) within 30 days "to confirm order".[137]

(b) Invoice dated 23 August 2013, directed to Establecimiento La Redonda, for the supply of 30 units, for a total cost of US$4.8 million. Again, the invoice requires a 50% deposit to be paid within 30 days.[138]

(c) Invoice, presumably dated September 2013, directed to Ministerio de Produccion y Desarrollo – Gobierno de Catamarca, for the supply of 5 units, for a total cost of US$800,000; again requiring a 50% deposit within 30 days.[139]

[115] A letter on DAT letterhead, signed by Dr Manfield, addressed to Mr Manasseh, dated 17 August 2015, purportedly lists orders from a further six customers, for sales totalling a further USD $11.32 million. The total of the purported orders due was USD $32.12 million.[140]

[116] One of the additional "orders" referred to in this letter is an order from Hara Canaberales, for 25 units. Mr Manasseh provided to ASIC a letter from this customer, dated 12 December 2015, referring to its order for 25 fodder units on 27 November 2013, and explaining the delay in payment of the expected deposit of USD $2 million by reference to Argentinian "government capital controls", and stating that "with the current change in policy on capital controls for foreign funds", this problem will "shortly be overcome".

[117] Mr Manasseh showed the sales orders to some prospective investors in Gognos.[141]

[118] No funds have ever been paid to DAT or Gognos in respect of any of these orders.[142]

[119] The respondents invite the court to find that, while the expected sales have not materialised, it would not be open to conclude on the evidence that there are no prospects or negligible prospects of orders coming in the future.[143] The respondents' submission is that "we're not suggesting that the orders will come in. What we're putting forward is there is evidence which would suggest that there are prospects", "prospects which the companies should be given the opportunity to pursue in order that there will be some return", although "the evidence clearly doesn't indicate how

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137 Keily (exhibit 1), exhibit MFK108.

138 Ibid, exhibit MFK109.

139 Ibid, exhibit MFK110 (the date of the invoice is not legible, but it is captured within an email from Dov Libman to Manasseh dated 19 September 2013).

140 Ibid, exhibit MFK111.

141 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 36 and 128.

142 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 59; exhibit MFK2 (s 19 examination of Manasseh) at p 128; MFK6 (s 19 examination of Manfield) at p 26; Manfield (exhibit 23) at [33(a)].

143 T 5-25 and the respondents' submissions on the factual findings sought (17 August 2017).

strong those prospects are",[144] indeed those prospects are "unknowable" on the evidence.[145]

[120] ASIC submits that "[t]here is nothing at all in the Companies' material to suggest that there is any realistic basis to believe that payment (in whole or in part) for the orders will ultimately be received".[146] On the basis of the evidence before the court, that is a fair submission, which I accept.

[121] The respondents were critical of ASIC for not making efforts to investigate the veracity of these orders, by endeavouring to contact any of the people involved, or enquiring into the political controversy in Argentina.[147] I do not accept that was ASIC's responsibility. The respondents, faced with full knowledge of the results of ASIC's investigation, and the material it relied upon in bringing this application, could have placed such material before the court, if it was available. The evidence reveals attempts to do this, which were not successful.

[122] In this regard, Mr Zwar travelled to Argentina in January 2017. He spoke with Dov Libman, requesting to meet with the individuals or entities that had, at least on paper, placed orders for the fodder units. He was not able to meet with any such person in the time he was there.[148]

[123] When cross-examined about the prospect of the deposits apparently paid in respect of orders, and held by the Central Bank of Argentina by reason of government controls, being released to DAT, following the change in government, Mr Zwar accepted that was not going to happen. He also accepted that, in circumstances where payment had not been made, in some cases more than five years after the orders were apparently placed, that could not be explained by issues with exchange controls in the government of Argentina. Mr Zwar acknowledged there is no prospect of any money coming to DAT from these so-called orders; although he says he is not as sceptical as he once was, about future orders.[149] Why that is so was not explained, or supported by any objective evidence.

[124] Dr Manfield seems to still believe something will come of the past orders,[150] based on verbal contact with the companies' agent in South America, Mr Libman – although he acknowledged that, given Mr Libman has been working to try and get orders in place for years and nothing has come of it, it does "challenge one's belief".[151] He

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144 T 5-25.

145 T 5-26.

146 ASIC's written address at [159].

147 Keily cross-examination at T 1-72 to 1-73.

148 Zwar (exhibit 13) at [2]-[4]; Zwar (exhibit 14) at [13]-[17]; and T 2-74.

149 T 2-72 to 2-73.

150 Manfield (exhibit 25) at [11] and T 3-59.

151 T 3-60.

nevertheless remains optimistic. He said although he had "many elements of frustration" and had "been through shades of scepticism" (but categorically denied currently being sceptical) he would not accept that the money "is never coming". He said "that's the talk of a person who gives up too easily". He disagreed that to hold on to that hope is commercially unrealistic.[152] Dr Manfield's evidence in this regard calls to mind the observation of Finn J in *AS Nominees* that where those interested in the company have neither the desire nor the incentive to wind it up, ASIC's public interest is most pronounced; and Beach J's observation in *Bilkurra Investments* that the investors' hopes for a "white knight" were little more than "wishful thinking", which even if they had a "sliver of reality" would not outweigh the concerns otherwise raised.

[125] When it was put to Mr Lissa that the overwhelming likelihood is that these past orders will never eventuate, he said "I don't know", although acknowledged it has "certainly been very prolonged". He seemed to attribute the present proceedings as a reason why these overseas parties may have pulled back from any further action.[153]

Promised share subscription payments

[126] Material produced by DAT and/or Gognos to ASIC included documents purporting to confirm subscriptions for shares. For example:

(a) A letter dated 15 April 2011 from Marcelo Poletti, in which that person confirms "my intention to subscribe a placement of $A 8,000,000 (16 million shares) in" DAT, and says the funds "will be deposited in your account in a few days".[154] Mr Manasseh explained that Marcelo Poletti was an investor from Argentina, whose money "never ever came", because of problems with the Argentinian government, but who Manasseh said, as at December 2015, was "working his way through to get us the money".[155] That did not happen.

(b) Further documents were produced to ASIC, purporting to be subscriptions for shares, from 16 other overseas investors,[156] three of which were from Argentina, but the other 13 were from investors in Panama, the US, Italy, Uruguay and Curacao. According to ASIC's summary, which was not controverted by the respondents, these documents purport to show subscriptions for a total of AUD $77.35 million worth of DAT shares, between March 2013 and March 2016.[157]

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152 T 3-61.

153 T 4-10 to 4-11.

154 Keily (exhibit 1), exhibit MFK113.

155 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 59.

156 Keily (exhibit 1), exhibits MFK118 to 133. See also Keily (exhibit 1) at [243].

157 ASIC's written address at [168].

(c) One of these documents is an offer to purchase 18.6 million shares by a Mr Martinez on behalf of Martyconsal Corp, in the United States, dated 24 September 2014.[158] The material includes email exchanges with Mr Martinez, with Mr Manasseh chasing the promised payment.[159] It is noteworthy that the reason Mr Martinez apparently gave for the delay was that his solicitor needed confirmation regarding the DAT/Gognos company arrangements. Despite a promise in an email of 15 July 2015 that $4.5 million will be sent "in the coming days", with the balance of $4.8 million to be transferred "in about three weeks", no money was ever paid.[160]

[127] Mr Manasseh also showed these documents to some investors in Gognos.[161]

[128] Mr Manasseh's explanation for the money from these potential buyers not being received was, again, Argentinian government controls, preventing overseas transfers of money. However, when questioned in December 2015, he referred to a change of government in Argentina, and suggested that "by the end of this month this will all be resolved". When it was put to him, in his s 19 examination, that none of the putative share subscribers, who are all separate, were Argentinian, Mr Manasseh suggested that they all have "set up accounts overseas and they send the money from Argentina to there and from there they send it out".[162] Mr Manasseh remained optimistic during his s 19 examination, that the money would arrive, saying to the ASIC investigator at one point "don't be surprised in the next few weeks I'll get a lot of money in, and I hope so, so that I can tell you and then you can go away happy".[163]

[129] I accept the submission by ASIC that Mr Manasseh's explanations for the "delays" in payment by these supposed prospective subscribers are implausible, as it is inherently unlikely that seemingly unrelated investors based in a number of different countries around the world would all be affected by the supposed government restrictions placed on moving money out of Argentina such that they would all default on their promises to pay.

[130] There is no realistic basis, on the material before the court, to expect that any of this money will ever materialise. Again, if that was something the companies wanted to seriously advance, in opposing this application, they ought to have filed material to support it. Speculation, and optimism, on the part of people who have been involved in these companies for many years is insufficient to overcome the picture objectively painted by the material that is before the court.

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158 Keily (exhibit 1), exhibit MFK122.

159 Keily (exhibit 1), exhibits MFK136 to 140.

160 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at pp 91, 92 and 97-98.

161 Ibid at p 94.

162 Ibid at pp 87 and 92.

163 Ibid at p 97; see also at p 99.

Representations to investors

[131] The evidence supports a finding that misleading representations were made to Gognos investors, in relation to:

(a) DAT listing on the ASX, even after it had withdrawn its application and DAT was not in a satisfactory financial position to further pursue an ASX listing;

(b) the existence of substantial orders for fodder units; and

(c) significant share subscriptions from overseas investors.

[132] As already noted, Mr Manasseh admitted, in his s 19 examination, that he showed the sales orders and share subscription forms to some potential Gognos investors. Prospective investors were also continuing to be told that DAT was to "very shortly", or within a certain timeframe, list on the ASX. For example:

(a) Letters dated in March 2013, from Gognos (signed by Mr Purves) to Michael Moses, Alex Berkowicz and Chris Marks, all refer to the IPO being "envisaged to take approximately 12 weeks to completion from the date of this letter".[164] Those people seemingly bought shares shortly after that.

(b) Letters dated in September and October 2014, and May 2015, from Gognos (signed by Mr Manasseh) to "Oshi", Mr Blasenstein and Mr Basserabie, suggested an anticipated ASX listing "later this year", "early next year" and "about May this year" respectively.[165]

[133] There was evidence at the trial from people who invested significant funds in Gognos, two of whom were called by ASIC (Mr Blasenstein and Mr Moses) and the others who were called by the respondents (Dr Stewart, Mr Senior, Mr David and Mr Shellim, who oppose the winding up).

Mr Blasenstein

[134] Mr Blasenstein, through his company Sysut1 Pty Ltd, acquired shares on 13 occasions between 14 October 2013 and 22 July 2015, ultimately acquiring 1.6 million shares in Gognos, at a cost to him of $330,000. Mr Blasenstein first became aware of DAT and Gognos in October 2013 through Moshe (Moses) David, whom he had known for a long time, and who attended the same synagogue.[166] At that time he knew of Mr Manasseh through the Sydney Jewish community, but had only spoken to him in passing. Before he decided to invest, Mr Manasseh came to his home to discuss Gognos and DAT, and he confirmed the information Moses David had

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164 Keily (exhibit 1), exhibit MFK147, 148 and 149.

165 Keily (exhibit 1), exhibit MFK154, 155 and 156.

166 Blasenstein (exhibit 4) at [8]-[10].

provided, including that DAT was going to list on the ASX in the next few months;[167] that DAT was already fully subscribed with very wealthy investors; that the company already had significant orders and sales that it was filling; and that Mr Manasseh had held back a small amount of shares in order to give locals in the community the chance to benefit from this great opportunity. Among other things, Mr Manasseh told him that he already had the investor money in hand and they were preparing to list on the ASX at the beginning of 2014.[168]

[135] Mr Blasenstein decided to purchase Gognos shares, based on the representations made to him by Mr Manasseh.[169]

[136] Mr Blasenstein outlines, in his affidavit, further representations that were made to him by Mr Manasseh, over the ensuing months, during which he purchased shares in Gognos on a further 12 occasions, after the initial purchase. Mr Manasseh imposed on Mr Blasenstein a number of times to invest further in the company, in circumstances where he would tell Mr Blasenstein that the listing of DAT was imminent, he needed further money to keep the company afloat pending the listing, and had exhausted all other avenues. Some of the matters that Mr Manasseh made representations to Mr Blasenstein about include:

(a) in around September 2014, that the Argentinean restrictions on funds transfers out of the country had been lifted and the money should be coming through shortly (at [43]); and then in October 2014, that he had received the funds from Argentina and they were "readying to list" (at [44]);

(b) also in October 2014, that in terms of the expected listing, February 2015 was very likely and at worst it would be March 2015, and he was desperate for funds to prepare for the float and keep the company running until then, offering Mr Blasenstein shares at half price, $0.25 each, which he took up (at [50]-[54]);

(c) in December 2014 asking Mr Blasenstein to invest further, as he needed $26,000 for the ASX listing fee, and offering him shares at $0.15 each, and then on 1 January 2015, after Mr Blasenstein had requested evidence that everything was in place for a listing early in 2015, sending Mr Blasenstein a copy of the purported agreement by Barfacci Capital Ltd to subscribe for 14 million DAT shares at $0.50, totalling $7 million (at [63]-[65]). In March, April and May 2015, when he made further requests to Mr Blasenstein for funds, Mr Manasseh sent other purported agreements to subscribe for large numbers of shares in DAT to Mr Blasenstein (at [89], [100]-[103]). The significance of sending these documents to Mr Blasenstein is made plain by his statement at [104], that:

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167 Noting that this is October 2013, and DAT's application for listing had been withdrawn in October 2011.

168 Blasenstein (exhibit 4) at [9] and [13]-[19].

169 Blasenstein (exhibit 4) at [20].

> "Seeing evidence of these irrevocable agreements to purchase DAT shares, which by this stage totalled $36 million, confirmed Maurice's statements about the wealthy overseas investors and gave me comfort that DAT already had a lot of money behind it";

(d) offering to show him the orders that he said he had for the containers (although he never did so) (at [87]-[88]).

[137] Mr Blasenstein said that after his share purchase in July 2015 he became very concerned about the inconsistencies in information being given to him by Mr Manasseh. In August 2015, Mr Blasenstein made a request, by email, to see the "financials for Gognos"; he received no response (at [122]). In September 2015, Mr Blasenstein says Mr Manasseh told him the "overseas big investors had pulled their money out of DAT due to the stock market correction". Mr Blasenstein queried how that was possible, if the funds "were already here", which is what he had understood ([123]). Mr Blasenstein had a meeting with Mr Manasseh on 8 September 2015 during which, among other things, Mr Manasseh revealed that so far none of the putative purchasers, the subject of the orders he had told Mr Blasenstein about, had paid the 50% deposit, which Mr Blasenstein said "came as a huge shock to me, because until then I was under the impression from Maurice that sales had already occurred" (at [127]). Further requests by Mr Blasenstein for information went unsatisfied.

[138] Having regard to the content of Mr Blasenstein's affidavit, which was not challenged in cross-examination, nor the subject of any evidence from Mr Manasseh disputing its contents, it is readily understandable why Mr Blasenstein would say that he no longer regards Mr Manasseh as a truthful man. Mr Blasenstein plainly trusted what Mr Manasseh, a member of his religious community, was telling him, and on the basis of that information invested a significant amount of money, which he accepts he will very likely lose if the companies are wound up. On the evidence before the court, Mr Manasseh's representations to Mr Blasenstein were blatantly dishonest.

[139] When the fact of the recent change of directors was raised with Mr Blasenstein in cross-examination, it being put to him that Mr Manasseh had been "forced out", and he was asked if that was something he would support, he answered, quite pragmatically, "it depends on who the other directors were … and my concern is that if they were involved with him before, that they might be part of it".[170] He expressed the opinion, in response to that and the further matter of the proposed injection of $400,000 to "reactivate" the company, that "to me, it's just another charade". He said he would still be extremely concerned about it, concerned that other people would be drawn in to it.[171] I regard these as insightful and telling observations, in light of my own analysis of the evidence.

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170 T 1-97.

171 T 1-98.

Mr Moses

[140] Mr Moshe Moses made three investments in Gognos, between October 2012 and January 2013, investing a total of $100,000 to acquire 200,000 shares.[172] Mr Moses also knew of Mr Manasseh through the Sydney Jewish community. Mr Manasseh's wife had known Mr Moses' father; Mr Moses' first interaction with the Manasseh family was in circumstances where Mr Moses' father was passing away.[173] A few months after this, in October 2011, Mr Moses met Mr Manasseh in the synagogue, and they had a conversation about the Dynamic Fodder business. Among other things, Mr Manasseh told him "we are going to the ASX very soon and you can get in at the ground level", and told him about a "good deal at the moment" where you could get three shares (after listing) for every share bought (at [9]). They had further conversations in the subsequent months, during which Mr Manasseh told Mr Moses the shares were selling for 50 cents each, and that "after we list, you will get 2 extra shares for every share you have purchased" (that is, three shares for each share listed). Mr Manasseh also said words to the effect that "even if the company floats at a third of its current share price you will still make your money back because of the 3 for 1 share deal. You can't lose" (at [12]). Mr Moses formed the impression from what Mr Manasseh said that the listing was imminent (at [13]).

[141] Mr Moses purchased his first tranche of 60,000 shares in October 2012. In November 2012 Mr Moses travelled to India on holiday. Mr Moses said that he was in regular contact with Mr Manasseh by phone while he was away, with Mr Manasseh pressuring him to transfer the money (for the additional shares), on the basis that he could not guarantee the 3 for 1 deal would still be available when he got back. Mr Moses purchased another 40,000 shares at this time. He purchased a further tranche of 100,000 shares in January 2013.

[142] Mr Moses says that during 2013 he became concerned that "Dynamic Fodder" was taking so long to list (elsewhere in his affidavit Mr Moses explains that he did not really understand how it all worked, and later became aware that the shares he was purchasing were in Gognos, not Dynamic Fodder).[174] He says he asked Mr Manasseh about this over the year, and he always seemed to have a reason: for example, that it was too close to the financial year, or too close to the Jewish holiday, or too close to Christmas (at [44]). Mr Manasseh also told Mr Moses that he had very wealthy investors from South America who were very interested, and had committed to the investments, and he was just waiting for their funds to arrive (at [45]). Mr Manasseh gave Mr Moses a variety of excuses for why the funds were not available, such as that the buyer had not transferred the funds; that the South American government was holding the funds back because they are corrupt; that the money went through but the

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172 Moses (exhibit 7) at [38].

173 Moses (exhibit 7) at [5]-[7].

174 Moses (exhibit 7) at [18].

American bank won't release it; that it's come into the Commonwealth Bank, but the Commonwealth Bank won't release it because it's from overseas (at [46]).

[143] In August 2014 Mr Moses was "fed up", and asked Mr Manasseh to sell his shares (having been promised by Mr Manasseh, on previous occasions, that he could sell his shares at any time). Mr Manasseh told Mr Moses that he had a buyer in South America for his shares, and sent him a form to fill out. Nothing came of that, and Mr Manasseh did not contact Mr Moses again (at [48]-[56]).

[144] Mr Moses, also, trusted Mr Manasseh, including on the basis of his dealings with him as part of his religious community, and relied on what he was being told by Mr Manasseh, which again was objectively dishonest.

[145] In his evidence at trial Mr Moses said he appreciated that if the order to wind up the companies is made, he would get no money at all. But in a selfless and again insightful response, when Mr Moses was asked, in cross-examination, whether he would support the companies being given the opportunity, with the proposed advance of $400,000 by Mr Lissa's company, to be "reactivated", with the possibility of that leading to his money being paid back, he said:

> "… I'm really not sure. I – I really would need time to think about it.
>
> All right? --- Because I don't know what they were going to do with this $400,000.
>
> All right? --- What's available for them to retrieve.
>
> All right? --- I don't know any of that.
>
> But you do appreciate – and I'm not putting – suggesting to you that you have to put your hand in your pocket at all. You do understand that --- Yeah. I know. I know. But also, you know, I think a lot of people have suffered through this and, you know, if – if the company needs to be closed down because more people may endure this kind of suffering, maybe that's the best thing to do."[175]

[146] Mr Moses was not challenged on any of his evidence, and there was no contradicting evidence from Mr Manasseh.

Dr Stewart

[147] Dr Jennifer Stewart, through her company, invested $12,500 in Gognos, about seven or eight years ago. She is a long term friend of Mr Zwar; they were at school together and have been friends ever since. She left it to Mr Zwar to deal with her involvement in the company. She opposes the winding up of Gognos, saying she believes the

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175 T 2-12.

company should be given every opportunity to succeed on a commercial basis.[176] Although she has not seen any accounts, she was not aware Gognos had not prepared any accounts since June 2012. She was aware DAT has not made any sales of containers since 2011, but does not believe the "developments, challenges and frustrations" encountered by the companies are insurmountable.[177]

Mr Senior

[148] Mr Robert Senior invested $50,000 in Gognos in about 2010. He opposes the winding up as he believes the shareholders should be given the opportunity for the company to go forward and development the technology in areas additional to agricultural production.[178]

Mr David

[149] Mr Moses David, through the corporate trustee of his super fund, has invested about $453,000 in Gognos.[179] It is unclear how many shares he purchased. Documents annexed to his affidavit seem to refer to 851,000 shares held in Gognos; but then another document records a holding of 600,000 shares in DAT. How that can have come about, when DAT has never been listed, is not clear,[180] save for a reference by Mr David to a loan of $30,000 he made to DAT in 2015, which was converted to equity.[181]

[150] In his affidavit Mr David refers to having known Mr Manasseh for many years, as they attend the same synagogue in Sydney. He and Mr Moshe Moses are cousins. Mr David refers to various things Mr Manasseh told him during 2012, which led to him purchasing shares in Gognos, although says he did so "on my own choice and it was never subject to anything that I regarded as any form of pressure from Maurice".[182] In his affidavit Mr David said he strongly opposes the winding up because "as a shareholder and subsequent creditor, I might possibly receive less return than my investment" and because he considers the technology is important for all and will significantly change the market.[183]

[151] It was apparent from his oral evidence that there are a number of important things Mr David was not aware of. For example, he was not aware that the companies have not lodged audited accounts since June 2012. He had never received a financial report

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176 Stewart (exhibit 27) at [4] and [5].

177 Stewart (exhibit 27), annexure A; T 4-24 to 4-28.

178 Senior (exhibit 28) at [5]-[6].

179 T 4-36.

180 David (exhibit 29), exhibit MD1.

181 David (exhibit 29) at [21].

182 David (exhibit 29) at [17].

183 David (exhibit 29) at [23].

for either company – but said, when it was put to him that he would expect to have done so, "I'm not expert in this – in this area. I just – I just put my money in". He has never received any notice of any AGM for either company, and of course has never attended one. It was apparent that Mr Manasseh has made misleading representations to Mr David also. Mr David confirmed he was told by Mr Manasseh that an order had come in from Argentina – but he was not told that none of the promised funds from the sale orders had been received. Instead, he said he was told by Mr Manasseh that $8 million had come in (he thought that was in 2013) – and said it would be "a bit of a surprise" to find out that DAT had not sold a single fodder unit since 2011. In re-examination he explained that in 2012 Mr Manasseh had come to his house and showed him that he had then sold two units. He is still expecting DAT to list on the ASX in the future, based on what Mr Manasseh has told him "many times", including this year (2017) – that as soon as the people put money in from Argentina, they will apply for listing.[184]

[152] Accepting that Mr David expresses his opposition to the winding up, his evidence is otherwise concerning, and gives added weight to the matters relied upon by ASIC about the conduct of Mr Manasseh, given the misrepresentations he apparently also made to Mr David.

Mr Shellim

[153] Mr Eli Shellim, through his company Yamte Investments Pty Ltd, holds 880,000 shares in Gognos, purchased between 2010 and 2012;[185] although the Gognos share registry seems to indicate Yamte owns 920,000 shares.[186] He opposes the winding up, on the basis that Yamte will lose all its investment if that occurs.[187] He, too, was not aware that Gognos had not prepared audited accounts since June 2012. He also has not received any financial reports, nor any notice of an AGM, does not know the true financial status of the company and has never been made aware of how the investment moneys were being spent.[188]

Mr Lissa and Mr Zwar – in their capacity as shareholders

[154] Mr Lissa is also a shareholder in Gognos, via Rocket Science Pty Ltd (the trustee of the Lissa Super Fund, of which he is a director), which purchased 300,000 shares for $65,000; and Property Magic Aust Pty Ltd, which purchased 500,000 shares for $40,000.[189] In his capacity as a director, shareholder and creditor of Gognos and DAT, he says he does not see "any utility in the company being wound up on just and

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184 T 4-36 to 4-40.

185 Shellim (exhibit 30), annexure ES1.

186 Keily (exhibit 1), exhibit MFK145 at p 1987; T 4-44 to 4-45.

187 Shellim (exhibit 30) at [19].

188 T 4-42.

189 Lissa (exhibit 26) at [34]-[35].

equitable grounds because each of the companies have prospects of commercial success, and the winding up application is strongly opposed".[190]

[155] Mr Zwar, as trustee of his super fund, Dovecote Grove Super Fund, is a shareholder of Gognos, having invested $130,000. In that capacity, he opposes the winding up of the companies, preferring that they be allowed to "continue to operate with the new directors and a new direction, so that [his] super fund and the other investors have the opportunity to participate in the venture in the future".[191]

Other shareholders opposed to the winding up

[156] In addition, Mr Zwar gave evidence that, as at 24 October 2016 he had received written correspondence from seven shareholders, informing him that they oppose the winding up of Gognos and DAT.[192] He also said that, in July and early August 2017 he had received 19 letters and statements from investors in Gognos expressing their opposition to the winding up application.[193]

[157] It may be observed that, of those shareholders opposed to the winding up who did give evidence at the trial (other than Mr Zwar and Mr Lissa), they were not apprised of all the facts and circumstances attending the management of the affairs of these companies. I am not in a position to know whether the same may be said for the other people Mr Zwar says have written to him. Nevertheless, as observed at the outset, I accept that the fact that some shareholders are opposed to the orders is a matter to be taken into account.

Conflicting explanation for inter-company transactions, variable share prices

[158] I will deal briefly with the next matters relied upon by ASIC. These again were not the subject of any evidence or submissions on behalf of the respondents.

[159] The first relates to confusing, and inconsistent explanations for inter-company transactions. I have addressed these matters, in outlining the background facts at paragraphs [53] to [62] above. The submission on behalf of ASIC that these transactions "have been insufficiently, or conflictingly, documented and no proper explanation for the transactions have been proffered" is accepted.[194] Likewise, I accept the submission that inadequate documentation, financial records and poor application of directorial rigour is patent.[195] I will return to the matter of lack of directorial rigour below.

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190 Lissa (exhibit 26) at [36].

191 Zwar (exhibit 16) at [11]-[12].

192 Zwar (exhibit 12) at [86] and T 2-46 to 2-47.

193 Zwar (exhibit 15) at [20] and T 2-47.

194 ASIC's written address at [190]-[201].

195 ASIC's written address at [205].

[160] The second relates to the variable prices at which shares were offered to investors, which had nothing to do with their market value, and everything to do with how badly the companies needed money. Shares in Gognos were initially offered at 50 cents a share; but there was a range of pricing, down to 15 cents a share, when the company required money urgently.[196] This practice represents, as ASIC submits, a disregard of the interests of shareholders who paid the standard price for the shares;[197] but it is consistent with the manner in which the affairs of these companies were being conducted, in particular by Mr Manasseh.

[161] There are other deficiencies in the book keeping records of the companies referred to in the material. They were not the subject of any focus at the hearing, and given all the other matters that have been addressed in these reasons, which amply in my view justify the conclusion I have reached, I do not propose to spend time addressing them in detail. These include, in relation to Gognos, an issue concerning payments made to a company related to Mr Manasseh, Nissim Securities;[198] and, in relation to DAT, issues concerning undocumented payments to Mr Manasseh for his "services" and undocumented loans said to have been made by Mr Manasseh to DAT.[199]

[162] The material before the court supports the submission by ASIC that, prior to 17 July 2017, the directors of Gognos and DAT demonstrated, inter alia, an inability to adequately document (accurately or at all) matters relating to the affairs of the company.[200]

Lack of directorial rigour in the management of the affairs of the companies

[163] More broadly, I am satisfied, by reference to the matters that have been addressed above, on the basis of the evidence before the court, and ASIC's submissions,[201] that there has been a demonstrable lack of directorial rigour brought to bear to the administration of the affairs of the companies – to such an extent that there is a well-founded and justified lack of confidence in the conduct and management of the companies' affairs. The observation of Hansen J in *Deputy Commissioner of Taxation v Casualife Furniture Pty Ltd* (2004) 9 VR 549 at 580 [494] that "[t]he facts and circumstances set out in this judgment describe an unhappy approach to corporate, directorial or management responsibility" is equally apt to this case.

[164] As discussed later in these reasons, the recent events relied on by the respondents do not persuade me that this lack of confidence is no longer justified, such that intervention by the court is unwarranted, in the form of a winding up order.

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196 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 66; exhibit MFK2 (s 19 examination of Manasseh) at p 36.

197 ASIC's written address at [204].

198 ASIC's written address at [219]-[220].

199 ASIC's written address at [227]-[228].

200 ASIC's written address at [221] and [223].

201 ASIC's written address at [205], [211]-[218], [221]-[222] and [225]-[226].

Companies unviable – not clearly solvent

[165] When questioned in December 2015 Mr Manasseh, after being taken to the bank statements for Gognos' two bank accounts, showing balances of about $500 in one, and $8.39 in the other, said Gognos was "currently managing its cash flow" from loans "From me. From friends".[202] In relation to DAT, he said "the company is broke",[203] and again that he was providing financial support to DAT.[204]

[166] As to where the money from the investors has gone, Mr Manasseh indicated it had been used to "upkeep the company [DAT] because the company has rent to pay and had to pay electricity and whatever in that"; it was not applied to the costs of actually manufacturing any fodder units, because they "didn't have any orders" at that time.[205]

[167] Also in December 2015, Mr De Andrade described the financial position of DAT as "Dire. I would say it's dollar in, dollar out. That's it", with the dollar in coming from Gognos.[206] Mr De Andrade was a director of DAT from November 2009 until July 2017. Notwithstanding he was a director of Gognos from January 2014, when questioned by ASIC in December 2015 he said he did not know what Gognos' financial position was.[207]

[168] When he was questioned in December 2015, Mr Lissa, who has been the accountant for Gognos for a long time, described Gognos as having "no funds" and "pretty much running it on empty",[208] and agreed that it could not then pay its debts when due (including to himself, who he described as the biggest creditor).[209]

[169] Dr Manfield agreed with the description of DAT's financial position as "dire" – also describing it as "stalled".[210]

[170] As at September 2016, the bank accounts holding the funds for each of Gognos and DAT (being the account held by Dynamic Fodder) were overdrawn.[211]

[171] The evidence at the trial, in relation to the draft accounts which had been prepared to that point, revealed the following (noting the respondents' express qualification that

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202 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 27.

203 Ibid at p 80.

204 Ibid at p 163.

205 Ibid at pp 116-117.

206 Keily (exhibit 1), exhibit MFK5 (s 19 examination of De Andrade) at p 59.

207 Ibid at p 65.

208 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 18.

209 Ibid at pp 23-24.

210 Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at p 53.

211 Keily (exhibit 1) at [131] and [460].

these draft accounts were not being relied upon for the truth of their contents, but to demonstrate the advances that had been made in their preparation[212]).

[172] In relation to Gognos:

(a) In the draft accounts which were prepared as at March 2017, in the statement of comprehensive income for 2016, a gross profit of $431,818 is identified. That is said to be a management fee accruing to Gognos, from DAT. That money has never been paid; and it is "highly unlikely"[213] it ever will be – since it is conditional on the IPO of DAT proceeding. This is the only item of substantive income identified for Gognos going back to 2013. Given the reality that this amount, even if accrued on paper, will never be paid, the deficit is considerably greater than the accounts show.[214]

(b) The balance sheet for the 2016 year shows current cash assets of $8 (being $8 in the bank) and receivables of just over $3.752 million.[215] That is a reference to a loan to DAT. Although Mr Zwar would not directly accept that there is no prospect of that loan ever being repaid, he did acknowledge that repayment of that is conditional on DAT having some commercial success, which it has not to date.[216] Non-current assets include "other financial assets" of just over $1.538 million – which is the value of Gognos' shares in DAT. Those shares are worthless.[217] When those two items are removed, the total assets of Gognos are only $67,000 (comprising $17,000 described as "current tax assets" and $50,000 "intangible assets", being the value of the intellectual property acquired from the predecessor, Almighty Fodder). The liabilities include trade creditors of $256,578 and other financial liabilities of $475,619, the majority of which is loans from shareholders.[218] The total liabilities identified are $972,202. On this analysis the total liabilities outweigh the total assets by just over $900,000.[219]

(c) Mr Lissa has prepared further draft accounts for the years ended June 2013 to June 2016. In the detailed income statement for the year ended June 2016, the "management fees" of $431,818 are the only item of income, which Mr Lissa similarly acknowledged was "most unlikely" to be paid. In fact, he has

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212 T 1-9.

213 Zwar at T 2-82.

214 Manfield (exhibit 24), exhibit RCM1 at p 69; Zwar at T 2-83.

215 Manfield (exhibit 24), exhibit RCM1 at p 70; Zwar at T 2-83 to 2-84.

216 Zwar at T 2-83.

217 Ibid.

218 Zwar at 2-93.

219 Zwar at 2-94.

included the same amount as an expense for doubtful debts – giving the item a nil value. This leads to a total loss in 2016 of $74,170.[220]

(d) In the draft balance sheet as at 30 June 2016, prepared by Mr Lissa, an amount of $3,752,956 is included as a receivable under the current assets heading. That is the so-called working capital loan from Gognos to DAT.[221] Mr Lissa acknowledged that the accounts of DAT make it plain that at present there is no prospect of DAT being able to repay that loan. The only way it might be realised, according to Mr Lissa, is if Gognos were to exercise its charge over the assets of DAT,[222] and take over the intellectual property (currently valued at $50,000 in the draft accounts, but which Mr Lissa seemed to indicate could be worth a lot more) and then consider operations to commercialise the product.[223] The balance sheet also includes, as non-current assets, a figure of $1,538,021, which is said to be the value of Gognos' shares in DAT. Mr Lissa also agreed that, having regard to the accounts of DAT, the value of those shares may have to be written off.[224]

(e) The balance sheet includes, as current liabilities an amount of just over $254,103 which Mr Lissa said relates to his professional fees for accounting services over about the last six years;[225] and also borrowings comprising loans by related parties (money Mr Lissa's firm has lent the company) and loans from other shareholders, amounting to about $475,000.[226]

(f) Mr Lissa said he was "not sure" he agreed with the proposition that, having regard to the (non) recoverability of the loan to DAT, and the (lack of) value of the shares in DAT, the assets of Gognos in reality are little more than the intangible assets (the intellectual property) of $50,000 (that seems to be on the basis that he considers the intellectual property to have a higher value) – although agreed that, if that view was taken, the company's liabilities significantly exceeded its assets.[227]

(g) But Mr Lissa agreed that the only way that Gognos has stayed afloat to this point is because its creditors (including him) have not pressed for the money that they are owed and because, at least up until 2015, the company continued

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220 Lissa (exhibit 26), exhibit GL2; T 4-13 to 4-14.

221 See note 5; and Lissa at T 4-14.

222 It is not clear what charge is being referred to in this context. There is reference in the material to a charge held by Gognos over the assets of DAT Finance (see paragraph [59] above) – but not DAT itself.

223 Lissa T 4-15 to 4-16.

224 T 4-16.

225 See note 9 and T 4-17.

226 T 4-17.

227 T 4-18.

to obtain equity from shareholders, and since 2015 it has continued to obtain loans from shareholders.[228]

[173] In his affidavit of 6 August 2017, Mr Lissa said it was his opinion, based on the draft accounts of Gognos, and his experience as an accountant and auditor, that the company is presently solvent.[229] Given his oral evidence, particularly the last point just noted, that opinion is not accepted.[230] The court is not asked to formally find that the company is insolvent. However, I do find, on the evidence before the court, that the company is not clearly solvent. Even by reference to the realistic assessment of just a few "big ticket" items in the draft accounts, the perilous financial position of Gognos is apparent.

[174] In relation to DAT (by reference to the consolidated management accounts, prepared for the Dynamic group, in the name Dynamic Fodder, as the trading company):

(a) The balance sheet as at June 2016[231] shows total assets of just over $167,000 – which includes a loan to DAT of $102,859 which, as matters presently stand, DAT has no capacity to repay.[232] The current liabilities include loans from shareholders (totalling just over $228,000) and long term liabilities include the loan from Gognos of just over $5.658 million – which again as things presently stand neither DAT nor Dynamic Fodder has any capacity to repay.[233] The balance sheet shows a total negative equity for the group of more than $5.7 million. The profit and loss statements for the years ended 2011 and 2013 to 2016 show no income from trading. The last time any income was earned from trading was 2012, when one container was sold for $150,000.[234]

(b) Mr Scotney, an accountant, has prepared draft accounts for Dynamic Fodder, based on the draft accounts for Gognos for the years 2013 to 2016 and the management accounts for Dynamic Fodder for 2016.[235] The profit and loss statement for the year ended 30 June 2016 shows no income, and a gross loss from trading of $17,170. When the expenses are taken into account, there is a loss before income tax of $247,054. The statement of financial position for Dynamic Fodder as at June 2016 shows a total negative equity of just over

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228 Ibid.

229 Lissa (exhibit 26) at [32].

230 Cf the respondents' written submissions (11 August 2017) at [102]. Although it is correct to say it was not directly put to Mr Lissa that the opinion he expressed in his affidavit was wrong, the substantive test for insolvency was put to Mr Lissa in cross-examination, and he had the opportunity to respond to that.

231 Manfield (exhibit 24), exhibit RCM2 at p 15.

232 Zwar at T 2-95.

233 Zwar at T 2-96.

234 Manfield (exhibit 24), exhibit RCM2 at pp 5 (profit and loss statement for 2012), 8, 11, 14 and 16; Zwar at T 2-97; Manfield at T 3-58.

235 Scotney (exhibit 31) at [8] and [9].

> $5.788 million (primarily the result of the loan from Gognos to DAT of $5.912 million).

[175] Mr Zwar looked at the management accounts for the Dynamic group, and the draft accounts for Gognos, before accepting appointment as a director. He accepted that the financial position of the Dynamic group – not having earned any income for so long – was "extremely concerning". He agreed with Mr Manasseh's description in his s 19 examination that DAT was "broke".[236]

[176] In response to the proposition that the evidence suggests the companies are not viable, Mr Zwar said:

> "Look, on the – based on the balance sheet, I would accept that the business – both – the whole group doesn't appear to be viable, but it all – it all, frankly, depends on whether there's any prospect of commercial trading with these units."[237]

[177] That prospect could be put no higher, in submissions on the respondents' behalf, than "unknowable". In the circumstances, the evidence supports a finding that both companies are not clearly solvent, and do not appear to be viable.

Recent change of circumstances

Appointment of the new directors

[178] The respondents relied heavily on the change of directors of both Gognos and DAT in opposing the winding up orders. There are two issues to be addressed in relation to this: first, the process of the appointment of the new directors; and second the role of Mr Zwar in particular.

Were the new directors properly appointed?

[179] It emerged during the cross examination of Mr Zwar that he, and the other new directors, may not have been properly appointed, in accordance with the constitutions of Gognos and DAT.

[180] Mr Zwar said that he became a director of DAT on 17 July 2017, and of Gognos on 31 July 2017. He says there was a telephone hook-up some days before 17 July, involving Dr Manfield, Mr Zwar and Mr Lissa. In his own words, Mr Zwar, Mr Lissa and Dr Manfield "have effectively taken control of" the companies.[238] Dr Manfield is not, however, one of the new directors.

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236 T 2-98.

237 T 2-99.

238 T 2-78 and 2-81.

[181] In so far as DAT is concerned, at the time the directors were Mr De Andrade, Mr O'Leary and Mr Manasseh. Mr Zwar's evidence was that none of these people were involved in the decision to appoint the new directors, including him. Having regard to DAT's constitution[239] the effect of Mr Zwar's evidence was that he had not been appointed as a director.[240]

[182] Mr Zwar's position was that the other directors of DAT (Mr De Andrade and Mr O'Leary) were not even aware of the change.[241] This is at odds with the evidence given by Dr Manfield, which was that he had spoken to Mr De Andrade about the change, and the proposed new directors and had communicated this to Mr Zwar. If it were necessary to decide, I would prefer the evidence of Mr Zwar on this, as there was no reason, at the time he was being cross-examined about this matter, for him to say Mr De Andrade was not aware of the change, if in fact that was not the case. On the other hand, by the time Dr Manfield gave his evidence, the potential ramifications of Mr Zwar's evidence were known.

[183] In relation to Gognos, at the time the directors were Mr Manasseh, Mr De Andrade and Mr Sum. Of those, Mr Zwar said only Mr Manasseh was involved in the decision to appoint new directors. Mr Zwar said there was a telephone hook-up between Mr Manasseh, Mr Lissa, himself and possibly Dr Manfield, also a few days before 31 July.[242] So the same problem arose in relation to this purported appointment of new directors. Gognos' constitution similarly enables the directors to appoint a person as a director, with two directors to form a quorum, unless otherwise agreed.[243] Again, the other directors of Gognos (Mr De Andrade and Mr Sum), according to Mr Zwar, were not aware of the change.[244]

[184] Even apart from this issue, it is clear Mr Zwar has had no contact with the other directors. Of Mr O'Leary (who lives in Dubbo) Mr Zwar said "I did meet him once… perhaps end of 2011, but I've not had any contact with him since";[245] of Mr Sum, Mr Zwar said "I've never had any contact with him";[246] and of Mr Davis, Mr

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239 Exhibit 22. DAT's constitution excludes the replaceable rules (such as s 201H of the *Corporations Act,* which enables the directors of a public company to appoint a person as a director, on the basis the appointment is confirmed by resolution at the company's next AGM), but makes provision in similar terms to s 201H in cl 13.2, enabling the board to appoint a director, with three directors comprising a quorum (cl 18.1(b).

240 T 2-75.

241 T 2-77 and 2-78.

242 T 2-76.

243 Exhibit 22, rules 81 and 91.

244 T 2-76 and 2-78.

245 T 2-54 and 3-8.

246 T 2-56.

Zwar said "I haven't been able to have any contact with him yet", "I've had no contact with Mr Davis at all yet".[247]

[185] This issue having arisen – and seemingly unexpectedly to both ASIC and the respondents' legal advisers – it was then sought to be dealt with when Dr Manfield was called to give his evidence, after Mr Zwar. He referred to discussions he had in mid-December 2016 with Mr Manasseh about bringing new directors on to DAT. It was Mr Manasseh who suggested Mr Barry Davis. He then outlined a conversation with Mr De Andrade in June 2017, who was keen to have a director come on board both DAT and Gognos to replace him as a director due to some personal issues he was addressing.[248] They discussed Mr Davis, Mr Zwar and Mr Lissa as possible replacements and, according to Dr Manfield, Mr De Andrade was happy for any of them to come on board either company, although the focus at that time was on DAT.[249] Dr Manfield said he communicated Mr Manasseh's and Mr De Andrade's views – that they accepted Mr Davis, Mr Zwar and Mr Lissa as suitable replacements – to Mr Zwar.[250] This was in a phone conversation between Dr Manfield and Mr Zwar on 10 July. As already noted, this is inconsistent with Mr Zwar's evidence.

[186] Dr Manfield referred to a phone hook-up on 14 July, involving him, Mr Zwar and Mr Manasseh, in the course of which a resolution was passed approving the appointment of Mr Davis, Mr Zwar and Mr Lissa as directors of DAT. This was inconsistent with Mr Zwar's account (see [181]-[182] above). Dr Manfield said he subsequently spoke to Mr Andrade, communicated this to him, and he endorsed that decision.[251]

[187] In relation to Gognos, Dr Manfield's evidence was that there was no teleconference, but he spoke separately to Mr Zwar and Mr Manasseh on 18 July, and that seems to have been the context in which he says he communicated Mr De Andrade's agreement to the three new directors.[252] This is also inconsistent with Mr Zwar's account (see [183] above).

[188] There were no minutes of any of these discussions kept by Dr Manfield; nor seemingly by anyone else. He explained this on the basis that "we" had vacated the office premises and he had no phone system, and his computer had been dismantled.[253]

[189] Against the possibility of a finding that the new directors had not been validly appointed, at the end of the hearing the following steps were taken.

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247 T 2-54.

248 T 3-22 to 3-25.

249 T 3-26.

250 T 3-28 to 3-29.

251 T 3-30 to 3-31.

252 T 3-32.

253 T 3-34.

(a) In relation to Gognos, a document signed by Mr Sum on 10 August 2017, appointing Mr Lissa and Mr Zwar as directors (in order to make up a quorum) was tendered; and then minutes of a resolution passed at a meeting held on the evening of 10 August 2017 in which Mr Zwar, Mr Lissa and Mr Sum (by telephone) participated, that Mr Zwar, Mr Lissa and Mr Davis be appointed directors.[254]

(b) Similarly, in relation to DAT, a document signed by Mr O'Leary on 10 August appointing Mr Lissa and Mr Zwar as directors (in order to make up a quorum); and then minutes of a resolution passed at a meeting on the evening of 10 August 2017, that Mr Zwar, Mr Lissa and Mr Davis be appointed directors.[255]

(c) Also tendered were documents purporting to be minutes of the resolutions said to have previously been passed, by each of Gognos and DAT, appointing the new directors – but what are actually retrospective confirmations of Mr Manasseh's and Mr De Andrade's agreement to the appointment of Mr Zwar, Mr Davis and Mr Lissa as directors of DAT on 17 July 2017 and Gognos on 31 July 2017.[256]

[190] These documents obviate the need to address, and make findings about, the conflicts in the evidence about the circumstances in which the new directors were appointed, and the consequences of that, having regard to the constitution of each company. Both ASIC and the respondents agreed that these were not matters the court needed to determine, because the appointments are capable of retrospective remedy even if (as appears to have been the case) they were initially ineffective.

[191] The real issue which arises from these matters is the lack of rigour demonstrated in the conduct of people charged with the responsibility to conduct the affairs of two public companies. The introduction of new directors to these companies was one of the primary bases on which the respondents urged the court that there was now no basis for any lack of confidence in the conduct and management of the affairs of the company, giving rise to a risk to the public interest. The fact that this was purportedly effected primarily by Mr Manasseh, together with Mr Zwar and Dr Manfield; in such loose and informal circumstances, seemingly without any attention paid to either the provisions of the *Corporations Act* or the companies' respective constitutions; with no proper meetings; without involving all necessary people in the decision-making process; without even having spoken in some cases to their fellow directors; with no minutes being kept; with conflicting explanations being given of the process of appointment, events which occurred only a matter of days or weeks before trial; and with no notice given to the shareholders about the changes[257] – does

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254 Exhibit 32.

255 Exhibit 33.

256 Exhibits 34 and 35.

257 See Zwar at T 2-77 to 2-78.

nothing to inspire confidence, but rather serves only to reinforce the concerns already justifiably held, given the past conduct.

The role of Mr Zwar

[192] It is necessary to say more about the role of Mr Zwar in particular as one of the new directors of both Gognos and DAT.

[193] Mr Zwar's various roles and relationships can be summarised as follows:

(a) he is, currently, the solicitor for both Gognos and DAT, in this proceeding, which commenced in September 2016;

(b) up until Mr Manasseh ceased as a director (which was 31 July 2017), he received his instructions from Mr Manasseh; he also receives instructions from Dr Manfield;[258]

(c) after 31 July 2017, he was seemingly taking instructions from himself, Mr Lissa and Dr Manfield, as he had not spoken to any of the other directors;

(d) he has known Mr Manasseh since 1998, having met him when acting for Mr Manasseh's daughter, in making an application for her to be declared a protected person following a traumatic brain injury;[259]

(e) he acted for Mr Manasseh personally in a criminal prosecution brought against him by ASIC in about 2001;[260]

(f) he assisted Mr Manasseh, and one of the Dynamic group entities, in relation to the preparation of a fixed and floating charge, in about 2013 or early 2014;[261]

(g) at or around that time, he was approached for advice in relation to the proposed "three for one swap" of shares in Gognos / DAT, but did not give formal advice in relation to that;[262]

(h) he is a shareholder, in Gognos, in his capacity as trustee of his super fund, Dovecot Grove Superannuation Fund, having first purchased shares in Gognos in 2009, upon the introduction of Mr Manasseh;[263]

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258 Zwar (exhibit 12) at [2] and T 2-48 (there is a reference here to 17 July, but Mr Manasseh ceased as a director on 31 July).

259 T 2-48 to 2-49.

260 T 2-49.

261 T 2-47, 2-49 and 2-50; clarified at 2-58.

262 T 2-49.

263 T 2-50.

(i) Gognos' share register also shows Mr Zwar at one stage owning some 200,000 shares in his own (personal) right,[264] and then later in September 2015, showing Mr Zwar as owning zero;[265] but Mr Zwar said the share register is "plain wrong" in that respect;[266] he deposes to Dovecot having invested approximately $130,000 for shares in Gognos[267] – but that does not seem to be reflected in the share register just referred to, which only shows 60,000 shares, for which $28,000 was paid – so presumably the share register is wrong in that respect also;

(j) he became involved in the making of complaints by shareholders to ASIC during 2014, both in acting for shareholders who made complaints, and making a complaint himself[268] – which is discussed below;

(k) Mr Zwar is also advancing part of the funds to be paid to his firm for the conduct of this litigation, together with "several of the shareholders" and Mrs Manasseh – Mr Manasseh's wife. Mr Zwar's liability is up to $150,000; another shareholder was identified as having a liability up to $10,000; and Mrs Manasseh's liability he described as "potentially unlimited".[269] This information only emerged from Mr Zwar during his cross-examination, after he initially answered a question about how this litigation was being funded by saying "third parties … are paying the … my professional cost", and over objection to the questioning on the basis it was not relevant.[270] That Mr Zwar is one of the "third parties" funding this litigation, along with Mrs Manasseh, and the extent of their contributions, is plainly relevant, given the way the case was put by the respondents.

[194] The material in relation to complaints made to ASIC is as follows. As at March 2014, Mr Zwar was becoming increasingly concerned, and sceptical, about the commercial bargains Mr Manasseh had apparently struck with the Argentinians ever being finalised, and the money eventuating.[271] In an email he sent on 18 March 2014 to Rodney Adler (ex-FAI managing director[272]) who had some involvement in these companies at an earlier time, and is (or at least, one of his corporate entities is) also a shareholder,[273] Mr Zwar said:

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264 See Keily (exhibit 1), exhibit MFK163 (share register as at 30 June 2012), at p 2019.

265 Ibid, exhibit MFK 145, at p 1988.

266 T 2-52.

267 Zwar (exhibit 16) at [11].

268 T 2-59 to 2-70.

269 T 2-53 to 2-55.

270 T 2-53.

271 T 2-60.

272 T 2-51.

273 T 2-59.

> "… I do hope that Maurice is able to bring this together with the Argentinians
>
> It seems to be the case that the money (so called) is stuck in a Citicorp branch in the US, possibly Florida
>
> If that is indeed the case then there may well be probity issues associated with any transfer…"

[195] Mr Adler responded:

> "I do not understand Maurice and what he is doing with the company. That so-called money has been stuck in that particular branch for too long for it to be sensible. Maurice is being played for a reason I do not understand. Maybe the Argentinians are serious or maybe Maurice is unwittingly part of laundering money – the whole situation makes absolutely no sense. From my perspective, unfortunately I have double underlined my exposure and I have commenced recovery action against him."[274]

[196] Some months later, on 30 July 2014, Mr Zwar emailed Mr Adler, saying:

> "… The story is now changing, away from Argentina and back to Australia. He claims he is pursuing funding options here involving all sorts of familiar names
>
> All of my clients are totally over it and have lodged official complaints with ASIC
>
> Please feel free to give me a call and we can compare notes"

[197] Mr Zwar said he was extremely concerned at this stage.[275] Mr Adler responded:

> "I feel very sad for Maurice, I think the lies are catching up with him and I think there is a groundswell of hatred against him. For my part I do not wish any problems and I would suggest that your clients do not report him to ASIC as I do not believe that that will help them recover money but it will insure to make life more difficult for Maurice and the company. Nevertheless, when people believe they have been 'lied to' and 'ripped off', they do things out of anger rather than commonsense. Sadly I have written my equity exposure down to Zero."[276]

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274 Exhibit 17.

275 T 2-62.

276 Exhibit 19.

[198] In August 2014 Mr Zwar assisted two of his clients, Patrick Fallon and Colin Piek – who had invested in Gognos, through their respective superannuation funds, as well as their respective corporate vehicles – by writing a letter of complaint to ASIC for them.[277] This letter outlines representations that were made by Mr Manasseh in June 2011 to those investors, including:

(a) that DAT was expected to have its initial public offering within the next 6 weeks;

(b) that the company was well established in Australia and had already sold in excess of 50 units;

(c) that DAT was already in possession of $8 million from Argentinian interests in furtherance of the float; and

(d) that if they invested immediately they would receive shares in Gognos and then, on the float, would receive an uplift factor of three DAT shares for every share held in Gognos.

[199] The letter also states, among other things, that:

(a) for the past two years (the letter being written in August 2014), "we have been continually fed the line through Mr Manasseh that the float was imminent and that all the commercial interests in Argentina were settling in behind the float and that funds for the float would be forthcoming. At no stage was it ever mentioned that the public offering was totally without any financial support whatsoever from Argentina. This is the position as we now understand it";

(b) during "the past few years" there had been a "never ending explanation of alleged sales of the containers to interests in Argentina"; however, "to the best of our knowledge not one sale has eventuated, the company has not undertaken any work so far as we are aware in the past 2 years"; and

(c) that "[w]e believe we have been profoundly misled and were only induced to join on the basis that the float was imminent and that production was already underway. Regrettably both of these issues have turned out to be lies".

[200] It appears Mr Zwar had had a telephone conversation with someone from ASIC prior to this letter being written.[278] In a subsequent email from ASIC it is noted that following the conversation ASIC received reports of misconduct from three investors with a total investment amount of $700,000. Reference is made to Mr Zwar indicating that there may be as many as 100 investors with up to $6,000,000 of funds invested, and the email says if Mr Zwar is aware of any additional investors, "we

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277 Exhibit 20 and T 2-64.

278 Exhibit 21, email from Joanna Orton of ASIC, referring to telephone conversation of 4 August 2014.

would encourage them to come forward". Mr Zwar responded by email on 18 August 2014 by saying:

> "If I include myself and one other it would probably bring the matter to close to $1 million
>
> I am aware of many other people who are intensely dissatisfied but so far, possibly in the vain hope that it will turn around have not sought to complain
>
> **My position is somewhat difficult** as I was asked at one stage to give advice in relation to the so called uplift factor although that went no further for obvious reasons
>
> However I will seek to press remaining investors that I know to come forward
>
> I understand that there are a great number at Mr Manasseh's synagogue"[279]

[201] Mr Zwar followed up the letter of complaint from Mr Fallon and Mr Piek with an email from himself to ASIC, on 31 October 2014, in which he said:

> "I concur with the complaints detailed therein and the representations of Mr Manasseh
>
> I was present when those representations were made
>
> My own shareholding held in my Superannuation fund is approximately 900,000 Dynamic Agritech or alternatively 300,000 Cognos Shares
>
> The consideration paid was approximately $175,000
>
> I am very concerned as to the allocation of funds in this matter as we have no cogent explanation as to what has become of more than $5 million raised over the course of the past 4 years"[280]

[202] When asked about this in cross-examination, Mr Zwar confirmed both the letter and the email accurately reflected his understanding of the situation at the time he wrote them. He also confirmed that, in terms of the position now, there have (still) been no concluded sales – as he said "plenty of paper suggesting sales, but no concluded sales" – and not a single deposit has been paid.[281] In terms of his 18 August 2014 email to ASIC, he confirmed there are still many people who are intensely

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279 Also part of exhibit 21. Emphasis added.

280 Exhibit 20.

281 T 2-66 to 2-67.

dissatisfied, but in terms of the hope of things turning around being a vain one, he said that was accurate at the time, but "I'm more prospective about it now. Having become directly involved, I am more prospective about it now".[282]

[203] Despite having described his position, in August 2014, as "somewhat difficult" (in circumstances where he was an investor, and was acting for other investors in respect of their complaints to ASIC, but had previously been asked to give advice in relation to the "so called uplift factor") – Mr Zwar nevertheless accepted instructions from Gognos and DAT, on instructions from then director Mr Manasseh, to act for them in relation to ASIC's winding up application. He also accepted appointment as a director of each company in July 2017, shortly before the trial, in circumstances where the change of directors, and the proposition the companies were "under new management", was a central and important element of the respondents' case. That was also in circumstances where he accepted (as is plain from the correspondence) that he knew the complaints to ASIC included allegations of misrepresentations made by Mr Manasseh to investors, he was present in some cases when those representations were made, and in proceeding to take instructions to act for the companies in this application, he was involved in preparing affidavit material directly dealing with many of those representations (including representations as to substantial and valuable orders having been received).[283]

[204] In cross-examination it was put to Mr Zwar that, before accepting appointment as the solicitor for the respondents, it should have been immediately apparent to him that he had a "hopeless conflict". He had earlier said he did not consider that he had a conflict, and when this was put to him reiterated "I don't accept that".[284] When he was asked "Is it not apparent to you knowing all of those facts the impossible situation that you've put yourself in?" Mr Zwar responded: "Well, with respect, I don't see it …".[285]

[205] ASIC submitted that Mr Zwar:

> "displayed a startling lack of insight into the difficulties of his own positions as (putative) director, instructing solicitor for the companies, part-funder of the litigation, shareholder, creditor and solicitor for shareholders complaining to ASIC about the conduct of the companies. He has longstanding commercial and personal relationships with other witnesses and relevant people such as Mr Manasseh, Mr Lissa and Dr Manfield. He is even a longstanding friend of at least one of the shareholders who gave evidence against the making of a winding up

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282 T 2-69.

283 T 2-70 to 2-71.

284 T 2-71.

285 T 2-71 to 2-72.

> order, Dr Stewart, although, of course, that friendship was only exposed during the course of cross-examination of Dr Stewart.
>
> That Mr Zwar put himself in such an impossibly conflicted situation is almost inconceivable. The conflicts were drawn to his attention at an early time by ASIC. Instead of acting on what should have been obvious, Mr Zwar ignored ASIC's warning. In doing so, he has only himself to blame for any resulting obloquy."[286]

[206] At [208] of ASIC's written address the many and varied aspects to Mr Zwar's involvement with the companies and Mr Manasseh are accurately set out, on the basis of which ASIC submitted (at [209]) that:

> "Despite all of these examples, Zwar was not prepared to accept that he had a conflict, even though it should have been immediately apparent to him and, appeared to maintain that he has acted appropriately. His inability to recognise this conflict should be a significant concern to the Court."

[207] The role(s) of Mr Zwar, the extent of which gradually emerged as the trial progressed, did raise matters of concern as to his position, which I expressed on a number occasions to the respondents' counsel.[287]

[208] The respondents maintained that these concerns were unwarranted, including in further written submissions filed, with leave, after the conclusion of the trial. The respondents submitted that there was no conflict of interest in Mr Zwar acting for them; that in fact his own interests coincide with those of the respondents, and apart from some "logistical difficulties" which ensued as a result of Mr Zwar also being a witness in the case, there was essentially no cause for concern.[288] In their written submissions the respondents further submitted that there has been no suggestion of any misuse of confidential information, no complaint or concern expressed by the respondents, or their directors or shareholders, about Mr Zwar acting and Mr Zwar himself did not consider he had a conflict of interest. It was also submitted that the contrary allegation – that he did have a conflict of interest – was not put to Mr Zwar in cross-examination. I reject that submission, as it was a matter upon which Mr Zwar was directly cross-examined.[289]

[209] It was further submitted that, although Mr Zwar was a witness, his evidence, in terms of his affidavits, largely dealt with uncontroversial matters and only took on some significance in the course of his cross-examination and that:

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286 ASIC's written address at [78] and [79].

287 See, for example, T 1-86, 2-27, 2-100 to 2-101 and 3-9 to 3-12.

288 T 5-56 and following; respondents' further written submissions on the conflict issue (17 August 2017) at [2]-[3].

289 T 2-70 to 2-71.

> "… Mr Zwar did not become an officer of the companies until very late in the peace (sic), some 3 weeks prior to the commencement of the trial. This placed Mr Zwar in a position whereby if he had stood aside as the solicitor with the conduct of the matter, both of the companies would have been disadvantaged in that the solicitor with the longstanding conduct of the proceeding would no longer be involved in the proceeding. This situation would have been both disadvantageous and prejudicial to the companies.
>
> It could not be said that in the circumstances there could be a basis for an injunction to restrain him from his role as instructing solicitor."[290]

[210] Reference was made in that regard to the authorities for the proposition that where an application to restrain a solicitor from acting is made, the jurisdiction of the court to make such an order is reserved for exceptional cases, it then being said that:

> "Whilst it may be undesirable that a solicitor in Mr Zwar's position represent the companies in the litigation where he is required to [give] evidence as to one or more issues, it does not necessarily follow that he ought to have removed himself."

[211] One of the authorities cited for this proposition is *Jeffrey v Associated National Insurance Co Ltd* [1984] 1 Qd R 238 where, at 245, Thomas J observed, in circumstances where the solicitor on the record for the defendant found himself having to give evidence about a controversial conversation, that:

> "My task in assessing the evidence in this subsidiary area was not made easier by the fact that the solicitor concerned remained on the record at all times as solicitor for the defendant, even after delivering a defence specifically relying upon the conversation between Mr Bryan and Mr Jeffery, when he knew that Mr Bryan was unlikely to come forward to verify the incident, and when he should have foreseen that he was likely to be personally involved in a controversial area. No doubt he did not think the matter through. In any case where a solicitor has reason to believe that he may be required to give evidence of a controversial kind in a proceeding, he should arrange for an independent solicitor to take over the matter **so that his objectivity cannot be questioned when he gives evidence**…"[291]

[212] Another of the authorities cited is *Chapman v Rogers; ex parte Chapman* [1984] 1 Qd R 542. In that case Campbell CJ made reference to the ethical rule which then applied, to a solicitor "when appearing in court for a client", as either an advocate or instructing solicitor, not to accept instructions to appear in a case in which the

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290 Respondents' further written submissions on the conflict issue at [36]-[37].

291 Emphasis added.

solicitor has reason to believe that he or she is likely to be a witness, and to withdraw if it becomes apparent that he or she is likely to be a witness on a material question of fact and can do so without jeopardising the client's interests (at 544-545). In relation to this Campbell CJ said, at 545:

> "I appreciate that the opening words of that ruling refer expressly to a practitioner 'appearing in Court for a client'; the solicitor here was not himself appearing in court so that the terms of the ruling do not seem to be directly applicable to the present circumstances. However, for the reason that it is **desirable to avoid any suggestion of real or apparent conflict between the duty to the court and the obligation to the client**, I consider that it is generally unwise for a solicitor, who is not himself appearing as advocate or as instructing solicitor in court but who is aware that it is likely that he will be called as a material witness (other than in relation to formal or non-contentious issues), to continue, either personally or through his firm, to represent the client if this can be reasonably avoided."[292]

[213] In *Hempseed v Ward* [2013] QSC 348 McMeekin J noted, at [39]-[40], by reference to *Watkins v Christian* [2009] QCA 101 at [37] that in this statement Campbell CJ was not purporting to propound a universal principle; that there is no such principle; and that what is or is not proper or permissible will depend in each case on a careful analysis of the relevant facts.

[214] Justice McMeekin also adopted, at [42], the following approach taken by Brereton J in *Mitchell v Burrell* [2008] NSWSC 772 at [20]:

> "That said, I do not accept that the mere circumstance that a solicitor will be a material witness, even on a controversial matter, of itself justifies restraining the solicitor from continuing to act. As Windeyer J pointed out in *Scallan v Scallan* [2001] NSWSC 1078, it is, for example, not unusual for instructing solicitors in contested probate proceedings to give evidence of facts relevant to instructions for and execution of a Will. Similarly, in contested conveyancing proceedings, it is not unusual for solicitors who have acted on the conveyance to continue to act in the proceedings for specific performance or rescission and to give evidence in those proceedings. Accordingly, despite Rule 19 of The Law Society of New South Wales *Professional Conduct and Practice Rules*, which imposes a professional obligation (as distinct from a private right), I do not accept that in every case where a solicitor acting for a party is a material witness even on a controversial matter, the Court will restrain the solicitor from continuing to act. Although some observations of

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[292] Emphasis added. In *Yamaji v Westpac Banking Corporation* (1993) 42 FCR 431, another of the cases cited by the respondents, at 432, Drummond J adopted those comments as words that need to be heeded by legal practitioners.

> Campbell CJ in *Chapman v Rogers; ex parte Chapman* [1984] 1 Qd R 542, 545, may go somewhat further, the cases indicate – as Campbell CJ did in that case itself – that **the line is crossed only when the solicitor has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involves the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings**. The presence of such circumstances will be a strong indication that **the interests of justice – which in this field involve clients being represented by independent and objective lawyers unfettered by concerns about their own interests** – require the lawyer to be restrained from continuing to act."[293]

[215] There is and was no application before the court to restrain Mr Zwar from acting for the respondents. But the principles that apply in that context are relevant here. In this regard, the test that is usually applied is "whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice".[294]

[216] As is apparent from the authorities surveyed by Brereton J in *Kallinicos,* one of the bases upon which the court may intervene, in the exercise of its inherent jurisdiction over its officers and to control its processes in aid of the administration of justice – even apart from cases of clear conflict of interest, or protection of confidential information – is where, because of the relationship between a solicitor and their client, the solicitor's professional independence and objectivity might be doubted. This is because the integrity of the judicial process is undermined if lawyers do not have the independence and objectivity which they are presumed to have,[295] matters reflected in the emphasised parts of the passages quoted above.

[217] In *Holborow v Macdonald Rudder* [2002] WASC 265[296] at [28]-[29] Heenan J said, after referring to *Giannarelli v Wraith* (1988) 165 CLR 543 at 555-556, in which Mason J outlined the nature of the overriding duty of a legal practitioner to the court, and the reasons why our system of justice depends upon litigants being represented by lawyers who are not mere agents for the litigant, but who exercise independent judgment in the interests of the court:

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293 Emphasis added.

294 *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [43], [44], [46], [62], [63]-[64], [70]-[72], [74] and [76] per Brereton J.

295 See, eg, *Kallinicos* at [45], referring to *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587; see also *Oceanic Life Ltd v HIH Casualty and General Insurance Ltd* [1999] NSWSC 292 at [48] and *Mitchell v Burrell* [2008] NSWSC 772 at [20].

296 Referred to in *Kallinicos* at [63]-[64].

> "[28] If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service …
>
> [29] From the wider viewpoint, including the perspective of the legal practitioner's duty to the court, it can readily be perceived that this situation justifies intervention by the court because of **an actual or sufficiently material threatened conflict of interest by the practitioner, as an officer bearing fiduciary obligations, between his obligations to the court, and his obligations to the client or to some other interest**. So it has long been accepted that a legal practitioner, who is likely to be a witness in a case should not act as counsel, or continue to act as counsel if a situation arises where he is unexpectedly required to give evidence. The reason being is that the **personal integrity of the practitioner may be put in issue if his credibility is at stake as a witness, and that this will, or may, constitute a personal interest inconsistent with the practitioner's duty to the court or to the client**. Other similar conflicts of interest can arise if, for example, the counsel or solicitor had a **substantial personal stake in the litigation** such as, for example, if he or she were to be a partner in a firm which was a party to the litigation, or a **substantial shareholder in a corporation which was a party**."[297]

[218] In *Bowen v Stott* [2004] WASC 94[298] at [52]-[53] Hasluck J described as "the most obvious case" in which it might be thought that solicitors or counsel did not possess the objectivity and independence which their professional responsibilities and obligations to the court require of them, the situation in which a solicitor had some direct pecuniary interest in the outcome.

[219] In *Paino v MDN Mortgages Pty Ltd* [2009] NSWSC 898 a solicitor who was a director of and had a significant financial interest in the defendant company was restrained from acting for the company, on the basis that his "personal interest in the outcome [was] such that, if he were to continue to act, the Court may be deprived of relevant objectivity in the preparation and presentation of the case" (at [31]).

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297 Emphasis added; references omitted.

298 Referred to in *Kallinicos* at [70]-[72].

[220] In *Pearlbran v Win Mezz No. 19 Pty Ltd* [2009] QSC 292 the plaintiff's solicitor was the owner and controller of a company, Boshanje Developments Pty Ltd, and had drafted pre-sales contracts between that company, as purchaser, and the plaintiff, which were being relied upon to enforce an agreement with the defendant to fund a property development. Even apart from the prospect that the solicitor would be a witness, it was held that he had "a personal or reputational interest in the result additional to his interest in doing his best for his client to succeed in the action" (at [18]) and that "there is the distinct possibility of a real or apparent conflict between his personal interest and his duty to the Court" (at [23]), matters "which argue against him being observably independent to a fair minded, reasonably informed member of the public" (at [28]).

[221] The respondents referred to r 27.2 of the *Australian Solicitors Conduct Rules*, which deals with the situation in which it becomes apparent that a solicitor is required to give evidence material to the determination of a contested issue. Other than where the solicitor is appearing as an advocate, rule 27.2 permits the solicitor to continue to act "unless doing so would prejudice the administration of justice". As McMeekin J observed in *Hempseed v Ward* at [37] this rule picks up the test referred to in *Kallinicos.*

[222] Reflecting the authorities that have just been discussed, I observe that, in addition to articulating the paramountcy of a solicitor's duty to the court and the administration of justice (r 3.1), the *Australian Solicitors Conduct Rules* 2012 also require, as a fundamental ethical duty, that a solicitor avoid any compromise to their integrity and professional independence (r 4.1.4).

[223] The concerns that arise given the numerous interests of and associated with Mr Zwar in relation to the companies and those centrally involved in them, including Mr Manasseh, are the result of the <u>combination</u> of what is an apparent conflict, between his current retainer *for* the companies, against the background of acting for shareholders in complaints *against and about* the companies, and the conduct of Mr Manasseh in particular; his role as one of the new directors, and as a witness giving evidence going beyond formal, uncontroversial matters; <u>and</u> importantly the apparent conflict between his personal interests in the companies (as a substantial shareholder, through his super fund, and a director), his financial interest in the outcome of the proceedings, his close personal relationship with the people involved in the companies, his personal reputational interests and his obligation to the court – all of which compound to strongly call into question the ability of Mr Zwar to discharge his duty to the court as an independent and objective lawyer unfettered by concerns about his own interests.

[224] How Mr Zwar could have described his position in 2014 as "somewhat difficult", but presently categorically deny any conflict – given the multifarious interests he now has – is difficult to comprehend. If his position was "somewhat difficult" in 2014, it is irreconcilable now. In my view, the submission by ASIC that Mr Zwar has displayed a "startling lack of insight" is justified.

[225] It was not submitted, nor do I find, that Mr Zwar's evidence ought to be rejected outright, as lacking credibility or reliability, given his conflicted position. Rather, ASIC's contention was that the lack of insight demonstrated by Mr Zwar, one of the new directors said to have taken over the management of the companies, was a relevant matter to be taken into account by the court in considering whether it is satisfied there is now, despite the past conduct, no longer a lack of confidence in the conduct and management of the affairs of the companies.[299]

[226] The respondents submitted that even if the court should find that there was a conflict of interest, this could not support a finding that the court could not have confidence in the management of the companies going forward, with Mr Zwar as one of the three new directors appointed.[300]

[227] I reject that submission. The long-standing commercial and personal involvement of Mr Zwar with Mr Manasseh and the companies, and the lack of insight shown by Mr Zwar, in placing himself in the position he has as a solicitor for the respondents, are relevant matters, amongst the many other matters that are addressed in these reasons, and support my conclusion that there remains a justified lack of confidence in the management of these companies.

Has Mr Manasseh really been cast adrift?

[228] The clear strategy of the respondents at the beginning of the trial was to distance themselves from Mr Manasseh – describing him as having been "cast adrift", and effectively "thrown under the bus", with the "investors who have the money at stake … [having] now taken over the management of … both companies". There was no attempt to contest the allegations regarding the actions of the past directors. Mr Manasseh was not called to give evidence.

[229] Consistently with this, the effect of Mr Zwar's evidence was that he had "forced the issue", "forced Mr Manasseh to resign", and also "forced his wife quite forcefully to … support the company".[301] Mr Zwar said that it took a while, that he had been pressuring Mr Manasseh to resign for many months, and that he (Mr Zwar) was the moving force because there was a necessity for someone to effectively take charge of the companies.[302] He "completely disagreed" with the proposition put to him in cross-examination that the change to management of the company was a carefully planned strategy between him and Mr Manasseh, in order to defeat ASIC's application, "absolutely" denying that he was a "cat's paw for Mr Manasseh".

[230] Dr Manfield's evidence painted a somewhat different picture. He said the change of directors had been a discussion point with Mr Manasseh for about a year (or even

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299 ASIC's written address at [77]-[78] and [207]-[209].

300 Respondents' further written submissions on the conflict issue at [39].

301 T 2-71 to 2-72.

302 T 2-76 to 2-77.

longer[303]), but that they came to a head in September 2016 when this proceeding commenced. In particular he referred to a meeting he had with Mr Manasseh in mid-December 2016 about possible candidates for new directors to come on board, referring to a "continued theme" that "we may be needing to get some fresh direction to the company and add some new directors to enact that fresh direction".[304] He agreed that Mr Zwar and Mr Manasseh were the people driving the idea of new directors coming onto the board, and said that Mr Manasseh was willing to depart the board, saying "Oh, yeah, he is – he has not been reluctant to – to – to leave if there was someone who could do the job better than him".[305]

[231] The evidence strongly supports the inference that although Mr Manasseh is no longer a director of Gognos or DAT, he is still very much involved in the companies. For example:

(a) he remains the director of Dynamic Fodder, the trading or operating company for the Dynamic group;

(b) his wife is funding this litigation, to an unlimited extent;

(c) he is in regular contact with Dr Manfield (who, in response to the question how regularly he speaks to Mr Manasseh said he would "have to take off my shoes and socks to count them in a day", "we would speak very frequently"[306]), including having spoken to him on the phone on the morning he gave his evidence;[307]

(d) he also has close and frequent dealings with Mr Zwar and Mr Lissa[308] – he spoke to Mr Lissa during the hearing, to ask how the court proceeding was going;[309]

(e) Dr Manfield carefully responded to the proposition put to him, that the respondents were conducting their case on the basis that Mr Manasseh no longer has any involvement in the conduct of the companies by saying "I would have thought Mr Manasseh no longer has any role *as a director* of the company"[310] –and when it was put to him that Mr Manasseh is still intimately

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303 T 3-41.

304 T 3-21 to 3-23.

305 T 3-48.

306 T 3-25.

307 T 3-42.

308 Manfield T 3-46.

309 T 4-9.

310 My emphasis.

involved in the conduct of the companies, Dr Manfield's response was "If he can bring the money in, we'd be very grateful";[311] and

(f) Mr Manasseh was centrally involved in the plan to replace the directors, including identifying Mr Davis and then Mr Zwar and Mr Lissa, people with whom he has longstanding relationships, as appropriate replacements – for him and Mr De Andrade.

[232] I accept the submission by ASIC that the whole idea of the departure of Mr Manasseh as a director, the appointment of the new directors, and the $400,000 facility, was a plan put together by Mr Zwar and Mr Manasseh (with Mr Lissa and Dr Manfield) to ensure the companies could continue to operate beyond the hearing of this matter. I do not accept that this was some of the shareholders "striking back" or taking over the companies; as opposed to the same people who have been involved with Mr Manasseh for a very long time, putting in place a strategy to try to resist the winding up application.

[233] In closing submissions for the respondents it was accepted that the change of directors was "to defeat these proceedings and to defeat the application to wind up" because, were Mr Manasseh and Mr De Andrade still directors running the company, "one would have thought there would have been very little prospect of the companies resisting the application".[312]

[234] In contrast to the manner in which the case was opened for the respondents, it was also said that the court would find it "incredible" that Mr Manasseh – as the person who had been, historically, the driving force behind these companies, having been involved for many years with the companies and people like Dr Manfield, and having a continuing interest in the companies because of his family's shareholding in them – would not seek to keep in touch to find out what is happening in these proceedings because, among other things, he continues to have a stake in these companies, through family shareholding, and his wife has invested a significant amount of money in the defence of these proceedings.[313]

[235] As I have already noted earlier, there was no evidence from any of the other directors, Mr Davis, Mr O'Leary or Mr Sum. I infer from the evidence that the people actually and actively involved in the operations of both companies are Mr Zwar, Mr Lissa, Dr Manfield and Mr Manasseh. As to the latter, that is an inference clearly available to be drawn from the evidence before the court. Mr Manasseh was not called to give evidence, a matter for which there was no explanation proffered. I infer that any

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311 T 3-50 to 3-51.

312 T 5-29.

313 T 5-30.

evidence he could have given would not have assisted the respondents' case in this regard.[314]

[236] In support of their case the respondents tendered undertakings signed by each of Mr Manasseh and Mr De Andrade that for a period of five years from the date of the undertaking (in each case, 2 August 2017) they would not:

(a) seek, nor accept appointment as a director or otherwise as an officer of Gognos; and

(b) seek, nor accept appointment as a director or otherwise as an officer of DAT.[315]

[237] This says nothing about being involved in the affairs of the companies. Mr Manasseh was not a director of Gognos until December 2013, but prior to this, he was plainly centrally involved in its affairs and operations. As Mr Lissa said, there is no doubt he would be deemed to be a shadow director of Gognos, saying "he's pretty much run across all of the companies, because at the end of the day it's his expertise, his contacts…"[316]

[238] In the course of his s 19 examination in December 2015 Mr Manasseh indicated it was not then his intention to be offering more shares in Gognos, until money was received from overseas.[317] There was no evidence to suggest he had done so.[318] Mr Zwar also deposed to being informed by Mr Manasseh that he was willing to give an undertaking "not to seek to raise funds from members of the public pending the resolution of this matter".[319] That is obviously of limited value, given the qualification as to time, that Mr Manasseh is no longer a director of either company, and that it says nothing about raising further funds from existing shareholders.

The $400,000 line of credit from Mr Lissa's company

[239] The respondents also relied upon the availability of the $400,000 line of credit, as supporting their contention that the companies ought to be given the opportunity to try to succeed.

[240] The $400,000 has been deposited into Mr Zwar's trust account by Property Magic Aust Pty Ltd, a company of which Mr Lissa and his wife are the directors.[320] Mr

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314 *Jones v Dunkel* (1959) 101 CLR 298*; ASC v AS Nominees* (1995) 62 FCR 504 at 515.

315 Exhibit 36.

316 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 58.

317 Keily (exhibit 1), exhibit MFK2 (s 19 examination of Manasseh) at p 163.

318 See also Keily at T 1-70.

319 Zwar (exhibit 12) at [90].

320 Lissa (exhibit 26), exhibit GAL-1.

Lissa says he agreed to advance that sum "by way of a working capital facility to [DAT] in order that the funds could be utilised at my express approval for ongoing commercial negotiations and sufficient capital for [DAT] to maintain and develop its overall business plan".[321] Mr Zwar confirmed that Mr Lissa would have a right of veto over the manner in which the funds are used (although that is not a matter which has been discussed with the other directors).[322]

[241] As described by Mr Zwar "the funds are available for the ongoing commercial activity of [DAT], including furthering its development of the containerised feed system and seeking commercial markets in relation thereto". Initially, it seems Mr Zwar has in mind using some of this money to fund a further trip to Argentina "with a view to finally finalising a fresh order that's emerged from Argentina".[323]

[242] Dr Manfield, on the other hand, does not envisage the money being spent in order to sell units, but rather proceeds on the basis that the current arrangements will see the orders completed, and envisages the money being utilised to fund him to travel to South America to "qualify" candidates for the manufacture of the units, to support the cost of realisation of an order(s) once a deposit is received, to meet initial manufacturing costs, any costs associated with expanded patent specifications and any further research and development.[324]

[243] According to Mr Zwar and Mr Lissa the funds will not be used for payment of the audits, nor for the payment of the costs of this proceeding.[325]

[244] Mr Zwar says that based on his knowledge of Gognos and DAT the sum of $400,000 "is sufficient to permit the commercial manufacturer (sic) of the feed containers and in furtherance of any further research and development, as it is has been the policy of [DAT] that a releasable deposit of 50% would be forwarded by the purchaser to enable to manufacture of the feed container".[326] Mr Lissa likewise says that DAT does not presently need funding over and above $400,000, as any orders obtained will involve payment of a deposit of 50% (the retail price of a unit being $150,000, the deposit would be $75,000), which would be sufficient to commence construction of a unit.[327]

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321 Lissa (exhibit 26) at [11]; T 4-12.

322 Zwar T 3-4.

323 T 3-5.

324 Manfield (exhibit 25) at [6] and T 3-62 to 3-66.

325 Lissa (exhibit 26) at [12]; Zwar (exhibit 15) at [11]-[14].

326 Zwar (exhibit 15) at [15].

327 Lissa (exhibit 26) at [23].

[245] But Mr Zwar also acknowledged that in circumstances where DAT's liabilities are presently in excess of $5 million, $400,000 is not a lot of money in the context of the historical cost of this business, and its current position.[328] Mr Lissa agreed.[329]

[246] There is no formal agreement in place about the $400,000, including as to the interest payable, or repayment terms. There has been no meeting of the directors of the companies to consider the appropriateness of entering into the arrangement for the line of credit; or about how it is to be utilised. There has been no budget prepared.[330] Mr Lissa agreed there is not yet any effective strategy for how this money is going to be used to develop the situation further for DAT – but justified that in the context of this having "only just come up", "so that time hasn't permitted any discussions to take place and formalise any terms and conditions of the loan".[331]

[247] The respondents invite the court to find that the proposed facility of $400,000 will beneficially assist in the development of the business.[332]

[248] What is apparent from the evidence about this proposed facility is that it is a last-minute idea; which has not been the subject of discussion with all directors; for which there is no plan or budget; and for which those involved seemingly have different ideas as to how it will be spent. Moreover, there is no proper business plan for how it is proposed to develop the business, beyond a continued reliance, indeed dependence, on the possibility of success of a sales agent in Argentina, who the evidence objectively indicates has been singularly unsuccessful in the last five years. Those matters do not assist to give confidence in the ongoing management and conduct of the affairs of the companies. The availability of this money, at this stage, is not such as, in light of all the other circumstances, to alter the conclusion I regard as appropriate in this case, that it is just and equitable in all the circumstances that the companies be wound up.

Why would Mr Zwar and Mr Lissa continue to stand behind the companies?

[249] The respondents submitted that the court "must ask why" Mr Zwar and Mr Lissa would want to advance further funds, and their personal time and energy into the continuation of the companies as a commercial enterprise, and that this is a matter the court "must give considerable weight to" in making its decision. It was further submitted that the court "is not in a position to make a determination of the commercial prospects of the companies, nor is it proper to do so", and that the court "must accept that the new directors (and the shareholders) have determined that there

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328 T 3-5.

329 T 4-18.

330 Zwar at T 3-3 and 3-6; Lissa at T 4-11 to 4-12 and 4-18.

331 T 4-19.

332 T 5-26 and the respondents written submissions on the factual findings (17 August 2017).

is in fact commercial prospects of the companies continuing to operate successfully".[333]

[250] Despite the imperative language used in these submissions, I do not find the question why Mr Zwar or Mr Lissa continue to support the companies readily amenable to an answer that is persuasive against the making of a winding up order. It may also be observed that there is no evidence of what the other directors, apart from Mr Zwar and Mr Lissa, may or may not have determined as to the commercial prospects of the companies; nor of "the shareholders", other than the few that gave evidence to the court, whose evidence has been referred to above.

[251] The reason why Mr Lissa is putting in money and time may well still be explained by reference to moral support and friendship, as he explained in his s 19 examination.[334] He has known Mr Manasseh since about 1988.[335] When he resigned as a director in 2012, it was in circumstances where he was owed about $120,000 for professional services, and had also loaned (one of) the companies around $50,000 – as he said, he was effectively a director, the tax agent, the accountant and the largest creditor – and so resigned as a director because he was in a position that he did not see as independent. He told Mr Manasseh that if he was paid, he would do the work, but otherwise he would provide him with support on a friendship basis.[336] In December 2015 he said "I've basically had a gutful. I just don't want to do it anymore. Like I said, I've just hung in there to just kind of support the company because Maurice [Manasseh] keeps me informed about this continuing interest".[337]

[252] Why Mr Zwar, a very experienced solicitor, would place himself in the position he has does not permit of a ready answer. Although he expressed the view that he was now more optimistic about the prospect of sales coming through from Argentina, there is no objective basis in the material before the court to support that view.

[253] Dr Manfield is clearly very passionate about the technology, and the potential for this business. But as he described himself in the s 19 examination: "I'm always a silver lining sort of guy … So the people we've got [now] are the diehards – really believe in the product; believe in Maurice [Manasseh] to that extent; believe in myself, because if I get run over by a bus today, the technology vision is unlikely to be realised".[338]

[254] I do not purport to express a view about the broader potential commercial prospects of the manufacture and distribution of fodder units. What I have formed a view

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333 Respondents' written submissions (11 August 2017) at [49] and [50]. See also T 5-27 to 5-28 and the respondents' submissions on factual findings sought.

334 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 13.

335 T 4-8.

336 Keily (exhibit 1), exhibit MFK1 (s 19 examination of Lissa) at p 12.

337 Ibid at p 42.

338 Keily (exhibit 1), exhibit MFK6 (s 19 examination of Manfield) at p 16.

about, however, is that there is a well-founded, justified, present, lack of confidence in the conduct and management of the companies' affairs, such as to give rise to a real risk to the public interest that warrants protection, and the fact that Mr Lissa, Mr Zwar and Dr Manfield have neither the desire nor the incentive[339] to wind up the companies is not such as to overcome those matters.

Impact on the shareholders

[255] The respondents pressed the point, and ASIC did not contend otherwise, that if the winding up order is made the investors in Gognos will lose their investment, which "can't be in the interest of the shareholders".[340] It goes without saying that losing their money is not an outcome that investors want. That is an extremely unfortunate outcome of the manner in which these companies have been conducted. But the reality is that they have already lost their money. The $7.7 million raised by Gognos has gone. Both Gognos and DAT are in perilous financial circumstances. What the respondents are asking the court to do is give them another chance to go out and try to garner commercial interest, and actual sales in the product – with a view to, in the future, possibly (acknowledging that the actual chances of the prospect of future sales is "unknowable" on the evidence[341]) being able to return an investment. The respondents submit there is no evidence of any additional detriment to the public interest were they permitted another six months to complete the audit of the accounts, and another six to twelve months to "re-establish the business".[342]

[256] I reiterate the observations made at [14]-[21] above. Adopting the words of Beach J in *Bilkurra Investments* at [16], "in the events that have transpired, this is little more than wishful thinking. But even if that prospect had a sliver of reality, it does not outweigh" the concerns addressed in these reasons. Given the evidence that is before the court, and the findings that have been made, I consider it inappropriate that the respondents be permitted to continue. Mr Blasenstein's concern that the recent changes may well be "just another charade", and Mr Moses' expression of concern for those who have suffered, and recognition that "if the company needs to be closed down because more people may endure this kind of suffering, maybe that's the best thing to do" are insightful observations which reflect the conclusion I have reached.

[257] In so far as recovery by the investors is concerned, it may be that further legal proceedings by or against the companies ensue consequent upon these proceedings, but that is not a matter about which I will speculate. As Mr Keily observed,

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339 Cf *ASC v AS Nominees* at 530 per Finn J.

340 T 5-26 and the respondents' submissions on factual findings sought.

341 T 5-26.

342 T 5-30 and the respondents' submissions on factual findings sought.

liquidation of the companies may also serve to crystallise a tax loss for those who are able to benefit from that.[343]

Conclusion and orders

[258] The evidence before the court demonstrably supports the conclusion that there is a well-founded and justified lack of confidence in the conduct and management of the companies' affairs, such as to give rise to a real risk to the public interest that warrants protection – to protect existing and the prospect of any future investors, the public, and creditors, where the companies have not carried on their business candidly and in a straightforward manner with the public, and have been mismanaged, as well as to prevent and condemn the repeated and continuing breaches of the *Corporations Law*. The financial position of the companies is perilous and such that, although a finding of insolvency has neither been sought, nor will be made, it supports winding up, rather than militating against it. It is inappropriate that the respondents be allowed to continue on the basis of what could be put no higher than an "unknowable" prospect of potential commercial success which may result in a return to investors, in the face of past and continuing non-compliance with obligations, mismanagement of the affairs of the companies, and misleading representations to investors, and where those now presenting as the "new management" are not "new" at all, but have long term associations with the companies and the principal offender in terms of the misleading conduct of the past, Mr Manasseh, who remains in the shadows of these companies.

[259] I am satisfied, for the reasons given, that it is just and equitable for the companies to be wound up and therefore that it is appropriate to make the orders sought by ASIC that:

1. The first respondent be wound up under section 461(1)(k) of the *Corporations Act* on the basis that it is just and equitable to do so.

2. Michael John Hill and William James Harris of McGrath Nicol be appointed as joint and several liquidators of the first respondent.

3. The second respondent be wound up under section 461(1)(k) of the Act on the basis that it is just and equitable to do so.

4. Michael John Hill and William James Harris of McGrath Nicol be appointed as joint and several liquidators of the second respondent.[344]

[260] ASIC also seeks an order that its costs of and incidental to this proceeding be costs in the winding up (taxed or as agreed) and reimbursed in accordance with section 466(2) of the Act. I will hear submissions from the respondents as to whether there is any reason to order otherwise.

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343 ASIC's written address at [10]; Keily T 1-69.

344 See the consents of official liquidators filed 13 October 2017.

[261] The respondents submitted that if the court was minded to make an order to wind up the companies the court should stay the order for a period of 1-2 weeks to enable the respondents' rights of appeal to be preserved.[345] I will also hear submissions from the parties in relation to this.

[345] Respondents' written submissions at [146].