SUPREME COURT OF QUEENSLAND

CITATION: *Jensen & Ors v RQYS Marina Ltd & Ors* [2014] QSC 243

PARTIES: **LAWRENCE JOHN JENSEN AND CAROLYN HUNTER ROSS**
(first applicants)
and
NAIAD AUSTRALIA PTY LTD, ACN 101 463 779
(second applicant)
and
PETER ROBERT FREDERICK LEWIS AND VIRGINIA ELIZABETH LEWIS
(third applicants)
v
R.Q.Y.S. MARINA LTD, ACN 010 217 991
(first respondent)
and
ROYAL QUEENSLAND YACHT SQUADRON LTD, ACN 053 989 272
(second respondent)
and
RQYS NOMINEES PTY LTD, ACN 130 840 523
(third respondent)
and
KEVIN ANTHONY MILLER
(fourth respondent)
and
IAN ROBERT THRELFALL
(fifth respondent)
and
MARK GALLAGHER
(sixth respondent)
and
GEOFFREY JOHN STANHOPE
(seventh respondent)
and
COLIN FRANCIS GIBBONS
(eighth respondent)
and
WILLIAM GEORGE KIRBY
(ninth respondent)
and
GREGORY CLARKE
(tenth respondent)
and
CHARLES RUSSELL MCCART
(eleventh respondent)
and
PETER JOHN CONDE

(twelfth respondent)
and
PAUL CRANSTON HUGHES
(thirteenth respondent)
and
DAVID GILBOUR VIRGO
(fourteenth respondent)

FILE NO:	6086 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2014
JUDGE:	Applegarth J
ORDERS:	**1. The application is dismissed.** **2. The applicants pay the respondents' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where some members of company limited by guarantee applied pursuant to s 237(1) of the *Corporations Act* 2001 (Cth) for leave to bring a proceeding in the name of the company against two other companies and numerous former and current directors of the company – whether it is in the best interests of the company to bring the proceedings – whether there is a serious issue to be tried – whether the applicant is acting in good faith *American Cyanamid v Ethicon* [1975] AC 396 *Australian Broadcasting Corporation v O'Neill* (2007) 227 CLR 57; [2006] HCA 46, cited *Charlton v Baber* (2003) 47 ACSR 31; [2003] NSWSC 745, cited *Coeur De Lion Investments Pty Ltd v Kelly* (2013) 302 ALR 771; [2013] QCA 160, followed *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480, cited *Farah v Say-Dee* (2007) 230 CLR 89; [2007] HCA 22, cited *MG Corrosion Consultants Pty Ltd v Vinciguerra* (2011) 82 ACSR 367; [2011] FCAFC 31, cited *Oates v Consolidated Capital* (2009) 233 FLR 283; [2009]

NSWCA 183, followed
Ragless v IPA Holdings Pty Ltd (in liq) (2008) 65 ACSR 700; [2008] SASC 90, cited
Re The Presidents Club Ltd; *Coeur De Lion Investments Pty Ltd v Kelly* [2012] QSC 364, cited
Robash Pty Ltd v Gladstone Pacific Nickel Pty Ltd (2011) 86 ACSR 432; [2011] NSWSC 1235, followed
South Johnstone Mill Ltd v Dennis (2007) 163 FCR 343; [2007] FCA 1448, cited
Swansson v RA Pratt Properties Pty Ltd (2002) 42 ACSR 313; [2002] NSWSC 583, cited
Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285; [1987] HCA 11, cited
Wood v Links Gold Tasmania Pty Ltd [2010] FCA 570, cited

COUNSEL: A J H Morris QC and L A Jurth for the applicants
S S Couper QC and C Curtis for the respondents

SOLICITORS: Londy Lawyers for the applicants
H W L Ebsworth Lawyers for the respondents

[1] The applicants are a few of the many berth holders in a marina. As berth holders they are required to be members of a company which operates the marina, and which exists to support the members of the Royal Queensland Yachting Squadron. The applicants seek leave to bring a proceeding on behalf of the company. The proposed proceeding is enormously complex and it would cost the company hundreds of thousands of dollars to litigate it. The essential issue is whether it is in the best interests of the company for leave to be given to the applicants to commence the proposed proceeding.

Background

[2] Before 1991 the Royal Queensland Yachting Squadron was an unincorporated association, and trustees held property for its benefit. In the late 1970s and early 1980s the Squadron obtained approval to construct a marina. By late 1980 the trustees of the Squadron decided that the marina project would be developed by a separate entity. This was done in order to protect the Squadron's assets and remove the trustees from the possibility of personal liability. Mr Kirby, who has been involved with the Squadron since the early l970s and has held various flag office positions in it, was the Honorary Solicitor of the Squadron between 1972 and 2002. He drafted the Memorandum of Association of RQYS Marina Ltd ("the Marina Company"). Its first object is:

> "To establish and support or to aid in the establishing or support of associations, institutions, trust funds or conveniences calculated to benefit the members of the Royal Queensland Yachting Squadron."

[3] To ensure that the marina project was managed in a way that could not be adverse to the Squadron in the future, its Articles of Association provided that the Flag Officers of the Squadron would comprise the majority of the directors of the Marina Company.

[4] Development of what later came to be known as "Marina 1" was commenced before the incorporation of the Marina Company on 23 March 1981. The Squadron

continued to hold the lease over parts of the Marina 1 areas. A lease was subsequently granted to the Marina Company in 1983 and the Squadron relinquished its leasehold interests. The purpose of arranging to have a head lease granted to the Marina Company in 1983 was to enable it to then grant interests to berth holders.

[5] Marina 1 is operated by the Marina Company in a seabed lease in the Manly boat harbour. It is surrounded by freehold land owned by the Squadron, which is utilised for access and car parking. The Marina Company's water, sewerage services and electricity is supplied from the Squadron's infrastructure. The Marina Company shares administration and management with the Squadron, and has done so since its inception.

[6] The Marina Company required each berth holder to be a member of the Marina Company. All members of the Marina Company are required to be financial members of the Squadron. This requirement was introduced to enable the Marina Company to obtain the benefit of "mutuality" principles that apply for taxation purposes to income received from berth holders. In addition, the Port of Brisbane Corporation required as a term of its sub-lease with the Marina Company that berth holders be financial members of the Squadron.

[7] Membership of the Marina Company does not confer any rights, or create any obligations in relation to berths. Berth holders enter into separate, fixed-term lease agreements with the Marina Company, which establish each berth holder's rights and obligations in relation to berths.

[8] On 14 October 1991 the Royal Queensland Yacht Squadron Ltd was incorporated as a company limited by guarantee, and effectively took over the activities, operations and affairs of the Squadron.

[9] The marina proved to be a success. Between 1984 and 1993 it was expanded to include what was known as "Stage 2". It now has 464 berths.

[10] From about 2002 onwards, discussions occurred among the directors and members of the Marina Company and the Squadron about the possibility of expanding the existing marina with the development of what is now known as Marina 2. The directors of the Marina Company wished to ensure that potential tax issues were addressed. They sought and obtained from the Australian Tax Office (ATO) a Private Ruling in 2007. Following this ruling the directors of the Squadron and of the Marina Company agreed to proceed with the development of Marina 2, by establishing a corporate trustee holding assets on trust for the Squadron, which is a tax exempt entity. As a result, RQYS Nominees Pty Ltd ("Nominees") was incorporated on 29 April 2008 and the New Marina Trust was established at about the same time under which Nominees held the relevant lease for Marina 2 on trust for the Squadron.

The application

[11] The applicants became members of the Marina Company on various dates when they became the holders for certain berths. They seek leave pursuant to s 237 of the *Corporations Act* 2001 (Cth) to bring proceedings on behalf of the Marina Company against the Squadron, Nominees and certain current and former directors of the Marina Company.

[12] The Court may grant leave if it is satisfied of certain things. These include that:

(a) it is in the best interests of the company that the applicant be granted leave;

(b) there is a serious question to be tried; and

(c) the applicant is acting in good faith.

The respondents contest that the Court could be satisfied of these things. These contested issues require consideration of the nature and substance of the proposed proceeding.

The proposed proceeding

[13] The proposed pleading certainly covers the waterfront. It runs to 93 pages. Leaving aside lengthy prayers for relief, it contains 309 paragraphs. Time and space do not allow me to summarise it in detail. It advances a variety of claims and canvasses at considerable length events at meetings in 2012 and 2013. It pleads a range of alleged misleading and deceptive conduct in breach of the *Trade Practices Act* 1974 (Cth) ("*TPA*") or the *Competition and Consumer Act* 2010 (Cth) under the chapter heading "False Justification of Impropriety". But the draft pleading does not allege what the consequences of these alleged contraventions were and does not allege that any person took (or abstained from taking) any action in reliance on the alleged representations, or that the Marina Company suffered any loss or damage as a result of the alleged representations. The purpose of alleging these contraventions is unclear. The proposed statement of claim seeks a declaration that the third to thirteenth defendants engaged in conduct in contravention of those statutes. Since no loss or damage is alleged to have been suffered as a result of these contraventions, the practical benefit to the Marina Company of obtaining such declarations is doubtful.

[14] Similarly, other large parts of the draft statement of claim make various allegations of alleged mismanagement or impropriety on the part of the directors and officers of the Marina Company, without pleading any link between that conduct and the relief that is sought in the proposed proceeding. The purpose of the allegations in relation to "Improper Administration" in Chapter XI of the proposed statement of claim is also unclear. The relief sought includes various declarations, but the utility of making such declarations is not apparent.

[15] Another chapter of the proposed pleading sets out a number of statements made by certain respondents which are alleged to have been false. These allegations are not relied upon as constituting conduct which was misleading or deceptive and which caused the Marina Company any loss or damage. Again, their purpose and their link to the relief claimed is not apparent.

[16] Leaving aside allegations which seem to go nowhere in terms of loss and damage alleged to have been suffered by the Marina Company, and concentrating upon the matters to which the applicants' written and oral submissions were directed, the substance of the proposed proceeding seems to be that the directors and some other officers of the Marina Company are alleged to have subordinated the best interests of the Marina Company and the fiduciary duties they owed to it to the interests of the Squadron. They are said to have misused the Marina Company's assets and funds and failed to take advantage of opportunities which are alleged to have been

available to it. Some of the conduct alleged against the directors and officers is said to have been engaged in under various alleged misconceptions. But Senior Counsel for the applicants went so far as to accuse certain officers of dishonesty. In any case, the directors and other officers are alleged to have breached all of the common law, equitable and statutory duties they owed to the Marina Company.

[17] I should mention that there is no allegation in the proposed pleading that any of the directors or officers obtained any personal benefit in any way from the alleged misconduct. They are not alleged to have put themselves in a better position personally than any other member of the Marina Company.

[18] In essence, they are alleged to have benefited the Squadron in making certain decisions and by allowing the Squadron and Nominees to take advantage of opportunities which were open to the Marina Company. The short response of the respondents is that the Marina Company and its directors were doing precisely what the Marina Company was established to do, namely benefit the Squadron. The directors did not breach their duties because the Marina Company was established to benefit the Squadron and its constitution provided for it to apply its income and property towards the promotion of its objects, the first and foremost of which was supporting entities calculated to benefit the members of the Squadron.

[19] The respondents submit that when regard is had to the specific events and transactions that are referred to in the draft statement of claim it becomes apparent that there is no serious question to be tried. They submit that, in any case, granting leave would not be in the best interests of the Marina Company because the proposed proceeding is misconceived, and the applicants have offered no personal indemnity or undertaking to protect the Marina Company from the effect of adverse costs orders in favour of the defendants, if the proposed proceedings are unsuccessful in whole or in part.

[20] Next they submit there is no possibility of the Marina Company obtaining the pleaded declaratory relief and that there is no evidence of loss or damage, or the quantum of any such loss or damage. Additional relief claimed for oppressive conduct might be sought by the applicants in separate proceedings in their own names. Only a few of the members of the Marina Company who responded to correspondence about the proposed proceedings support it, whilst many more oppose it. The respondents submit that the proposed proceedings would be divisive and disruptive.

[21] According to the respondents, given the problems that beset the proposed proceeding, the risk that it will fail in whole or in part and the absence of any clear, let alone quantifiable, benefit to the Marina Company if the proposed proceeding was successful, the Court could not be satisfied that it is in the best interests of the Marina Company to grant leave.

[22] In addition, the respondents argue that, in such circumstances, an applicant, acting in good faith, would consider the question of whether the amount likely to be recovered in the litigation merited the expenditure of the time, resources and money which the litigation would necessitate.[1] The total costs to be incurred by both parties to the proposed proceeding are estimated to be in the order of $2 million.

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[1] *Coeur De Lion Investments Pty Ltd v Kelly* (2013) 302 ALR 771 [57]; [2013] QCA 160 [57] ("*Coeur De Lion*")

The respondents submit that the time and resources of the Marina Company would be seriously diverted by the proposed proceeding. This is said to call into question whether the applicants can be said to be bringing the application in good faith.

[23] Finally, and as part of the issue of whether the proposed proceeding is in the best interests of the Marina Company, the respondents complain about the objectionable form in which the proposed statement of claim is pleaded. After reciting a series of facts and events over 272 paragraphs and 77 pages, the following five pages plead a set of duties which the directors and officers are alleged to have owed at common law, in equity and under the *Corporations Act*. Rather than attempt to identify which duty was breached by particular conduct in relation to particular transactions, the draft pleading alleges that every duty was breached at all material times by each of the third to thirteenth defendants. The respondents complain that they are left to guess or speculate in relation to every transaction the precise nature of the alleged breaches and that the pleading does not define the causes of action sought to be advanced. Instead it seeks to instigate an open-ended and oppressive field of inquiry.

Specific matters and transactions

[24] Because of the way in which the proposed statement of claim is pleaded, and because different proposed defendants acted as directors at different times it is invidious to address the proposed proceeding at some abstract level on the basis that all of the defendants could be said to have breached all of their duties in respect of various matters and transactions which occurred over a number of years. It is appropriate to assess the applicant's proposed case that the relevant directors subordinated the best interests of the Marina Company and breached their duties as directors in respect of particular transactions. The transactions and the alleged failure to take advantage of various opportunities which are said to have been available to the Marina Company, which broadly correspond to different chapters of the draft statement of claim, may be described as follows:

(a) An alleged failure to take advantage of an opportunity for the Marina Company to become the owner of the second marina;

(b) An alleged failure to obtain a future head lease over the Marina 1 seabed area and adjacent areas from 2029 to 2051;

(c) Transactions in relation to a business known as the Yard Business and related facilities;

(d) Alleged financial irregularities in relation to loans made to the Squadron which are said to have been on uncommercial terms and to have benefited the Squadron and Nominees;

(e) The alleged misappropriation of monies known as the dredging fund in relation to the purchase of a dredge.

Two central issues

[25] Two issues are central to whether the proposed proceedings has sufficient prospects of success to satisfy the Court that it is in the best interests of the Company for leave to be granted to bring the proposed proceeding. The first is the constitution of

the Marina Company and whether it authorises the company to support the Squadron (and entities associated with it) by transferring property and allowing the Squadron by itself or by its nominee company to exploit a business opportunity. The second is the tax status of the Marina Company and the implications of the 2007 ATO ruling that was obtained when Marina 2 was being planned.

The constitution of the Marina Company

[26] The proposed proceeding alleges that decisions of the directors of the Marina Company were made in breach of Article IV of the Marina Company's Articles of Association, and that the directors misunderstood the purpose of Object No 1 of Article III. In particular, the directors are alleged to have acted under the misconception that the Marina Company was authorised to apply or transfer its income or property for no, or alternatively inadequate, consideration to the Squadron, Nominees or another entity related to or associated with the Squadron. In addition, the directors and officers are alleged to have acted under the misconception that the first object of Article III authorised them to act in the best interests of the Squadron or its members, or Nominees or another entity related to or associated with the Squadron.

[27] As noted, the first object in Article III of the Articles of Association involves, among other things, the support of associations, institutions, trust funds or conveniences calculated to benefit the members of the Squadron. This Article was introduced when the Squadron was unincorporated, but no argument was advanced about the practical differences between support calculated to benefit the members of the Royal Queensland Yacht Squadron as an unincorporated club and support calculated to benefit the Squadron in its present incorporated state and indirectly its members. It was accepted during oral submissions that one way, and possibly the only way, to benefit all members of the Squadron without differentiating between Marina Company members and other members would be to assist the Squadron and thereby benefit all of its members.

[28] The first object which I have earlier quoted is the only truly purposive object. Object 4 permits the Marina Company to lease or acquire a marina and states that such property is to be used in or about the business of the company as a marina owner or otherwise "within the objects of the Company". The Marina Company has power under Object 30 to do all such other things as may be deemed incidental or conducive to the attainment of the objects. And, of course, the first object is to, in effect, support the Squadron and entities associated with it so as to benefit the members of the Squadron.

[29] The documents which constitute the Marina Company do not indicate that it is required to, or even authorised to, act solely for the benefit of members of the Marina Company to the exclusion of the members of the Squadron. Instead, its principal object is to benefit the members of the Squadron.

[30] The fact that the Marina Company was created to support the Squadron is reinforced by Article VII of its constitution which provides that, on a winding up, all the remaining assets of the Marina Company are to be transferred to the Squadron or an entity with similar objects, and not to the Marina Company's members.

[31] Neither the Squadron nor the Marina Company has any issued capital or shareholding. Their respective constitutions prevent any distribution of income or assets to their members.

[32] Members of the Marina Company were described by Senior Counsel for the applicants as investors. Their real investment might be said to be payment of a substantial amount to become a berth holder. Berth holders are required to be members in order to enable the Marina Company to obtain the benefit of the principle of mutuality for tax purposes. Each member enters into separate contracts with the Marina Company and it is that contract which governs entitlements to berths and, indirectly, the value of a person or entity's investment as a berth holder.

[33] The Squadron has many more members than the Marina Company. The first object of the Marina Company would not seem to be achieved by advancing the interests of members of the Marina Company, being berth holders, to the exclusion of members of the Squadron. Acting so as to benefit all members of the squadron will indirectly benefit members of the Marina Company who are required to be members of the Squadron. The primary purpose of the Marina Company in supporting institutions or conveniences calculated to benefit the members of the Squadron would seemingly permit the Marina Company to build a clubhouse worth $1 million for members of the Squadron to use or, for that matter, to make a gift of $1 million to an entity which was established to construct such a clubhouse or similar facility for members of the Squadron to use.

[34] The hypothetical clubhouse example serves to illustrate the proposition that, provided it has the resources to do so, and that doing so would not be contrary to its constitution or contrary to the duties of its directors, the Marina Company might use its income or property to establish a clubhouse or similar facility for the members of the Squadron. It might do so by a variety of means including making a gift to the Squadron or an entity, such as a nominee company that is controlled by the Squadron, or by undertaking the construction itself for the benefit of the Squadron so that the Squadron or a related entity owned the clubhouse. It might construct the clubhouse and transfer it to the Squadron for no, or alternatively inadequate, consideration. In supporting the Squadron in such a way the Marina Company would not be acting contrary to, or to the exclusion of, its interests, but acting consistently with the object of supporting the members of the Squadron.

[35] The purposes that the directors and officers of the Marina Company were authorised to pursue turn upon the Marina Company's constitution and the conduct which it authorises or permits. If the Company's constitution, on its proper construction, authorises or permits certain conduct or actions by a director or officer, there is no breach of duty.[2] One does not start by asking whether a provision of the Marina Company's constitution allows a director or officer to "breach their duties". The prior question is what the Marina Company's constitution provides about the company's purposes and the things that it is authorised to do.

[36] Because of the Marina Company's constitution, one does not start with the proposition that it is equivalent to a trading company which is obliged to act in the collective interests of its shareholders, reflecting their proprietary shareholding interests.[3] The Marina Company does not have shareholders. Its members are not

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2 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 300-301.

3 *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 at [67].

owners of or investors in the Marina Company. The objects of the Marina Company displace, to some extent, the proposition that a company, by its directors, must act in the interests of its members, and not in the interests of the members of another company. Object 1 clearly states that the Marina Company's purpose is to support certain entities or conveniences that are calculated to benefit the members of another entity, namely the Squadron.

[37] Article IV of the Marina Company's Memorandum of Association relevantly provides, subject to various exceptions that:

> "The income and property of the company shall be applied **solely towards the promotion of the objects of the company** as set out herein and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise to or amongst the members of the company ..."(emphasis added)

The applicants submit that Article IV prevents any form of payment or transfer to or among its members and, as a consequence, no property or money could be paid or transferred to Nominees as it is a member of the Marina Company.

[38] The authority to make a certain payment or transfer must depend upon the particular circumstances. For that reason, it will be necessary to address certain transactions in order to determine whether any portion of the income and property of the Marina Company was paid or transferred directly or indirectly "by way of dividend, bonus or otherwise to or amongst the members of the company". It is appropriate, however, to turn first to the general issue of the proper interpretation of Article IV.

[39] Article IV should be construed in its context and read as a whole. The Article envisages that the Marina Company's income and property will be applied for the purpose of supporting the Squadron and its members. A blanket prohibition on any form of payment or transfer, even for full value, of property to the Squadron or a nominee company established to benefit the Squadron and its members would operate to defeat the attainment of the Marina Company's purpose whose member's are also members of the squadron. Such an interpretation seems inconsistent with the stated purpose of the Marina Company. To take an example, the Marina Company could not construct a clubhouse or similar facility which was calculated to benefit the members of the Squadron, and transfer title to the Squadron since it would be thereby transferring indirectly its property to or amongst the members of the Marina Company. Nor could it transfer title of the clubhouse to Nominees to hold on trust for the Squadron and its members, even if such a transfer would indisputably benefit the members of the Squadron, because Nominees is a member of the Marina Company.

[40] There is a strong argument that the prohibition in Article IV is directed at payments and transfers to members of the Marina Company for their personal benefit, as distinct from a coincidental benefit such a person might derive by virtue of being a member of the Squadron. On this view, Article IV does not prevent payments to or the transfer of property to the Squadron or a nominee company of the Squadron or a trust fund associated with the Squadron, provided that payment or transfer is applied solely towards the promotion of the objects of the Marina Company.

[41] The Marina Company's constitutional arrangements allow a transfer of property to the Squadron as long as the purpose of the transfer is calculated to benefit the

members of the Squadron. The Marina Company's interest may be served by achievement of this objective. The Marina Company's primary purpose of supporting the members of the Squadron does not prevent it from making a payment or transfer to the Squadron. The relevant issue is whether such a payment or transfer is for the purpose of supporting institutions or conveniences that are calculated to benefit the members of the Squadron.

[42] I am not required to finally decide the issue of interpretation. It is sufficient to conclude that the respondents' contentions about the Marina Company's constitution are persuasive.

The ATO Ruling

[43] In 1981 the Marina Company received a non-binding letter from the ATO that income received would not be assessable under the mutuality principle. This was not in the form of a ruling. The letter stated that no expression of opinion by the ATO as to the outcome of future transactions would bind it.

[44] After 2002, in considering the expansion of the existing marina into what was to become Marina 2, the directors of the Marina Company and the directors of the Squadron considered potential tax issues flowing from the sale of the berths. In 2006 the members of the Marina Company resolved to establish a trust fund with surplus money from the Marina 2 project calculated to benefit the members of the Squadron. At that time it was proposed that the cost of constructing Marina 2 would be covered by granting subleases of individual berths for terms of 10 to 20 years, with a lump sum amount of rent payable in advance, together with charges over the terms of the subleases to cover ongoing expenses. It was envisaged that the Marina Company would hold the subleases in respect of Marina 2, but that berth holders in Marina 2 would be treated and accounted for as a separate class of members so that the mutuality principle for taxation purposes might continue to apply in respect of each class of member.

[45] In 2007 the directors of the Marina Company instructed solicitors to apply to the ATO for a private ruling in respect to the proposed structure for Marina 2. In late October 2007 the ATO issued a private ruling in respect of the application. It stated, amongst other things that:

> "(a) In relation to payments of 'lump sum rent' by the New Members to [Marina Company] for construction and Sub-Lease of a new berth, it appears that the requirement for a 'reasonable relationship' between participants in a common fund and members who share the benefit is not met ...;
>
> (b) the New Members of [Marina Company] are not a separate class of persons from the Old Members as they do not exhibit any distinguishing features capable of setting them apart from the rest of the membership of [Marina Company] (other than being new members);
>
> (c) It is apparent that its members ('berth owners') do not have the necessary ownership and control of [Marina Company] for mutuality to apply;

(d) [Articles of Association of Marina Company] combine to provide the Squadron with ownership and control of [Marina Company] and if necessary to deal with any excess funds as the Squadron sees fit. In such circumstances, the principle of mutuality cannot apply to the payments made by members of [Marina Company] for the construction and Sub-Lease of New Marina;

(e) Marina Ltd's activities involve the leasing of berths to its members (berth owners), who currently can all avail themselves of the right to on-leasing their berths onto new tenants (as provided for in the Old Head Lease with POBC). It is considered that the sub-leasing arrangement to the New Members is of a business nature rather than a mutual arrangement ...; and

(f) the income from the sub-leasing arrangements with the New Members will form part of the assessable income of [Marina Company] under the ITAA 1997, section 6-5."

[46] Strictly speaking, the 2007 ruling related only to Marina 2. However, the directors were understandably concerned about the reasoning set out in it. The directors and officers of the Marina Company discussed the matter and were unanimous in their concerns about the implications of the ruling to the Marina Company's operation of Marina 1. Mr Kirby explains that he formed the view that what was set out in the 2007 ruling about the lack of ownership and control of the Marina Company by its members applied to the Marina Company generally. He concluded that there was a significant risk that the ATO might, if called on to do so, revise its position as stated in its 1981 letter. Other directors shared this concern. Their concern was that the Marina Company may never in fact have been a "mutual" for taxation purposes. This had serious financial consequences, not only for the proposed Marina 2 project, but also potentially for the Marina Company in respect of income it had received relating to Marina 1.

[47] Another matter of concern to Mr Kirby was that, by 2007, the pattern of the use of berths in the marina had changed significantly. Previously, a substantial majority of berths were used by people to moor their own boats. However, increasingly the berths were being rented to boat owners on a commercial basis, and in some cases berths were sold at a profit. The directors of the Marina Company discussed the effect of the 2007 ruling on many occasions and reached the view that it would not be in the best interests of the Marina Company or individual berth holders for the pre-2007 situation to be the subject of a detailed review by the ATO.

[48] There may be a distinction between the development of Marina 1 where, it is suggested, persons interested in securing a berth invested money on the basis of the cost to construct it and the proposal in relation to Marina 2 whereby berths were to be sold at market value. However, this possible point of distinction which was raised by Senior Counsel for the applicants in his oral address does not alter other important aspects of the 2007 ruling which were unaffected by the commercial basis upon which the pre-payment for a lease was determined. For example, the ATO considered the constitution of the Marina Company and concluded that it was apparent that its members, namely the berth holders, did not have the necessary

ownership and control of the company for mutuality to apply. In addition, the company's activities in leasing berths to its members who had the right to on-lease their berths to new tenants involved a trading activity. The sub-leasing arrangement was of a business nature, rather than a mutual arrangement.

[49] The present issue is not the correctness of the 2007 ruling or whether the views taken by the directors of the Marina Company about is implications are necessarily correct. The issue is whether the directors and officers of the Marina Company could have rationally formed the view which they did about the implication of the rulings and the risks that it posed. Contemporaneous documents show that the directors did have the concerns expressed in Mr Kirby's affidavit about the consequences of the ruling for the Marina Company. Senior Counsel for the applicants submits that the directors could not "genuinely, sensibly, rationally" have formed the view which they did about the ruling. I am unable to agree. Advice subsequently obtained in 2013 by the Marina Company was that the 2007 private ruling did not have general application to the mutuality status of the company as a whole. However, obviously, there was a risk that, if the Commissioner was asked to consider whether the principle of mutuality applied to the Marina Company as a whole, he would not agree with the conclusions reached in the 1981 ATO correspondence.

[50] It is hardly necessary to go to the 2013 advice to appreciate that the directors of the Marina Company were entitled to be concerned about the implications of the 2007 ATO ruling even though, strictly speaking, it related only to the proposed Marina 2 project. It would have been remiss of them not to be concerned about its potential implications for the business of the Marina Company as a whole. Any diligent director in their position would have been concerned that the reasoning contained in the 2007 ATO ruling had implications for the Marina Company's past, present and future activities. If the matter came to be tested, and the ATO or a court concluded that the Marina Company did not attract the principle of mutuality then this would have potentially disastrous implications for the taxation position of the company over the years.

A false issue

[51] Before turning to each of the impugned transactions so as to assess the applicants' argument that in each case the relevant directors acted in breach of their duties, it is appropriate to address the applicants' argument that the issue at the heart of the case is whether the Marina Company and the Squadron must be treated as two separate entities, or whether it is permissible to treat them as a single amalgamated body. This argument erects a straw man in order to knock it over.

[52] The applicants' submissions pose a number of questions which are said to provide the answer to "this central issue". To briefly answer those questions, the Marina Company and the Squadron are separate legal entities, which were formed at different times and with different objects. They have, and always have had, different memberships, albeit with some common members. The Marina Company has approximately 397 members, whereas the Squadron has 3,165 members. Each entity is controlled by differently constituted boards of directors although there are common directorships. Each entity owns and controls different property. Both are companies limited by guarantee. Neither has a share capital.

[53] In July 2013 a berth holder wrote to the Treasurer of the Marina Company and observed that a note in the consolidated annual accounts for the Squadron relating to investment in controlled entities stated that the Squadron had a 100 per cent beneficial holding in the Marina Company. The berth holder noted that the Marina Company had no shares or shareholders and so the Squadron could not have a 100 per cent beneficial holding in it. The Treasurer responded soon after, acknowledging that the term used was technically inaccurate and would be changed in the next annual report. It is hardly necessary to grant leave to commence the proposed proceedings in order to confirm this correction or to state that the Marina Company and the Squadron have been, and remain, two separate entities.

[54] According to the applicants' submissions, the common directors have treated the interests of the Marina Company as subordinate or ancillary to the Squadron. If this is so, then it does not establish that any, let alone all of the proposed defendants, have treated the two companies as, in effect, one fused entity. Some of the transactions to which I turn demonstrate that directors have been acutely conscious of the fact that the Marina Company and the Squadron are distinct legal entities and that this has implications for the conduct of their businesses and by which entity a commercial opportunity should be explored and pursued.

The impugned transactions

Alleged failure to take advantage of an opportunity to become the owner of a second marina

[55] The proposed pleading alleges that completion of the Marina 2 project was an opportunity in which the Marina Company was interested, or could reasonably have been interested, which was diverted or usurped away from it in favour of Nominees. The factual basis for this claim is pleaded in Chapter V which pleads that on 9 March 2005 the members of the Marina Company in an Extraordinary General Meeting authorised the directors to implement a project to expand the number of berths in Marina 1. It refers to the fact that after 2005 the Marina Company planned the construction of Marina 2, including negotiating the terms of a lease in its favour.

[56] The respondents contest whether Marina 2 was a commercial opportunity that the Marina Company's directors were obliged to pursue. They point to the fact that the applicants have not adduced any evidence to support this conclusion, including any evidence of the estimated cost of the project, the capacity of the Marina Company to carry it out and whether it would have represented a commercially viable project for the Marina Company.

[57] Mr Kirby's affidavit gives an account of the decision-making processes in relation to the development of Marina 2, and this evidence is not contradicted. In the end result, the development was carried out by Nominees as trustee for the Squadron, rather than by the Marina Company. Mr Kirby explains that the directors at the time reached the view that the Marina 2 project was not financially or commercially viable for the Marina Company. He gives a number of reasons for that, including the fact that the Marina Company was not in a position to fund the construction, holding surplus cash assets of $1.1 million at the time when construction commenced. The project was assessed as only being viable if Nominees could have use of the Squadron's infrastructure at non-arms-length rates. The project was pursued in order to advance the long-term goals of the Squadron, including the

expansion of the number of berths and because the Squadron wanted to maintain its ownership of the land so it was available for future generations. The project was unlikely to be profitable if the Squadron's land and infrastructure had to be paid for on a commercial or arms-length basis. In a detailed report produced in 29 August 2008 Mr Kirby described the new marina project as "a lousy deal, but good outcome". There were adverse costs associated with it, but long-term benefits to the Squadron and future generations.

[58] As to whether the Marina Company could have obtained profits from the proposed development, Mr Kirby points out that at an Extraordinary General Meeting on 5 April 2006, its members passed a resolution to establish a trust fund in accordance with Object 1 and to support the trust fund by making available to it any funds remaining after completion of the project for the purpose of undertaking the construction of a new clubhouse building for the use and benefit of the members on the Squadron's land. In other words, any surplus funds available upon completion of the project would not be for the use of the Marina Company.

[59] Subsequently, on 23 July 2008 members of the Marina Company voted for the project to proceed in the way which it did, through the use of Nominees. They authorised the directors to enter into contracts with Nominees for the operation of the new marina in conjunction with the existing marina.

[60] The relevant resolutions call into question whether Marina 2 was a commercial opportunity which its directors were obliged to pursue. The pursuit by the Marina Company of the project was overtaken by the resolutions passed in 2008 whereby the members voted for Nominees to undertake the project.

[61] If the Marina Company had itself pursued the project, resulting in it owning and operating the second marina, then the 2007 ATO ruling indicated that it would be liable to pay tax because it could not avail itself of the mutuality principle. In the circumstances, it was preferable, and seemingly for the benefit of the Squadron and its members, for any potential profit generated by the development to be derived in a tax-effective manner. In the circumstances, it was understandable that the directors of the Marina Company would forego the opportunity for the Marina Company to itself to develop Marina 2, and allow the development to be undertaken by Nominees.

[62] Paragraph 73 of the proposed pleading alleges that the Marina Company paid for the costs of the Marina 2 project. Mr Kirby explains in his affidavit that, with the exception of the provision of a loan from the Marina Company to Nominees prior to the commencement of construction (which was repaid), no part of the Marina Company's funds or assets were used to fund the construction of Marina 2. Its construction was funded entirely by payments made to Nominees by persons who had paid for intended berths in Marina 2. This evidence is not contested by the applicants.

[63] On the material before me, the Marina Company would seem to have poor prospects of obtaining the relief which it seeks in respect of the alleged failure to pursue an opportunity in respect of Marina 2.

[64] The decisions made by the relevant directors of the Marina Company appear to have been open to them, based upon their assessment of the opportunity, the costs associated with it, the risks associated with its unsuccessful development and the

opportunity for another entity to develop the project in a tax effective manner which would benefit the Squadron and its members.

[65] Even if the Marina Company was successful on this point, it is unclear what remedy would be available to it. There is an issue about whether a constructive trust would be declared in respect of an alleged lost opportunity, and the value of any such opportunity is a matter of contention and speculation. The applicants do not attempt to place any particular value upon it so as to determine a possible award of compensation in the event of success. However, it is unnecessary for me to pursue that issue because the proposed claim appears to have poor prospects of success.

Alleged failure to obtain a lease over the Marina 1 area from 2029 to 2051

[66] Prior to the incorporation of the Marina Company in 1981, the idea of a marina was promoted by the then-Commodore of the Squadron, Dr Nicholas Girdis. Dr Girdis was an experienced property developer. At the time the Squadron had very little money or capacity to earn money. It did not have the capacity to fund the construction of a marina, and some members doubted the proposed marina's financial viability. As a result, construction of the marina was undertaken by another entity, and Dr Girdis developed the idea of funding the construction by berth holders prepaying for berths before construction commenced. Dr Girdis negotiated with the Queensland government for a lease, and together with other promoters of the project, embarked upon the "pre-sale" of the yet to be constructed marina berths. It is unclear precisely what he represented to potential buyers. There is hearsay evidence that potential buyers were told that at the end of their 15 year term, the lease would be "rolled over". Mr Kirby's recollection is that applicants for berths in Stage 1 were told that they would receive a "right of first refusal" if an extension was obtained to the initial 15 year lease over Marina 1. In any event, these statements were not made by the Marina Company, which did not exist at the time.

[67] In 1983 the Marina Company was granted the original lease over the area and this lease expired in 1998. When the Marina Company's lease was renewed in 1998, each of the Marina 1 berth holders obtained a new term. Even if the representations made by Dr Girdis and other promoters, which were made before the Marina Company was incorporated somehow bound the company contractually or were representations about a future matter for which the Marina Company would be liable, the alleged representation to the effect of the lease being rolled over at the end of the 15 year term or being extended under some "right of first refusal" was seemingly fulfilled.

[68] The applicants complain that instead of securing further leases for berth holders beyond 2028, the opportunity was diverted away from the Marina Company to the Squadron. The essence of the allegation is that the Marina Company's directors and officers breached their duties in failing to obtain an extension to berth holder leases until 2051 by obtaining an extension of the head lease so that it was held by the Marina Company. Instead, in October 2013 the future Marina 1 lease was granted to Nominees.

[69] It is unnecessary to address in detail the lengthy allegations made in this regard which occupy Chapters IX and X of the proposed statement of claim. They occupy about 30 pages and include allegations of "false justification" and "concealment of

impropriety". Nor is it necessary to set out the detailed reasons given in Mr Kirby's affidavit about these matters.

[70] In summary, the lease was granted to Nominees instead of the Marina Company because of taxation concerns, and concerns about the impracticability of attempting to put an arrangement in place that depended upon the Squadron's agreement. There is no sound reason to not accept Mr Kirby's sworn evidence about the considerations which were taken into account and the reasons the directors made the decisions which they did. His affidavit contains extensive consideration of taxation issues which were considered over a substantial period. Consideration was given to the Marina Company being declared an exempt sporting body. The financial capacity and willingness of members of the Marina Company to pay for the full costs of refurbishment were considered.

[71] After lengthy consideration about obtaining an extension of the Marina 1 lease held by the Marina Company, a decision was reached that it would not be in the best interests of the Marina Company's members. The reasons that led Mr Kirby to that view included:

(a) the implications of the 2007 ATO ruling and the potential taxation risks associated with having the Marina Company's affairs re-examined;

(b) the unlikelihood that the Marina Company could obtain a tax exempt status or regain the benefit of the mutuality principle;

(c) the berth holders would need to be levied greater amounts to cover taxation.

Mr Kirby and the other directors agreed that it was in the best interests of the members of the Marina Company for the future lease over Marina 1 to be held by Nominees as trustee for the Squadron as this would be the best outcome for the members of the Marina Company in the circumstances.

[72] A point is raised by the applicants in their proposed pleading about the alleged failure to act upon a resolution passed on 3 October 2012. Mr Kirby explains that certain proposed resolutions would not be able to be implemented because Marina 1 could only be operated, then and in the future, with the use of the Squadron's land and infrastructure and unless agreement was obtained from the Squadron about the use of its land and infrastructure the proposed extensions could not be operated. There would have been no utility or benefit to berth sub-sublessees in Marina 1 being extended to 2051 without a corresponding arrangement being reached with the Squadron to ensure that berths could be useable until 2051. The decision to enter into such an agreement rested with the Squadron and Squadron members considered the matter on 15 May 2012.

[73] The applicants' submissions assert that two "pretexts" have been proffered as to why the future Marina 1 lease was diverted to Nominees for the benefit of the Squadron. The first relates to the ATO ruling. However, the ATO ruling provided a compelling reason for the relevant directors of the Marina Company to make the decisions which they did.

[74] The second alleged pretext relates to whether the Department of Transport and Main Roads required that any further lease be granted only to one entity. It seems that at some point this had been a requirement but that in 2011 the Department indicated

that it was not an essential outcome and that the Department would be prepared to deal with the three corporate entities. Mr Kirby gives evidence about dealings with representatives of the Department, which commenced with a letter from the Department dated 1 July 2011 indicating its intention to negotiate one lease over all the areas with tenure for 40 years. It is unnecessary to detail the course of negotiations. Even if, at some point, the Department indicated a preparedness to deal with the three corporate entities, it made commercial sense for one lease to be held by one entity. For the reasons Mr Kirby has explained, the view could be reasonably taken that the best interests of members of the Marina Company and the best interests of members of the Squadron were served by that entity being the wholly owned nominee of the Squadron that enjoyed tax exempt status.

[75] Incidentally, the applicants complain about the language which was used in a June 2008 chairman's report about the ATO ruling. This allegation can be found at paragraph 156 of the proposed statement of claim, in Chapter IX – "False Justification of Impropriety". The June 2008 report stated that the ruling by the ATO, among other things, stated that the Marina Company is "not a mutual" and its profits are taxable in accordance with the relevant provisions of the *Income Tax Act*. That may have inadequately stated the implications of the 2007 ATO ruling, but it is not suggested that a fuller report about the implications of the 2007 ATO ruling would have had any different consequence. The substance of the matter is that the 2007 ATO ruling was one justification for the directors to act as they did.

The Marina 1 refurbishment

[76] The refurbishment of Marina 1 was required, at least in part, because of a notice of non-compliance issued by the Queensland Fire and Rescue Service in relation to Marina 1's fire services. The main issue of non-compliance was the inability to provide enough water pressure to the mains at Marina 1. This constituted a breach of sub lease that the Marina Company held with the government. The costs of upgrading the fire services were estimated to be $1.5 million. Due to this issue as well as a number other aspects of the Marina which needed to be upgraded the directors determined the best course of action would be to undertake a complete upgrade of the Marina.

[77] In 2011 the Directors sought a private ruling from the ATO to determine if the works would be repair and maintenance or capital expenditure. The private ruling determined that the repair works would be largely capital expenditure rather than repair and maintenance. This would have increased the costs of the refurbishment due to taxation liabilities by $4 million.

[78] Given these (and other factors) the decision was made that the lease should be transferred to Nominees. This meant that the overall cost of the refurbishment would be cheaper because of limited tax liabilities. It also meant that the same method of paying upfront for the berth leases could be used as those funds would not be taxable in the hands of Nominees.

[79] The course of events, the considerations leading up to the decisions that were made about the refurbishment of Marina 1 and how the refurbishment works would be funded are the subject of detailed evidence in the affidavit material. The Marina Company had to decide whether to engage in a $10.5 million project and the matter was considered over an extended period. Various options were considered and

voted on on 11 August 2011. Consideration was given to the relative advantages and disadvantages in proceeding with the refurbishment through either the Squadron, the Marina Company or Nominees.

[80] The decision to have Nominees conduct the refurbishment work appears to be one which was open to the directors to make. There is no real evidence to suggest that the directors of the Marina Company breached their duties, having regard to the fact that, due to the different tax position of Nominees, the cost of the refurbishment would be less if undertaken by Nominees. The directors were entitled to conclude that this was the most financially effective way to proceed with the refurbishment and that to do so was in the interests of members of the Marina Company, and also in the interests of the members of the Squadron.

The Yard Business

[81] Part A of Chapter VII of the proposed statement of claim alleges that the "Yard Business" was transferred from the Marina Company to Nominees for no consideration. Orders are sought to impose a constructive trust in relation to the business and for an account of profits in relation to it.

[82] The circumstances in relation to this matter are explained in the affidavits of Mr Kirby and Mr Virgo. The Yard Business, which is also referred to as "Slipping" is a business which removes vessels from the water, cleans them and then places them onto on-shore racks or cradles to allow them to be serviced by contractors or members. Prior to 2008 it was conducted by the Marina Company on land adjoining Marina 1. It was not conducted on a commercial or profit-making basis. It offered concessional rates to Marina Company and Squadron members. The terms of the Port of Brisbane Corporation lease required that it be operated only for the benefit of members.

[83] In 2007 environmental regulations governing the Yard became more stringent. These included requirements in relation to anti-fouling and other materials. These issues were discussed among the directors of the Marina Company, and are documented in the minutes of various meetings. A consultant gave advice to the directors about these issues. Very substantial costs would need to be incurred to address the environmental requirements. It became apparent to the directors that if the Yard Business was to remain viable, and seek more business from non-members, significant expenses would be incurred, including the cost of constructing a suitable building.

[84] The directors agreed that it would be unfair and inequitable to require the members of the Marina Company to contribute the capital needed to meet increased environmental requirements and to fund future upgrades to the Yard Business which benefited all members of the Squadron. It was agreed that the business should be transferred to a Squadron entity so that the burden associated with these costs would be shared equitably by all members of the Squadron, and not only members of the Marina Company.

[85] Mr Virgo's evidence is of similar effect to the evidence of Mr Kirby about the consideration of these issues.

[86] Mr Virgo is a Fellow of CPA Australia, a Fellow of the Governance Institute of Australia and a Fellow of the Chartered Institute of Secretaries. He has held the

position of Honorary Treasurer of the Squadron since 2005 and is familiar with the financial affairs of the Squadron and related entities, including the Marina Company. He was aware of the 2007 ATO ruling, and recalls that after the ruling consideration was given within the Marina Company to transferring the Yard Business to Nominees, which acted as a corporate trustee and held property in trust for the Squadron as the sole beneficiary. Mr Virgo explains that as the Squadron held tax exempt status, under this proposal any income earned from the Yard Business could be treated as tax exempt.

[87] Mr Virgo's recollection is that the purpose of the transfer of the Yard Business from the Marina Company to Nominees was both to ensure that the income of the Yard Business would be tax exempt in the future, and to protect the Marina Company members from being required to make contributions for capital works that might be necessary in the future.

[88] The issues in relation to the Yard Business were raised with members of the Marina Company through a special resolution at its annual general meeting on 23 July 2008. The meeting authorised the directors to take all steps to transfer the operation of the Yard Business to Nominees.

[89] On 25 September 2008, in accordance with the special resolution, and for the reasons that Mr Kirby and Mr Virgo have explained, the Yard Business was transferred to Nominees.

[90] The respondents deny that it was transferred without adequate consideration. Mr Kirby explains that an assessment of the goodwill of the Yard Business was conducted, but as the business was not profitable, this was assessed at nil. The plant and equipment of the Yard Business was not transferred. Instead, it was leased by the Marina Company to Nominees, and steps were taken by Mr Virgo and also the Financial Controller to have the rent assessed at fair value so that it could be paid to the Marina Company. Nominees became responsible for the upgrade and replacement of equipment.

[91] The evidence given by Mr Kirby and Mr Virgo about the circumstances under which the Yard Business was transferred is seemingly not contested. Instead, the applicants submit that the directors' reasoning was to the effect that, to save the Marina Company from having to pay tax on any profit made by the Yard Business, its directors determined that the Yard Business, together with any profit it might generate, should be transferred to Nominees. The applicants' submissions describe this reasoning as "nonsensical". They also submit that the 2007 ATO ruling did not have the effect stated by Mr Virgo and that his belief is surprising, given his qualifications.

[92] The applicants' submission that the decision in question was nonsensical is unpersuasive. One good reason for the transaction was to protect the Marina Company members from being required to make contributions for significant capital works. If the transfer was so inimical to the interests of members it is surprising that the transfer was approved by members of Marina Company in general meeting. Whilst a decision by a trading company to transfer a profitable business for an inadequate consideration, or no consideration, would require substantial justification, the Yard Business was not profitable. Of course, as the applicants point out, it had the potential to be profitable. But that potential for profit depended,

to some extent, on the Marina Company being in a position to derive a profit after levying capital contributions for required improvements. Also, the 2007 ATO ruling, while strictly confined to the Marina 2 proposal, had obvious implications for any profit-making business undertaken by the Marina Company. Consideration of the implications of that ruling and whether the Marina Company could claim to be a "mutual" for taxation purposes was reasonable.

[93] In essence, the directors were faced with the prospect of the Marina Company being required to pay tax on any potential profit which the Yard Business might generate in the future, with any after-tax profit being used, one way or the other, to benefit members of the Squadron in accordance with the Marina Company's constitution. Alternatively, they could transfer the business, on suitable commercial terms, to Nominees where it was expected to enjoy the Squadron's tax exempt status if any profit was made.

[94] The applicants respond to Mr Virgo's evidence about the fact that the Marina Company members could not receive any financial benefit from the Yard Business because the Articles of Association precluded distributions to members. They submit that whilst the constitution of the Marina Company may preclude distribution to members, it does not preclude the Marina Company from engaging in a profit-making business. This is true. However, the Yard Business was not a profit-making business and it was appropriate for the Marina Company's directors to make a commercial decision about how the objective of benefiting members of the Squadron and the interests of members of the Marina Company could best be advanced. Their decision to transfer the then loss-making Yard Business in the circumstances that I have described appears to have been a reasonable one, based upon appropriate consideration of relevant matters.

[95] The decision had a reasonable justification in the circumstances and was not nonsensical. If the proposed proceeding was litigated, then the Marina Company would have difficulty in establishing that the directors acted in breach of duty in making the decision that they did or that the business should be subjected to a constructive trust.

Alleged financial irregularities

[96] Particular mention is made in the applicants' submissions to Parts B and C of Chapter VIII of the proposed statement of claim which, according to the applicants' submissions, alleges a "misappropriation of refurbishment costs for Marina 1 and a sham repayment of purported loans from the Marina Company to each of the Squadron and Nominees". Part of the proposed claim relates to approximately $1.85 million in loans made by the Marina Company to the Squadron and Nominees which, according to the applicants, was "effectively written off in the accounting of the refurbishment costs".

[97] These matters have been addressed in an affidavit and report of the Company's auditor, and relevant source documents are in the evidence before me. The respondents' explanation for these matters may be summarised as follows. The total cost of the refurbishment was $10.5 million, the majority of which came from contributions levied directly on Marina Company members. The cost of the refurbishment was to be paid for by the Marina Company. The funds were sourced (in approximate amounts):

(a) by $8.7 million obtained from berth holders;

(b) $0.75 million transferred from the Squadron as repayment of an inter-company loan; and

(c) $1.1 million transferred from Nominees as repayment of an inter-company loan.

The applicant's complain that this amounted to writing off inter-company loans. The respondents explain that the purpose of applying the loan repayment amounts to the refurbishment costs was to reduce the amount that members of the Marina Company were required to contribute to the refurbishment. The purpose of the directors in conducting the refurbishment works through Nominees was so that the income derived from the members would not be assessable as income. The directors assessed that if the project was conducted by the Marina Company, then the funds obtained from members could be assessable as income, which would have meant that an additional $4 million would have to have been obtained from members in order to account for the tax which would have to be paid. The directors obtained a tax ruling to confirm that having the refurbishment conducted by Nominees would avoid this outcome.

[98] The respondents point to the fact that arrangements were communicated to members, including the fact that Nominees would be conducting the refurbishment works, along with details of the sources of all the funding. This hardly seems consistent with an exercise in misappropriation.

[99] The respondents reject the allegation contained in the draft statement of claim that the "entire value and ownership" of the refurbishment works were obtained by Nominees to the exclusion of the Marina Company and its members. This is said to disregard the fact that, in return for the payment of the refurbishment costs, the Marina Company obtained the use of the refurbished Marina 1 to 2028 and every berth holder member of the Marina Company obtained a berth lease to 2041.

[100] For present purposes, it is sufficient to observe that the respondents' evidence and submissions present a persuasive response to the allegation of a misappropriation of refurbishment costs. There is a reasonable business explanation for the manner in which the costs of undertaking the required refurbishment of Marina 1 was paid for. No convincing reply to the evidence that the purpose of applying the loan repayment amounts to the refurbishment costs was to reduce the amount that members of the Marina Company were required to contribute to the refurbishments. As with each of the other transactions that I have canvassed, I am not required to reach any final decision about the proposed claim. It is sufficient to conclude that there are viable defences to the proposed claim of misappropriation and that, the proposed claim appears to be a weak one.

[101] The proposed statement of claim also raises other alleged financial irregularities in relation to what is said to be uncommercial loans. These are not specifically addressed in the applicants' submissions. They are addressed in the respondents' submissions and in the substantial material cited therein. For the reasons given by the respondents there seems to be nothing untoward or unusual in the arrangements, and this is confirmed by, among other things, an auditor's report which addresses interest bearing loan accounts and non-interest bearing loans. In the absence of any

detailed response to this material and to the submissions I conclude that the proposed proceeding would have poor prospects of success in respect of these matters.

The dredging fund

[102] The Marina Company was obliged to conduct dredging works for Marina 1. In 2013 and early 2014 the Marina Company was assessing the most economical way to undertake the required dredging work. The cost was likely to be substantial. The dredging would have to be conducted slowly and in stages. A commercial operator would require a considerable payment and this was estimated to be up to $3.3 million on a worst case scenario. The Marina Company had only approximately $1 million available for dredging costs. It was decided that the most economical way to undertake the works was to establish a dredging operation and to use a newly-designed small dredge that could remain onsite and dredge the spoil slowly.

[103] A new entity, Harbour Dredging Pty Ltd, of which the Squadron is the sole shareholder, was established. Mr Hughes, who is the General Manager of the Marina Company and the Squadron explains that the operation was to be conducted through this separate entity because, in the course of discussions with the Marina Company, it was agreed that there was considerable risk to the project as dredging in this way had not been attempted before. The major risk was that the project could turn out to be an uneconomical. If the project was conducted through a separate entity, it would bear the risks of the project failing and the Marina Company would be shielded from those risks. Also, by having the dredging conducted by an entity acting as trustee for the Squadron, the income of the entity would not be taxable, which meant that it could charge less for dredging to the Marina Company.

[104] A dredging operating contract was entered into and it gives the Marina Company an express right to terminate the arrangement in the event that the cost of the works becomes uneconomical, having regard to the amount the Marina Company has available to it to pay for the works. Under the contract, the amount charged is on a cost basis only (costed per cubic metre of spoil dredged) with no margin for profit. The costs for the dredging of Marina 1 was specified to be $1 million, and entering into this contract was assessed by the Marina Company as the most cost-effective way for it to have the necessary dredging work undertaken.

[105] Mr Hughes explains that it was never considered that the dredging operation to be conducted by Harbour Dredging Pty Ltd would be a profit-making enterprise. It was considered to be a method of potentially reducing the expenses of the Marina Company in the immediate future and to provide a resource for future dredging of marinas, which is required periodically.

[106] Part G of Chapter 8 of the proposed statement of claim alleges the misappropriation of the dredging fund. The essence of the allegation is that the Marina Company paid almost $1 million for a dredge that was acquired by or on behalf of the Squadron. This characterisation of the transaction is disputed by the respondents on the basis outlined above.

[107] In addition, to the extent that it might be suggested that a commercial opportunity was diverted, the respondents submit that, as the dredging operations are being

conducted by Harbour Dredging Pty Ltd on a cost-only basis with no margin for profit, the Marina Company has lost no profit from the arrangements.

[108] The material filed by the respondents and their submissions present a persuasive case against the allegation of misappropriation. In addition, the applicants have not established that the Marina Company was likely to make a profit from the dredging operation, or that the risks and potential rewards of doing so justified the use of the funds which it had available to it for dredging costs to establish such an operation. The decision by the Marina Company to avoid the risk of undertaking potentially uneconomical dredging enterprise was a consideration which could reasonably be taken into account by the Marina Company and its directors. The prospects of the Marina Company establishing the alleged misappropriation of the dredging fund would appear to be poor.

Conclusion in relation to the impugned transactions

[109] For the reasons given above in respect of the transactions and matters which featured in the submissions, the Marina Company appears to have poor prospects of establishing the proposed claims. The respondents have advanced persuasive reasons as to why the claims are misconceived or have poor prospects of succeeding following a trial in the proposed proceeding.

Principles governing the grant of leave under s 237

[110] In this application, there is no dispute that it is probable that the Marina Company will not itself bring the proposed proceedings, or properly take responsibility for them, or for the steps in them. Nor is there a dispute that the notice required under s 237(2)(e) has been satisfied. The contested issues are those stated in s 237(2)(b), (c) and (d) which require the Court to be satisfied:

> "(b) the applicant is acting in good faith; and
>
> (c) it is in the best interests of the company that the applicant be granted leave; and
>
> (d) if the applicant is applying for leave to bring proceedings – there is a serious question to be tried; ..."

[111] Some evidence which relates to the prospects of each of the proposed claims has a relevance to each of the matters about which the Court must be satisfied. However, each subsection requires separate consideration since, for example, an applicant may be acting in good faith in applying for leave to bring proceedings in which there is upon further analysis no serious question to be tried. In a different case, an applicant may apply for leave to bring proceedings which raise a serious question to be tried, but be lacking in good faith. In other situations, an applicant who is acting in good faith in applying for leave to bring proceedings which raise a serious question to be tried may be proposing proceedings which, if brought, would not be in the "best interests" of the company. It is unnecessary to review the substantial body of case law about the operation of s 237.[4] It is convenient to address the principles governing each of the relevant provisions in reverse order.

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[4] The leading authorities are cited in *Coeur De Lion Investments Pty Ltd v Kelly* (2013) 302 ALR 771; [2013] QCA 160 ("*Coeur De Lion*").

The applicant is acting in good faith – s 237(2)((b)

[112] The observations of Palmer J in *Swansson*[5] have been approved in many cases, including by the Court of Appeal in *Coeur De Lion Investments Pty Ltd v Kelly*[6]. Palmer J stated that there are at least two interrelated factors. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. This is not a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold the belief. The second factor is whether the applicant is seeking to bring the proceeding for such a collateral purpose as would amount to an abuse of process. Palmer J recognised that these are not the only matters to which a court may have regard in determining the existence of good faith.[7] The onus is upon the applicants to satisfy the Court that they are acting in good faith. There must be some positive evidence before the Court to show this.[8] As Muir JA (with whom Fraser JA and Jackson J agreed) stated in *Coeur De Lion Investments Pty Ltd v Kelly*:[9]

> "One would think it likely that an applicant under s 237, acting in good faith, would turn its mind to the question whether the amount likely to be recovered in the litigation merited the expenditure of time, resources and money which litigation would necessitate."

The best interests of the company – s 237(2)(c)

[113] This requirement is concerned with the company's separate and independent welfare.[10] Section 237(2)(c) requires the Court to be satisfied, not that the proposed derivative action may be, appears to be or is likely to be, in the best interests of the company. Rather the Court must be satisfied that it *is* in its best interests.[11] The question of whether the proposed action is in the best interests of the company requires account to be taken of all of the relevant circumstances. This will include the effects of the proposed litigation on the proper conduct of the company's business.[12] Other considerations include whether the substance of the redress is available by means which does not require the company to be brought into litigation against its will.[13] There also should be evidence about the ability of the proposed defendant to meet at least a substantial part of any judgment in favour of the company in the proposed action so that the Court may ascertain whether the action would be of any practical benefit to the company.[14] The Court must consider the interests of the company as a whole. I adopt, with respect, the following statement by Ball J in *Robash Pty Ltd v Gladstone Pacific Nickel Pty Ltd*:[15]

> "In considering what is in the best interests of the company, it is necessary to consider the prospects of success of the action, the likely costs and likely recovery if the action is successful and likely consequences if it is not. One relevant matter in considering these issues is the nature of any indemnity the applicant has offered to the

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5 *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313; [2002] NSWSC 583 ("*Swansson*").
6 *Coeur De Lion* 783-784 [44] – [48].
7 *Coeur De Lion* at 784 [48].
8 *South Johnstone Mill Ltd v Dennis* (2007) 163 FCR 343 at 355 [68].
9 *Coeur De Lion* at 786 [57].
10 *Charlton v Baber* (2003) 47 ACSR 31at 44 [52]; [2003] NSWSC 745 [52] ("*Charlton*").
11 *Swansson* at 324 [55].
12 Ibid at 324 [58].
13 Ibid at 324 [59].
14 Ibid at 324 [60].
15 (2011) 86 ACSR 432 at 445 [57]; [2011] NSWSC 1235 at [57].

> company if the action is brought and the likelihood that the company will recover under that indemnity. It is also necessary to consider the resources the company will be required to devote to the action and the resources it has available, together with the effect that the action may have on other aspects of its business. Finally, it is necessary to consider whether some other remedy is available to the applicant so as to make the proposed action unnecessary from its point of view ..."

[114] I also follow the statement of principle of the New South Wales Court of Appeal in *Oates v Consolidated Capital*:[16]

> "... the sort of circumstance in which the bringing of proceedings would be in the best interests of the company would be when the benefit that the company would derive from the bringing of proceedings outweighed the costs and risk that the company would suffer in bringing them."

Serious question to be tried – s 237(2)(d)

[115] It has been said that an applicant has the same relatively low threshold to surmount as in the case of an application for an interlocutory injunction, and that in order to ascertain whether there is a serious question to be tried for the purposes of s 237(2)(d) it will not normally be necessary to enter into the merits of the proposed proceeding to any great degree.[17] Consistent with that approach, an applicant must show at least a probability of success in establishing an entitlement to the relief sought at the final hearing.[18] Such a requirement is consistent with the aim of "preventing potentially vexatious or unmeritorious actions that would be detrimental to the company on whose behalf the action was taken".[19] The enactment of the term "a serious question to be tried" may have been intended to adopt the low threshold discussed in authorities such as *American Cyanamid v Ethicon*[20] and Australian authorities which followed it, rather than the more demanding requirement of establishing a *prima facie* case in the sense discussed in the context of interlocutory injunctions.[21] The point was not argued before me and I shall assume that the threshold is a low one. In deciding whether there is a serious question to be tried, a court does not usually embark upon the resolution of disputed questions of fact and attempt to resolve word on word contests. However, certain facts may not be disputed. The mere making of an allegation of dishonesty does not compel the conclusion that there is a serious question to be tried in that regard. The conduct of the party alleged to be dishonest may be convincingly explained and the explanation supported by contemporaneous documents. Still, one cannot conclude that there is no serious question to be tried simply because allegations are denied and contested.

[116] It has been said that the applicant need only demonstrate that there is "a real question to be tried", and this requires the applicant to identify "the legal or equitable rights to be determined at trial in respect of which the final relief is

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16 (2009) 233 FLR 283 [119]; [2009] NSWCA 183 at [119]
17 *Swansson* at 318 [25].
18 *Charlton* at 45 [55].
19 *Wood v Links Gold Tasmania Pty Ltd* [2010] FCA 570 at [4].
20 [1975] AC 396 at 407-408.
21 *Australian Broadcasting Corporation v O'Neill* (2007) 227 CLR 57 at 81 [65] - 84 [71].

sought".[22] Because the inquiry relates to identifying some prospect that the proposed plaintiff will succeed in establishing an entitlement to the relief sought in the proposed proceeding, it is necessary to consider whether there is a sufficient basis to conclude that the proposed plaintiff may succeed in establishing an identified cause of action and obtain the relief sought in the relevant prayer for relief. It is therefore necessary to consider the proposed claims separately.[23]

Is it in the best interests of the company that leave be granted?

[117] Leave to bring a derivative action must not be given lightly.[24] The Court must be satisfied by the applicant for leave that the proposed action is in the best interests of the company. Obviously, it is in the best interests of a company to have its property returned to it. If there are no other ways of obtaining that outcome, then it may be necessary for the company to bring the required proceeding to achieve that result. Likewise, it generally follows that pursuit of an action by or on behalf of a company against an officer for recovery of compensation for damage done to the company by the officer's breach of duty is in "the best interests of the company".[25] However, as Mullins J observed, this general proposition is a starting point for the consideration of the issue and the circumstances in a particular case can displace the application of the proposition.[26] The general proposition that it is in the best interests of a company to have its property returned to it is also a starting point. The Court then considers whether in the particular case there are reasonable grounds to conclude that the company's property has been taken from it, the prospects of success of an action to recover it, the likely costs and the likely recovery if the action is successful and the likely consequences if it is not.

[118] The applicants submit that without the proposed proceedings being brought, the only future for the Marina Company is that it will continue "to be stripped of its assets until being wound up". For the reasons given by me in considering the separate transactions and matters of substance raised by the applicants in their submissions, I am not satisfied that the Marina Company has been stripped of its assets or that the past and present directors of it intend that it should be stripped of its assets until it is a shell. The applicants point to a statement in the 2010 annual report in which Mr Kirby stated that mention had been made of the fact that the rights of berth owners cease as at 30 December 2028 and "it is not currently thought there will be any reason for the [Marina] Company to operate beyond that time ...". This statement about the Marina Company's long-term future and what business it might have to conduct after 30 December 2028 is an insufficient basis to conclude that Mr Kirby or anyone else is intent of stripping the Marina Company of its assets until it is wound up.

[119] Rather than address generalities and broad assertions to the effect that the directors of the Marina Company, past and present, have engaged in a dishonest course of conduct involving stripping the Marina Company of its assets, I have addressed some of the more substantial proposed claims. In doing so, I have not been satisfied that if the proposed action was brought by or on behalf of the Company that the claims would have a reasonable prospect of success based on the evidence before

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22 *Ragless v IPA Holdings Pty Ltd (in liq)* (2008) 65 ACSR 700 at 711 [40]; [2008] SASC 90 at [40].

23 *Charlton* at 45 [55].

24 *Swansson* at 318 [24].

25 *MG Corrosion Consultants Pty Ltd v Vinciguerra* (2011) 82 ACSR 367 at 379 [60].

26 *Re The Presidents Club Ltd*; *Coeur De Lion Investments Pty Ltd v Kelly* [2012] QSC 364 at [59].

me. Consistent with the authorities in determining whether it is in the best interests of the Company for the proposed claims to be brought, it is necessary to consider the prospects of success of each claim and the risks posed to the Marina Company in bringing it.

[120] The applicants have not satisfied me that any of the proposed claims have reasonable prospects of success. The uncontested evidence of an independent costs assessor is that, on the basis of a three week trial, the proposed defendants' assessable costs would be in the order of $885,000. The Marina Company would presumably incur very substantial costs in litigating the proposed proceeding. The applicants have not offered any personal indemnity or undertakings to protect the Marina Company against adverse costs orders in the event that all or part of the proposed proceeding was unsuccessful.

[121] A relevant consideration is whether the company would be prejudiced by being exposed to the costs and expenses of litigation and risk of an adverse costs order. As Davies J stated in *Cooper v Myrtrace Consulting Pty Ltd*,[27] the grant of leave has often been made conditional upon the applicant for leave indemnifying the Company for its costs of the proceeding and any adverse costs order against it.[28] Her Honour cited authorities which emphasised the importance of such an indemnity as a means of addressing the risk of prejudice to the company from the commencement of proceedings. I respectfully adopt these observations.

[122] In the absence of a personal indemnity or undertaking of substantial value, the Marina Company is exposed to the substantial prejudice of incurring very substantial costs in litigating the proposed proceeding and a very substantial adverse costs order if the proceeding is unsuccessful. In the absence of such a protection, the proposed litigation, with its substantial costs, is likely to have an adverse effect on the proper conduct of the Marina Company's business. This alone is a reason why I am not satisfied that granting leave is in the best interests of the company.

[123] In addition, much of the declaratory relief that is sought by the applicants in the proceeding is of no practical benefit to the Marina Company. The proposed proceeding seeks other relief in the form of constructive trusts over property held by Nominees and alternatively orders for equitable compensation or compensation pursuant to causes of action under the *Corporations Act* 2001. As to the claims which seek relief by way of constructive trusts over the property held by Nominees on trust for the Squadron, the applicants have not shown that the Marina Company has good prospects of having a constructive trust declared over the property. As to the alleged diversion of what are said to have been opportunities which should have been made available to the Marina Company, the respondents have advanced a substantial case that these were not opportunities which it was in the best interests of the Marina Company or in the interests of members of the Squadron for the Marina Company to pursue.

[124] In addition, there is a very substantial argument based upon the High Court's decision in *Farah v Say-Dee*[29] that the first limb of the rule in *Barnes v Ady* does not extend to a lost opportunity, rather than a transfer of the Marina Company's property. On this argument, the success of the proposed claim depends upon

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27 [2014] FCA 480 at [29].

28 *Ibid*.

29 (2007) 230 CLR 89 at 144 [120].

whether or not a dishonest or fraudulent design can be proved. I am not satisfied that the Marina Company has reasonable prospects of doing so.

[125] As to claims for compensation, no attempt has been made to particularise, even approximately, the loss which is alleged to have been sustained by the Marina Company, let alone to quantify it. The fact that the Marina 2 venture may turn out to be a profitable venture does not prove the value of the opportunity at the relevant time, with its associated risks. Similar observations apply to the Yard Business and the Dredging Company.

[126] As to the Marina 1 lease, proof of dishonesty would appear to require the Marina Company to establish that its former directors' interpretations of the Company's constitution and of the 2007 ATO ruling were not simply wrong, but not genuinely held, or that it was a belief that no director could reasonably hold. The Marina Company has poor prospects of establishing those matters.

[127] The applicants submit that the Squadron and Nominees are able to satisfy any judgment which will be made against them. They point to recent financial statements which disclose that both have significant assets and cash-flow. However, this begs the question of the likely judgment, a matter not adequately addressed in the proposed statement of claim in its pleading of loss or damage or in the applicants' submissions.

[128] Any eventual monetary judgment may be small and it would not be in the best interests of the Marina Company to bring hazardous litigation when the benefit it would derive from such a monetary judgment would be outweighed by the costs and the risks associated with bringing the proceeding.

[129] The draft pleading sets out extensive allegations of oppressive conduct, but there is no apparent reason why the applicants could not pursue such relief by separate proceedings under Part 2F.1 of the *Corporations Act* if they had a proper basis.

[130] Any real dispute about the proper interpretation of the Marina Company's constitution might be sought in simpler and less costly litigation.

[131] The proposed statement of claim raises many allegations which have only marginal relevance to the claims of substance. For the reasons given earlier and for the reasons developed in the respondents' submissions, many of the allegations do not give rise to claims for loss and damage or at least any loss and damage which the applicants have properly particularised.

[132] The proposed statement of claim is not simply lengthy and one to which it would be very expensive to plead. It rolls up allegations against numerous directors in respect of various transactions, and does not adequately distinguish between alleged breaches by different respondents, and the loss and damage which each breach is alleged to have caused.

[133] Reference was made in the course or oral submissions to the fact that the applicants, taking account of the criticisms made by the respondents to the proposed proceeding, might revise the pleading and that the applicants were "in no sense wedded to or locked into the draft statement of claim in its current form". The applicants said that they were prepared to review it based upon what the respondents had said in their outline of submissions and that the applicants would

be unable to resist the imposition of conditions on leave, requiring the applicants to confine their case as the Court thought fit. One difficulty with that suggestion is that I am left to guess about which parts of the draft statement of claim, including which prayers for relief against which proposed defendants, the applicants have any real affection for, let alone are wedded to. I do not consider that it is appropriate, in the circumstances, given the form in which the draft statement of claim appears, to select, as it were, a few chapters and to confine the applicants to this abridged version.

[134] To the extent that it is possible to separate the various claims for relief and the causes of action which are alleged to support them, I am not satisfied that it is in the best interests of the Marina Company for any of the claims to be brought. None of them appear to have sufficient prospects of success, or to be likely to result in the recovery of substantial property or a substantial award of compensation if successful, so as to justify the likely costs of the litigation and the risks to the Marina Company of paying the proposed defendants' costs if the claims are unsuccessful.

[135] In conclusion, the applicants have not discharged the onus of satisfying me that it is in the best interests of the Company that they be granted leave to bring the proposed proceeding or proceedings.

Serious questions to be tried?

[136] It is strictly unnecessary for me to reach a conclusion about this issue. For the reasons earlier given, some of the proposed claims have little, if any, prospect of success and if the Marina Company does in fact have an arguable cause of action based upon the allegations made by the applicants, the applicants have not demonstrated that the cause of action entitles the Marina Company to the wide variety of relief claimed.

Are the applicants acting in good faith?

[137] None of the applicants swore and filed an affidavit addressing their belief that a good cause of action exists and has reasonable prospects of success. Instead, the applicants' solicitor swore an affidavit in which he stated that, based upon the instructions and information that he had received from the applicants and the documents referred to in the proposed statement of claim, he believed that the Marina Company had a good and arguable case against the proposed defendants and that the proposed statement of claim sought relief to which the Marina Company is justly entitled. I accept that the solicitor has the belief sworn to, based upon his instructions and the information that he received from the applicants. Although not sworn to, I infer that the applicants have a similar belief.

[138] Although the applicants, as members of a company limited by guarantee, do not have the same interest as shareholders of a company, they have an interest in ensuring that the Marina Company's property is not improperly dissipated and that the Marina Company carries out its objective of supporting the Squadron's members in accordance with the Marina Company's constitution.

[139] That said, one would think that the applicants, acting in good faith, would turn their mind to the question of whether the amount, if any, that is likely to be recovered in the litigation, merited the expenditure of time, resources and money which such

complex litigation would necessitate. The applicants are willing to have the Marina Company expose its assets to such hazardous litigation. Whilst the applicants obviously have incurred very substantial costs in bringing the present application, and this might be said to show their real interest in ensuring that the Marina Company pursues viable claims, they have not been prepared to offer any indemnity as to the Marina Company's costs of litigating the proposed proceeding.

[140] In addition, the applicants have, through their counsel, made serious allegations of dishonesty against the past and present directors and officers of the Marina Company. Many of the allegations appear to be without substance. These matters call into question the good faith of the applicants. A finding that the applicants are not acting in good faith would be a very serious finding to make. In circumstances where I have decided to dismiss the application on another basis, it is unnecessary to reach a conclusion about whether the applicants have discharged the onus of showing that they are acting in good faith.

Conclusion

[141] The applicants have not satisfied the Court that it is in the best interests of the Marina Company that they be granted leave to bring the proposed proceeding.

[142] Subject to hearing from the parties on the question of costs, I propose to make the following orders:

1. The application is dismissed.

2. The applicants pay the respondents' costs of and incidental to the application to be assessed on the standard basis.