

SUPREME COURT OF QUEENSLAND

CITATION: *Australian Securities and Investments Commission v Sheers & Anor* [2003] QSC 474

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(applicant)
v
RICHARD THOMAS SHEERS
(first respondent)
GARRY RAYMOND HOWES
(second respondent)

FILE NO/S: SC 5793/03

DIVISION: Trial Division

DELIVERED ON: 24 December 2003

DELIVERED AT: Brisbane

HEARING DATE: 24 September 2003

JUDGE: McMurdo J

ORDER: **1. Pursuant to s 1317E it is declared that Richard Thomas Sheers contravened s 182 of the *Corporations Act 2001 (Cth)* in relation to Gold Ribbon (Accountants) Pty Ltd (ACN 081 156 078) by:**
(a) causing to be made a loan by that company of approximately \$100,000 to Jumarsh Pty Ltd in July 1999;
(b) causing to be made a loan by that company of approximately \$300,000 to Jumarsh Pty Ltd in September 1999;
(c) causing to be made loans by that company to Garry Peter Moss in October and November 1999 and May 2000 in amounts totalling approximately \$733,259.

2. It is ordered that Richard Thomas Sheers be disqualified from managing a corporation for a period of two (2) years.

CATCHWORDS: CORPORATIONS LAW – CONTRAVENTIONS – DIRECTORS – where improper use of director’s position – whether director should be disqualified from managing a corporation.

Corporations Act 2001 (Cth), s 180, s 181, s 182, s 206C, 1317E

Australian Securities Commission v Donovan (1998) 28 ACSR 583, followed

R v Byrnes (1995) 183 CLR 501, applied

COUNSEL: C J Conway for the applicant
Mr Sheers (first respondent) in person

SOLICITORS: Australian Securities and Investment Commission (applicant)

- [1] **McMURDO J:** This is an application made against Mr R T Sheers, for a declaration that he contravened s 182 of the *Corporations Act* 2001, and for an order disqualifying him from managing a corporation. The conduct complained of concerns Mr Sheers' directorship of Gold Ribbon (Accountants) Pty Ltd ("GRA"). He was appointed a director of that company on 28 June 1999, and he remained a director until it was wound up on the insolvency ground in August 2001. The conduct complained of occurred within the first year of his directorship. In essence the applicant's case is that Mr Sheers improperly used his position as a director of GRA by causing it to lend money to two particular borrowers, in order to gain an advantage for himself or someone else. Those borrowers were Jumarsh Pty Ltd ("Jumarsh") and a Mr G P Moss. Before discussing the particular facts and circumstances of these loans, it is necessary to describe the nature of GRA's business.
- [2] The following facts are not in dispute. GRA was incorporated in December 1997 and carried on business as a lender of money to members of the accounting profession. In essence, it provided loans to practising accountants upon a short term basis, usually 90 days. GRA's source of funds was its borrowing from Colonial State Bank, which provided it with a bank bill facility with a limit of \$25M. That facility was subject to certain conditions, which included a condition that a policy of insurance, to be issued by HIH Casualty and General Insurance Ltd, should at all times be in place to insure against any loss as a consequence of a borrower failing to repay money due to GRA and owing under the terms of the facility. An agreement between GRA, HIH and Colonial State Bank was made on 24 February 1999 to record the terms of HIH's agreement to indemnify each of GRA and the bank. By that agreement, GRA was obliged to ensure that its lending was made according to certain conditions. One of those conditions was that "the Accountant must, if operating as an incorporated entity, provide personal guarantees of its directors to GRA". Another was that the accountant borrower must supply to GRA a certificate as to the accuracy of its outstanding fees billed for an immediately preceding period. The evident purpose of the provision of this declaration was to show the value of the particular accountant's asset constituted by debts owing to that practice, and the maximum amount which could be lent was 80 per cent of the outstanding fees so declared. However, the loans to accountants were unsecured, and once the accountant was in receipt of the funds advanced, the accountant was free to spend or invest the funds as it saw fit.
- [3] On 7 June 1999, GRA entered into an agreement with Austide Holdings Pty Ltd ("Austide"), whereby that company would administer GRA's loan portfolio for a fee. At all relevant times, Mr Sheers and his de facto partner, Ms Schweitzer, were the directors of Austide.

- [4] With the demise of HIH in early 2001, the bank demanded repayment of the whole of the amount outstanding under its facility, which GRA was unable to pay because a number of its borrowers had seriously defaulted.

ASIC's application

- [5] These proceedings are by an originating application filed on 30 June 2003, naming Mr Sheers as first respondent and Mr Garry Howes as second respondent. The proceedings sought declarations against each respondent that as a director of GRA, he contravened s 180, s 181 and s 182 of the *Corporations Act*. Orders were sought pursuant to s 206C disqualifying each respondent from managing a corporation for a period of five years, or such other period as the court considered just. The originating application was supported by a number of affidavits referring to the conduct of Mr Sheers, the distinct conduct of Mr Howes and other matters. Much of the evidence within those affidavits is admissible against one respondent but not the other. Mr Howes did not contest the application, and on 29 August 2003, Dutney J declared that Mr Howes had contravened s 180, s 181 and s 182, and disqualified him from managing a corporation for a period of five years. In his reasons for judgment, Dutney J made a number of findings in relation to GRA's loans to Mr Moss. These loans were also the subject of part of the case against Mr Sheers. In essence, Mr Howes' misconduct was in his causing Mr Moss to deliberately overstate the receivables of his accounting practice, so as to permit excessive amounts to be advanced to him by GRA. Mr Howes was found to have engineered this fraud upon GRA, telling Mr Moss that although he did not have sufficient owing to him in his practice to justify further borrowings, Mr Howes would help him by compiling a fictitious debtors' list.
- [6] The application against Mr Sheers requires the evidence against him to be distinguished from that admissible against Mr Howes. In addition, in the hearing of the application against Mr Sheers, ASIC abandoned its case of alleged contraventions of s 180 and s 181.
- [7] The ASIC case has not been pleaded, but it is according to its outline of submissions provided to Mr Sheers at least some days prior to the ultimate hearing date. At the commencement of that hearing, counsel for ASIC confined the application to the alleged contravention of s 182, as particularised in paragraph 16b of that outline of submissions, which is in these terms:

“16. Mr Sheers improperly used his position to gain an advantage for himself or someone else or caused (*sic*) a detriment to GRA in relation to the following matters:

...

- (b) Obtaining funding for their own purposes and for their own benefit
- (i) Mr Sheers used his position as director to indirectly obtain funding through GRA for his own purposes and for his own benefit (see affidavits of: Grant Sparks at paragraphs 15(v), 27(iii); Garry Moss 15-21, 32, 35-40, 49-54, 57-61, 79-81, 92-96, 104, 114-116; Michael Norton-Smith 65, 82, 83, 89, 93, 94, 102, 103, 120-129, 131-144, 149-150; Julian Norton-

Smith 11, 32, 33, 35, 46, 47, 59, 60, 62; Peter Scott 26, 42, 44, 71).”

Whilst certain other paragraphs of that outline were expressly abandoned, paragraph 17 was not. It is in these terms:

“The Applicant contends that by permitting Austide to administer the loan portfolio and by actively encouraging Jumarsh, an unsuitable applicant, to apply for funding which was then to be used to invest in start-up companies in which Mr Sheers had an interest without disclosing that interest to other GRA Board members (with the exception of the Second Respondent), Mr Sheers acted without good faith and improperly used his position as director of Gold Ribbon to gain an advantage for himself. (See affidavit of Gary Moss paragraphs 19-61).”

- [8] Part of the case thereby abandoned was the allegation¹ that “Mr Sheers encouraged applicants to overstate the amount of receivables upon their application form in order to obtain funding from GRA”. Another allegation abandoned was that the applicant had breached s 180 by, amongst other things, permitting loans to be made or renewed when it was known that the declared receivables provided by the borrower included amounts which were not then owing but were estimates of work in progress.² In consequence the respondent conducted his case upon the basis that there was no allegation of impropriety by the use of estimates of work in progress as if they were receivables.
- [9] Accordingly the applicant’s case must be considered upon the basis that Mr Sheers was not involved in the falsification of the amount of a borrower’s receivables, either by the inclusion of estimates of work in progress or by an overstatement of the receivables themselves. Nevertheless, the identity of the party or parties in respect of whom the borrowing accountant had relevant receivables or work in progress, and the apparent means of those parties, are relevant matters for consideration upon the applicant’s case as it was ultimately advanced.

Jumarsh loan

- [10] The facts are largely uncontroversial,³ and I find them to be as follows. Jumarsh is a company formed by Mr Michael Norton-Smith. Until 1998, he practised as an accountant in Tasmania. Apparently that practice was conducted through Jumarsh from June 1996. In August 1998 he resigned as a director and was replaced by his son, Julian Norton-Smith, in consequence of Michael Norton-Smith’s imminent bankruptcy. That bankruptcy was annulled on 30 June 1999.
- [11] In March or April 1998, Mr Norton-Smith moved to the Gold Coast where he commenced to do accounting work, through Jumarsh, as a consultant to another accounting firm. In late 1998, Mr Norton-Smith met Mr Sheers, through a Mr Peter Scott. Mr Norton-Smith, Mr Scott and Mr Sheers established a company called RPM Holdings Pty Ltd in which they were issued shares through nominee companies. These three persons became interested in establishing a group of

¹ Outline para 16a ii

² Outline para 12a ii

³ No witness was required for cross examination

companies to own and manage timber plantations. Mr Norton-Smith became involved in providing tax and financial advice in relation to that proposal. A company called Timber Tec Industries Ltd (“Timber Tec Industries”) was established, in which RPM became the majority shareholder. Mr Sheers was interested in Timber Tec not only through RPM but by shares in Timber Tec Industries held by the companies Carrington Pty Ltd and Austide, which, as I have already mentioned, later entered an agreement with GRA for the administration of GRA’s loan portfolio. Other companies were established as members of what Mr Norton-Smith describes as the Timber Tec group. The plantation proposal was a large and ambitious one, requiring some tens of millions of dollars to be raised. The intention of the Timber Tec group, including that of Mr Sheers who was a director and “in control of the general management of Timber Tec Industries”⁴ was to have the group borrow several million dollars from a bank, which it eventually did in late 1999. Before those funds were available, however, the Timber Tec group needed another financier. At a time which Mr Norton-Smith puts at between July and September 1999, Mr Sheers discussed with him the use of Jumarsh as a provider of finance to the Timber Tec group, from monies to be borrowed from GRA by Jumarsh as an accountant. Mr Sheers said words to the effect that Jumarsh still had the means to draw up to \$800,000 or \$900,000 (having regard to the amount which could be put as its receivables), and that funds could thereby be obtained for the use of the Timber Tec venture and also for another proposed investment of Mr Sheers in a company Gold Ribbon Corporate Services Pty Ltd. Mr Sheers then also suggested that in this way \$50,000 could be effectively borrowed by each of Mr Sheers, Mr Howes and Mr Norton-Smith.

- [12] As at the beginning of July 1999, Jumarsh had already borrowed from GRA. In March 1999 an amount of \$342,000 was loaned to Jumarsh by GRA, which after deduction of stamp duty and an initial payment of interest, resulted in a net payment to Jumarsh of \$334,265.76. This particular advance is not an element of ASIC’s case, because it occurred before Mr Sheers was a director of GRA. Mr Sheers signed the relevant loan application on behalf of Jumarsh. The proceeds of this first advance were used in part to pay creditors of Mr Norton-Smith but the majority of the proceeds were paid by cheque to Mr Sheers dated 15 March 1999 in an amount of \$200,000.
- [13] As I have mentioned, Mr Sheers became a director of GRA on 28 June 1999. At all material times thereafter, he was then a director each of GRA, Jumarsh and Austide being respectively the lender, the borrower and the loans administrator. There are two loans made by GRA to Jumarsh after Mr Sheers became a director of GRA. The first of them, which I shall call the “July loan” was a further \$100,000 (the net proceeds of which were \$97,828) made on 14 July 1999. The second, which I shall call the “September loan”, was for a further \$400,000, involving net payments totalling \$391,207.20.
- [14] The July loan increased the Jumarsh debt from \$342,000 to \$442,000. At no stage did Mr Sheers provide a guarantee of the Jumarsh debt in favour of GRA. He provides no explanation for not having done so, although the conditions agreed between Colonial State Bank, GRA and HIH required guarantees from directors of a corporate borrower. The \$100,000 the subject of the July loan was paid as to \$10,000 to Mr Sheers and at least approximately \$79,000 of the balance was paid

⁴ Affidavit of Michael Norton-Smith para 39

for the benefit of the Timber Tec venture. That included an amount of \$50,000 for the payment of establishment fees for the (then proposed) Timber Tec facility with the St George Bank. The purposes for which the funds were borrowed then were to provide funding for Timber Tec as well as to pay Mr Sheers \$10,000. As to this payment to him, at the hearing he told me he was unable to recall the specific purpose for that payment, nor could he say whether it was a loan. I find however that his intended application of the July loan accorded with its actual application. The July loan was obtained on the basis of certain represented receivables, which were a combination of receivables and work in progress. Both of these components included amounts in relation to the Timber Tec group. The applicant also relied upon an affidavit sworn by Mr Benneworth, which exhibits spreadsheets used to calculate the amount of receivables (including work in progress) in support of the applications by Jumarsh for these two loans. It is unnecessary to set out in detail the amounts involved but it is sufficient to say that a very substantial component of the receivables and work in progress is attributable to one or more of the Timber Tec companies.

- [15] The September loan took the total borrowing by Jumarsh from GRA to an amount of \$884,000. Again, this was obtained on the basis of represented receivables and work in progress which contained a substantial component of work for the Timber Tec Group. The September loan was then applied to a large extent in payment of debts owing by one or more members of that group. But there were also payments by GRA in making this September loan of \$50,000 to each of Mr Sheers and a company Dexmont Pty Ltd (a nominee for Mr Howes who was at that time a bankrupt). I find that Mr Sheers intended that this third loan should be advanced to Jumarsh principally for the purpose of providing further funds for the Timber Tec group and also to provide him and Dexmont with the amounts which I have mentioned. I accept, as Mr Norton-Smith says, that the \$50,000 paid to Mr Sheers was a loan from Jumarsh to him, but I also find, as he says, that this was an unsecured loan at no interest and not the subject of any written agreement. This took Mr Sheers' debt to Jumarsh to at least \$250,000, which he repaid to Jumarsh in November 1999, it would appear, coinciding with the provision of finance to the Timber Tec group by St George Bank. I also accept that the various funds provided by Jumarsh to the Timber Tec group from its borrowings from GRA were repaid to Jumarsh, again it would appear from the St George Bank facility.

Analysis of the Jumarsh case

- [16] Section 182 of the *Corporations Act 2001* (Cth) provides:

“182(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.”

- [17] The applicant's case is that Mr Sheers used his position as a director of GRA to obtain the two Jumarsh loans which I have described as the July loan and the September loan. There is no issue as to Mr Sheers being involved as a director of GRA (as well as in other respects) in the making of these two loans. There is no suggestion, for example, that Mr Sheers sought to completely distance himself from any consideration by GRA of the Jumarsh applications for these loans. The

questions then for determination are whether Mr Sheers improperly used his position and whether he did so in order to gain an advantage for himself, or alternatively for someone else. The first of these questions is an objective one. In *R v Byrnes* (1995) 183 CLR 501, Brennan, Deane, Toohey and Gaudron JJ said at 514-515:

“Impropriety does not depend upon an alleged offender’s consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender’s knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.”

- [18] The second issue, which is whether Mr Sheers acted with the alleged purpose of benefiting himself or another, is one which calls for an assessment of his state of mind.⁵ I have already expressed my findings that Mr Sheers caused these two loans to be made by GRA to Jumarsh in order to have monies paid as they were paid from the proceeds of these two loans. In particular, Mr Sheers acted with the intention that the proceeds of these two loans would be used principally to benefit the Timber Tec group as well as to benefit Mr Sheers himself. The payments in favour of one or more members of the Timber Tec group or to Mr Sheers himself, I accept, represented advances by Jumarsh to them (save for the \$10,000 payment to Mr Sheers). As I have said, those advances were repaid but nevertheless the payments to them, when made, were for their benefit as they were intended to be. It is unnecessary to attempt some valuation of that benefit, although in Mr Sheers’ case, it seems that he was able to borrow substantial sums on an interest free basis. The payments to the Timber Tec group were plainly to its benefit because they enabled the group to pay at least some of its then debts or otherwise advance the proposal of the timber plantations ahead of the long term funding eventually provided by St George Bank. It must be concluded that Mr Sheers used his position as a director of GRA by causing these loans to be made, in order to benefit the Timber Tec group and himself.
- [19] The remaining question is whether he acted improperly. The test of impropriety is an objective one. In some cases “a single state of mind with which an act is done might establish both impropriety in the use of position and the proscribed purpose (or intention) with which the position was improperly used”: *R v Byrnes* at 512. In the present case, Mr Sheers’ purpose is a relevant consideration to the issue of whether he acted improperly.
- [20] So far as the relative advantage to GRA from these loans is concerned, the loans were not, on an objective view, attractive propositions. They were made in the

⁵ *Chew v R* (1991-1992) 173 CLR 626

context of Jumarsh already being a substantial debtor from the initial loan of \$342,000 in March. Importantly the loans were not supported by a guarantee from Mr Sheers. As I have mentioned, this was contrary to the agreed condition (agreed between GRA, HIH and Colonial State Bank) for a loan to a corporation. Moreover, Mr Sheers was well aware that another director of Jumarsh, Mr Julian Norton-Smith, had had to provide a guarantee. This is demonstrated by the evidence of that person, which I accept, that Mr Sheers then told him that he should not be concerned about giving a guarantee because there was, he said, no prospect of its being called upon because of the HIH insurance. Nevertheless, Mr Sheers is unable to satisfactorily explain why he did not himself give a guarantee. I conclude that he consciously chose to exempt himself from the required condition of a director's guarantee, although he knew that at least one other director of Jumarsh had had to provide a guarantee. In this way, he was able to borrow at least \$250,000 on an unsecured basis, and at least in part on an interest free basis, where his only personal liability was to Jumarsh.

- [21] It is relevant also that he was acting for the benefit of Timber Tec by providing it with finance which it needed in advance of obtaining its St George Bank finance, but at the same time on the basis of Jumarsh's receivables and work in progress referable to the Timber Tec group. From GRA's point of view, the prospects of Jumarsh duly repaying these loans were dependent upon the prospects of Timber Tec ultimately obtaining the St George Bank finance. The value of the Timber Tec accounts and work in progress was likely to be insignificant absent the provision of that finance. I have mentioned already the confinement of the ASIC case by its abandoning the reliance upon the use of work in progress as represented debtors of the borrower. However, the fact that much of the work in progress involved the Timber Tec group is relevant in assessing the relative benefit to GRA of these loans.
- [22] Against these considerations, Mr Sheers raises a number of matters which he says are an answer to the allegation of impropriety. The first is that his co-directors were well aware of his directorships of Jumarsh and Austide. However, it is not suggested that they were aware of the affairs of the Timber Tec companies, and of the extent of the risk in making funds available for the purpose of a group in a position where it had not commenced business and where although it was incurring very substantial outlays, its future was dependent upon the assessment by others of its prospects. Nor does Mr Sheers say that his fellow directors made some informed decision not to require his guarantee.
- [23] Mr Sheers emphasises that it was a matter for Jumarsh as to how it applied the monies borrowed from GRA, in that according to the standard terms of GRA's lending, the borrower could use the funds for any purpose. That is so but the intended purpose for the borrowing is nevertheless relevant, in assessing the prospects of repayment to GRA and thereby the likely benefit to GRA of the loans.
- [24] Mr Sheers also emphasises the fact that the advances by Jumarsh to him and the Timber Tec group were repaid to Jumarsh. That this occurred does not provide any answer to the allegation that it was imprudent for GRA to have made these advances at the time.
- [25] Mr Sheers also submits that Jumarsh "met the criteria to borrow funds" from GRA. To some extent that is so, having regard to ASIC's abandonment of its case that work in progress did not constitute a receivable, but that is not a sufficient answer if

impropriety is otherwise established. It is not persuasive for Mr Sheers to argue that Jumarsh met the necessary criteria if at the same time he excused himself from meeting the important and usual condition of a director's guarantee. In that sense then, Jumarsh's loan applications were non complying. To the extent that Jumarsh did meet the required criteria, it is a matter which explains how he used his position but it does not excuse it.

- [26] In my view, Mr Sheers acted improperly in the use of his position to cause GRA to make these two loans. The loans were relatively risky, having regard to the fact that most of their proceeds were being paid to the Timber Tec group on an unsecured basis in advance of the commencement of its business where the prospects of repayment were dependent upon a third party ultimately agreeing to fund the group. Importantly, Mr Sheers preferred his interests to those of GRA by not giving a guarantee. But for his own interest in obtaining some of these loan monies, and his interest through Timber Tec, it seems inconceivable that as a director of GRA he would have seen fit to cause these loans to be made at least on a basis unsecured by a director's guarantee.
- [27] I therefore conclude that Mr Sheers contravened s 182 by conduct constituted by causing to be made the loan of amounts totalling approximately \$400,000 by GRA to Jumarsh in July and September 1999.

The loans to Mr Moss

- [28] Mr Moss as an accountant who, between 1991 and 1999, practised as a sole practitioner operating from his house. Mr Moss borrowed substantial sums from GRA, it would appear, by the use of falsified statements of his receivables, as planned by Mr Howes and discussed in the judgment of Dutney J in relation to him. The case against Mr Sheers however, is not that Mr Sheers was involved in those misrepresentations. Instead, it is that some of the monies lent to Mr Moss were to benefit entities in which Mr Sheers had an interest.
- [29] On 11 October 1999, Mr Moss applied for a loan of \$650,000 from GRA. On 20 October 1999, GRA advanced \$350,000 to Mr Moss, resulting in a net amount of \$343,380.80 being paid to the bank account of his family trust. From those monies, \$30,000 was paid on 26 October 1999 to Jumarsh. Mr Moss says that this payment was made to reimburse it for monies paid to others on his behalf. Mr Moss further says that most of this \$343,380.80 was used to pay the expenses of No Lift Products (Aust) Pty Ltd, Cable Drum Pty Ltd, a Mr Barry Dixon and members of the family by the name of Charlton.
- [30] Cable Drum Pty Ltd was a company originally owned by the Charlton family. Its business was the development of any recently invented product. The Charlton family made an agreement with R P M Holdings Pty Ltd which I have referred to at [11] as a company in which Mr Sheers had an interest. RPM agreed to provide \$150,000 to two companies in relation to the development of this invention, being Cable Drum Pty Ltd and Innovation Design Marketing (International) Pty Ltd. The shareholding in those companies became 50% owned by the Charlton family and 50% owned effectively by a consortium of Mr Moss, Mr Howes, Michael Norton-Smith and Mr Sheers. Mr Sheers and Mr Norton-Smith had a shareholding in these companies through Timber Tec Holdings Pty Ltd.

- [31] The company No Lift Products had also developed an invention. It was originally under the control of Mr Barry Dixon. Its shareholding became 50% owned by Mr Dixon and 50% owned by the same consortium: Mr Moss, Mr Howes, Mr Norton-Smith and Mr Sheers. Again, the interests of Mr Sheers and Mr Norton-Smith were through Timber Tec Holdings Pty Ltd.
- [32] Consequently, according to the affidavit of Mr Moss, whose evidence was not challenged by cross examination and which I accept, a substantial part of the initial borrowing of \$343,380.80 from GRA was used to pay companies in which Mr Sheers had an interest or the expenses of other shareholders in those companies.
- [33] At about the same time that this money was borrowed, Mr Moss discussed with Mr Howes his concern that he was borrowing so substantially from GRA. Mr Howes replied that he and Mr Sheers would provide a “cross guarantee”, which was provided in the form of a document now exhibited to Mr Moss’ affidavit.⁶ It is a one page document signed by Mr Howes, Mr Sheers and Michael Norton-Smith and is dated 8 November 1999, which is shortly before a further \$300,000 was approved by GRA on 12 November and advanced to Mr Moss on 17 November 1999. The document is in the form of an acknowledgement of debt by Mr Howes, Mr Sheers and Mr Michael Norton-Smith in favour of Mr Moss. It recites that those “debtors” and Mr Moss “have come to certain financial arrangements in relation to investments in certain companies” and that “Moss has obtained certain funds by way of borrowings to finance such investments” and that “the debtors have agreed to be personally responsible to Moss for a proportion of such borrowings”. It then contains an acknowledgement and agreement by the “debtors” that “Moss and the debtors are investing the sum of \$300,000 in two companies” and that “in the event that the companies failed to repay the total investment of \$300,000 to Moss when due”, then it was agreed that the “debtors” should be personally responsible to repay to Moss any amount outstanding in the proportions of one third each of two thirds of \$300,000. The document thereby records the fact that at least much of the borrowings by Mr Moss was being used for investment in the entities in which Mr Moss, Mr Howes, Mr Norton-Smith and Mr Sheers were investing.
- [34] The net proceeds of the further advance to Mr Moss on 17 November 1999 were \$294,326.40. At least \$74,000 of those funds were paid to the Charlton family.
- [35] In May 2000 Mr Moss borrowed a further (net) \$83,259.20 from GRA, of which at least \$24,000 was paid for the benefit of No Lift Products.
- [36] By February 2001 Mr Moss had begun to default in repaying GRA. Mr Howes and Mr Sheers then paid interest payments for two to three months before the demise of GRA.

Consideration of the Moss loans case

- [37] The issues are similar to those in relation to the Jumarsh loans, in that they concern whether Mr Sheers acted with the purpose of benefiting himself or other persons and whether he acted improperly. As to his purpose, I find that he was intending the funds advanced to Mr Moss to be applied substantially as they were applied, i.e. that he was intending the funds advanced by GRA to benefit Cable Drum Pty Ltd, No Lift Products Pty Ltd and the shareholders of those companies, including Timber

⁶ Exhibit GPM008

Tec Holdings Pty Ltd. By benefiting Timber Tec Holdings he was intending also to benefit himself. Mr Sheers says that he has never “received any funds or benefit from the borrowings of Garry Moss”,⁷ but Mr Moss’ evidence, which I accept, is that there was a benefit through his shareholding in Timber Tec Holdings Pty Ltd and its shareholding in Cable Drum and No Lift Products. In any case, the fact that no benefit *was* obtained, would not affect the fact that his intention was to benefit, amongst others, himself.

- [38] In an affidavit by Mr Sheers,⁸ he gives some evidence in response to the then allegation by ASIC that there were breaches of s 181 by failing to disclose to other directors of GRA that he had an interest or involvement in any application by an accountant for a loan. He there says:⁹

“In response to this particular allegation, I assume that the allegation is with respect to interest that I, Mr Howes and Mr Norton-Smith held in a number of companies at the request of Mr Garry Moss.

These companies were formed with the view of developing, manufacturing and marketing a number of unique products. My involvement was to market the products, but none of the ventures proceeded to a material stage. None of these companies borrowed money from (GRA) and therefore I do not believe that it was my responsibility to advise the directors of (GRA).”

In the course of oral submissions, ASIC relied upon this as an admission that Mr Sheers had not disclosed to his fellow directors that he had an interest in the companies which were to receive the benefit of the loans to Mr Moss. I accept this submission. I thereby conclude that he failed to disclose to his fellow directors his interest in GRA’s loans to Mr Moss.

- [39] Mr Sheers has sworn that he had no idea of the size of Mr Moss’ practice “as I relied on the due diligence performed by Mr Howes”. He says that although “it seemed very suspicious that this new practice had sprung up from no where” he “left it up to Mr Howes to investigate this matter as I was extremely busy with my timber plantation project at the time”. This evidence was not ultimately challenged. I will assess the propriety or otherwise of Mr Sheers’ involvement in these loans on the assumption that he was unaware of the fact that Mr Moss’ receivables were being falsified to obtain these loans.
- [40] In essence then the case against him is that he was acting in preferring to the interests of others including himself as the ultimate beneficiaries of these loans, to the interests of GRA. He knew that the loans would be used for what can only be described as highly speculative investments, although on the assumption that Mr Moss had substantial receivables to support his application for these loans, that may not have been such a concern. Nevertheless there was a conflict between his own interests and those of his fellow investors on the one hand and on the other hand those of GRA. He was a co-venturer with the borrower, Mr Moss, yet he had not disclosed that to his fellow directors at GRA. In my view he acted improperly by using his position as a director of GRA to promote these loans to Mr Moss, at least

⁷ Outline of Submissions p 7

⁸ Filed 15 September 2003

⁹ In a paragraph numbered (iii) commencing on p 7

once it is seen that he kept his own interest in the making of these loans from his fellow directors of GRA.

- [41] Accordingly, there will be a declaration that his conduct in causing to be made the loans by GRA to Mr Moss in October and November 1999 and May 2000 contravened s 182.

Disqualification Order

- [42] The remaining questions are whether there should be an order made under s 206C and if so in what terms. The court may disqualify a person from managing a corporation for a period considered appropriate once a declaration is made under s 1317E that the person has contravened s 182 and the court is satisfied that the disqualification is justified. By s 206C(2), in determining whether the disqualification is justified, the court may have regard to the person's conduct in relation to the management, business or property for any corporation and any other matters that the court considers appropriate.
- [43] I am satisfied that some disqualification is justified. The conduct in each case was the result of a deliberate preference by Mr Sheers for his own interests and those of other investors over the discharge of his duties as a director of GRA. He knew that he was using his position as a GRA director to obtain funds for speculative ventures in circumstances where not all of the relevant facts were being provided to his fellow directors.
- [44] In determining the length of any banning period the court can take into account any prior conduct of the person concerned, his present activities, his likelihood of re-offending, any contrition shown by him and any benefit received by the person: *Australian Securities Commission v Donovan* (1998) 28 ACSR 583. A particular concern is that Mr Sheers fails to accept any fault on his part, a matter which increases the prospects of his re-offending. At present he is an undischarged bankrupt so that the immediate practical impact of a disqualification is insignificant. However, there is a prospect that his bankruptcy might be terminated within some relevant time.
- [45] In my view it is also relevant to have regard to the order made against Mr Howes, who was disqualified for a period of five years. That is the period of disqualification still sought against Mr Sheers but I note that this was sought upon the originating application when a much more extensive case was advanced against him before the case was confined as I have described. In particular, that was a period of disqualification sought on the basis of an alleged involvement by Mr Sheers in the falsification of information provided by borrowers to obtain loans. A comparison with Mr Howes' case, in my view, shows that his conduct was more serious than that ultimately proved against Mr Sheers. In the circumstances a lesser period of disqualification seems to me to be an appropriate one.
- [46] It is difficult to now assess the extent of any benefit received by Mr Sheers from this conduct. I shall have to assume that he has not received any substantial benefit, notwithstanding that I have found it was his purpose at the time to benefit himself and his interests.
- [47] In all the circumstances, I further order that the applicant be disqualified from managing a corporation for a period of two years.