SUPREME COURT OF QUEENSLAND

CITATION:	*SDW2 Pty Ltd v JLF Corporation Pty Ltd & Ors* [2017] QSC 1
PARTIES:	**SDW2 PTY LTD** (plaintiff/applicant) **v** **JLF CORPORATION PTY LTD** (first defendant/first respondent) **RICHARD ELLEM** (second defendant) **CUSTODIAN FUNDS MANAGEMENT GROUP LIMITED** (third defendant/second respondent) **SHAW INVESTMENTS NO 1 PTY LTD** (fourth defendant)
FILE NO/S:	SC No 7342 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for interlocutory injunction
DELIVERED ON:	2 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2016 and 25 August 2016
JUDGE:	Bond J
ORDER:	**Upon Mr Scott Damien Watson and the plaintiff, jointly and severally, giving the usual undertaking as to damages,** **And upon Mr Scott Damien Watson undertaking to:** **1. exercise his functions as director to cause Custodian Administration Pty Ltd ACN 162 103 602, Custodian Land Syndicate Ltd ACN 127 663 414 and Custodian Equity and Income Funds Limited ACN 112 753 876 (the "Companies"), and each of them, to continue to conduct their business in the ordinary course of business and pursuant to the Service Agreement dated 31 January 2013, including refraining from doing any of the following without the consent in writing of the third defendant:** **(a) employing any new staff or terminating the employment of any existing staff;** **(b) engaging any new contractors; and** **(c) making any payments other than in the ordinary course of business; and**

2. not to seek to enjoin or otherwise prevent the meeting of the third defendant adjourned to 20 July 2016, and any adjournment thereof, for the purpose of considering resolutions to increase directors' remuneration as set out in the notice of meeting dated 21 June 2016;

3. refrain from performing the duties at paragraph 31(2) to (5) of the affidavit of Mr Graeme John Maclaren sworn 26 July 2016;

4. not cause the Companies to pay any amount in excess of $1,000.00 without first giving Mr Graeme John Maclaren or Mr Jason Matigan (each of whom are directors of the third defendant) 48 hours' notice in writing of his intention to do so and will not make any such payment if directed in writing by either of them to that effect prior to causing the payment to be made;

until the trial of this proceeding or earlier order of the Court.

The orders of the Court are that:

1. The first defendant, by its officers, servants or agents, must not, without the agreement in writing of the plaintiff –

(a) cast any votes it may have in respect of its shareholding in the third defendant at any properly convened meeting in respect of a resolution to:

(i) remove Mr Scott Damien Watson as director from the Companies, and each of them; and

(ii) to appoint another director to the Companies, and each of them; and

(b) otherwise, take any step to effect the matters in subparagraphs (i) and (ii) of the immediately preceding paragraph,

until the trial of this proceeding or earlier order of the Court.

2. There be liberty to apply on the giving of not less than three days' notice in writing to all other parties.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the first defendant, fourth defendant and applicant plaintiff each held shares in the third defendant – where the Shareholders Agreement provided that upon an "Event of Default" by a shareholder the non-defaulting shareholders would have an option to acquire the defaulting shareholder's shares – where the applicant plaintiff alleges a

transfer of the fourth defendant's shares to the first defendant was void, and that it is entitled to purchase the first defendant's and fourth defendant's shares – where the applicant plaintiff seeks an interlocutory injunction to restrain the third defendant from holding certain meetings and restraining the first defendant from casting votes on particular resolutions – whether interlocutory relief ought to be refused because there is no relevant threatened infringement of the applicant plaintiff's rights

EQUITY – EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the first defendant, fourth defendant and applicant plaintiff each held shares in the third defendant – where the Shareholders Agreement provided that upon an "Event of Default" by a shareholder the non-defaulting shareholders would have an option to acquire the defaulting shareholder's shares – where the applicant plaintiff alleges a transfer of the fourth defendant's shares to the first defendant was void, and that it is entitled to purchase the first defendant's and fourth defendant's shares – where the applicant plaintiff seeks an interlocutory injunction to restrain the third defendant from holding certain meetings and restraining the first defendant from casting votes on particular resolutions – whether there is a serious question to be tried

EQUITY – EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the first defendant, fourth defendant and applicant plaintiff each held shares in the third defendant – where the Shareholders Agreement provided that upon an "Event of Default" by a shareholder the non-defaulting shareholders would have an option to acquire the defaulting shareholder's shares – where the applicant plaintiff alleges a transfer of the fourth defendant's shares to the first defendant was void, and that it is entitled to purchase the first defendant's and fourth defendant's shares – where the applicant plaintiff seeks an interlocutory injunction to restrain the third defendant from holding certain meetings and restraining the first defendant from casting votes on particular resolutions – whether the balance of convenience favours the granting of interlocutory relief

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, considered
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, considered
Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd [2011] QCA 334, cited
Griggs v Sorockyj Investments [2014] NSWSC 667, cited
Hayden v Teplitzky (1997) 74 FCR 7, cited

Live Earth Resource Management Pty Ltd v Live Earth LLC [2007] FCA 1034, cited
Mineralogy Pty Ltd v Sino Iron Pty Ltd [2016] WASCA 105, cited
Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 12) [2016] WASC 335, cited
Northcorp Ltd v Allman Properties (Australia) Pty Ltd [1994] 2 Qd R 405, cited
Politano v ACN 060 442 926 Pty Ltd (Unreported, Federal Court of Australia, 29 May 1998), cited
Remrose Pty Ltd v Allsilver Holdings Pty Ltd (2005) 225 ALR 588, considered
Shercliff v Engadine Acceptance Corp Pty Ltd [1978] 1 NSWLR 729, cited
Stacks Managed Investments Ltd v Tolteca Pty Ltd [2015] QSC 234, cited
Tribal Health Pty Ltd v Flush Fitness Pty Ltd [2016] QSC 103, cited
Warner-Lambert Company LLC v Apotex Pty Ltd (2014) 311 ALR 632, cited

COUNSEL: D A Savage QC, with B J W Kidston, for the plaintiff/applicant
R N Gallagher (Sol) (12 August 2016); R A Perry QC (25 August 2016) for the first defendant/first respondent
No appearance for the second defendant
R J Anderson QC, with K M Riedel, for the third defendant/second respondent
No appearance for the fourth defendant

SOLICITORS: Mahoneys for the plaintiff/applicant
Thomson Geer Lawyers for the first defendant/first respondent
No appearance for the second defendant
Shand Taylor Lawyers for the third defendant/second respondent
No appearance for the fourth defendant

Background facts

[1] The third defendant (**CFMG**) is a public company. Its principal objectives are to hold interests in and to raise funds to support the businesses of its subsidiary entities that provide property development, syndication and asset-backed income stream investment opportunities for investors located throughout Australia.

[2] CFMG has three wholly owned subsidiaries, namely:

(a) Custodian Land Syndicate Limited (**Custodian Land**);

(b) Custodian Income Funds Limited (**Custodian Income**); and

(c) Custodian Administration Pty Ltd (**Custodian Administration**).

[3] Custodian Land acts as a manager for reward of a number of syndicated residential property development companies. Custodian Income acts as the responsible entity for a number of managed investment funds. Custodian Land and Custodian Income each have an Australian

Financial Services licence. Custodian Administration is a service company for the group comprising CFMG and its three subsidiaries.

[4] A services agreement dated 30 January 2013 between, on the one hand, Custodian Administration (referred to as the Service Entity) and, on the other hand, Custodian Land and Custodian Income (referred to as the Custodian Entities) sets out the terms by which Custodian Administration has agreed to provide defined "services" to the Custodian Entities. The services agreement operates for a 20 year term unless terminated upon notice in the event of a change in the shareholding of the parties or they all agree. Amongst other things, pursuant to the terms of the services agreement Custodian Administration provides for the Custodian Entities the following services:

(a) employment of suitably qualified management, administration and operational staff to assist the Custodian Entities in their day to day business operations;

(b) remuneration of such staff, including payment of salaries, superannuation, payroll tax and workcover costs;

(c) staff amenities, training, recruitment, and payroll;

(d) company management, advice and assistance to carry out efficiently the management, administration and control of financial affairs of the Custodian Entities;

(e) the registered office and premises;

(f) facilities, stationery, telephone, and postage as reasonably required by the Custodian Entities;

(g) computers, software, software maintenance and office equipment as reasonably required by the Custodian Entities; and

(h) the administration of the Custodian Entities' corporate secretarial affairs.

[5] When, on 31 January 2013, CFMG's shareholders first entered into a shareholders agreement (**the Shareholders Agreement**), the shares in CFMG were held in this way:

(a) the first defendant (**JLF**) was the majority shareholder and held 70%;

(b) the fourth defendant (**Shaw Investments**) held 14%;

(c) the applicant plaintiff (**SDW2**) held 8%; and

(d) two other minority shareholders held 4% each.

[6] SDW2 was then, and is now, a company controlled by Mr Watson. Until very recently, he was the Chief Executive Officer of CFMG. He was at the time of the Shareholders Agreement a director of CFMG and of all three subsidiaries. At the present time, he is the sole director of Custodian Administration and is a director of Custodian Land and Custodian Income.

[7] The Shareholders Agreement took the form of an agreement between the shareholders identified at [5] above and CFMG. It relevantly provided:

(a) by cl 2.1, that it regulated the relationship of the shareholders and sets out the arrangements between them for the ownership, governance and operation of CFMG and the conduct of its business and affairs;

(b) by cl 3.1, a constraint on the removal of Mr Watson from the Board of CFMG except by way of resolution of the shareholders passed by "Special Majority" (as to which see cl 4 referred to below);

(c) by cl 3.10, that each shareholder would take all reasonable steps within its power to procure that its voting rights as shareholder of CFMG and the voting rights of directors nominated by it to the Board of CFMG were exercised in a manner, and that each shareholder and those directors would otherwise act, so as to ensure that CFMG and its directors would act in conformity with the Shareholders Agreement;

(d) by cl 3.11, that subsidiaries of CFMG would be conducted in accordance with the Shareholders Agreement;

(e) by cl 4 and schedule 2, that the question of appointment or removal of directors to CFMG or its subsidiaries was one of the "Shareholder Fundamental Matters" which could only be achieved by "Special Majority" as set out in cl 4 (which, for present purposes, meant 85% of the ordinary shareholders in CFMG);

(f) by cl 7.1(a), that the shareholders agreed that CFMG would be the major vehicle through which they or their affiliates (a term widely defined) would operate the business of providing property development, syndication and asset-backed income stream investment opportunities for investors throughout Australia;

(g) by cl 7.1(b), an obligation that each Shareholder must not compete with CFMG or do business with its customers and each shareholder must ensure that its affiliates (a term defined to include its shareholders; its related corporations; its directors, secretaries or officers; and certain other entities defined by reference to control);

(h) by cl 8, detailed terms governing the circumstances in which each shareholder might dispose of their shares in CFMG and which terms also conferred on other shareholders particular rights of pre-emption, including –

  (i) by cl 8.12, that no shareholder could create a security interest over their shares unless the grantee agreed in writing to the disposal regime in cl 8 and the other shareholders provided their prior written consent; and

  (ii) by cl 8.14(a), that CFMG must not register any transfer of any shares if cl 8 has not been complied with and any purported disposal of shares in breach of cl 8 is void;

(i) by cl 9, that in the event a shareholder committed an "Event of Default", the non-defaulting shareholders would have an option to acquire the defaulting shareholder's shares in CFMG at "Fair Market Value" less 10%, which option could be exercised by taking these steps:

  (i) the giving of an "Appraisal Notice", which required that Fair Market Value be determined as at the date of the Appraisal Notice by an expert accountant appointed by the shareholders (they being obliged to use their "best endeavours to appoint") and failing that, by the chairman of CFMG making such appointment; and

  (ii) within 30 days of receipt of the expert's certificate of the Fair Market Value, the giving of written notice of exercise of the option to the defaulting shareholder and CFMG;

(j) by cl 9.5(c) to (i), that in the event that the option is exercised –

  (i) the defaulting shareholder must sell and the non-defaulting shareholder must buy the shares at Fair Market Value less 10%;

  (ii) the seller would be deemed to warrant to the buyer the transfer of clear and unencumbered legal title to the shares;

(iii) that the purchase price was payable on the day which was 10 business days after the date of the exercise of the option; and

(iv) at settlement, the seller would deliver to the buyer: share certificates, executed transfer; written resignations of each director appointed by the shareholder and a duly executed irrevocable appointment of the buyer as the seller's proxy in respect of the shares until the transfer was registered;

(k) by cl 9.5(j)[1], that in the event that a non-defaulting shareholder did not exercise the option within the 30 days of receipt of the expert's certificate of the Fair Market Value, the option would lapse and would no longer be capable of exercise;

(l) by cl 13.2, that each shareholder would immediately notify other shareholders of any matter or event coming to its attention that constituted, or was "reasonably likely to constitute", or would constitute "with the passage of time or notice" etc., an Event of Default;

(m) by cl 15.6, no party could rely on any delay by any other party in the exercise of a right under the agreement, as a waiver of any right under the agreement, unless the waiver was in writing signed by the person granting it; and

(n) by cl 15.9, that each party must do all things to give full effect to the Shareholders Agreement and their obligations thereunder.

[8] The shares in CFMG are presently held in this way:

(a) JLF is still the majority shareholder, having increased its shareholding from 70% to 88%, consequent upon: (1) acquiring one of the 4% minority shareholdings; and (2) acquiring the 14% shareholding of Shaw Investments;

(b) SDW2 is still a minority shareholder, holding 8%; and

(c) Ms McBain, an employee of JLF, is the only remaining minority shareholder, holding 4%.

[9] In the principal proceeding, which was commenced on 19 July 2016, Mr Watson's company, SDW2, claims relief as against four defendants, namely JLF, the chairman of CFMG, CFMG and Shaw Investments. SDW2 relevantly pleads:

(a) facts asserted to justify the conclusion that there were events of default by JLF under the Shareholders Agreement;

(b) in respect of the events of default by JLF:

(i) the giving of appraisal notices by SDW2 under the Shareholders Agreement to JLF;

(ii) breach of the Shareholders Agreement by JLF by conduct preventing the retainer of the expert for the purpose of determining the Fair Market Value of JLF's shares; and

(iii) that the breach resulted in no determination being made of the Fair Market Value of JLF's shares;

(c) Shaw Investments purported to sell its shares to JLF pursuant to the pre-emptive rights mechanism provided by cl 8 of the Shareholders Agreement and, in the course of so

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[1] The terms of cl 9.5(j) refer to the exercise of the option within a specified time and cross refer to cl 9.5(a). However it is cl 9.5(b) which specifies a time for the exercise of the option. I conclude that the cross reference to cl 9.5(a) is a typographical error and I construe the term as intending to cross refer to cl 9.5(b).

doing, both Shaw Investments and JLF breached cl 8, with the result that the purported disposition of shares from Shaw Investments to JLF was void and there was an event of default by Shaw Investments under the Shareholders Agreement;

(d) in respect of the event of default by Shaw Investments:

(i) the giving of appraisal notices by SDW2 under the Shareholders Agreement to Shaw Investments;

(ii) breach of the Shareholders Agreement by Shaw Investments thereby preventing the retainer of the expert for the purpose of determining the Fair Market Value of the shares purportedly transferred to JLF;

(iii) that the breach resulted in no determination being made of the Fair Market Value of the shares purportedly transferred to JLF;

(e) that the chairman of CFMG had wrongfully refused to act as required to appoint an expert for the purpose of determining the Fair Market Value of relevant shares;

(f) that particular identified conduct by JLF and the chairman of CFMG were for the purposes of s 232 of the Corporations Act oppressive to, unfairly prejudicial to, and unfairly discriminatory against, SDW2 whether as a member of CFMG or otherwise;

(g) a claim for damages for breach of the Shareholders Agreement against JLF (and also as against Shaw Investments in respect of its shares) on the hypothesis that, but for the breaches, SDW2 would have exercised its options and acquired the relevant shares for Fair Market Value less 10% calculated as at the date of the relevant Appraisal Notice and, accordingly, SDW2 has suffered loss the measure of which is present market value less (Fair Market Value less 10% calculated as at the date of the relevant Appraisal Notice); and

(h) a claim for damages for breach of fiduciary and statutory duties against the chairman of CFMG, and against JLF for knowing involvement in the breach of duty by the chairman.

[10] In the principal proceeding SDW2 claims the following final relief as against JLF, the chairman of CFMG, CFMG and Shaw Investments:

1. As against [JLF, the chairman of CFMG, CFMG, and Shaw Investments]:

(a) a declaration that:

(i) there have been the events of default pleaded in this statement of claim;

(ii) that [SDW2] is entitled to have [the chairman of CFMG] nominate an independent expert as referred to in the Shareholders Agreement;

(iii) [SDW2] is entitled to purchase and [JLF] is obliged to sell the shares at the price determined by the said independent expert;

(iv) [SDW2] is entitled to purchase and [Shaw Investments] is obliged to sell the shares at the price determined by the said independent expert;

(b) alternatively, the mechanism for determining the price of the shares having failed, a special referee be appointed to determine the fair market value of:

(i) [JLF's] shares in [CFMG] at the relevant dates; and

(ii) [Shaw Investment's] shares in [CFMG] at the relevant date;

2. as against [Shaw Investments], a declaration that [Shaw Investments] by [the conduct pleaded in the statement of claim, Shaw Investments] disposed or purported to dispose of its shares in [CFMG] in breach of the Shareholders Agreement;

3. as against the defendants other than [CFMG]:

(a) [the chairman of CFMG] do a specified act as referred to in section 233(1)(j) of the *Corporations Act* 2001 (Cth) namely the act referred to in [1(a)(ii)] above;

(b) alternatively, a mandatory injunction requiring [JLF] to do all [things] necessary to ensure that the chairman for the time being appoints an expert pursuant to clause 9.4(c) of the Shareholders Agreement, pursuant to section 1324 of the *Corporations Act* 2001 (Cth);

(c) alternatively, damages at law or pursuant to section 1317 of the [*Corporations Act* 2001 (Cth)] alternatively or equitable monetary compensation for the breaches of duty or obligations pleaded in this statement of claim;

(d) interest pursuant to statute at the rate set from time to time for interest prior to judgment;

(e) costs on an indemnity basis or otherwise;

(f) further or other relief.

[11] Quite apart from the issues which arise consequent upon the commencement of the principal proceeding, Mr Watson and CFMG are now in a dispute concerning the circumstances in which Mr Watson's employment as CEO of CFMG came to end on 30 June 2016. Mr Watson alleges that he accepted CFMG's repudiation of his employment agreement, whilst CFMG alleges his employment came to an end upon the expiry of a fixed term of employment. Of course, Mr Watson is the sole director of Custodian Administration and Custodian Administration is still the provider of a broad range of services pursuant to the services agreement.

[12] CFMG has called a meeting of its members for the purpose of removing Mr Watson as director of, and appointing replacement directors to, Custodian Administration.

[13] Mr Watson has deposed to a belief (which mathematically must be right) that in order to achieve the required special majority of 85% to remove him as a director, JLF will have to exercise the voting rights in respect of all 88% of the shares which JLF says it owns. This would involve JLF exercising voting rights in respect of –

(a) JLF's original 70% shareholding as supplemented by the 4% minority shareholding, all of which Mr Watson says SDW2 is entitled to purchase from JLF and would have purchased but for JLF's breach of the Shareholders Agreement; and

(b) the 14% shareholding which JLF has purportedly purchased from Shaw Investments, which Mr Watson says SDW2 is entitled to purchase and would have purchased but for Shaw Investment's breach of the Shareholders Agreement and which SDW2 cannot now purchase from JLF because the sale from Shaw Investments to JLF is void.

[14] SDW2 is concerned that unless the Court intervenes to stop it, the meeting will be convened and voting rights exercised in the way just described, in advance of SDW2 being able to have determined the entitlements for which it contends. Mr Watson estimated that the value of JLF's shares in CFMG was between a nominal value and $700,000. He deposed "I have the ability to raise sufficient funds to purchase JLF's shares in accordance with Shareholders Agreement if I am successful in these proceedings proper".

[15] By its amended application, SDW2 seeks an interlocutory injunction –

(a) restraining CFMG until the trial of this proceeding from –

(i) holding meetings for the purpose of considering and voting upon resolutions to remove Mr Watson as director from the three CFMG subsidiaries; and

(ii) appointing another director to one or more of them; and

(b) restraining JLF until the trial of this proceeding from –

(i) casting any votes it may have in respect of its CFMG shares at any properly convened meeting in respect of a resolution to remove Mr Watson as director from the three CFMG subsidiaries and to appoint another director to one or more of them; and

(ii) otherwise taking any step to effect those matters.

[16] As originally formulated the application only sought against CFMG the relief specified at [15](a) above. An application seeking that relief was filed on 19 July 2016. On the same day, Atkinson J made an order by consent adjourning the application to 27 July 2016 upon undertakings of Mr Watson and CFMG which restrained Mr Watson from doing certain things in his role as director and CFMG from holding a meeting to remove Mr Watson until that date. On 27 July 2016, Jackson J made a further order by consent adjourning the application to 12 August 2016, upon similar undertakings by Mr Watson and CFMG to that contained in Atkinson J's orders (and on materially identical terms to those outlined at [19] below).

[17] On 12 August 2016 SDW2's application for interlocutory relief came on before me. The application was opposed by both JLF and CFMG. During the course of argument on that day I granted SDW2 leave to amend the application to add the claim for relief against JLF specified at [15](b). SDW2 then determined no longer to pursue its claim for an interlocutory injunction against CFMG. The application for interlocutory injunction against JLF was still opposed by both JLF and CFMG, the latter on the basis that it was a person which would be affected by the grant of the injunction sought against JLF who wished to be heard to oppose that outcome.

[18] Mr Watson offered, "jointly and severally with the plaintiff" the usual undertaking as to damages. SDW2 provided no evidence as to the worth of its undertaking as to damages. As to the worth of Mr Watson's personal undertaking, the evidence comprised Mr Watson's evidence that he held an interest in nine real estate holdings and that his best estimate of the value of his equity in those holdings was $3,049,250.

[19] By orders made by consent, I adjourned the application to a further hearing on 25 August 2016. Those orders were made upon undertakings given by Mr Watson and CFMG which, in effect, preserved the orders of Jackson J until 5.00pm on 25 August 2016. At the end of argument before me on that day, the parties agreed that the position should be preserved until the time of my judgment by adjourning the application to a date to be fixed with costs reserved, upon the following undertakings:

(a) the undertaking of Mr Watson:

(i) to exercise his functions as director to cause Custodian Administration, Custodian Land and Custodian Income to continue to conduct their business in the ordinary course of business and pursuant to the services agreement, including refraining from doing any of the following without the consent in writing of CFMG:

A employing any new staff or terminating the employment of any existing staff;

B engaging any new contractors; and

C making any payments other than in the ordinary course of business;

(ii) not to seek to enjoin or otherwise prevent the meeting of CFMG for the purpose of considering resolutions to increase directors' remuneration as set out in the notice of meeting dated 21 June 2016;

(iii) to refrain from performing [the following duties: policy direction of the operations of the CFM Group; the efficient and effective operation of the CFM Group; ensuring directors of CFMG are provided with accurate and clear information in a timely manner to promote effective decision-making by the board; and ensuring all material matters affecting CFMG are brought to the attention of the board];

(iv) not to cause Custodian Administration, Custodian Land and Custodian Income to pay any amount in excess of $1,000.00 without first giving the new CEO of CFMG 48 hours' notice in writing of his intention to do so and not to make any such payment if directed in writing by Mr Rockley to that effect prior to causing the payment to be made;

(b) the undertaking of CFMG, by its officers, servants or agents, not to conduct any meeting for the purpose of considering and voting upon any resolution:

(i) to remove Mr Watson as a director of the CFMG subsidiary companies, and each of them;

(ii) to appoint any director to the CFMG subsidiary companies, and each of them; and

(iii) otherwise, to take any step to effect the matters referred to in the preceding two subparagraphs.

[20] I turn first to identify the legal principles which are relevant to the determination of SDW2's application.

Relevant legal principles

[21] The legal principles governing the disposition of an application for interlocutory injunction were discussed by me in *Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234 at 3 to 5 and again in *Tribal Health Pty Ltd v Flush Fitness Pty Ltd* [2016] QSC 103. In the latter case I summarised relevant principle in these terms (at [23]):

(a) The law in Australia has long regarded it to be necessary to make two main inquiries:

(i) whether the applicant has shown that it has a prima facie case; and

(ii) whether the applicant has shown that the balance of convenience favours the granting of the relief claimed.

(b) The significance of the requirement that a prima facie case be shown is elaborated upon in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57[2] and *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 at [11] to [13].

(c) The considerations brought to bear on the balance of convenience requirement were the subject of discussion in *Australian Broadcasting Corporation v O'Neill* and *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334, the latter case clarifying that the adequacy of an award of damages and the question of the sufficiency of the usual undertaking were to be considered as part of the totality of the balance of convenience question[3].

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2 See per Gummow and Hayne JJ at 81 to 84 [65] to [72], Gleeson CJ and Crennan J agreeing at 68 to 69 [19].

3 See *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [39] per Fraser JA (with whom White JA and M Wilson AJA agreed).

(d) The progression of the two main inquiries is not a mechanical exercise. Whether the relief sought is prohibitory or mandatory, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense of granting an injunction to a party who fails to establish his right at an ultimate trial, or in failing to grant an injunction to a party who succeeds at trial. In making that decision, the Court should weigh in the balance all relevant factors, including matters pertaining to the strength of the case to be tried[4] and the balance of convenience.

(e) Where the effect of an injunction would be to alter the status quo and effectively finally to determine a respondent's legal rights against the respondent in advance of a trial, it would be appropriate to require an applicant to establish its case that the respondent should not be afforded those legal rights with a high degree of assurance.

[22] There was no dispute between the parties concerning the adequacy for present purposes of the foregoing summary of legal principle.

[23] However some contentions were advanced by JLF and CFMG which necessitate articulation of a further aspect of legal principle.

[24] Both JLF and CFMG pointed out that SDW2 seeks an interlocutory injunction to constrain a shareholder from exercising voting rights to remove and to appoint directors, but that SDW2 does not seek to establish at trial that it has a legal or beneficial interest in those shares or that it has any present right to control the voting rights of those shares. At its highest, SDW2 seeks to establish by declaration that it has an entitlement, effectively an option, to purchase those shares. But SDW2 does not contend that it has exercised that option or that otherwise it has any obligation to purchase the shares even if it succeeds in establishing the existence of the entitlement it alleges.

[25] Factually those contentions are right. SDW2 does not assert that an option to acquire either the JLF shares or the Shaw Investments shares has actually been exercised. The declarations which it seeks go only as to entitlement of SDW2 to acquire the JLF shares and the Shaw Investments shares, not as to obligation. The final injunction sought by SDW2 would only go so far as requiring the performance of a step which would put SDW2 in the position of exercising an option. SDW2 would only be obliged to acquire the shares if the option was exercised pursuant to cl 9.5(b) of the Shareholders Agreement. And if the option was not so exercised, cl 9.5(j) of the Shareholders Agreement provides that it would lapse.

[26] The implications of these contentions were said to be that even if I found the existence of a prima facie case to the final relief sought at trial, I would find that the case involved no threatened infringement of the rights in respect of which SDW2 would seek final relief. CFMG suggested that SDW2's case did not establish an equity of the kind that the Court would step in to protect by the grant of an injunction. It contended that the application should fail for this reason.

[27] A brief articulation of first principle is required.

[28] In *Australian Broadcasting Corporation v O'Neill* the High Court referred with approval[5] to its earlier affirmation in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 that, where an interlocutory injunction is sought, it is necessary to identify the legal (including statutory) or equitable rights which are to be determined at the trial and in respect of which final relief is sought.

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4 See *Warner-Lambert Company LLC v Apotex Pty Ltd* (2014) 311 ALR 632 at 646 [70].

5 See at 60 [2] per Gleeson CJ and Crennan J and at 78 [54] per Gummow and Hayne JJ.

[29] In *Lenah Game Meats* Gleeson CJ cited with approval Sir Frederick Jordan's statement that "the purpose of an interlocutory injunction is to keep matters *in statu quo* until the rights of the parties can be determined at the hearing of the suit"[6]. The Chief Justice went on to state that the corollary of that proposition was that a plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is sought[7]. Critically for present purposes, he observed that[8]:

> The justice and convenience of imposing interim restraint, pending the hearing of the final action, if it exists, lies in the need to prevent the practical destruction of [the right sought to be vindicated by the relief sought at trial] before there has been an opportunity to have its existence finally established.

[30] Similarly, Gaudron J observed that because a claim to an interlocutory injunction is a remedy, "it is axiomatic that it can only issue to protect an equitable or legal right or, which is often the same thing, to prevent an equitable or legal wrong"[9]. Her Honour suggested that if a claimant for an injunction to restrain conduct can point to no equitable or legal right which is or will be infringed by, nor to any equitable or legal wrong involved in the conduct sought to be restrained, then the claimant would not be entitled to the injunction[10].

[31] Gummow and Hayne JJ made the statement that the basic proposition remained that where interlocutory injunctive relief was sought in a Judicature system court, it was necessary to identify the legal (which may be statutory) or equitable rights which were to be determined at trial and in respect of which there was sought final relief which may or may not be injunctive in nature[11].

[32] The following observation by Lindgren J in *Politano v ACN 060 442 926 Pty Ltd*[12] on which Senior Counsel for CFMG relied in argument before me preceded the observations by the High Court in *Lenah Game Meats* but are entirely consistent with it:

> The common reference to "a serious question to be tried" is an abbreviated form of reference to a serious question to be tried as to the granting of a form of final relief, the substance of which, in the relevant respect, would be rendered nugatory by the course of action threatened and sought to be prevented.

[33] It can be seen, then, that on an interlocutory injunction application in a case like the present, the Court is required to conduct a careful examination of the rights the vindication of which is sought at trial and to consider whether an interlocutory injunction is necessary to prevent harm to them before there is even a chance to establish them.

Should the case be dismissed because there is no relevant threatened infringement of SDW2's rights?

[34] I turn now to an evaluation of the argument against the grant of an interlocutory injunction which I have set out at [24] to [26] above.

[35] Insofar as SDW2's application seeks to constrain JLF against exercising voting rights in respect of the shares it has purported to acquire from Shaw Investments, the argument must be considered separately. For those shares, SDW2 contends that the purported disposition of shares from Shaw Investments to JLF was conducted in breach of cl 8 of the Shareholders Agreement. If that is right, then cl 8.14 would have the consequence that the disposition of shares from Shaw Investments to JLF would be void, with the result that JLF would not be

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6 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 216 [9] per Gleeson CJ.

7 Ibid at 217 [11] per Gleeson CJ.

8 Ibid at 217 [12] per Gleeson CJ.

9 Ibid at 231 to 232 [60] per Gaudron J.

10 Ibid at 232 [61] per Gaudron J.

11 Ibid at 241 [91] per Gummow and Hayne JJ.

12 Unreported, Federal Court of Australia, 29 May 1998.

entitled to exercise the voting rights in respect of the shares. The threat so to do in reliance on rights conferred by transfer of the shares would, necessarily, be a threatened infringement of SDW2's contractual rights. Accordingly, I would reject this argument in relation to that part of SDW2's case.

[36] But the position is different so far as it relates to the injunction which is sought in protection of SDW2's alleged option rights. The remaining discussion under this heading addresses that part of SDW2's case.

[37] The right sought to be vindicated at trial is the entitlement but not the obligation to acquire shares. If SDW2 is successful at trial in obtaining the relief it seeks, it would put itself in the position of exercising the option which, *ex hypothesi*, it had established. But it is not bound to exercise the option.

[38] If it did not exercise the option, the option would lapse. If it exercised the option, it would become obliged to buy and the defaulting shareholder would become obliged to sell. SDW2 would then be the owner in equity of the shares and it might well be that it could then constrain the way in which the legal owner could exercise the voting rights: cf *Griggs v Sorockyj Investments* [2014] NSWSC 667 at [13] per McDougall J. It undoubtedly could do so once the sale had settled 10 business days after the date of exercise of the option, because the Shareholder Agreement obliged the legal owner to provide an irrevocable proxy at that time.

[39] But on what basis could SDW2 constrain the exercise of the voting rights attached to the shares at a time before exercise of the option to acquire the shares, when there is no obligation on it to exercise the option?

[40] To paraphrase the observations of Gleeson CJ in *Lenah Game Meats* quoted at [29] above, the justice and convenience of imposing the interim restraint, pending the hearing of the final hearing, if it exists, would lie in the need to prevent the practical destruction of the right sought to be vindicated at trial before there has been an opportunity to have its existence finally established.

[41] Accordingly, the answer to the question I have posed is that the basis would exist if SDW2 could demonstrate that constraint was necessary to avoid practical destruction of the option right, or, to put it another way, constraint was necessary to avoid that right being rendered nugatory.

[42] At one level, if JLF was permitted to exercise voting rights to remove Mr Watson as director, there would be no impact on the option rights which SDW2 might establish at trial. SDW2 would still be capable of exercising any entitlement it established at trial. If it exercised the right it would acquire the shares. Indeed, if it did so, it would then itself have sufficient votes to be able to reinstate Mr Watson, if he had been removed. At that level of analysis, there would be no actual infringement of the right which SDW2 seeks to establish. If the threatened conduct came to pass, the right would still exist and could still be fully exercised.

[43] SDW2's complaint however, focused on the threat of damage to the value of the right. It contended that there was a need to impose the restraint because if Mr Watson was removed, business decisions would be made at the behest of the majority shareholder JLF which would be detrimental to the interests of CFMG, because they would be to the advantage of its major shareholder and not to the advantage of its shareholders as a whole. This would diminish the value of the shares in CFMG and, accordingly, the value to SDW2 of its option to purchase the shares. Particularly would that be so when the option would have to be exercised by reference to a price set as at the time the appraisal notices were provided under the Shareholders Agreement.

[44] Mr Watson put his concerns in this way in his first affidavit at [228] to [233]:

> [228] If I am removed as a director of Custodian Administration, I verily believe that CFMG will and/or JLF will use its voting power to:
>
> (a) change the current corporate structure that aligns with that of an asset management model to that which aligns to a funds management structure;
>
> (b) terminate the employment or contracts, as the case may be, of [Custodian Administration] Employees in the key roles of sales and marketing, project identification, investor relations and legal/compliance and have that work done by staff currently engaged by JLF, and through JLF, in those fields;
>
> (c) re-divert business resources of Custodian Administration, Custodian Land and Custodian Equity in a way that further supports JLF's own business interests where related clients or customers of those entities are also mutual clients or customers of JLF;
>
> (d) merge the business operations of JLF with the business operations of Custodian Administration including staffing, office accommodation and other resources;
>
> (e) prevent Custodian Administration from using the database of investors purchased from JLF for $420,000; and
>
> (f) embark on further related party transactions to the detriment of the business by exercising control over the board of CFMG.
>
> [229] I have that belief because of the matters set out in this affidavit and:
>
> (a) on 23 September 2013 Mr King forwarded to me an email that he had received from Fitzgerald Senior that said:
>
> "Thinking of issuing a notice of demand on CLS and taking that business back. Timing good as they have cash flow and lots of staff duplication so we could cut staff and use our team. Project managers being contracted also helps.". A true copy of that email appears at page 262 of the Exhibit;
>
> (b) during my meeting with Fitzgerald Senior and Ms McBain on 5 November 2015 Fitzgerald Senior said: "The business operations of JLF be merged with the business operations of CFMG". Fitzgerald Senior went on to say words to the effect that JLF and CFMG would be putting staff in each others offices and that JLF would proceed to make some board appointments/changes;
>
> (c) the letter tabled at the annual general meeting of CFMG held on 26 November 2015 signed by Fitzgerald Senior and Ms McBain states, relevantly:
>
> "… The only business plan that we have seen is the one tabled as the strategy meeting we attended, however, this plan was designed for an Asset Management Company (with no distribution), not a Funds Management Company…"
>
> "… It is simply not acceptable that [CFMG] see JLF Corporation Pty Ltd (JLF) as a threat and/or weakness to [CFMG], as evidence in the business plan tabled at the recent strategy day…"
>
> "… One immediately available operational synergy available to [CFMG] would be to collaborate and share opportunities and information with its largest shareholder and distribution partner, JLF. JLF would welcome the opportunity to discuss same and assist in identifying such opportunities…". I note that JLF is required under the terms of the Referral Agreement to, inter alia, exclusively identify and deliver to Custodian Administration projects that meet certain criteria and has other obligations to Custodian Administration; and
>
> (d) contrary to the advice received in the correspondence from [the CFMG chairman] of 21 December 2015 that any changes to board compositions should only be made after the business review is completed and that all capital raising functions by put on hold until a revised business plan was tabled for review by the shareholders, steps have been taken contrary to that advice.
>
> [230] Further, as I have been the person that has been in control of Custodian Administration and to whom the [Custodian Administration] Employees report since each of them having commenced employment which in relation to those who have been employed since inception has been for the past 40 months and the competing nature of JLF's business activities is obvious and known to the [Custodian

Administration] Employees (I say this based on my conversations with them), if I am removed as director there is the real risk of the [Custodian Administration] Employees will leave Custodian Administration with a view to taking up work elsewhere.

[231] If the [Custodian Administration] Employees are terminated or lost, the projects that are underway and proposed that I have identified herein will be put in jeopardy, lost or unable to be pursued by Custodian Administration, on behalf of the CFMG Group.

[232] Further, by reason of the [matters] set out herein I am concerned about the following matters if I am removed as a director of Custodian Administration or it is taken out of my control by the appointment of additional directors:

(a) that the business of CFMG will not be conducted in the best interest of CFMG. The board appears to have aligned itself with the interests of the major shareholder JLF, or at least it lacks the inclination to resist JLF pursing an agenda that is in JLF's interests;

(b) I, on behalf of SDW2, have been held out of documents and information of CFMG, that it has an express written entitlement to (clause 5.3 of the Shareholders Agreement) and pursuant to the *Corporations Act* 2001 (Cth);

(c) by reason of (b), [the CFMG chairman's] refusal to exercise his power to appoint an accountant firm to value JLF's shares under the mechanism pursuant to the Shareholders Agreement, the recent engagement of Ellen Warren Lawyers (i.e. [the CFMG chairman's] firm) by the board of CFMG in circumstances where such related party transactions require a resolution of Special Majority of shareholders to be passed and none (not even an ordinary resolution) has been so passed, I have no faith in the board of CFMG conducting the business of CFMG in accordance with its obligations pursuant to the Shareholders Agreement;

(d) that the business of CFMG, which is in substance all carried out by Custodian Administration will be run down or materially altered such that by the time SDW2's claims are determined victory in the proceeding will be rendered nugatory or seriously diminished. This issue is exacerbated by the valuation mechanism in the Shareholders Agreement providing for JLF's shares to be valued as at the date of the appraisal notices and for that price to be paid by SDW2, but SDW2 will only take the shares and indirectly the Custodian Administration business at the conclusion of the trial. In short, SDW2 will pay for one thing and likely get something else.

[233] However, if I am not removed and no other directors are appointed, I will continue to conduct Custodian Administration pending trial or earlier order of the court:

(a) as an asset management business with the staffing, contractors and corporate structure being adopted which aligns to that model;

(b) in accordance with the business plan approved by the board of CFMG on 15 September 2015;

(c) to ensure that each of Custodian Land and Custodian Equity meet their obligations and that the strategic direction set for each are followed;

(d) to reduce business risk by not relying on any singular service provider but where existing projects are on foot using a specific service arrangement e.g. in relation to the Booval Project not change the strategy already engaged; and

(e) to continue with the current terms of the redeemable convertible preference shares issued to the 99 investors in CFMG and conduct the business using its current and pending resources to endeavour to grow the value of CFMG and its subsidiaries before the redemption dated on 31 October 2019; and

(f) to continue with its current reporting regime including operational statistics, business development, financial statements, financial services licensing requirements, compliance matters and the management reporting obligations to the managed syndicates and schemes.

[45] These complaints read very much like complaints about conduct which a minority shareholder would argue was conduct which would constitute oppression within the meaning of the *Corporations Act*. Interestingly, in *Remrose Pty Ltd v Allsilver Holdings Pty Ltd* (2005) 225 ALR 588 a minority shareholder framed a case for final relief pursuant to the relevant sections of the *Corporations Act* restraining analogous conduct as oppressive

conduct and then sought interlocutory relief to preserve the position pending the trial of that claim for final relief. In *Remrose* the minority shareholder –

(a) sought as final relief orders pursuant to ss 232, 233 and 1324 of the *Corporations Act* –

(i) restraining the majority shareholder from removing the minority shareholder's nominee director as a director of a group of companies;

(ii) requiring the majority shareholder to sell to the minority shareholder at fair market value all of the shares which the majority shareholder owned in particular relevant companies;

(b) submitted successfully that it would arguably be considered unjust, inequitable or unfair for a majority shareholder to use its voting power to exclude the minority shareholder's nominee director from participating in the management without giving the minority shareholder the opportunity to remove its capital upon reasonable terms.

[46] But *Remrose* does not assist SDW2 because it has neither framed its argument nor its claims for final relief in that way. As I have earlier pointed out, the only final injunction sought in the present case is an injunction requiring the chairman of CFMG to appoint an expert to value the shares. And SDW2 does not seek any final relief committing it to the purchase of the relevant shares. Nor does it seek to restrain JLF from exercising its voting power in a particular way because such a course was the first step in an oppressive scheme.

[47] The subject matter of this litigation is whether or not SDW2 has the valuable right which it contends that it has. SDW2 seeks to justify its case for an interlocutory injunction by: (1) demonstrating a prima facie case as to the existence of that right; (2) providing evidence of the existence of threat to its value by the persons against whom it seeks to establish the right; and (3) suggesting that, in principle, an interlocutory injunction could be obtained with a view to protecting the value of the right until the question of its existence can be determined by the Court. The logic of that case seems unassailable but for one thing: the absence of a pleaded or argued case that the threatened conduct (namely the exercise of voting rights in advance of the exercise of an option) would constitute a legal or equitable wrong.

[48] Does that matter?

[49] The *Mareva* cases strongly suggest that the question should be answered in the negative. It will be recalled that in those cases, the conduct sought to be restrained is dissipation of assets having the effect of rendering a future judgment for damages wholly or partially ineffective. At one stage it was thought that a claimant for a *Mareva* injunction had to demonstrate the threatened conduct was an abuse of process because it was conduct for the purpose of defeating any future judgment. Such conduct, of course, would have been a legal wrong. But it has now been made clear by authority binding on me that the proper focus is on effect rather than purpose: see *Northcorp Ltd v Allman Properties (Australia) Pty Ltd* [1994] 2 Qd R 405 and the cases there discussed[13]. It is not necessary to establish that the threatened conduct which would have the effect of dissipation of assets would constitute abuse of process or would otherwise amount to a legal or equitable wrong.

[50] By parity of reasoning, in my view the logic of SDW2's case must be accepted. SDW2 says it would not avail SDW2 to establish that it had a right to acquire the shares, if, in the meantime, the majority shareholders had embarked upon a course of conduct (the first step of which was the removal of Mr Watson as director) which would have the effect of

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[13] A helpful discussion of authorities may also be found in the judgment of Lindgren J in *Hayden v Teplitzky* (1997) 74 FCR 7.

destroying the value of the right. In my view evidence of threatened conduct which would have the effect of rendering any future judgment as sought by SDW2 wholly or partially ineffective (in the sense that its value to the claimant was defeated) is, in principle, sufficient to engage the Court's jurisdiction to grant an injunction. Accordingly, I would not conclude that the application should fail based only on the respondents' argument I have identified at [24] to [26] above.

[51] However, instead of the two main inquiries of: (1) is there a prima facie case as to the existence of the relief sought to be established at trial; and (2) does the balance of convenience favour the injunction, SDW2's case[14] effectively adds the necessity of an intermediate inquiry, namely whether the refusal of the injunction will give rise to a real risk that any final judgment in the proceeding will be rendered ineffective by reason of the damage which will have been done to the value of the option right sought to be vindicated.

[52] I turn first to the questions whether SDW2 has established the requisite prima facie case as to the rights which it seeks to establish.

Is there a prima facie case as to the relief sought to be established at trial?

[53] In order for SDW2 to establish the prima facie case of the existence of the option right for which it contended, SDW2 must establish a prima face case –

(a) as to the occurrence of the event of defaults on which it relied; and

(b) that after the occurrence of the events of default it gave the requisite appraisal notices under cl 9.4(a) of the Shareholders Agreement.

[54] JLF contended that SDW2 failed to establish a prima facie case in respect of any of the five events of default on which it relied. I will examine that proposition under separate headings below, but it is necessary to make some introductory observations.

[55] First, in *Australian Broadcasting Corporation v O'Neill* the High Court explained that although the law requires an applicant for an interlocutory injunction to demonstrate a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief, that does not mean that the applicant must show that it is more probable than not that at trial the applicant will succeed; it is sufficient that the applicant show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.

[56] Second, when evaluating whether the applicant has demonstrated a prima face case, it is a trite proposition that an application for an interlocutory injunction is not the trial of the cause of action. Such an application is not, generally speaking, the occasion to resolve disputed questions of fact. Especially is that so where, as is the case with most applications for interlocutory injunctions, and as was the case here, the application is argued on affidavit material with no cross-examination of any deponents. I agree with the following observations by Chaney J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 12)* [2016] WASC 335 at [15]:

> While the court takes into account the apparent strength of the plaintiff's case, the court does not undertake a preliminary trial or attempt a forecast of the ultimate result. Moreover, an application for interlocutory injunction is not an occasion to determine contested questions of fact and conflicts in affidavit evidence. In a passage recently cited with approval by the Full Federal Court in *Warner-Lambert Company LLC v Apotex Pty Ltd* [2014] FCAFC 59 [72], Mahoney JA (with whom Glass & Samuels JJA agreed) made observations in *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729 about the use to which the defendant's evidence can be put in determining an application for an interlocutory injunction:

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[14] At least, apart from the case which relies on contending that JLF's acquisition of Shaw Investments' 14% shareholding, as to which see [35] above.

> But there are limitations upon the extent to which a judge is to take into account such evidence as the defendant may tender upon an interlocutory application. It is not his function to conduct a preliminary trial of the action, nor is it, in general, to resolve the conflict between the parties' evidence, and grant or refuse the application upon the basis of such findings. Where there is conflict of evidence, the use which may be made of the defendant's evidence in determining whether the plaintiff has made out a prima facie case is a limited one. For example, the plaintiff's evidence, considered alone, may be such a prima facie case as would be acceptable if submitted to a jury in a trial. But, when considered in the light of the defendant's evidence, it may be explained away so as no longer to be such. Or the defendant's evidence, when juxtaposed to that of the plaintiff may show that there is in reality no such case, no real question between the parties, appropriate to warrant preserving the status quo until the hearing (734).

[57] When this application first came on for argument, it seemed to me that JLF's argument, as orally presented by its solicitor, did not pay sufficient regard to these constraints on fact finding for the purpose of interlocutory injunctions. When the application was not concluded in the day allocated to it, I directed JLF to develop in writing its argument as to why there is no serious question to be tried as to the five events of default. I subsequently heard further oral argument from the parties after those submissions had been delivered and responded to by SDW2. I will treat JLF's argument as confined to the matters developed in the written submissions given in compliance with my direction.

[58] Third, in those submissions, JLF contended that its primary submission as to why there was no prima facie case was that there was an evidentiary deficit concerning the compliance by SDW2 with a condition precedent to any option entitlement. I make the following preliminary observations as to this contention:

(a) The argument is irrelevant to SDW2's contention that the purported disposition of shares from Shaw Investments to JLF was void, with the result that JLF would not be entitled to exercise the voting rights in respect of the shares and should be restrained from so doing. It is however relevant insofar as the interlocutory injunction was sought in protection of the option rights.

(b) By cl 9.3 the option right claimed by SDW2 was in the nature of a call option which arose "immediately on the occurrence of an Event of Default".

(c) But SDW2's ability to take advantage of the right, was contingent upon giving notice within a particular time period, namely "within 30 days of … becoming aware of the occurrence of the Event of Default". Clause 9.4(a) provided:

> At any time within 30 days of the Non-Defaulting Shareholders becoming aware of the occurrence of the Event of Default, a Non-Defaulting Shareholder may serve a written notice on [CFMG] and the Defaulting Shareholder setting out the details of the Event of Default and stating that it requires the Fair Market Value of the Defaulting Shareholder's Shares be determined (the **Appraisal Notice**).

(d) I think that JLF correctly submitted that the giving of the appraisal notice within 30 days of becoming aware of the occurrence of an "Event of Default" was a condition precedent to the option right sought by SDW2.

(e) "Event of Default" was defined in cl 9.1. Relevantly:

> An Event of Default occurs in relation to a Shareholder if:
>
> (a) **material breach**: the Shareholder commits a material breach of a term of this agreement and that breach:
>
> (1) is incapable of remedy; or
>
> (2) if capable of remedy, is not remedied within 30 days of being notified in writing by the other Shareholder of the breach.
>
> …

(h) **Disposal of Shares**: the Shareholder Disposes, or purports to Dispose, of any Shares in breach of the Constitution or this agreement.

(f) The question whether I should form the view that on the evidence before me I could not be persuaded that there was a prima facie case that SDW2 gave the requisite appraisal notices within time could turn on –

(i) For an Event of Default which was a material breach incapable of remedy –

A when the material breach occurred;

B when SDW2 in fact became aware that the material breach had occurred.

(ii) For an Event of Default which was a material breach capable of remedy –

A when the material breach occurred;

B when the defaulting shareholder was given notice of the breach;

C when SDW2 in fact became aware that the material breach had occurred and the breach had not been remedied within 30 days of the notice having been given.

(iii) For an Event of Default which was disposal or purported disposal of shares –

A when the disposal or purported disposal occurred, "disposal" being defined as including "sell, transfer, create a trust or option over, or alienate the right to exercise the vote attached to, or decrease any economic interest in, any Share";

B when SDW2 in fact became aware that there had been a disposal or purported disposal in breach of the agreement.

[59] Fourth, there were two arguments advanced in written submissions by JLF (and not characterized as JLF's primary submission) which seemed to me to raise considerations which were obviously matters for a trial and not matters which were capable of being resolved against SDW2 on the question of whether a prima facie case was established.

[60] The first of these arguments was this:

1.16 Further, in any event, the Plaintiff must account in respect of any option as directed by JLF's notice dated 14 July 2016: Seccombe (1) exhibit page 242 – 249 at 244 – Crt doc 5. This issue is further addressed in the initial submission under "merits" especially at paragraphs 22 to 24.

[61] As to this argument, I make the following observations:

(a) The document referred to was a solicitor's letter which contended that Mr Watson owed fiduciary duties to JLF because he was its general counsel in the lead up to the parties entering into the Shareholders Agreement (although, it seems, not at the time the Shareholders Agreement was executed). The letter contended Mr Watson must have breached his duties to JLF by not ensuring that JLF received independent advice on the Shareholders Agreement and drawing to its attention that he was in a position of conflict in relation to the involvement of his company SDW2 in the transaction. The theory seemed to be that any advantage SDW2 ever subsequently obtained under the agreement must be regarded as an advantage which it obtained by reason of Mr Watson's breach of duty and SDW2 would have to account to JLF for that advantage.

(b) The very many propositions of fact which would necessarily underlie such an argument were contested. SDW2's written submissions had clearly identified a

detailed factual refutation of the contention, together with references to evidentiary support[15]. Notably, JLF's argument was not addressed at all in oral submissions.

(c) The contention raises controversies which could not, except in the absolute clearest of cases, be resolved on an application such as the present. This was not such a case. Accordingly I do not regard this argument as a reason to conclude that SDW2 has not demonstrated the existence of a prima facie case.

[62] The second of the arguments referred to at [59] above related to the first, second and third events of default relied on by SDW2. As will appear, each of those events relies on an alleged breach by JLF of the restraint of trade clause in the Shareholders Agreement. JLF advanced the argument that such clauses are only enforceable if the terms were reasonable with reference to the interests of the parties concerned, and of the public. JLF submitted that SDW2 had not discharged the onus of establishing that the clause was reasonable in the interests of the parties.

[63] As to this argument, I make the following observations:

(a) Clause 7.3(a) set out the acknowledgement of each shareholder that the restrictions in the clause were "reasonable in the circumstances and necessary to protect the goodwill of the Business (and of the businesses of [CFMG's subsidiaries]) and are intended to operate to the maximum possible extent."

(b) Clause 7.1 provided:

> 7.1 Commitment to Business
>
> (a) The Shareholders agree that [CFMG] will be the major vehicle through which the Shareholders and its Restricted Persons operate the business of providing property development, syndication and asset-backed income stream investment opportunities for investors located throughout Australia; and
>
> (b) Accordingly, each Shareholder must not, and must procure that its Restricted Persons will not, during the Restricted Period do, or attempt to do any of the following within the Restricted Territory:
>
> | | | |
> |---|---|---|
> | 1 | No Competing business | directly or indirectly carry on or otherwise have an interest in, or be engaged in any business that is the same as or substantially similar to or that competes with a Restricted Business (including by providing the same or similar products or services). |

(c) It is not necessary to identify the competing arguments in any detail[16]. It is sufficient to observe that I agree with SDW2's contentions that in the circumstances before me there is no reason to conclude a prima facie case of enforceability of the restraint of trade had not been established. At best for JLF, JLF's submissions to the contrary raised matters of controversy which were appropriate to be dealt with at the trial. At worst, they raised matters which would be irrelevant, even at a trial.

[64] I turn to address each of the events of default on which SDW2 relied. It is convenient to address first those which SDW2 referred to as the fourth and fifth events of default and then to address the first, second and third events of default.

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15 See SDW2's primary submissions at [53(f)] and [53(g)].

16 They were set out in SDW2's primary submissions at [53(e)], JLF's supplementary submissions at [7.1] to [7.16] and SDW2's response to JLF's supplementary submissions at [57] to [61].

The fourth event of default

[65] On about 19 June 2014, Shaw Investments purported to engage the cl 8 mechanisms for the disposition of its 14% shareholding in CFMG by giving notice of sale to each of the then shareholders in CFMG.

[66] Clauses 8.2 and 8.3 require –

(a) a selling shareholder to give notice of sale notifying the number of shares proposed to be sold; the sale price per share (which had to be a cash consideration); and the payment terms; and

(b) the option to purchase must be exercised by a buying shareholder giving a written notice of exercise of its option, in which case the selling shareholder must sell at the price per share and on the terms set out in the notice of sale.

[67] SDW2's case is that the terms of cl 8 were breached because although JLF gave notice purporting to accept the offer on about 26 June 2014, the sale did not take place within the required 10 days after the option was exercised, and the sale was accomplished by a share sale agreement entered into on 18 July 2014 which provided for the sale to occur on terms different to those set out in the notice of sale, including in relation to the consideration for the sale.

[68] In my view SDW2 has established a prima facie case of breach by Shaw Investments and JLF of cl 8 of the Shareholders Agreement (and, therefore, so far as Shaw Investments was concerned, an event of default by operation of cl 9.1(h)), which breaches must have occurred on or prior to 18 July 2014. That creates a prima facie case that, pursuant to cl 8.14(a), the purported disposition to JLF of Shaw Investments 14% shareholding in CFMG was void. JLF's condition precedent argument has no application to this conclusion.

[69] SDW2 did not act on those events until almost 2 years later. But SDW2 contends and I agree that it has a prima facie case to be entitled to purchase all of JLF's shares in CFMG as at 5 August 2016 (apart from the Shaw Investments shares which on this case, JLF did not own), the passing of time being irrelevant because:

(a) Mr Watson explains that he did not know of the terms on which Shaw Investments sold to JLF at about the time the events occurred. He deposes that he did not know that the terms constituted an event of default until about 21 June 2016.

(b) On 24 June 2016 SDW2 gave JLF notice to remedy its breaches within 30 days pursuant to cl 9.1(a)(2) of the Shareholders Agreement. It says that the breaches could have been remedied by JLF accepting the proposition that the disposition was void, handing back the shares to Shaw Investments and causing the CFMG register to be corrected to reflect the fact that Shaw Investments still owned the shares.

(c) At the expiration of 30 days after that notice, JLF did not remedy the breaches, thereby creating an event of default pursuant to cl 9.1(a)(2).

(d) On 5 August 2016 SDW2 gave an Appraisal Notice to JLF, which was well within 30 days after the earliest time SDW2 (by Mr Watson) could have become aware of the occurrence of the event of default constituted by JLF not remedying the earlier breach within 30 days of being notified in writing of the requirement so to do.

[70] In light of the way in which SDW2 cast its argument, JLF's contention that there was an evidentiary deficit concerning the compliance by SDW2 with a condition precedent to any option entitlement, must be rejected.

The fifth event of default

[71] Clause 8.12 of the Shareholders Agreement provided:

> 8.12 Security Interest over Shares
>
> A Shareholder must not create a Security Interest over a Share unless:
>
> (a) the person to whom the Security Interest is granted enters into an agreement with the Shareholders not to Dispose of the Shares unless that person complies with this clause 8 and to permit the Shareholder to Dispose of Shares in accordance with its obligations under this agreement; and
>
> (b) the other Shareholder gives its prior written consent.

[72] SDW2's breach case against JLF is simple. On 27 March 2013 and 24 January 2014 JLF granted to two banks registered security interests over all of its assets, thereby creating security interests over the shares owned by JLF. That conduct was in breach of cl 8.12 because the consent of the other shareholders was neither sought nor obtained and neither of the banks entered into an agreement of the sort contemplated by cl 8.12(a).

[73] JLF submitted that there was evidence to suggest that at the time the Shareholders Agreement was entered into Mr Watson must have known that the security interests would be created by JLF. But how that knowledge could affect the proper construction of cl 8.12 was unclear. At the least, JLF has not explained how that knowledge should be attributed to all of the shareholders who were parties to the agreement. And in any event the terms of cl 8.12 are unambiguous. In my view SDW2 establishes a prima facie case that JLF breached cl 8.12 in March 2013 and January 2014.

[74] JLF submitted that SDW2 (by Mr Watson) must be taken to have consented to the conduct which SDW2 now wants to contend was a breach because of the knowledge Mr Watson had. The factual controversy affecting that question is not capable of being resolved on an application such as this. It does not affect my conclusion of the existence of a prima facie case of breach.

[75] What of JLF's condition precedent argument?

[76] SDW2's answer is similar to that which it gave in respect of the fourth event of default. It treated the breaches as breaches capable of being remedied and on 21 June 2016 gave JLF notice to remedy the said breaches within 30 days pursuant to cl 9.1(a)(2). It says that the event of default occurred at the expiration of the 30 days thereafter, which meant that the Appraisal Notice which it issued on 5 August 2016 was given within time.

[77] JLF's answer to the logic of that argument was to contend that a breach of the nature of that identified could not be regarded as a breach which was capable of remedy, because failure to give prior written consent could never be remedied, once it had occurred. To my mind, that is too narrow an approach. The question is whether an independent third party standing in the shoes of the parties as at the time of the Shareholders Agreement, would have concluded that such a breach could be regarded as "capable of remedy" by obtaining consent, albeit after the event. It seems to me that it is likely that is the better view. I do not regard this controversy as a reason to conclude that SDW2 has not established a prima facie case as it contends.

[78] I record that JLF contended that the circumstances revealed that SDW2 must have been in breach of the cl 13.2 requirement that each party given written notice to the other party of any matter or event coming to its attention that constitutes or is reasonably likely to constitute (with the passage of time, the giving of notice, the making of any determination under the agreement of any combination thereof) an event of default. However no argument was

developed demonstrating when that breach must have occurred or why I should regard it as negating the prima facie case conclusion.

The first event of default

[79] This event of default concerns the involvement of JLF and its sole director, Mr Fitzgerald, in the companies referred to as Cypress Gardens and Custodian Capital. Those two companies were, respectively, undertaking a property development known as Cypress Central and a capital raising to fund that.

[80] It is alleged that JLF's involvement (by Mr Fitzgerald) in the Cypress Central project was in breach of cl 7 of the Shareholders Agreement because the project was either the same as, substantially similar to, or competed with CFMG's business and further because it had been marketed to CFMG clients in such a way as to breach cl 7.

[81] The evidence establishes a prima facie case that this breach occurred as alleged. The business was, at the least, substantially similar to CFMG's business.

[82] Shaw Investments first complained about the conduct in about 20 December 2013. On 11 February 2014 Shaw Investments gave JLF notice to remedy its breach (of involvement in the capital raising then being pursued) pursuant to cl 9.1(a)(2) of the Shareholders Agreement. The letter required the breach be remedied by Mr Fitzgerald and JLF ceasing their involvement in the Cypress Central project by resigning relevant directorships and disposing of relevant shares and other interests.

[83] Prima facie, the result is that an event of default occurred in relation to JLF when it did not remedy the breach within 30 days of being notified by Shaw Investments. At the earliest, this occurred within 30 days after 11 February 2014. Although the event of default was established at the instance of a letter sent by only one of the non-defaulting shareholders, once established, any of the non-defaulting shareholders could engage the process contemplated by cl 9 to establish an option to purchase shares.

[84] On 18 March 2014 Shaw Investments gave an Appraisal Notice pursuant to cl 9.4(a) of the Shareholders Agreement to, inter alia, JLF. SDW2 gave its Appraisal Notice on 1 April 2014 and another shareholder (one of the two 4% shareholders) gave its notice the day after. These notices were all given within the time contemplated by cl 9.4(a), even assuming, which SDW2 disputes, that each of the shareholders knew about the failure to remedy as at the time it occurred. JLF's contention that there was an evidentiary deficit concerning the compliance by SDW2 with a condition precedent to any option entitlement, must be rejected.

[85] No Expert was agreed to by the shareholders and Mr Praeger, the then chairman of CFMG, on 13 May 2014[17] appointed BDO as Expert to value JLF's shares pursuant to cl 9.4(c) of the Shareholder Agreement and on 21 May 2014[18] circulated BDO's retainer for execution. JLF subsequently purchased the 4% shareholding and purported to purchase the Shaw Investments shareholding and nothing was done to progress the engagement of BDO to value JLF's shares.

[86] It seems that SDW2 did not do anything to agitate that matter until, on 8 April 2016, SDW2 sent a letter to the new chairman of CFMG, inter alia, requesting that he complete the engagement of BDO as Expert so that the valuation of JLF's shares could be completed. Thereafter:

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17 Exhibits to affidavit of Mr Watson sworn on 20 July 2016 at 392.

18 Exhibits to affidavit of Mr Watson sworn on 20 July 2016 at 391.

(a) On 27 May 2016 CFMG's solicitor sent a letter to SDW2 asserting that everything that the chairman had to do in respect of the appointment of BDO had been done.

(b) On 27 May 2016 SDW2 sent a letter to JLF attaching an updated BDO retainer executed by SDW2 and demanded that JLF execute same to progress the appointment of the Expert. SDW2 further advised that in the alternative to BDO it would accept any appropriate accounting firm nominated by JLF as the Expert.

(c) JLF refused to execute the BDO retainer or nominate any alternative accounting firm to act as Expert.

[87] SDW2 contends that by refusing to execute the retainer, JLF has breached its duty under –

(a) clause 9.4(b) of the Shareholders Agreement "immediately upon the issue of the Appraisal Notice [to] use [its] best endeavours to appoint [the Expert]"; and

(b) clause 15.9 of the Shareholders Agreement to do all things necessary to give effect to the agreement and the parties obligations under it,

and that it is entitled to the relief which I have earlier described.

[88] The arguments advanced by JLF as reasons why no prima facie case had been established were these:

(a) first, the condition precedent argument;

(b) second, the unenforceable restraint of trade argument;

(c) third, factual controversies as to whether its conduct could be regarded by SDW2 as a breach of cl 7 by JLF; and

(d) fourth, the contention that the process to exercise any option under cl 9 by SDW2 miscarried, and came to an end when JLF acquired the shares of the persons other than SDW2 who had given appraisal notices, because that conduct rendered further compliance with cll 9.4(d) and 9.5 impossible.

[89] I have already dealt with and rejected the first two arguments. The fourth argument is simply wrong: that JLF might have acquired the shares of 2 out of 3 non-defaulting shareholders does not mean that the clause could not be complied within in relation to the third, namely SDW2. As to the third argument, as was the case in relation to the arguments addressed at [59] to [63] above, JLF raised matters which were not capable of being resolved against SDW2 on the question of whether a prima facie case was established. It is not necessary to identify the competing arguments in any detail[19]. Again, it is sufficient to observe that I agree with SDW2's contentions that in the circumstances before me there is no reason to conclude a prima facie case of enforceability of the restraint of trade had not been established. JLF's factual contentions raised, at best for JLF, matters of controversy which are appropriate to be dealt with at the trial. At worst, they raised matters which would be irrelevant, even at a trial.

<u>The second event of default</u>

[90] This event of default concerns a further breach by JLF of cl 7.1 of the Shareholders Agreement in respect of JLF, through Custodian Financial, undertaking capital raising activities which resulted in offers being made to customers of CFMG and Custodian Land, when JLF's other entity Custodian Capital had been engaged to undertake capital raising for CFMG's Custodian Land.

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[19] They were set out in JLF's supplementary submissions at [2.1] to [2.12] and SDW2's response to JLF's supplementary submissions at [8] to [13] and [15].

[91] The evidence establishes a prima facie case that the breach had occurred in May 2015. The activities fit within the ambit of conduct prohibited by cl 7.

[92] On 7 April 2016 SDW2 gave JLF an Appraisal Notice pursuant to cl 9.4(a) of the Shareholders Agreement referring to the existence of a material breach as just described which had occurred "in or about May 2015". It stated that the breach was incapable of remedy. But if that were so, then there is no evidence before me to suggest that the Appraisal Notice was given within 30 days of SDW2 becoming aware of the occurrence of that default, because there is no evidence of when SDW2 first became aware of the breach. In respect of that appraisal notice and for the event of default so regarded, JLF's contention that there is an evidentiary deficit concerning the compliance by SDW2 with the condition precedent to any option entitlement is a good one.

[93] The notice of 7 April 2016 also provided that "further and in the alternative to, and without derogating from [the proposition that the breach was incapable of remedy]" SDW2 gave notice requiring JLF to remedy the breach. Thereafter the argument proceeded in much the same way as in relation to the first event of default:

(a) On 24 May 2014 SDW2 gave JLF a further Appraisal Notice pursuant to cl 9.4(a) of the Shareholders Agreement on the basis that the breach had not been remedied within 30 days of the notice to remedy breach given by SDW2. If the breach was capable of remedy, then this notice would have been within time because the event of default would have been when the breach was not remedied within 30 days after the 7 April 2016 notice.

(b) On 26 May 2016 SDW2 sent a letter to CFMG's chairman advising that no Expert had been agreed and requesting that he appoint an Expert to value JLF's shares in CFMG pursuant to cl 9.4(c) of the Shareholders Agreement.

(c) On 27 May 2016 SDW2 sent a letter to JLF advising that it would accept any appropriate accounting firm nominated by JLF as the Expert.

(d) JLF refused to nominate any accounting firm to act as Expert, which SDW2 contends is in breach of cll 9.4(b) and/or 15.9 of the Shareholders Agreement.

(e) CFMG's chairman refused to appoint an Expert on the ground that JLF disputes there is an Event of Default, which SDW2 contends is inconsistent with cll 9.4(a) to (c) of the Shareholders Agreement which requires the chairman to draw a lot upon JLF and SDW2 not agreeing upon an Expert.

[94] The problem with SDW2's argument is that the breach in respect of which its notices were formulated was an historical breach which occurred "in or about May 2015". I am not satisfied that it is arguable that a breach so characterized is a breach which was capable of being remedied. No argument was presented to me which explained how it could have been.

[95] The result is that I conclude that there is no prima facie case as to the relief sought to be established at trial, insofar as reliance is placed on the second event of default.

<u>The third event of default</u>

[96] This event of default concerns a further breach by JLF of cl 7.1 of the Shareholders Agreement in respect of JLF, through companies in which JLF or Mr Fitzgerald had a direct or indirect interest undertaking from late 2015 a residential land subdivision project which was the same or substantially similar to or competing with a business of CFMG or Custodian Land. I am satisfied that there is a prima facie case that activities the subject of the evidence and the pleaded claim fit within the ambit of conduct prohibited by cl 7.

[97] This breach was also the subject of the 7 April 2016 notice referred to above but the notice referred to the breach in terms which also encompassed the proposition that the breach was constituted by the continued involvement of JLF and Mr Fitzgerald in the project. In respect of this alleged breach the notice expressly was a notice to remedy the breach. Unlike the position in relation to the second event of default, it seems to me that it is arguable that the breach was remediable.

[98] If that is so, then the events which followed would justify the conclusion that SDW2 has established its prima facie case and, in particular, that the Appraisal Notice which was given was given within time:

(a) On 7 April 2016 SDW2 gave JLF notice to remedy the breach within 30 days.

(b) On 24 May 2016 SDW2 gave JLF an Appraisal Notice pursuant to cl 9.4(a) of the Shareholders Agreement on the basis that the breach had not been remedied within 30 days of the notice to remedy breach given by SDW2.

(c) On 27 May 2016 SDW2 sent a letter to JLF advising, inter alia, that it would accept any appropriate accounting firm nominated by JLF as the Expert.

(d) JLF refused to nominate any accounting firm to act as Expert, in breach of cll 9.4(b) and/or 15.9 of the Shareholders Agreement.

[99] The arguments advanced by JLF as reasons why no prima facie case had been established were these:

(a) first, the condition precedent argument;

(b) second, the unenforceable restraint of trade argument;

(c) third, an argument that the breach was incapable of remedy;

(d) fourth, an argument that the conduct of JLF was not capable of being regarded as falling within the ambit of cl 7.

[100] I have already dealt with and rejected these arguments.

Conclusion on whether a prima facie case has been established

[101] I am satisfied that SDW2 has established a prima facie case that the purported acquisition by JLF of Shaw Investments' 14% shareholding of CFMG was void and that JLF threatens to exercise a voting entitlement which there is a prima facie case that it does not have. That voting entitlement would be critical in JLF's ability to establish the special majority which would be necessary to remove Mr Watson as director.

[102] I am satisfied that SDW2 has established a prima facie case as to the existence of the option right for which it contended, at least insofar as that option right is said to derive from the first, third, fourth and fifth events of default.

The risk of damage to the value of the option right

[103] I have earlier concluded that, at least insofar as it seeks an interlocutory injunction to protect the option rights which it contends it has, SDW2 must provide evidence that the refusal of the injunction will give rise to a real risk that any final judgment in the proceeding will be rendered ineffective by reason of the damage which will have been done to the value of the option right sought to be vindicated.

[104] SDW2 contends that Mr Watson's affidavit evidence before me – particularly that which I have quoted at [44] above – sufficiently satisfies this requirement. Neither JLF nor CFMG sought to cross-examine Mr Watson on any part of his evidence.

[105] For its part, CFMG submitted (and its submissions were adopted by JLF) that Mr Watson's view was illogical, because Mr Watson was confusing –

(a) the function of those charged with making executive and policy decisions on behalf of the group and the businesses it conducts (namely the current CEO of CFMG and the board of CFMG); with

(b) the function of Custodian Administration under his sole directorship, a company which was not charged with the responsibility of making those decisions and could have no control over them.

[106] CFMG submitted that it would be able to conduct its business in the way determined by its CEO and Board, regardless of whether or not Mr Watson stayed as director of Custodian Administration. The implication of CFMG's submission was that refusal of the injunction sought would not give rise to the real risk complained of, because there was no relevant causal connection between Mr Watson's position as director of Custodian Administration and CFMG's ability to conduct the business as it thought fit. If that were so, then the risk of which Mr Watson complains would exist regardless of whether or not he was removed from Custodian Administration, and the fact that neither he nor SDW2 had framed a case which was directed to that conduct would be fatal to the present application.

[107] I do not think that the exclusion of Custodian Administration from executive functions in relation to the group's activities is so clear cut, at least for present purposes.

[108] It is true that the CEO of the group is employed by CFMG, not by Custodian Administration. Mr Watson's own (now terminated) employment indicates that the key duties and responsibilities of that role were:

(a) monitoring and overseeing the day to day management of the group comprising CFMG and its three subsidiaries;

(b) policy direction of the operations of the group;

(c) the efficient and effective operation of the group;

(d) ensuring directors of CFMG were provided with accurate and clear information in a timely manner to promote effective decision-making by the board; and

(e) ensuring all material matters affecting CFMG are brought to the attention of the board.

[109] But, on the other hand, CFMG's businesses are actually conducted by its three subsidiaries Custodian Land, Custodian Finance and Custodian Administration, with the former two having contracted with the latter for the provision of the services which permit them to conduct the businesses via the long term services agreement described at [4] above. CFMG's own evidence explains that it is by this mechanism that the group is able to quarantine all its operational costs away from CFMG, Custodian Land and Custodian Finance[20]. The CEO is the only employee of CFMG, although he was paid via Custodian Administration[21]. All other employees are employed by Custodian Administration[22].

[110] Under the services agreement, Custodian Administration provided management, administration and operational staff for the day to day business operations of Custodian Land and Custodian Finance. It also provided company management to carry out their management. And under cl 6 of the services agreement, Custodian Administration, although obliged to provide services with due diligence and care, was entitled to exercise its

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20 See affidavit of Mr Maclaren sworn on 26 July 2016 at [20].

21 See affidavit of Mr Maclaren sworn on 26 July 2016 at [32] and [33].

22 See affidavit of Mr Maclaren sworn on 26 July 2016 at [32].

independent discretion as to the most appropriate and effective manner of providing the services. This is consistent with Mr Watson's affidavit evidence that the business of CFMG is in substance all carried out by Custodian Administration. On the basis of Mr Watson's evidence, the way to exercise direct control over the people who actually perform the work of the business of the group would be to control Custodian Administration.

[111] I am satisfied that the evidence of Mr Watson sufficiently demonstrates the existence of a real risk of the nature of that to which he has deposed.

Balance of convenience

[112] SDW2 contended that the balance of convenience favoured granting the injunction –

(a) because of the nature of the threat to its rights which had been demonstrated and, in particular, of the risk adverted to under the previous heading;

(b) because a valuable undertaking had been offered from Mr Watson personally; and

(c) because the risk of real interference in the running of any of the businesses was not established on the evidence and, in any event was capable of being dealt with by the undertakings which had been in place under the existing orders.

[113] CFMG (whose submissions were adopted by JLF) contended that the balance of convenience did not favour granting the injunction. CFMG advanced the following contentions in support of the proposition that the course which carried the lower risk of injustice in the sense contemplated by the authorities was the dismissal of the application, leaving SDW2 to whatever legal remedies it might have. Relevantly:

(a) It contested the value of the undertaking offered by Mr Watson.

(b) It advanced the submissions concerning the risk of which Mr Watson complained which I have referred to at [105] and [106] above, in the context of the submission which I have summarized at [24] to [26] above.

(c) It contended that the grant of the injunction effectively determined the legal rights of JLF in relation to its shares in advance of trial.

(d) SDW2 had been guilty of delay, most of the alleged breaches having occurred between March 2014 and May 2015.

(e) The grant of the injunction would create a long term problem for the business of the group because it would entrench Mr Watson in place until the trial. This also had the potential to create further problems in the event that there is an occasion for exercise of a vote which requires a special majority. Moreover, CFMG had a well-founded apprehension that if left in place, Mr Watson would breach his duty as a director.

[114] As my earlier discussion of the law has demonstrated, CFMG's focus on where the lower risk of injustice lay was the correct focus.

[115] In carrying out the balancing exercise which the authorities suggest I should do in order to determine the course which carries with it the lower risk of injustice, I have considered the arguments which I have summarized. I make the following additional observations.

[116] First, as to the value of the undertaking:

(a) Mr Watson estimates that he has net equity in real estate holdings of in excess of $3 million.

(b) Whilst it is true that Mr Watson's evidence was based on estimates of his equity in real estate which he deposed to owning, no objection was made to the admissibility of his estimate and he was not cross-examined.

(c) I see no reason to regard his undertaking as insufficient.

[117] Second, I explained under a previous heading my reasons for forming the view that there is a prima facie case that there is a real risk of harm to the value of the option rights for which SDW2 contends. In my view, the considerations that –

(a) the option rights which SDW2 seeks to protect are not rights which permit SDW2 to control voting rights until they are exercised;

(b) SDW2 seeks to restrain conduct by JLF which is not alleged to constitute a legal or equitable wrong; and

(c) the effect of the restraint would be to interfere with the status quo because it would finally determine against JLF for a period of time an aspect of JLF's legal rights, namely the right to exercise the voting rights attached to its shares as it thinks fit at any meeting which is lawfully convened,

suggest that it would be appropriate to require SDW2 to establish with a high degree of assurance both its case as to the existence of the option rights and the risk of harm to them.

[118] Third, I explained under a previous heading my reasons for forming the view that there is a prima facie case that the Shaw Investments transfer to JLF of its 14% shareholding in CFMG was void. Although it is true that any restraint sought in relation to JLF's ability to exercise the voting rights associated with those shares would be to prevent JLF from exercising its legal rights for a period of time, given the fact that there is a prima facie case which directly impeaches JLF's title to the shares, I do not think that the high degree of assurance referred to in the previous paragraph is required.

[119] Fourth, I acknowledge that delay is relevant to the balance of convenience. But in this case, I do not think the delay has significant weight in evaluating the lower risk of injustice. The parties to the Shareholder Agreement (which included CFMG and JLF) specifically agreed by cl 15.6 that delay in the exercise of a right did not constitute a waiver of a right. Moreover, the discussion of the condition precedent argument has demonstrated that the prima facie case of event of default is founded on conduct which took place in 2016.

[120] Fifth, the question of whether the grant of the injunction might create a long term problem for the CFMG group is a real one, albeit one in which there was a conflict of evidence. But it seems to me that, as SDW2 suggested, in any event it was capable of being dealt with by the undertakings which had been in place under the existing orders and the fact that any injunction would be granted subject to liberty to apply.

[121] I do not think that the course which carries the lower risk of injustice is to leave SDW2 with its legal rights. The parties to the Shareholder Agreement saw fit to entrench appointment of directors to CFMG and its subsidiaries by requiring the requisite special majority for any change, and the parties to the services agreement saw fit to entrench Custodian Administration in its position within the group via a long term agreement. The prima facie case advanced by SDW2 is of sufficient strength (even bearing in mind the matters referred to at [117] above) to persuade me that Mr Watson should not be removed in advance of a trial of this proceeding.

[122] The course which carries the lower risk of injustice is to grant the interlocutory injunction sought against JLF upon the usual undertaking as to damages of Mr Watson, and to deal with the risk of conflict between the executive management of CFMG and Mr Watson lawfully

exercising his authority as the sole director of Custodian Administration in relation to the performance of the services agreement, by requiring of SDW2 that it also offer Mr Watson's continued undertaking in the form already given, as to which see [19](a) above. SDW2's written submissions confirm that the undertaking is offered.

Conclusion

[123] There should be a grant of an interlocutory injunction against JLF upon SDW2 and Mr Watson jointly and severally offering the usual undertaking as to damages and upon Mr Watson's continued undertaking in the form already given.

[124] I order as follows:

Upon Mr Scott Damien Watson and the plaintiff, jointly and severally, giving the usual undertaking as to damages,

And upon Mr Scott Damien Watson undertaking to:

1. exercise his functions as director to cause Custodian Administration Pty Ltd ACN 162 103 602, Custodian Land Syndicate Ltd ACN 127 663 414 and Custodian Equity and Income Funds Limited ACN 112 753 876 (the "Companies"), and each of them, to continue to conduct their business in the ordinary course of business and pursuant to the Service Agreement dated 31 January 2013, including refraining from doing any of the following without the consent in writing of the third defendant:
   (a) employing any new staff or terminating the employment of any existing staff;
   (b) engaging any new contractors; and
   (c) making any payments other than in the ordinary course of business; and
2. not to seek to enjoin or otherwise prevent the meeting of the third defendant adjourned to 20 July 2016, and any adjournment thereof, for the purpose of considering resolutions to increase directors' remuneration as set out in the notice of meeting dated 21 June 2016;
3. refrain from performing the duties at paragraph 31(2) to (5) of the affidavit of Mr Graeme John Maclaren sworn 26 July 2016;
4. not cause the Companies to pay any amount in excess of $1,000.00 without first giving Mr Graeme John Maclaren or Mr Jason Matigan (each of whom are directors of the third defendant) 48 hours' notice in writing of his intention to do so and will not make any such payment if directed in writing by either of them to that effect prior to causing the payment to be made;

until the trial of this proceeding or earlier order of the Court.

The orders of the Court are that:

1. The first defendant, by its officers, servants or agents, must not, without the agreement in writing of the plaintiff–
   (a) cast any votes it may have in respect of its shareholding in the third defendant at any properly convened meeting in respect of a resolution to:
      (i) remove Mr Scott Damien Watson as director from the Companies, and each of them; and
      (ii) to appoint another director to the Companies, and each of them; and
   (b) otherwise, take any step to effect the matters in subparagraphs (i) and (ii) of the immediately preceding paragraph,

until the trial of this proceeding or earlier order of the Court.

2. There be liberty to apply on the giving of not less than three days' notice in writing to all other parties.

[125] I will hear the parties as to costs on a date to be fixed, once the parties have had an opportunity to consider the foregoing reasons.