SUPREME COURT OF QUEENSLAND

CITATION:	*Jones & Ors v Invion Ltd & Anor* [2015] QCA 100
PARTIES:	**STEPHEN GEORGE BURCH JONES** (first appellant) **JASON RICHARD YEATES** (second appellant) **JAMES GREIG** (third appellant) **v** **INVION LIMITED (FORMERLY CBIO LIMITED)** ACN 094 730 417 (first respondent) **CHARTIS AUSTRALIA INSURANCE LIMITED** ACN 004 727 753 (second respondent)
FILE NO/S:	Appeal No 6136 of 2014 SC No 1671 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 97
DELIVERED ON:	12 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce further evidence is dismissed.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – GENERALLY – the appellants were directors of the first respondent – the first appellant was executive Chairman, the second appellant Chief Executive Officer and the third appellant Chief Financial Officer – the Board of the first respondent resolved to amend the contracts with the appellants to extend the termination notice period to be provided by the first respondent to the appellants to 12 months – the appellants, among themselves, amended

their contracts with the first respondent so as to provide that each appellant or the first respondent could terminate the respective contracts for any cause and each appellant could unilaterally elect to either be paid out 12 months' salary/retainer or work 12 months – the appellants did not request approval from the Board or notify the Board of the amendments they had made to the contracts – where the trial judge found the appellants had each breached their fiduciary duties as directors and had breached ss 180, 181 and 182 of the *Corporations Act* 2001 (Cth) (the Act) and the respondent corporation was entitled to equitable compensation and compensation under s 1317H of the Act – whether the trial judge erred in finding that the appellants acted dishonestly in dereliction of their duties as directors in varying their contracts and not notifying the Board – whether, if there was no error as to the dishonesty finding, the trial judge erred in failing to find that the appellants' conduct was not causative of the respondent's loss – whether the trial judge erred in failing to conclude that the Board did not believe that the company was bound to make payments to the appellants, but acquiesced to making them in any event

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – DEFENCES TO BREACH OF DUTY – the appellants were directors of the first respondent – the first appellant was executive Chairman, the second appellant Chief Executive Officer and the third appellant Chief Financial Officer – the Board of the first respondent resolved to amend the contracts with the appellants to extend the termination notice period to be provided by the first respondent to the appellants to 12 months – the appellants, among themselves, amended their contracts with the first respondent so as to provide that each appellant or the first respondent could terminate the respective contracts for any cause and each appellant could unilaterally elect to either be paid out 12 months' salary/retainer or work 12 months – the appellants did not request approval from the Board or notify the Board of the amendments they had made to the contracts – whether the trial judge erred in finding that ss 1317S and 1318 of the Act were not available to the appellants and failing to find there was an honest explanation for the appellants' breaches of duties and that the appellants ought fairly to be excused from liability

Corporations Act 2001 (Cth), s 180, s 181, s 182, s 199B(1), s 1317E, s 1317H, s 1317S, s 1318

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Chappel v Hart (1998) 195 CLR 232; [1998] HCA 55, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited

Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335, cited
Hall v Poolman (2007) 215 FLR 243; [2007] NSWSC 1330, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; [1990] HCA 32, cited

COUNSEL: N H Ferrett for the appellants
M R Hodge for the first respondent
R Perry QC for the second respondent

SOLICITORS: Aitken Whyte for the appellants
McCullough Robertson for the first respondent
Carter Newell for the second respondent

[1] **MARGARET McMURDO P:** I agree with Philippides JA's reasons for dismissing this appeal with costs. I also agree with the additional observations of Peter Lyons J.

[2] **PHILIPPIDES JA: Introduction** The first respondent (Invion Limited) successfully brought proceedings against its former directors, Mr Stephen Jones (the first appellant), Mr Jason Yeates (the second appellant) and Mr James Greig (the third appellant) for compensation under s 1317H of the *Corporations Act* 2001 (Cth) (the Act) for breach of statutory duties under s 180, s 181 and s 182 of the Act and equitable compensation for breach of fiduciary duties.[1]

[3] The trial judge found[2] that the appellant directors acted dishonestly and in breach of their duties, when, without authority, each of them purported on behalf of the first respondent, to vary the termination provisions of the contracts or consultancy agreement of another of them.[3] The appellants did not tell the full Board of the changes. They subsequently received payments under the amended provisions, which conferred on each a right to be paid 12 months' pay/fees on resignation. The appellants were ordered to give restitution or to pay compensation for their breaches of duty.

[4] The appellants' counterclaim for payment of a bonus was dismissed on the basis that they had no contractual entitlement to such a payment.[4]

[5] The appellants were also unsuccessful in third party proceedings against Chartis Australia Insurance Ltd (the second respondent) in respect of that insurer declining to indemnify the appellants.

Grounds of Appeal

[6] The appellants, by their amended Notice of Appeal, appeal against the judgment in favour of the first respondent. The amended Notice of Appeal is commendably succinct in reducing the many grounds previously raised to the following three grounds:

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1 *Invion Limited v SGB Jones Pty Ltd & Ors* [2014] QSC 97 ("Reasons") at [146]–[147].
2 Reasons at [139]–[146].
3 Mr Greig agreed on behalf of the company with Mr Jones' company. Mr Jones agreed on behalf of the company with Mr Yeates. Mr Yeates agreed on behalf of the company with Mr Greig: Reasons at [134] point 3.
4 Reasons at [153]–[155].

1. The learned trial judge erred in his conclusion that the appellants acted dishonestly by failing to disclose the variation of their contracts in a timely manner, that conclusion being inconsistent with the appellants waiting so long to resign.

2. The learned trial judge erred in his conclusion that the appellants caused the losses because there was no evidence that the first respondent made the relevant payments in reliance on any misunderstanding that it was bound to make them.

3. The learned trial judge erred in his conclusion that the appellants were not entitled to be excused under s 1317S and s 1318 of the Act because, having disclosed their asserted entitlements to the Board in time for the Board to reject those entitlements, if it so chose, the appellants should be seen to have acted honestly.

[7] At the hearing, the appellant's counsel indicated that an application to adduce further evidence was no longer pressed.

Issues at trial

[8] The trial judge identified the issues arising at trial from the pleadings as follows.

The first respondent's pleadings

[9] The first respondent alleged the appellants did not act in good faith, in its best interests or for a proper purpose and that they used their position as directors improperly "to gain an advantage for themselves or someone else".[5] The first respondent contended the termination payments resulted from a mistake of law or fact on its part and that it was entitled to restitution on the basis of the unjust enrichment of the appellants.[6] It alleged breach by the appellants of their fiduciary duties as directors and of s 180(1), s 181(1) and s 182(1) of the Act and claimed an account of profits, alternatively equitable compensation, and compensation under s 1317H of the Act.[7] (On the basis the varied contracts were ineffectual, the first respondent additionally relied on its entitlement to withhold fees because the requisite termination notices, under the previous contracts, were not given.[8])

The appellants' pleadings

[10] The appellants sought to support their varied contracts on a number of grounds.[9] In broad terms, it was contended that Board approval was not needed because of an agreement among the directors in 2000 and the "conventional" way of transacting such business within the company. The legitimacy of the amended contracts was also said to be vindicated by the lack of query on independent audit (by Ernst and Young) or by solicitors engaged in reviewing the company's operations in another context (McCullough Robertson). The appellants argued that the contracts were set in place at a time when they were personally at considerable risk for their support of a company of doubtful solvency, the circumstances of their past and continuing devotion to the first respondent and as necessary to forestall destabilising resignations by directors.

The insurer third party claim

[11] The appellants' third party proceedings were defended by the second respondent on the basis that the appellants' claims amounted to an "employment related benefit" which was excluded by the policies or that the policies operated to exclude the insurer's liability,

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5 Reasons at [81].
6 Reasons at [82].
7 Reasons at [83]–[84].
8 Reasons at [85].
9 Reasons at [90].

because of an established contravention of s 199B(1) of the Act, or deliberate dishonesty or fraud.[10]

Summary of facts and critical findings of the trial judge

[12] Mr Yeates and Mr Greig were employed in 2011 as executives pursuant to contracts with the first respondent.[11] Mr Jones provided services to the first respondent through a company he controlled (SGB Jones Pty Ltd[12]) pursuant to a consultancy agreement it had with the first respondent.[13]

[13] The trial judge summarised the pertinent facts and his critical findings as follows:[14]

> "The [appellant] directors were concerned about their security should a major pharmaceutical company become involved with the [first respondent]. The Board responded by extending to 12 months the notice period for termination by the [first respondent] of their contracts [at the Board meeting on 25 March 2011].
>
> The [appellants] also sought performance rights, but because the shareholders would not countenance that, the [appellants] took that matter to the Board.
>
> Dissatisfied with the level of security being achieved, the [appellant] directors arranged for new contracts giving them the right to resign whereupon they would be paid 12 months' remuneration. … that greatly enhanced their position: they could resign at once and take 12 months' remuneration, whereas under a company termination, they would have to work out the notice period.
>
> Those who purportedly bound the [first respondent] to those contracts had no authority to do so. In purporting to do so, they breached their duty as directors and their fiduciary duty.
>
> Inferentially, the [appellant] directors by-passed the Board because they surmised the Board would not agree. Consistently, they did not disclose to the Board what they had done.
>
> After six months, they resigned and sought payment of the sums allegedly due to them. That payment was made does not bind the [first respondent], because the full Board was not aware of what the [appellants] had done in April: the [appellants] had kept that information from their fellow Board members.
>
> The [appellant] directors were patently obliged to inform their fellow directors of those matters, especially where the solvency of the [first respondent] was in doubt, the contingent liability was so substantial, and the [appellants] were themselves the potential beneficiaries.
>
> I draw the inference, which I say is clear and reasonable, that they wanted to establish this "entitlement" and realize upon it with no notice to the full Board. Knowing this matter should have gone to the Board, the [appellant] directors should be seen as having acted dishonestly, in dereliction of their duties as directors.

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10 Reasons at [89].
11 Reasons at [16]–[17].
12 That company was subsequently deregistered.
13 Reasons at [13].
14 Reasons at [136]–[146].

> I conclude that the [appellants] (obviously) knew of the Board resolution of 25 March 2011, and must have appreciated that the April changes greatly enhanced their potential benefit. They also appreciated that the authority of a director was subject to any Board direction (para 52B further amended statement of claim, which was admitted). By its March resolution the Board was "occupying the field" of termination. (Even if Mr Yeates as Managing Director had the implied authority he claims he had, it could not have survived this assertion of full Board authority.) I conclude also that the [appellants] were acting in concert in April, and that they knew this matter should have gone to the Board, so that ipso facto, they knew they lacked actual authority to effectuate this alone.
>
> The [appellants] owed fiduciary duties to the [first respondent], to avoid conflict of duty and interest and not take advantage of their position to secure a personal benefit (*Chan v Zacharia* (1984) 154 CLR 178, 198–9). Also, in relation to s 180 (director exercising reasonable care and diligence), see *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465, 476 and for s 181 (good faith in the interests of the company) of the *Corporations Act* 2001 (Cth), see *Permanent Building Society (in liq) v Wheeler & Ors* (1994) 14 ACSR 109, 137. As to s 182 (prohibition on using position to gain personal advantage "for themselves or someone else"), see *R v Byrnes* (1995) 183 CLR 501, 514–5 and *Australian Securities and Investments Commission v Adler & Ors* (2002) 168 FLR 253, 365.
>
> For reasons already developed, the [appellants] breached these common law and statutory duties: the fiduciary duty, by taking advantage of the position of director to obtain a personal benefit; as to s 180, because a reasonable person would not have made such a contract or accepted payment pursuant to it; under s 181, because of the absence of good faith and proper purpose; and as to s 182, because they used their position to gain an advantage for themselves (or their co-defendants)."

Factual background

[14] In order to address the grounds of appeal it is necessary to traverse in some detail the facts relied upon by the first respondent at trial (much of which was, as the trial judge observed, uncontroversial).[15]

Amendments to the consultancy agreement and employment contracts

[15] In March 2011, Mr Graham, as Company Secretary, circulated a revised agenda and Board papers for a Board meeting on 25 March 2011 which included as an item, "Amendment of Executive Management Contracts", to be spoken to at the meeting by Mr Jones and Mr Greig. At the meeting on 25 March 2011, the Board of Invion resolved to amend the executive contracts (the contracts of Mr Jones' company, Mr Yeates and Mr Greig) to "extend the termination notice period to be provided by [the first respondent] … to 12 months".[16] The appellants abstained from voting on that resolution.[17]

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15 Reasons at [3].
16 Reasons at [25].
17 Reasons at [25].

[16] The trial judge set out at length how in April 2011, the appellants (together with Mr Graham[18]) between themselves, purported to change their contracts:[19]

> "On 4 April 2011, Mr Jones sent an email to Mr Graham, copying in Mr Yeates and Mr Greig, requesting Mr Graham to prepare 'codicils' with respect to the employment contracts for the four of them to extend the termination provisions from 6 to 12 months. Mr Graham responded, 'we are on it as we speak'.
>
> Mr Greig emailed [the first respondent's solicitors] on 6 April 2011, attaching the employment contracts of Mr Graham and Mr Yeates and the consultancy agreement with SGB Jones Pty Ltd. Mr Greig listed what he believed to be the required changes to those contracts to reflect the Board's resolution to change the termination period to 12 months notice, and he stated 'I don't see the need to change anything else to give effect to the Board's decision to increase notice period to 12 months.' He also said, 'internally we have been updating all staff contract documentation, and we will update these contracts as well for consistency.'
>
> Mr Greig then emailed Mr Jones (copying in Mr Yeates and Mr Graham), on 13 April 2011, with the updated Consultancy Agreement with SGB Jones Pty Ltd advising that he had 'updated [his] previous agreement … to now reflect a 12 month notice period as recently approved by the Board.' There was no amendment to the notice period required from SGB Jones Pty Ltd.
>
> Mr Jones replied by email 38 minutes later, stating:
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> > '… Do not agree to the 6 months notice period by [SGB Jones Pty Ltd]. It should be either party can terminate without cause and the 12 months can be paid out or worked out depending on the decision of [SGB Jones Pty Ltd]. Please amend otherwise ok.'
>
> Mr Greig replied to Mr Jones early that same afternoon stating '[s]ee revised document attached, with changes tracked.' The revised consultancy agreement contained the following amended provision:
>
> > 'Notwithstanding anything else to the contrary, either party may terminate this Agreement at any time and in this case, the [first respondent] will make payment to [SGB Jones Pty Ltd] of the amount equivalent to 12 months of fees, any portion of which may be worked at the discretion of the Consultant.'
>
> Mr Jones replied by email 6 minutes later advising that the amendment to the termination provision was 'fine'.
>
> The next day, 14 April 2011, Mr Greig emailed to Mr Jones a final version of the amended consultancy agreement with the amendment … Mr Yeates and Mr Graham were again copied into the email. Mr Jones signed the contract on 14 April 2014 on behalf of SGB Jones Pty Ltd. Mr [Greig] in his position as Finance Director signed the amended contract on behalf of the [first respondent] on 10 May 2011.
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> Mr Greig sent a letter dated 4 April 2011 to Mr Graham and Mr Yeates on behalf of the [first respondent] providing them with updated employment

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18 A claim brought against Mr Graham was settled.

19 Reasons at [26]–[36].

> contracts. Mr Yeates sent a similar letter to Mr Greig, on behalf of the [first respondent], also dated 4 April 2011, providing Mr Greig with his updated contract. All updated contracts contained handwritten notes next to clauses 8.3 and 8.4. They stated 'Refer Schedule 1 Amendment', and were initialled by Mr Yeates for Mr Greig's contract and Mr Greig for Mr Yeates' and Mr Graham's contracts. Clauses 8.3 and 8.4 dealt with termination of employment by the [first respondent] or the employee and provided that notice of between 1 to 5 weeks was required depending on the years of service and age.
>
> Schedule 1 to both Mr Yeates's and Mr Greig's updated contracts contained the following statement under the heading 'Other terms specific to your employment:'
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> > 'Clauses 8.3 and 8.4 are amended, so that the notice period to be given either by the [first respondent] or you is 12 months. In either scenario, given the executive position held, you will be entitled to a payment of 12 months salary, however you will not be required to work during this period unless agreed to by both you and the [first respondent]. The payment in lieu of notice by the [first respondent] is 12 months salary.'
>
> Mr Yeates signed his updated contract on 14 April 2011 and Mr Greig on 15 April 2011. Both of these updated contracts, as well as the updated signed contract of Mr Graham, were sent by Mr Greig to Mr Jones via email on 15 April 2011.
>
> Mr Jones emailed Mr [Greig], copying in Mr Yeates and Mr Graham, on 15 April 2011, asking Mr Greig whether the [first respondent] was required to sign the updated contracts of Mr Greig, Mr Yeates and Mr Graham and, if so, he would print them out, sign them and return them on behalf of the [first respondent]. Mr Greig replied that the [first respondent] need not sign the employment contracts; the covering letter of the [first respondent] advising that each employment contract had been updated was sufficient." (footnotes omitted)

The 12 May 2011 Board Meeting

[17] The Board met again on 12 May 2011, with the appellants and non-executive directors present at that meeting. The minutes of the 25 March 2011 meeting (where it was resolved that executive contracts be amended to increase the notice period to 12 months if the first respondent terminated the employment or consultancy of the executives) were approved and signed by Mr Jones as Chairman. The appellants did not inform the Board of the amendments, which had occurred in April 2011.[20]

Termination of the executive positions by the appellants

[18] There was a Board meeting on 11 October 2011, at which Mr Jones, as Chairman, complained about misinformation distributed by the shareholder group concerning capital management and corporate governance, and the Board agreed that a letter be sent to shareholders to correct any such misinformation.[21] It was at this meeting that Mr Jones advised he would resign as Executive Chairman but would remain on the Board as non-executive Chairman. Likewise, Mr Yeates advised he would step down

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20 Reasons at [37].

21 Reasons at [38].

as Managing Director but would remain as a non-executive Director. Mr Greig also advised he would step down as Finance Director but would remain as a non-executive Director. Again, the appellants did not inform the Board of the April 2011 amendments.[22]

[19] In addition, on 11 October 2011, Mr Jones, as Director of SGB Jones Pty Ltd, wrote to Mr Graham as the Company Secretary, terminating the consulting agreement between the first respondent and SGB Jones Pty Ltd effective immediately and attaching an invoice to the first respondent, $504,900.00 of which was for "termination payment" pursuant to the consultancy agreement (equal to 12 months aggregate billings to date of termination).[23]

[20] On 12 October 2011, Mr Yeates emailed his resignation letter to Mr Jones as Chairman, stating he was giving notice of resignation in accordance with his employment contract and that, "In accordance with [his] employment contract", he would "work out [his] notice period only as is required to provide an appropriate transition to the incoming executive and only if [his] own position permit[ted him] to do so".[24] Mr Jones, as Chairman, responded to Mr Yeates via email and stated "[p]lease send to me for approval your statement of monies owing in accordance with your employment contract which should include the 12 months motor vehicle emolument".[25] Mr Yeates answered, "[i]n accordance with my contract of employment I am entitled to a payment of 12 months' one year's salary ($350K)…" to which Mr Jones replied "[a]pproved".[26]

[21] Mr Greig also sent his resignation letter on 12 October 2011 to Mr Yeates as Managing Director and Chief Executive Officer, stating he was providing the required notice "in accordance with [his] employment contract" and advising "in accordance with [his] employment contract" that due to the situation concerning the shareholder action group he would not work out his notice period but would leave as an executive "with immediate effect". [27]

Termination payments to the appellants

[22] On 12 October 2011, Mr Graham, as Company Secretary, emailed Mr Jones, responding to the termination of the consultancy agreement and in relation to termination payments to SGB Jones Pty Ltd, Mr Greig and Mr Yeates. Mr Graham expressed concern about making termination payments without notifying the Board:[28]

> "On the payment of termination payments, i (sic) am not comfortable making those payments without the awareness of the Board. Not their approval, but their awareness. I have no issue with the validity of the payments, but I think it is prudent and in everybody's best interests, particularly in the current circumstances, that the board are made aware of the fact that (a) the board changes have been made, (b) that they receive a copy of the ASX announcement, and (c) they be advised that termination payments will be made in accordance with the various agreements. A simple email will do the trick and cover everybody's ass. I don't want anybody to be able to say when it comes up in the

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22 Reasons at [39]–[40].
23 Reasons at [41].
24 Reasons at [42].
25 Reasons at [43].
26 Reasons at [43].
27 Reasons at [44]. Mr Greig resigned as a non-executive director on 26 October 2011 by letter to Mr Jones as non-executive Chairman of the first respondent: Reasons at [54].
28 Reasons at [45].

> Dec 4C or the half yearly accounts or the annual report that they did not know, or that the payments were made without the knowledge of the board. Again, I am not questioning the payments, but I just want to make sure we dot the 'i's and cross the 't's."

[23] Mr Jones in turn responded to Mr Graham by email later on the same day, copying in Mr Yeates and Mr Greig, stating:[29]

> "As for the payments they should be made and (sic) today. They are contractual. I agree that you should make the Board aware that they have been made and that they are in order, contractual and also distribute the release at the same time to our colleagues that way all are in the loop."

[24] Later on the same day, Mr Graham, as Company Secretary, wrote to all members of the Board, including the appellants, and advised that the appellants had resigned from their executive roles and that "[i]n accordance with our contractual obligations termination payments will be made to [the appellants] in accordance with the terms of their employment contracts and consulting agreements. These will equate to 12 months salary/12 months previous consulting fees".[30]

[25] Dr Ando, a non-executive director, responded to Mr Graham the following day, stating, "I assume [the appellants] have formal contracts which gives them 12 months salary also when they resign?" Mr Graham replied, "Yes, all have contracts with a 12 month termination payment clause. There was a board resolution early in the year agreeing to the 12 month payment, except in the circumstances of summary dismissal etc. I can send copies if you like?" Dr Ando did not request anything further.[31] As the trial judge observed, Mr Graham was incorrect in saying the earlier Board resolution covered this situation.[32]

[26] Termination payments to SGB Jones Pty Ltd, Mr Yeates and Mr Greig were approved by Mr Graham as Company Secretary and paid by 17 October 2011, being $504,900 to SGB Jones Pty Ltd (only $458,999.99 of which was claimed by the first respondent), $371,329 to Mr Yeates and $220,000 to Mr Greig.[33]

Mr Graham's termination and payment

[27] Although the claim against Mr Graham was settled, it is pertinent to note that Mr Graham resigned by letter dated 26 October 2011 to Mr Jones (as non-executive Chairman) and advised:[34]

> "In accordance with the terms of my employment contract, I am not prepared to provide a notice period and my resignation is effective immediately. In accordance with Schedule 1 of my employment contract, I am entitled to a payment of 12 months salary on my termination. I request that the [first respondent] make appropriate arrangements in regards to this payment as soon as practical."

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29 Reasons at [46].
30 Reasons at [47].
31 Reasons at [48].
32 Reasons at [49].
33 Reasons at [50]. Insofar as the primary judge stated at [50] that the payments were all made on (rather than by) 17 October 2001 that was incorrect but the error is of no moment.
34 Reasons at [51].

[28] Mr Graham also emailed Mr Jones on 27 October 2011, requesting a final termination payment of $146,371 (less tax) being an average of the base salary of three years prior (not the higher 12 months salary as per Mr Graham's amended employment contract, which he did not consider he could be paid without shareholder approval).[35] Mr Jones approved that payment to Mr Graham which was made on 28 October 2011.[36]

Performance rights

[29] The Board papers for the 25 March 2011 meeting included a resolution put forward by Mr Jones for the issue of "performance rights" (aggregating to 4.2 million) on certain conditions to the appellants, amongst others, but it was resolved at the meeting that shareholder approval be sought on that matter.[37] A "circular resolution" put forward by Mr Jones on 14 April 2011 proposed the issue of 7.2 million "performance rights" on conditions.[38] Approval was to be sought at the general meeting of 15 July for the issue of performance rights, including to each of the appellants.[39] Before the proposed meeting, upon the realisation that shareholder approval would not be given, the resolutions were withdrawn.[40] (The matter of the proposed issue of performance rights was considered to be relevant by the trial judge to the issue of dishonesty as discussed below.)

[30] On 1 September 2011, the Board resolved to provide executive bonuses (on certain conditions as to capital raising and performance criteria) to the appellants in lieu of the issue of performance rights.[41]

Inquiries by the first respondent

[31] The minutes of 10 November 2011 (the first Board meeting after the appellants' resignations and departure) recorded the various questions raised:[42]

> "At the first Board meeting after the resignation and departure of Mr Jones, Mr Yeates, Mr Greig and Mr Graham, on 10 November 2011, Dr Craven, Ms Cameron and Mr Brown (non-executive directors) raised questions about the termination payments and performance rights paid. The Minutes say:
>
> > 'Dr Craven, Ms Cameron and Mr Brown raised questions relating to the minutes of prior Board meetings as provided, including:
> >
> > - Minutes of 1 September 2011 … Dr Craven, Mr Brown & Ms Cameron questioned the appropriateness of the bonuses and termination payments agreed for Executives, whether conditions had been satisfied, whether disclosure of contractual obligations and payments had been made to the market and authorisation of payments. The minute approving the bonuses and termination payments appeared to be in response to shareholders not approving the performance rights.

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35 Reasons at [52].
36 Reasons at [53].
37 Reasons at [55]–[56].
38 Reasons at [57].
39 Reasons at [58]–[60].
40 Reasons at [61]–[62].
41 Reasons at [63].
42 Reasons at [66]–[67].

> - Ms Cameron stated that there did not appear to be any financial delegations manual in place or levels of authority for payments. Copies of the individual employment contracts were requested to be provided.
>
> Noted pages 25 & 26 of the 2011 Annual Report contained disclosure on terms of payment and contracts.
>
> Agreed 3 main issues need to address:–
>
> - Terms and conditions for bonus payments and timing re meeting hurdles (20% payable on finance completion, 80% on deal with Pharma).
>
> - Separation payments and if in accordance with contractual terms.
>
> - Approvals and authorisation of payments for Jones, Greig, Yeates and Graham.
>
> Agreed to follow up investigations of authority levels and systems in place and implement a formal delegations of authority – draft being prepared and to be circulated to Board.
>
> …
>
> Mr Brown queried payments to former executives and whether in accordance with terms of their employment contracts. Directors agreed that external lawyers be briefed to review executive employment contracts, payments made and provide legal advice and actions (if any) to take, particularly if any illegality involved.'
>
> Also, at the meeting, the directors resolved to rescind the previous Board resolutions relating to bonus payments to the then former executives Mr Jones, Mr Yeates, Mr Greig and Mr Graham, and to investigate the timing of their resignations and as to whether the conditions had been met to justify the payment of the 20% bonus." (footnotes omitted)

Findings as to the appellants' position concerning their authority

[32] Having set out the "uncontroversial facts" outlined above, his Honour observed that the real controversy in the case arose from the appellants' evidence and how it should be assessed. His Honour dealt separately with the position of each appellant.

The evidence of Mr Jones

[33] Mr Jones' justification for the respective appellants committing the first respondent to the varied contracts without Board approval centred on his evidence of an unminuted oral agreement reached between him and the other directors in the year 2000 (Dr Hanisch and Mr Goodall), that any of them, acting alone, could exercise the authority of the Board, subject only to the first respondent's constitution and to their acting lawfully and properly.

[34] Mr Jones' evidence about the asserted agreement was rejected by his Honour, who noted that Mr Jones conceded he did not tell anyone else about it, including the auditors and McCullough Robertson, who conducted the due diligence process prior to the public listing of the first respondent.[43] His Honour observed the arrangement

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43 Reasons at [94].

"would ordinarily be considered unusual" and that Mr Jones' evidence about it was vague and unconvincing.[44] Mr Jones' claim was inconsistent with the only other evidence on the matter, given by Dr Hanisch (that the overriding principle was that everything had to be agreed to by the Board) and Mr Goodall (that anything financial had to be agreed to at Board level). Their evidence was accepted by his Honour. They denied there was a meeting in 2000 at which any such delegation was agreed.[45] Furthermore, Ms Farris (who became Company Secretary in April 2012) confirmed there was, at no material time, a "delegations manual" in existence, which tended to support the first respondent's constitutional position, that all directors needed to join in decisions, at least those instrumental to the first respondent's operations (as were those in issue).[46]

[35] His Honour also observed that the documentary evidence sat uncomfortably with Mr Jones' claim.[47] In that regard, the minutes of Board meetings tendered contained numerous instances where the Board, rather than a single director, concerned itself in authorising employment contracts, including for executives.[48] Significantly, the minutes of 2 February 2006 showed the Board approving ("accepting") the Managing Director's recommendations as to "executive salaries" and those for the meeting of 8 November 2004 showed the Board "adopting" the tabled "managing director's employment contract".[49] Furthermore, inconsistently with Mr Jones' claim of devolution of authority, the financial reports for 2005 and 2008 (signed as correct by Mr Jones) included the statement, under the heading "corporate governance", that "the Board determines the remuneration packages for executive directors and senior employees",[50] and the 2010 report contained a statement that, "All matters relating to the nomination of new directors and remuneration of directors and managers are dealt with by the Board as a whole".[51] Similarly, the prospectus for the public float specified, as to matters which would otherwise be dealt with by a Remuneration Committee, that they were "being dealt with by the full Board".[52]

[36] In a similar vein was the documentary evidence for 2011.[53] The minutes of the 1 September 2011 Board meeting noted the establishment of a Remuneration Committee, "to make recommendations to the Board concerning remuneration". The annual report for the year ended 30 June 2011, signed by Mr Jones, contained the statement, "the Board is responsible for determining and reviewing compensation arrangements for the directors themselves, the CEO and executive team". It also stated, "The Board as a whole was responsible for all matters relating to remunerations which would otherwise be attended to by a remuneration committee" and that the Board had "formed a remuneration committee which will now be responsible for making recommendations to the Board on the remuneration arrangements for non-executive directors, executives and employees". His Honour found those statements presented a situation which was inconsistent with the contention that each director had authority on behalf of the Board to enter into contracts such as those in issue.[54]

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44 Reasons at [95].
45 Reasons at [96]–[98].
46 Reasons at [99].
47 Reasons at [100].
48 Reasons at [101].
49 Reasons at [102].
50 Reasons at [103].
51 Reasons at [104].
52 Reasons at [104].
53 Reasons at [105].
54 Reasons at [105]–[106].

[37] His Honour observed that, if the 2000 agreement existed, Mr Jones' answer to the solicitors who conducted the IPO process was "disingenuous", in not qualifying the Board's involvement "in the major decisions affecting the company" by referring to such wide-ranging authority vested in the hands of individual directors.[55] His Honour also noted the original defence, which pleaded the agreement advanced at the trial by Mr Jones, was withdrawn on the basis he had not authorised it and was the subject of a complaint to the Legal Services Commission.[56] In his letter of complaint of 15 January 2014, Mr Jones stated that his then solicitor had "invented (the) alleged meeting", but in his oral evidence he contended that the directors had agreed to an even broader delegation than particularised in the original defence.[57] His Honour observed that in those circumstances the reference to the "invention" of the alleged meeting was "at least infelicitous" and Mr Jones "may have become uncomfortable about contending for a meeting which he knew had not led to the delegation on which he now relies".[58]

[38] His Honour rejected Mr Jones' contention that the April changes did not materially affect the first respondent's interests; having to pay 12 months' remuneration for no return conferred additional financial benefit on the appellants to the first respondent's detriment.[59] His Honour also rejected Mr Jones' argument that the resignations of the directors anticipated the prospective removal of Mr Greig and him by shareholders at an extraordinary general meeting (so that it was the shareholder action which operated to pass the benefit to him). His Honour found that it was the appellants' termination of the contracts which crystallised the entitlements; the reasons behind their terminations were not to the point. What was relevant was how the April changes came about and the appellants' motivation discernible from those circumstances.[60]

The position of Mr Yeates

[39] In terms of Mr Yeates, his Honour found that there were "a range of matters which reflected poorly on his credibility", that he was "often unprepared to provide direct answers to uncomplicated questions, and often took a defensive approach". His Honour considered that Mr Yeates' claim that all directors subsequently authorised the payments in question was "untrue, and Mr Yeates would have appreciated it to have been untrue".[61]

[40] Mr Yeates' contentions, as to the sources of his authority to bind the first respondent to the contracts (namely his contract as Managing Director, his position as Managing Director under the constitution, his implied authority as Managing Director, and the Board's acquiescence in his actions) were rejected by the trial judge.[62] His Honour found that Mr Yeates' contract was an insufficient foundation for the specific authority alleged. The schedule to the contract, under the heading "Authorities (financial/staffing/policy)" specified "as delegated by the Board"[63] but Mr Yeates could point to no relevant delegation.[64] Further, as to acquiescence by the Board, there was

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55 Reasons at [107].
56 Reasons at [108].
57 Reasons at [109].
58 Reasons at [110].
59 Reasons at [111].
60 Reasons at [112].
61 Reasons at [113].
62 Reasons at [114]–[119].
63 Reasons at [115].
64 Reasons at [116].

no evidence that the Board knowingly endorsed what had occurred in April, nor evidence that the appellants were awaiting such endorsement before exercising their newly enlarged power of termination.[65] Mr Yeates' argument as to ostensible or implicit authority was also rejected as "extraordinary", bearing in mind the contracts and the substantial potential personal benefits conferred.[66] The first respondent's constitution "conferred" no relevant authority on Mr Yeates as Managing Director by the Board.[67]

The position of Mr Greig

[41] Mr Greig's position was that (as Finance Director and CFO) he agreed on behalf of the first respondent to the new contract for Mr Jones's company because it was necessary to ensure that Mr Jones remained within the first respondent, which was a "proper purpose".[68] He did this after a couple of hours' consideration and without taking external advice, notwithstanding the new arrangement would expose the first respondent to a potential liability exceeding $400,000.[69]

[42] His Honour observed the fallacy in that approach was that the new provision could not guarantee his object but rather created a temptation which could produce the opposite result.[70] In concluding Mr Greig was dishonest in his conduct, his Honour was "strongly influenced" by his view that it was "so obvious this change should have been taken to the Board that Mr Greig as an experienced businessman must have appreciated that".[71] There were additional matters to which his Honour had regard. His Honour noted[72] Mr Greig was evasive when cross-examined about why he did not inform the Board of the arrangement to which the appellants came in April 2011. Although Mr Greig acknowledged it was a material matter relevant to the financial position of the first respondent, he did not adequately explain why he did not inform the directors of the matter. His Honour found:[73]

> "Mr Greig was an experienced chartered accountant and company director. That he was not candid with the whole Board about this matter is consistent with what I regrettably conclude – his having wished to keep the matter from the Board, in his own personal financial interests. Mr Greig emotionally rejected that position, under cross-examination. He may have convinced himself he was acting rightly and honourably. But as I have said, that possibility falls to be measured against the plain wrongness of what was being set in place."

[43] Mr Greig acknowledged that the statement in the 2011 Annual Report that, with relation to executive contracts, "notice periods vary depending on the period of service and the level of seniority of the executive", was inaccurate and his Honour observed it was "plainly inaccurate" in relation to the appellants, concerning the April variations to their contractual position.[74] His Honour further observed:[75]

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65 Reasons at [117].
66 Reasons at [118].
67 Reasons at [121]–[122].
68 Reasons at [124].
69 Reasons at [125].
70 Reasons at [126].
71 Reasons at [127].
72 Reasons at [129].
73 Reasons at [129].
74 Reasons at [130].
75 Reasons at [131].

> "… Mr Greig held strongly to his assertion of authority to bind the [first respondent] to these contracts (as CFO via the CEO and Managing Director). When tested, he conceded that a change to the termination period … which the Board had ordained in March 2011, would have to go to the Board. Yet he held to the position that the individual directors had authority themselves to set up other benefits for themselves, such as those established here in April, because such benefits concerned what he presented as a different issue – termination not by the [first respondent] company, but by the individual director. I considered that to be an untenable distinction. The relevant issue was termination (generally) of executives' contracts."

[44] In this context, his Honour also referred to Mr Greig's acknowledgment that the process of proposing a "circular resolution" as occurred on 14 April 2011, in relation to the issue of performance rights, could have been adopted in relation to the contractual amendments.[76] His Honour noted the peculiarity of changes which exposed the first respondent to substantial contingent liabilities not being dealt with similarly. Also significant was that the explanation to the Board for the "circular resolution" made no mention of what had occurred just the day before.

Grounds of Appeal

[45] The appellants acknowledged the limitations on the review on an appeal of factual findings made by a trial judge[77] and did not seek to overturn his Honour's views as to credit. Rather, the appellants contended that, even disregarding the oral evidence of the appellants entirely, the documents and evidence from the first respondent's witnesses demonstrated that his Honour made obvious mistakes that should be reversed.

Ground 1: Findings of dishonesty

The appellants' submissions

[46] The first complaint raised by the appellants was that the trial judge's findings of dishonesty were not justified; his Honour having chosen amongst the competing conjectures as to the explanation of the appellants' conduct as distinct from a plainly available one. (This ground has implications, in turn, for the availability of the excuses for which s 1317S and s 1318 of the Act provide).

[47] The challenged findings as to the operative dishonesty, are encapsulated in the following finding of the trial judge:[78]

> "I draw the inference, which I say is clear and reasonable, that [the appellants] wanted to establish this 'entitlement' and realize upon it with no notice to the full Board. Knowing this matter should have gone to the Board, the [appellant] directors should be seen as having acted dishonestly, in dereliction of their duties as directors."

[48] The difficulty pointed to with his Honour's findings was that, having made the variations to the termination provisions, the appellants continued working in their positions for six months and, in that time, they would have appreciated (each being an experienced businessman and company director) that the first respondent's accounts

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76 Reasons at [132].
77 *Fox v Percy* (2003) 214 CLR 118 at 126–127.
78 Reasons at [143].

would be (and in fact were) audited, a process which was very likely to include an inspection of the obligations to senior employees. Had they been acting in an attempt deliberately to conceal, as distinct from a mistaken view as to their authority and obligations to disclose, they were unlikely to have waited the six months.

[49] The appellants submitted that because the question of dishonesty was resolved inferentially, it invited consideration of the proper approach to drawing such inferences.[79] Moreover, in arriving at a view as to which was the more probable, the Court was required to take into account the seriousness of the finding of dishonesty.[80]

[50] The appellants submitted that his Honour's finding required that dishonesty, as opposed to mistake, on the part of the appellants must have been the more probable explanation for their conduct. The appellants' submission was essentially that if they acted dishonestly, then they also acted quite stupidly; by waiting so long before resigning, they took a very great risk that their dishonesty would be discovered. That view, it was contended, was at odds with much of his Honour's reasoning which proceeded upon the basis that the appellants were highly competent and astute. In those circumstances, the better explanation (assuming that they lacked authority) was that they were mistaken as to their authority and as to their obligation to disclose.

The respondents' submissions

[51] The respondents argued that the appellants' contention as to the more probable explanation of their conduct was flawed, in that it was sought to be made in a factual and evidentiary vacuum.

[52] The first respondent submitted that the finding of dishonesty was premised on detailed findings as to the knowledge and understanding of each of the appellants based on an assessment of the documents, the evidence from the witnesses called by the first respondent and the evidence from each of the appellants. Further, for it to be accepted that the appellants were simply mistaken, the appellants would need to have given that evidence and it would need to have been accepted. Had they not given evidence, a *Jones v Dunkel* inference could and should have been drawn against them. However, the appellants did give evidence and their claimed belief that they had authority to enter into the impugned contracts and were not obliged to disclose what they had done to the rest of the directors was rejected.

[53] The second respondent made similar submissions, arguing also that the appellants' concession that the findings as to credit were not disputed was fatal to the appeal; the appellants, in accepting those findings, could not challenge the conclusions which necessarily flowed from them. While the appellants might have wished for their actions to be seen in an evidentiary vacuum, it remained that they ran a case as to their authority which was found to be untenable in terms both of the discharge of their duties as directors and of their honesty. None sought to explain their conduct on the basis of some misunderstanding. They strongly asserted an express entitlement to do what they did and that they, at all times, acted appropriately. Their explanation was also inconsistent with their admission of the allegations in paras 52B and 52C(b) of the Statement of Claim (that the appellants' authority remained subject to any direction or decision of the Board) and that the amended termination provisions conferred a greater benefit than determined as appropriate by the Board. Moreover, the appellants' reliance on "documents" alone to challenge his Honour's conclusions was misconceived;

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79 See *Jones v Dunkel* (1959) 101 CLR 298 at 304–305 per Dixon CJ.

80 *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 362.

his Honour expressly considered, and traversed at length, the documentary evidence in the context of the appellants' evidence, particularly the first respondent's constitution and annual reports.

Consideration

[54] The respondent's submissions are clearly correct. While the appellants urged an approach which disregarded their evidence, it cannot be overlooked that each sought in his evidence to justify his actions on the basis that he acted with authority and none gave evidence of being mistaken as to his authority. In those circumstances and, given the rejection of the evidence of each appellant, considered against a detailed analysis of the documentary evidence and the credibility findings his Honour made, there was no room for an inferential finding that any appellant acted mistakenly as to his authority.

[55] That was particularly the case, when one bears in mind the seven cogent matters concerning the character of the appellants' actions in effecting the amended contracts to which his Honour had regard, in concluding that the appellants' conduct was knowingly discreditable. The first matter referred to by his Honour concerned the issue of what led the appellants to take the impugned course. His Honour stated:[81]

> "Mr Jones would as necessary have relied on the so-called "Hanisch precedent" to circumvent the prospect of the shareholders dooming, in relation to them, the performance rights proposal. It was the actions of the shareholders which prompted (but did not cause) the contract revisions. The [appellants] secured and agreed in these changes to their contracts at a time when there had been vocal expression of shareholder concern about the existing level of directors' remuneration. Yet they did so without taking the matter to the Board, in the context of the Board's having only recently directed a change to the notice period to be given by the company upon termination under the preceding contracts."

[56] A second matter referred to by his Honour was that the performance rights issue "was tied to variation to the employment contracts". Although the circular resolution of 14 April 2011 proposed increasing performance rights, the appellants made no reference to the change to the termination provisions that had occurred the day before.[82] In that respect, his Honour noted:[83]

> "The two issues being so closely connected, they plainly should have informed the Board of the contract changes when advancing the case for an increase in performance rights from 4.2 million to (the substantially higher level of) 7.2 million."

[57] A third issue was the means by which appellants secured the contract revisions:[84]

> "… the directors recused themselves from the Board meeting which approved the extension from 6 months to 12 months in relation to company termination, and they say or would say they did that on ethical grounds, but they later amended the contracts without reference to the Board in a way which allowed them all to resign and be paid

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81 Reasons at [134].
82 Reasons at [57] and [132].
83 Reasons at [134].
84 Reasons at [134].

> 12 months' remuneration. Further, their method – Mr Jones agreed to the change to Mr Yeates's contract, Mr Yeates to Mr Greig's, and Mr Greig to that of SGB Jones – could hardly be considered arms-length, as Mr Greig in particular emphasized. It rather suggests the contrary, that it was a collegial or corporate or complicit endeavour, done that way to avoid the alternative, which was separate Board endorsement."

[58] A fourth matter was the appellant directors' treatment, including limited disclosure, of what they had secured. The appellant directors did not advise the Board, over the six months prior to their resignation, of the changes which had been made six months earlier.

[59] Fifthly, there was the fact that the annual report for the year ended 30 June 2011, signed by Mr Jones, did not record what amounted to a "termination benefit" because of the revision of the contracts (notwithstanding its contingent character), in relation to the appellant directors. His Honour was inclined to the view it should have been specified, even though contingent. On that basis, his Honour noted the omission was consistent with Mr Jones' and Mr Yeates' not having informed the auditors or the other directors of what had occurred with the revision of the contracts in April 2011.[85]

[60] Aligned to that was a sixth matter. The 2011 annual report, signed by Mr Jones, included an assertion that "board members are fully informed on relevant issues in a timely manner". However, as his Honour pointed out:[86]

> "Mr Jones did not achieve that goal. He said the Board had acquiesced in what had been done, but that point is hollow in circumstances where the [appellant] directors had not informed their fellow non-executive directors of what they had done."

[61] His Honour has regard to one further matter; he noted that:[87]

> "Especially where the solvency of the company was doubtful, not informing the Board of the creation of a potential liability of this magnitude (more than $1 million), and where the [appellant] directors were themselves the beneficiaries, was, quite apart from the matter of authority, discreditable. It was a clear breach of the obligation to keep the full Board informed of all matters relevant to its role; 'ensuring that Board members are fully informed on relevant issues in a timely manner'."

[62] There can be no doubt as to the relevance of any of the matters listed by his Honour, nor any cause for complaint as to the significance attached to them in reaching the findings of dishonesty.

[63] The contention that there was a risk, which must have been understood by each appellant that the alterations to the contracts would be discovered, merely serves to underline the imprudent nature of their conduct – it does not impeach the conclusion reached by the trial judge as to dishonesty.

Ground 2: Causation

The appellants' submissions

[64] The second matter raised by the appellants was that the first respondent failed to prove that the breaches of duty caused the "losses" suffered or that the person who made

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85 Reasons at [134].
86 Reasons at [134].
87 Reasons at [134].

the relevant payments made any mistake justifying restitution. (This ground only concerned the first respondent.)

[65] The appellants' submission was advanced relying on the following. On 12 October 2011, following receipt of termination letters, Mr Graham, as Company Secretary, informed the non-executive directors by email that the appellants had resigned from their executive roles and that "[i]n accordance with our contractual obligations termination payments" of 12 months salary or consulting fees would be made to the appellants "in accordance with the terms of their employment contracts and consulting agreements". Only Dr Ando, inquired as to whether there were formal contracts justifying such a course. Mr Graham responded that there were and stated (his Honour found incorrectly) that the contracts were in line with an earlier Board resolution. The appellants' argument centred on the fact that the payments to the appellant were not made until after Mr Graham had approved them on 17 October 2011. In the preceding five days, none of the directors asked to see the contracts. None of them intervened to suspend the payments. It was submitted it was impossible to say anything about why they took no action; no member of the Board from the relevant period was called by the first respondent. Nor was Mr Graham, who approved the payment made pursuant to the variations (and a beneficiary in the same process of variations), called.[88]

[66] The appellants' argument was that, the intention to make the payment having been disclosed in time for the Board to intervene if it thought fit, it could not be concluded that the appellants' failure to disclose was causative of loss. Rather, the position was that once armed with the information, the Board did nothing. The Board's failure to act was to be considered in light of the failure to call evidence as to whether it understood it was not – on his Honour's view – bound to make the payments. At least the following possibilities were said to arise:

(a) the Board thought the company was bound and, for that reason, acquiesced in the payments; or

(b) the Board did not believe the company was bound, but acquiesced in the payments in any event; or

(c) the Board acquiesced in the payments without bothering to consider whether there was a legal obligation to make them.

[67] The appellants accepted that, if either (a) or (c) were true (it not being in contention that there was a breach of duty) then the breach of duty was causative of the loss because the loss would not have occurred but for the breach of duty. However, it was submitted that if (b) was true, then the breach of duty did not cause the loss because the first respondent, understanding it was not bound, decided to make the payment anyway. The difficulty for the first respondent, it was argued, was that it led no evidence permitting the Court to consider (a) or (c) anything more than competing conjectures.[89] It was asserted that if anything, (b) would have to be considered the most likely on the basis of the trial judge's findings. Taking his Honour's view that it ought to have been plain to the appellants, because they were directors, that the Board had never authorised the transactions, it was submitted that it ought to have been just as plain to the other directors. It followed that it should have been held that the first respondent failed to prove that the breaches of duty cause the loss. Likewise,

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88 Reasons at [26].

89 Cf *Jones v Dunkel* (1959) 101 CLR 298.

the failure to lead evidence as to any mistake on behalf of the first respondent defeated its claim for restitution for mistake.

[68] In advancing these arguments, counsel for the appellants relied on the following in *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors*,[90] where the Court considered the issue of causation by reference to the "increased risk of loss" approach explained in *Chappel v Hart*[91] by McHugh J as follows:

> "Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff."

[69] In *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors*,[92] Keane JA, referring to this passage, stated:

> "This passage supports a process of logical inference of a causal nexus between breach and loss. It confirms that one may logically infer, from the creation or increase in the risk of an event by reason of a breach of duty and the fact of the occurrence of the event, that the breach caused the event…
>
> It must be emphasised that the approach of McHugh J is one of logical inference of a causal link, not of a legal presumption which obviates the need for proof of a causal link. As McHugh J himself said in *Commissioner of Main Roads v Jones*, the approach to causation which he explained in *Chappel v Hart* is appropriate to cases 'where the only evidence concerning causation was that the defendant had breached his duty of care and that the injury that occurred was within the scope of the risk of injury arising from the breach of duty'. The inference of causation is a deduction which may logically be made in a case where the risk created or increased by the defendant's breach of duty may operate, either alone or with other risks attending particular action or enterprise, to produce the loss. But it is not a logical deduction where the evidence, either shows that the removal of the risk created by the defendant's breach of duty would not have prevented the occurrence of the loss by reason of the operation of the other attendant risks, or *gives reason to regard the possibility of such a result as equally probable*." (citations omitted) (emphasis added)

[70] In essence, the appellants' argument was that it was possible that the Board did not believe the first respondent was bound, but acquiesced in the payments in any event.

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90 [2006] QCA 335.
91 (1998) 195 CLR 232 at 244–245.
92 [2006] QCA 335 at [277]–[278].

In that case, the first respondent, "understanding it was not bound", decided to make the payment anyway so that the breach of duty did not cause the loss. It was therefore "an equally probable outcome that the payments were made because the first respondent understood the quality of its act" (rather than for example being mistaken).[93]

The first respondent's submissions

[71] The first respondent submitted that the appellants' submissions were misconceived on a number of grounds. Firstly, even if there was acquiescence (which was disputed) by the non-executive directors that would not assist the appellants, given the unchallenged finding that they breached their duties by purporting to bind the first respondent to the contracts in question. The payments were made on the basis of those contracts and, but for the appellants purporting to bind the first respondent, the payments would not have been made. Therefore, the breach of duty caused the loss. In any event, if the non-executive directors had realised before 17 October 2011 that the appellants had no entitlement to the payments, but failed to stop the payments, that might mean that those non-executive directors had breached their duties but it would not absolve the appellants.

[72] Second, the pleadings precluded the contention now advanced as to causation. That was because the only basis upon which the appellants denied that the first respondent suffered loss as a consequence of the breaches of duty was that there were no breaches of duty.[94] It was admitted that Mr Jones approved and caused to be made the payments to Mr Yeates,[95] that Mr Yeates approved and caused to be made the payment to Mr Jones' company,[96] and that Mr Jones and Mr Yeates together approved and caused to be made the payment to Mr Greig.[97] Both Mr Jones' company and Mr Jones pleaded that "the seeking and approving and causing to be made of the [relevant] payments ... occurred pursuant to [the varied contracts]".[98] Mr Greig pleaded that "the [relevant] payments ... were sought and approved pursuant to [the impugned contracts]".[99]

[73] Third, it was impossible that "the company ... decided to make the payment anyway" as asserted by the appellants. An individual director had no authority to bind the company (save where there is a lawful delegation). Directors could act only collectively as a Board and the function of an individual director was to participate in decisions of the Board.[100] The only way in which the company could have decided to make the payment was if the Board had convened before the first payment was made (on 13 October 2011) and resolved, in light of the resignations of the appellants, to pay the equivalent of 12 months salary or consulting fees immediately (or perhaps resolved by flying minute to the same effect), which did not occur.

[74] Fourth, while it was unclear in what sense the appellants used the term "acquiescence", the facts were incapable of supporting "acquiescence" in a legal sense. If the contention

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93 Transcript 1–16.

94 See paras 71 and 81 of the Statement of Claim and pleas in para 45 of Mr Jones' Defence, para 46 of Mr Yeates' Defence and para 44 of Mr Greig's Defence.

95 See para 51 Statement of Claim and pleas in para 32 of Mr Jones' Defence and para 31 of Mr Yeates' Defence.

96 See para 51A of the Statement of Claim and pleas in para 32A of Mr Jones' Defence, para 31A(a) of Mr Yeates' Defence and para 29A(a) of Mr Greig's Defence.

97 See paras 51 and 51A of the Statement of Claim and pleas in paras 32 and 32A of Mr Jones' Defence, paras 31(b) and 31A(b) of Mr Yeates' Defence and para 29A(a) of Mr Greig's Defence.

98 Para 37(a) of Mr Jones' Defence and para 36(a) of Mr Yeates' Defence.

99 Para 35(c)(iii) of Mr Greig's Defence.

100 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 205 per Dawson J.

was that there was ratification by acquiescence, it would be necessary to demonstrate "full knowledge of all the material facts and circumstances of the agent's unauthorised act". Similarly, if it was suggested that there was an equitable defence to the breach of fiduciary duty by acquiescence, it would be necessary for there to be knowledge of the infringement of rights. There could not be acquiescence by the first respondent, in either of those senses, because there would have to be a fully informed decision, made collectively by the Board of directors, to stand by and allow the payments to be made. There was no such decision and there could be no suggestion that the non-executive directors were fully informed. What they were told was, "[i]n accordance with our contractual obligation termination payments will be made".

[75] Fifth, even if causation had been put in issue, there was no cogent reason why the trial judge should not have been satisfied on the civil standard of proof that the appellants' breach of duty caused the loss. Given his Honour's findings, the premise on which the appellants' argument was founded (that it identified a hypothesis as to knowledge and conscious inaction by the non-executive directors that would preclude satisfaction as to causation on the civil standard) was, as a matter of fact, fanciful.

Consideration

[76] The first respondent's submission that the argument now sought to be raised by the appellants as to causation involves a departure from the pleadings is validly made. The appellants' argument (advanced in reply) that their admissions concerning causation should be understood in the context that the focus in the relevant parts of their pleadings was on the dispute as to authority does not assist. There was no alternative plea that, in the event that the appellants lacked authority or breached their duties, their conduct did not cause loss. Unsurprisingly then the issue of causation was not a matter identified by the trial judge as one of the issues for determination.[101] The appellants did not allege as a ground of appeal that his Honour failed to determine causation when it was an issue in dispute at trial. The complaint before this Court, in effect, was that, inconsistently with the appellants' pleaded case, his Honour ought to have found that causation was not established. The appellants, having made admissions as to that issue, are precluded from now seeking to litigate it.

[77] But even leaving aside the insuperable obstacle presented by the admissions in the pleadings, the contention that it was an equally probable outcome that the payments were made not believing that the first respondent was bound, but "acquiescing" in their payments anyway is unmaintainable. It may, in passing, be observed that the appellants' submission that a *Jones v Dunkel* inference should be drawn concerning the lack of evidence on the matter from the first respondent suffers from the difficulty that, because of the appellants' admissions as to causation there was no need for the first respondent to call evidence. The submission that "acquiescence" arose because "armed with information the Board did nothing", does not bear analysis. As his Honour observed, there was "no evidence that the Board knowingly endorsed" what had occurred in April 2011[102] and in these circumstances the point is "hollow".[103]

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101 Reasons at [81]–[83] and [90]. There was the echo of an argument as to causation dealt with in [111] and [112] by the trial judge's reasons. That the variations did not materially affect the first respondent's interests and that it was the shareholder action which operated to pass the benefit to him. Those arguments were comprehensively rejected.

102 Reasons at [117].

103 Reasons at [134].

[78] The prospect that the first respondent made the payments not believing that it was bound to do so, but acquiescing in the payments, was not realistically open in the light of the findings at trial. These findings pertinently were that the non-executive directors, constituting the Board, had resolved in March 2011 as to the appropriate changes to the termination provisions in the appellants' contracts and were thereby "occupying the field".[104] The appellants consciously concealed from the rest of the Board what they had done in varying the contracts and "by-passed the Board because they surmised the Board would not agree".[105] A "reasonable person would not have made such a contract or accepted payment pursuant to it".[106] The non-executive directors were not told before 17 October 2011 that the appellants had in April 2011 purported to enter into contracts that had different termination provisions that would confer greater benefits than those approved by the Board.[107] They were not told that that there was no proper basis for the payments but rather that they would be made in accordance with contractual obligations.[108] At the first meeting of the Board after the appellants' resignation and departure (that is on 11 November 2011) the non-executive directors along with the new directors, agreed "that external lawyers be briefed to review executive employment contracts, payments made and provide legal advice and actions (if any) to take, particularly if any illegality involved".[109]

Ground 3: Excuse

[79] The third ground raised was that, to the extent that there were any breaches of duty by the appellants, the fact that there was an honest explanation for those breaches engaged the excuses provided for in s 1317S and s 1318 of the Act. (This ground was relevant to whether an excuse was available in respect of the first respondent's claim and also whether the appellants' claims were excluded under the insurance policies.)

[80] Sections 1317S and 1318 each require satisfaction of two limbs – that the contravenor acted honestly and that having regard to all the circumstances the contravenor ought fairly to be excused from liability. As to the first limb, the test is whether the person has acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for himself, herself or for another, and without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all has been made to carry out the duties and obligations of his or her office imposed by the Act or the general law.[110]

[81] As the appellants' counsel accepted, satisfaction of the first limb involved not only upholding the appellants' submissions as to dishonesty but also that a positive finding of honesty ought to have been made. Given his Honour's findings as to dishonesty (for which there can be no basis for complaint as explained above), a finding of honesty was simply not available. That is sufficient to dispose of this ground. But it should also be observed that there is no merit in the appellants' contention that the contravention was an honest one because "before the payments were made, with (at least) the acquiescence of the appellants, the board was told," the argument being that

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104 Reasons at [144].
105 Reasons at [140].
106 Reasons at [146].
107 Reasons at [141] and [144]; see also [134].
108 Reasons at [47].
109 Reasons at [66].
110 *Hall v Poolman* (2007) 215 FLR 243 at 318 [325] per Palmer J, adopted by Sackville AJA with whom Beazley and Barrett JJA agreed in *Gillfillan v ASIC* (2012) 92 ACSR 460 at 526 [293].

the appellants did not, but could have, objected to Mr Graham's notifying the Board. In that regard, the appellants placed reliance on the response by Mr Jones, when Mr Graham suggested notifying the Board:[111]

> "As for the payments they should be made and (sic) today. They are contractual. I agree that you should make the Board aware that they have been made and that they are in order, contractual and also distribute the release at the same time to our colleagues that way all are in the loop."

[82] Anticipating that the above might be thought to be indicative of Mr Jones attempting to push the payments through before notification, the appellants argued that there was no suggestion that Mr Jones continued to pressure Mr Graham immediately to make the payment, nor of any such communication from Mr Yeates or Mr Greig. The appellants' submissions miss the mark. The appellants' failure to disclose occurred in circumstances where disclosure was deliberately withheld or not made when, on any objective measure, a director ought to have known that disclosure was required.

[83] As to the second limb, the appellants accepted that it was for them to demonstrate that the circumstances otherwise justified a release from liability. The circumstance relied upon was that, when faced with the opportunity to prevent the payments, the Board, fully informed, did nothing and later, and differently constituted, the Board had a change of heart. That submission must be rejected. As already discussed, the Board was not "fully informed". To the contrary, as his Honour found, they were incorrectly informed as to the contractual position.

Orders

[84] None of the grounds of appeal having been made out, the appeal should be dismissed with costs. The application to adduce further evidence is dismissed.

[85] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Philippides JA. Her Honour comprehensively sets out matters relevant for the determination of this appeal. I wish to provide some additional short reasons.

[86] It is convenient to state briefly the effect of some sections of the *Corporations Act* 2001 (Cth) on which the first respondent relied for its claim against the appellants. Under s 180, a director or other officer of a corporation must exercise the powers and discharge the duties of the relevant office with the degree of care and diligence that a reasonable person would exercise in that office. Under s 181, a director or other officer of a corporation must exercise the powers and discharge the duties of the relevant office in good faith in the best interests of the corporation, and for a proper purpose. Under s 182 a director, secretary or other officer of a corporation must not improperly use that person's position to gain an advantage for the person or someone else, or to cause detriment to the corporation. Each of these provisions is a civil penalty provision[112]. Section 1317H empowers a Court to order a person to compensate a corporation for damage suffered by the corporation if the person has contravened such a provision, and the damage resulted from the contravention.

[87] At first instance it was held that the appellants had each breached ss 180, 181 and 182; and accordingly the first respondent was entitled to compensation under s 1317H. It was

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111 Reasons at [46].

112 See s 1317E of the *Corporations Act*.

also held that each of the appellants had breached the fiduciary duty which each of them as a director owed to the first respondent, and accordingly the first respondent was entitled to compensation for that breach.[113] Hence the judgment against the appellants.

[88] The findings of breach of the statutory provisions just mentioned, and breach of fiduciary duty, were themselves underpinned by a finding that each of the appellants "should be seen as having acted dishonestly, in dereliction of their duties as directors"[114]. The first ground of appeal is directed to this finding. It should be put in context.

[89] In October 2011, SGB Jones Pty Ltd (the company through which the first appellant provided services to and received remuneration from the respondent) terminated its consulting agreement with the first respondent, and claimed $504,900 as a termination payment under that agreement. The second appellant resigned his position with the first respondent, as did Mr Greig. They both claimed termination payments under their contracts with the first respondent. That resulted in payments to SGB Jones, and to the second and third appellants, for which it was held at first instance the first respondent was entitled to recover compensation. The basis on which the amounts were claimed, were terms inserted into each of these contracts, in April and May 2011. It is convenient to record briefly some of the circumstances in which that occurred.

[90] On 25 March 2011, the Board of the first respondent had resolved to vary these three contracts, "to extend the termination notice period to be provided by (the first respondent) … to 12 months"[115]. Those variations provided security in respect of the benefit of these contracts for SGB Jones, the second appellant and the third appellant. Each of the appellants abstained from voting on the resolution to amend these contracts.

[91] In the subsequent few weeks, each of the appellants took steps which had the clear appearance of a concerted arrangement under which each purported to exercise authority to make further variations to the contracts, creating additional benefits for SGB Jones and the second and third appellants.

[92] It might be noted that the variations to the contracts made in April and May of 2011 gave the appellants two benefits not available under the amendments approved by the Board in March. One was that if the first respondent terminated any of the contracts, the relevant appellant would not be required to work for the 12 month period of notice. The other was that in the event any appellant should choose to cease working for the company, there would be an entitlement to 12 months' remuneration.

[93] Assuming that the appellants had authority to vary the contract to create these additional benefits, their conduct in doing so cannot, in the circumstances, be described as honest. Each of the appellants abstained from voting on the resolution to vary the contracts at the March 2011 meeting, because they understood that it would be improper for them to do so; or in Mr Greig's case, because he knew he was not permitted to do so.[116] None of them could have honestly thought that their conduct in working together to increase the benefits available to each, beyond those authorised by the Board in March 2011, was proper. Further, their silence at the Board meeting of 12 May 2011, at which the Minutes of the meeting of March 2011 were approved, is not consistent with honest conduct by them in acting together to confer on themselves additional rights, beyond those approved by the Board at the earlier meeting.

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113 Reasons at [146], [147].
114 Reasons at [143].
115 Reasons at [25].
116 Vol 1 Record Book pp 274, 319, 426.

[94] In oral submissions, it was contended for the appellants that their conduct could not be judged as dishonest, because the varied contracts remained with the company's papers, at risk of discovery by the auditors (and perhaps by others). As Philippides JA points out, in the circumstances this does no more than establish that their conduct was imprudent. It is insufficient to overcome the strong inference of dishonesty, arising from the matters discussed earlier in these reasons.

[95] In my view, these considerations are sufficient to support the finding of dishonesty. It was not suggested that if this finding was maintained, breaches of s 180, 181 and 182 of the *Corporations Act* had nevertheless not been established. These considerations accordingly dispose of grounds 1 and 3 of the Amended Notice of Appeal.

[96] On 12 October 2011, and prior to the payments which have led to these proceedings, Mr Graham sent an email to all members of the Board stating that in accordance with the first respondent's contractual obligations, termination payments equating to 12 months' salary or 12 months' consulting fees would be paid to the appellants, in accordance with the terms of the relevant contracts with the first respondent[117]. The only resulting query was that from Dr Ando, in response to which Mr Graham stated that the contracts had a 12 month termination payment clause, as a result of an earlier Board resolution. In giving instructions relating to the making of the payments, Mr Graham relied upon the contracts as varied in April and May 2011[118], and shortly afterwards he approved the payments[119]. The role which the variation to the contract, recorded in April and May 2011, played in the payments is apparent. For this reason, and for the reasons given by Philippides JA, the finding at first instance in relation to causation of the loss claimed by the first respondent should not be disturbed.

[97] The Notice of Appeal sought relief against the second respondent. However, nothing was ultimately advanced on behalf of the appellants, beyond the matters discussed earlier in these reasons. Because the appellants have not succeeded on any of the grounds which they now advance, it is unnecessary to consider further their claim for relief against the second respondent.

[98] I agree with the orders proposed by Philippides JA.

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117 Vol 6 Record Book p 2331.
118 Vol 2 Record Book p 2353.
119 Vol 6 Record Book p 2366.