SUPREME COURT OF QUEENSLAND

CITATION: *ASIC v Neolido Holdings P/L & Ors; ASIC v Neolido Holdings P/L & Ors; ASIC v Neolido Holdings P/L & Ors; Spencer & Anor v ASIC & Ors* [2006] QCA 266

PARTIES:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(applicant/appellant)
v
NEOLIDO HOLDINGS PTY LTD ACN 102 472 015
(first respondent/first respondent)
NEO LIDO PTY LTD ACN 095 065 928
(second respondent/second respondent)
RICHARD WILLIAM SPENCER
(third respondent/third respondent)
SILVANA PEROVICH
(fourth respondent/fourth respondent)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(applicant/appellant)
v
NEOLIDO HOLDINGS PTY LTD ACN 102 472 015
(first respondent/first respondent)
NEO LIDO PTY LTD ACN 095 065 928
(second respondent/second respondent)
RICHARD WILLIAM SPENCER
(third respondent/third respondent)
SILVANA PEROVICH
(fourth respondent/fourth respondent)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(applicant/first respondent)
v
NEOLIDO HOLDINGS PTY LTD ACN 102 472 015
(first respondent/third respondent)
NEO LIDO PTY LTD ACN 095 065 928
(second respondent/fourth respondent)
RICHARD WILLIAM SPENCER
(third respondent/first appellant)
SILVANA PEROVICH
(fourth respondent/second appellant)
RAYMOND WILLIAM RICHARDS
(second respondent)

RICHARD WILLIAM SPENCER
(applicant/first appellant)

	SILVANA PEROVICH (applicant/second appellant) **v** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (first respondent/first respondent) **NEOLIDO HOLDINGS PTY LTD** ACN 102 472 015 (second respondent) **NEO LIDO PTY LTD** ACN 095 065 928 (third respondent)
FILE NO/S:	Appeal No 11018 of 2005 Appeal No 11019 of 2005 Appeal No 11052 of 2005 Appeal No 382 of 2006 SC No 4544 of 2005 SC No 4544 of 2005 SC No 4544 of 2005 Appeal No 10268 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane - Appeal No 11018 of 2005 Supreme Court at Brisbane - Appeal No 11019 of 2005 Supreme Court at Brisbane - Appeal No 11052 of 2005 Court of Appeal at Brisbane - Appeal No 382 of 2006
DELIVERED ON:	28 July 2006
DELIVERED AT:	Brisbane
HEARING DATES:	17 July 2006 and 18 July 2006
JUDGES:	Williams, Keane and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. In Appeal No 11019 of 2005 and Appeal No 11018 of 2005, ASIC's applications for leave to appeal are granted and ASIC's appeals are allowed** **2. In Appeal No 11019 of 2005, the condition imposed on the grant of leave given to ASIC to apply for the winding up of the companies is set aside** **3. In Appeal No 11019 of 2005 and Appeal No 11018 of 2005, the companies are to pay ASIC's costs of the appeals to be assessed on the standard basis; the companies are to have an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* (Qld) in respect of their costs and their liability for the costs of ASIC** **4. In Appeal No 11052 of 2005 and Appeal No 382 of 2006, the appeals by Ms Perovich and Mr Spencer are dismissed**

5. In Appeal No 11052 of 2005 and Appeal No 382 of 2006, Ms Perovich and Mr Spencer are to pay ASIC's costs of their appeals to be assessed on the standard basis

CATCHWORDS: CORPORATIONS - WINDING UP - WINDING UP APPLICATION - ORDERS - ASIC sought leave to apply for the winding up of the companies - leave granted subject to a condition that ASIC pay all costs of the liquidator involved in the winding up - whether the imposition of a condition was an order "as to costs only" - whether the decision to impose the condition was erroneous

WORDS AND PHRASES - learned primary judge gave ASIC liberty to apply to set aside the condition imposed on the grant of leave - liberty to apply subject to ASIC giving four days' notice to Spencer and Perovich - subsequently different primary judge ruled on apparent basis that four business days' notice had not been given - whether "four days' notice" meant "four business days' notice"

CORPORATIONS - WINDING UP - WINDING UP APPLICATION - winding up order purported to wind up two companies in the one order - whether ASIC's failure to make separate applications for each company was an irregularity such as to make the winding up order a nullity

CORPORATIONS - WINDING UP - WINDING UP APPLICATION - learned primary judge refused the application of Spencer and Perovich to appear on behalf of the companies as opposed to on their own behalf - learned primary judge refused to allow Spencer and Perovich more time to obtain evidence or legal advice - whether winding up order a product of a denial of natural justice

APPEAL AND NEW TRIAL - QUEENSLAND - POWERS OF COURT - application for leave refused by single learned judge of the Court of Appeal - single judge of Court of Appeal acted under s 43(2)(a) of the *Supreme Court of Queensland Act 1991* (Qld) and r 767 of the *Uniform Civil Procedure Rules 1999* (Qld) - whether this Court can exercise afresh the discretion exercised by the single learned judge of the Court of Appeal

Corporations Act 2001 (Cth), s 459C, s 459P, s 459R, s 467A, s 471B, s 534
Acts Interpretation Act 1954 (Qld), s 36
Appeal Costs Fund Act 1973 (Qld), s 15
Supreme Court Act 1995 (Qld), s 209, s 253
Supreme Court of Queensland Act 1991 (Qld), s 43
Uniform Civil Procedure Rules 1999 (Qld), r 27, r 767

Cameron v Cole (1944) 68 CLR 571, cited
Emanuele v Australian Securities Commission (1997) 188 CLR 114, cited

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648, cited
House v The King (1936) 55 CLR 499, cited
Hubbard Association of Scientologists International v Anderson [1972] VR 340, cited
In re Display Multiples Ltd [1967] 1 WLR 571, cited
Re Gordon Grant and Grant Pty Ltd (1982) 1 ACLC 196, cited
Re Shields Marine Association (1867) 16 WR 69, 17 LT 308, cited
Simto Resource Ltd v Normandy Capital Ltd (1993) 10 ACSR 776, cited
The State of South Australia v O'Shea (1987) 163 CLR 378, applied

COUNSEL: J K Bond SC, with P R Franco, for Australian Securities and Investments Commission
I Dorey (*sol*) for Neolido Holdings Pty Ltd, Neo Lido Pty Ltd and Mr Richards
K McMillan SC, with N R Rosenbaum and E J Power, for Mr Spencer and Ms Perovich

SOLICITORS: Australian Securities and Investments Commission for Australian Securities and Investments Commission
Bain Gasteen for Neolido Holdings Pty Ltd, Neo Lido Pty Ltd and Mr Richards
Marler & Darvall for Mr Spencer and Ms Perovich

[1] **WILLIAMS JA:** Keane JA has set out in his reasons for judgment the circumstances in which the five appeals came before this Court. Appeal No. 7976 of 2005 (the appeal against the order of Philippides J of 24 August 2005) was dismissed without opposition at the outset of the hearing in this Court. It is not necessary to refer any further to that appeal.

[2] I agree with all that is said by Keane JA with respect to the other appeals, but add some brief observations of my own.

[3] On the hearing of the winding-up applications on 25 November 2005, ASIC relied, amongst other material, on an affidavit of a Mr Robinson, a senior accountant employed by ASIC. That affidavit was served on the solicitors then acting for the companies on 6 June 2005. That affidavit established that ASIC in April 2005 had called upon the companies to demonstrate their solvency. Notwithstanding assertions in correspondence from solicitors acting for the companies that experienced accountants had been retained to provide that information, nothing was forthcoming. There was no response to those requests by 25 November 2005 when the hearing took place. At best for the companies the submission was made on 23 November that something might be forthcoming if the companies were granted an adjournment for about eight weeks.

[4] There was, in my view, overwhelming evidence that the companies were insolvent as at 25 November 2005, and in consequence the only reasonable course open to Fryberg J was to order that the companies be wound-up.

[5] I agree with all that has been said by Keane JA with respect to issues raised by Spencer and Perovich with respect to Appeal No. 11018 of 2005. The reasoning of McPherson JA [2005] QCA 446 also demonstrates there is no substance in the contention the order of 25 November 2005 was void because it referred to two companies. There is no basis for setting aside the orders that each of the companies be wound-up. That appeal should be dismissed.

[6] I turn now to the appeal by ASIC (No. 11019 of 2005) seeking to have the condition imposed by Fryberg J on the making of the winding-up orders set aside. Again I agree with all that has been said by Keane JA with respect to that, but I would add one further observation.

[7] It was suggested that one of the reasons motivating Fryberg J in imposing the condition was the fact that because receivers and managers were in place the further expense associated with winding-up was not justified in the public interest. Such an approach would, in my view, be erroneous. If a company is hopelessly insolvent then there are good reasons for winding it up notwithstanding the fact that receivers are in place and there is little likelihood of unsecured creditors benefiting significantly from a winding-up.

[8] As Keane JA has pointed out there was no valid basis for the imposition of the condition and it should be set aside. The appeal should be allowed.

[9] The fact that the condition was to be imposed emerged for the first time when Fryberg J gave his reasons for ordering the winding-up of the companies. He concluded by saying: "Since I have not heard from counsel on that question, I will do so before making a formal order". Counsel for ASIC then intimated that he did not then have instructions on the point and was unable to deal with it instantly. The judge then intimated that he was prepared to give ASIC liberty to apply to have the condition set aside or varied, but could not himself hear such an application because of his commitments. He indicated that any such application should be brought before the judge hearing applications. In the light of that, he granted ASIC "liberty to apply on or before 9 December to set aside or vary that condition on four days notice to the directors of the companies … ".

[10] That explains why the matter came before Mullins J. It was clear that ASIC had not had the opportunity of making submissions before Fryberg J on the point and to ensure that principles of natural justice applied ASIC was entitled to have its application heard on the merits by Mullins J. As Keane JA has pointed out, four days notice was in fact given and Mullins J should have heard the application on the merits. The appeal by ASIC against the order of Mullins J should be allowed.

[11] The judgment of McPherson JA of 9 December 2005 was clearly correct and Appeal No. 382 of 2006 must be dismissed.

[12] I agree that the appeals should be disposed of as proposed by Keane JA in his reasons.

[13] **KEANE JA:** The issues in these interconnected appeals and applications arise out of the demise of two property development companies.

The proceedings

[14] On 8 June 2005, Perpetual Nominees Limited ("Perpetual") appointed Ms Muller and Mr Hutson ("the receivers") as receivers and managers of property of Neo Lido Pty Ltd and Neolido Holdings Pty Ltd ("the companies") pursuant to securities given by the companies. The companies commenced proceedings asserting the invalidity of these appointments. That claim was rejected, after a trial, by Philippides J. On 24 August 2005, Philippides J declared that the receivers had been validly appointed.

[15] On 6 June 2005, the Australian Securities and Investments Commission ("ASIC") applied to wind up the companies. On 25 November 2005, Fryberg J made an order for the winding up in insolvency of the companies.

[16] At the hearing of the application for the winding up of the companies, Ms Perovich and Mr Spencer, who were directors of the companies, sought to appear on behalf of the companies. Fryberg J declined their application. His Honour indicated that he was willing to hear Ms Perovich and Mr Spencer in their own right, but not on behalf of the companies. Upon his Honour giving this indication, Ms Perovich and Mr Spencer took no further part in the hearing.

[17] Under s 459P(2)(d) of the *Corporations Act 2001* (Cth) ("the Act"), a winding up order may be made on the application of ASIC only if ASIC's application is made with the leave of the court. One of the orders made by Fryberg J on 25 November 2005 gave ASIC leave *nunc pro tunc* (now for then) to apply for the winding up of the companies.[1] This leave was granted on the condition that ASIC "pay all costs of the liquidator involved in the winding up". His Honour granted ASIC liberty to apply to set this condition aside on or before 9 December 2005 on four days' notice to Ms Perovich and Mr Spencer.

[18] On Thursday 1 December 2005, ASIC filed an application to set aside the condition attached to the grant of leave. That application came on for hearing before Mullins J on Tuesday 6 December 2005. Ms Perovich and Mr Spencer appeared on that date on their own behalf. Mullins J refused to abridge the time for hearing the application, and, because ASIC had not given four business days' notice of its application, Mullins J dismissed ASIC's application.

[19] Ms Perovich and Mr Spencer applied to McPherson JA for leave to appeal in the names of the companies against the winding up order of Fryberg J. That application was rejected on 12 December 2005.

[20] This welter of litigation has spawned a number of appeals, and associated applications, to this Court. The appeals and applications may be summarised thus:

(a) An appeal was instituted in the name of the companies against the order of Philippides J. This proceeding is CA No 7976 of 2005. Pursuant to an application dated 29 May 2006, Ms Perovich and Mr Spencer were given leave by Williams JA on 2 June 2006 to be joined as interveners in this appeal. The grant of leave was, however, conditional upon Ms Perovich and Mr Spencer paying

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1 See *Emanuele v Australian Securities Commission* (1997) 188 CLR 114.

$42,000 inclusive of GST to the Registrar on or before 23 June 2006 by way of security for the respondents' costs of the appeal.

(b) ASIC has appealed against the imposition by Fryberg J of the condition on the order for the winding up of the companies. This proceeding is CA No 11019 of 2005. This Court ordered that Ms Perovich and Mr Spencer be added as respondents to this appeal on 4 May 2006. In this appeal, there was an application by Ms Perovich and Mr Spencer to strike out ASIC's appeal. This application was disposed of on 4 May 2006 with the application being dismissed with costs.

(c) ASIC has appealed against the decision of Mullins J. This proceeding is CA No 11018 of 2005. This Court ordered that Ms Perovich and Mr Spencer be added as respondents to this appeal on 4 May 2006. In this appeal, there was an application by Ms Perovich and Mr Spencer to strike out ASIC's appeal. Once again, this application was disposed of on 4 May 2006 with the application being dismissed with costs.

(d) Ms Perovich and Mr Spencer have appealed against the winding up order by Fryberg J. This proceeding is CA No 11052 of 2005.

(e) Ms Perovich and Mr Spencer have appealed against the decision of McPherson JA of 9 December 2005. This proceeding is CA No 382 of 2006.

[21] Before the substantive issues which arise in these appeals can be discussed intelligibly, it is necessary to set out some more of the background that has given rise to these proceedings.

Background

[22] The companies were property developers. In the course of their business, they incurred large debts which were secured, inter alia, by floating charges in favour of Perpetual over the assets of the companies.

[23] ASIC's application to wind up the companies in insolvency was made on 6 June 2005. An interlocutory application seeking leave to make the winding up application was also filed on that date.

[24] As I have mentioned, the receivers were appointed to the companies on 8 June 2005. This appointment was made pursuant to the floating charges given by the companies to Perpetual.

[25] On an application for the winding up of a company, a company is presumed to be insolvent for the purposes of s 459P of the Act if, under a power contained in an instrument relating to a floating charge on property of the company, a receiver and manager is appointed of property of the company during or after the period of three months ending on the day when a winding up application is made.[2]

[26] As I have mentioned, the companies sought to challenge the validity of the 8 June 2005 appointment of receivers. It is unnecessary at this stage to explain the grounds of the challenge. It is sufficient to note here that the challenge was dismissed by Philippides J on 24 August 2005. A notice of appeal against her Honour's decision was filed, in the name of the companies, on 21 September 2005. Ms Perovich and

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2 See *Corporations Act 2001* (Cth) s 459C(2)(c).

Mr Spencer caused this notice of appeal to be filed in the names of the companies. That appeal had not been determined when the winding up application came on for hearing.

[27] In September 2005, an application was made to Moynihan SJA by Ms Perovich and Mr Spencer pursuant to r 2.13 of the *Corporations Proceedings Rules* for an order that they, as officers of the companies, be heard in the application for the winding up of the companies without themselves becoming parties to the proceedings. On 23 September 2005, Moynihan SJA gave the following direction in relation to the hearing of the winding up application:

> "Silvana Perovich and Richard Spencer as directors of [the companies] be granted leave pursuant to rule 2.13 of the Corporations Rules to be heard in the proceeding in the name of [the companies]."

Moynihan SJA also set the matter down for hearing before Fryberg J on 23 November 2005.

[28] The winding up application came on for hearing before Fryberg J on 23 November 2005. The companies were represented by counsel. Through their counsel, they sought, and were granted, an adjournment of the hearing on the basis of late service of affidavit material by ASIC. Fryberg J granted the adjournment until 25 November 2005. His Honour declined to grant a longer adjournment to enable the companies to obtain an accountant's report. It was said that this would take about eight weeks. His Honour was not disposed to grant an adjournment for such a lengthy period.

[29] When the matter came on for hearing again on 25 November 2005, the companies were no longer represented by lawyers. That lack of representation was unexplained, save for the assertion by Ms Perovich that the lawyers were unable to cope with the volume of material upon which ASIC sought to rely. Ms Perovich and Mr Spencer submitted to Fryberg J that the effect of the order of Moynihan SJA was that they were entitled to oppose the application for the winding up of the companies and to do so on behalf of, and in the names of, the companies. Fryberg J did not accept that this submission reflected the correct interpretation of the order made by Moynihan SJA; but his Honour made it clear that Ms Perovich and Mr Spencer were entitled to be heard and to call evidence at the hearing. Ms Perovich and Mr Spencer asked for an adjournment to enable the companies to obtain legal representation or advice. They also supported an application for an adjournment by Neovest Pty Ltd, a creditor of the companies. These applications were not granted. Ms Perovich and Mr Spencer then left the court, and took no further part in the hearing.

[30] Fryberg J proceeded to order the winding up of the companies in insolvency, and appointed R W Richards as liquidator. As I have mentioned, his Honour also made the necessary grant of leave to ASIC to apply for this order conditional on ASIC paying all the costs of the liquidator involved in the winding up. Fryberg J also gave ASIC liberty to apply to set that condition aside.

[31] ASIC's application to set aside the condition came on before Mullins J on 6 December 2005. Because of ASIC's concern to have this application heard within the period of six months after the filing of its application for the winding up of the

companies,[3] the application for the removal of the condition was filed on Thursday 1 December 2005 and was brought on for hearing on Tuesday 6 December 2005. ASIC took the view that the "four days' notice" included the intervening Saturday and Sunday. The liquidator provided a letter which was put in evidence saying that he neither consented to, nor opposed, the application. Ms Perovich and Mr Spencer opposed the application and also opposed any abridgement to enable the application by ASIC to be heard.

[32] Mullins J held that the period of four days' notice specified by Fryberg J had not been accorded to Ms Perovich and Mr Spencer. In argument, her Honour referred to a failure to give four "clear days", but, on any view, four clear days were given. It appears, therefore, that her Honour must have regarded the reference to "four days" as being to "four clear business days", ie excluding the intervening Saturday and Sunday. Her Honour was "not inclined to make any abridgement of time that would be necessary to enable the application … to be heard today". The application was dismissed by Mullins J.

[33] On 8 December 2005, Ms Perovich and Mr Spencer applied to McPherson JA for leave to appeal against the winding up order of Fryberg J, on behalf of the companies, and for an order staying the winding up order until the hearing of the appeal. McPherson JA, sitting alone but exercising the powers of the Court of Appeal under r 767 of the *Uniform Civil Procedure Rules 1999* ("UCPR"), refused the application for leave to appeal. Accordingly, there was no occasion for the grant of a stay of the winding up order. As indicated above, Ms Perovich and Mr Spencer have appealed against the decision of McPherson JA in proceedings CA No 382 of 2006.

[34] As I mentioned earlier, Ms Perovich and Mr Spencer were joined as interveners in CA No 7976 of 2005 on 2 June 2006, subject to the payment of security for the respondents' costs of that appeal. That payment was not made; thus, the condition was not satisfied. No other party seeks to pursue that appeal. As a result, at the hearing before this Court, the companies' appeal against the winding up order was dismissed without opposition. It was also ordered that the companies pay ASIC's costs of and incidental to the appeal (including reserved costs) to be assessed on the standard basis, and that Ms Perovich and Mr Spencer pay ASIC's costs of and incidental to their application for leave to be joined/intervened dated 29 May 2006 (including reserved costs), to be assessed on the standard basis.

ASIC's appeal against Fryberg J's condition: CA No 11019 of 2005

[35] Ms Perovich and Mr Spencer argue in their written submissions that ASIC's appeal in relation to the imposition of the condition is incompetent. They seek to rely upon s 253 of the *Supreme Court Act 1995* (Qld). That provision is relevantly in the following terms:

> "No order made by any judge of the … court … as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order."

[36] Ms Perovich and Mr Spencer argue that the order of Fryberg J, whereby ASIC's leave to apply for the winding up of the companies was subject to the condition as to the payment of the costs of the liquidation, is an "order … as to costs only which

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[3] See *Corporations Act 2001* (Cth) s 459R.

by law are left to the discretion of the judge" within the meaning of s 253 of the *Supreme Court Act 1995*. There are three reasons why this argument is misconceived. The first is that it is not accurate to say that the costs of the liquidation are "by law left to the discretion of the judge" who decided the winding up application. The costs of the liquidation are subject to the control of the Supreme Court as the court with ultimate control over the course of the liquidation, rather than to the discretion of any one judge of the Supreme Court.

[37] Secondly, it is evident from the statutory context in which s 253 appears that the section is concerned to limit appeals from orders which dispose of the costs of proceedings which have been determined prior to the making of the order for costs. The condition in question is concerned with the costs of proceedings which have not even been begun, much less determined, and with other expenses of the liquidation which may not be costs of proceedings at all.

[38] Thirdly, the order imposing the condition is not an "order as to costs only". Rather, it is an order granting leave to apply for the winding up of the companies. To that order, the condition is an adjunct. It is not apt to characterise the order granting leave to apply for a winding up as an order for costs only.

[39] Having determined that ASIC's appeals are competent, I turn now to consider the substance of ASIC's appeals. ASIC requires leave to institute the appeals by reason of s 471B of the Act because the companies have been placed in liquidation. This leave may be granted *nunc pro tunc*.[4] No party opposed the grant of leave. Leave was granted by this Court at the hearing of the appeals. It is, therefore, appropriate to turn to a consideration of the merits of the proposed appeals.

[40] As to the condition imposed by Fryberg J on the grant of leave to ASIC to apply for the winding up of the companies, it is apparent that Fryberg J was minded to impose the condition because, as his Honour said:

> "the investigation of whether there has been any offence [of insolvent trading] and its further prosecution will necessarily be carried out using funds which otherwise could go towards the satisfaction of debts."

[41] The first point to be made here is that the condition which has been imposed is not supported by the consideration referred to by the primary judge.[5] That condition casts upon ASIC the cost, not only of investigation of civil insolvent trading claims, but of the entirety of the liquidator's costs of the winding up. Thus, even if the condition were otherwise justifiable, it is much wider than could be justified. In my view, however, the condition cannot be justified at all.

[42] It seems that his Honour assumed that the liquidator would be likely to incur costs in investigating and prosecuting any offence of insolvent trading, and that it was necessary or desirable to impose prospectively some judicial control over the allocation of the burden of the costs which might hypothetically be incurred. In my respectful opinion, these assumptions are unwarranted.

[43] In general, it is ASIC itself which brings proceedings for offences against the Act. Indeed, subject to one exception under the Act, the liquidator of a company has no

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4 *Re Gordon Grant and Grant Pty Ltd* (1982) 1 ACLC 196 at 199.

5 *House v The King* (1936) 55 CLR 499 at 505 - 508.

ability to bring proceedings for an offence against the Act and, in particular, no ability to seek a declaration of a contravention of the Act or a pecuniary penalty order.[6] To that extent, the mischief at which the condition was directed does not exist. The exception to which I have referred arises by reason of the rarely invoked[7] s 534 of the Act. It should be noted here that Fryberg J did not suggest that the condition was warranted by the possibility of a prosecution under s 534. For the sake of completeness, however, I should explain why I consider that the condition was not warranted by the possibility of a prosecution under s 534 of the Act.

[44] Section 534 of the Act provides that a liquidator "may begin a prosecution" for an offence referred to in a report by the liquidator pursuant to s 533 if "it appears to ASIC that the matter is not one in respect of which a prosecution ought to be begun". As to prosecutions commenced under s 534 of the Act, the statute makes specific provision for the payment of the costs incurred therein by the liquidator in such proceedings. In such a case, ASIC may, under s 534(2), direct that the whole or part of the costs and expenses properly incurred by the liquidator in the proceedings be paid out of the money of ASIC. Subject to such a direction by ASIC and to charges on the property of the company and debts to which the Act gives priority, the costs and expenses properly incurred by the liquidator are payable out of the property of the company as part of the costs of the winding up. ASIC's discretion under s 534(2) is unfettered. There is no room for the variation by judicial discretion of the specific statutory provision for the payment of the costs and expenses of a prosecution commenced under s 534. The condition imposed by Fryberg J is thus inconsistent with the Act insofar as the condition might apply to prosecutions under s 534 of the Act.

[45] For these reasons, I have concluded the assumptions by Fryberg J that the liquidator might incur costs on behalf of the companies in prosecuting offenders, and that there was scope for some form of prospective judicial control of the allocation of the burden of those costs, were unwarranted.

[46] In relation to the costs of investigations by the liquidator, the requirement of leave in s 459P of the Act is not informed by any concern that the liquidator might exercise his or her powers of investigation at the expense of the creditors of the company in liquidation. The requirement in s 459P of the Act for the grant of leave to ASIC to apply for the winding up of a company serves to ensure that the "serious and perhaps commercially destructive step of applications for winding up in insolvency" only be made by ASIC where there was a prima facie case of insolvency.[8] In other words, the considerations which relevantly bear upon the exercise of the discretion to grant ASIC leave to make an application to wind up a company in insolvency are concerned with the strength of the evidence that the company is insolvent and that a winding up order should be made, rather than with the control of the course of the ensuing liquidation. Considerations relating to the future control of the liquidation, if a winding up order is made, are not relevant to the discretion to grant or withhold leave to ASIC to apply for a winding up under s 459P. The Act gives the Court ample power to deal with the question of the costs and expenses of the liquidation.[9]

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6 See *Corporations Act 2001* (Cth) s 1315 and s 1317J.

7 McPherson, *The Law of Company Liquidation*, 4th Ed (1999) at 654.

8 See *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 121 - 122, 143 - 144.

9 *Corporations Act* s 473, s 477, s 1321.

[47] In any event, to the extent that a liquidator might investigate possible insolvent trading, these investigations would take place with a view to proceedings (for a compensation order) against the former directors of the companies. These investigations can be presumed to be undertaken for the benefit of the companies and their creditors.[10] To the extent that a liquidator pursues such an investigation for the benefit of the companies and their creditors, eg pursuant to s 588FH of the *Corporations Act*, there is no reason why the companies and their creditors should not bear those costs. And there is every reason why the public purse, represented by ASIC, should not bear the cost of investigations made for the private benefit of the companies and their creditors.

[48] For these reasons, in my respectful opinion, the decision to impose the condition was erroneous. In CA No 11019 of 2005, therefore, leave to appeal should be granted. The appeal should be allowed and the condition imposed by Fryberg J should be set aside.

ASIC's appeal against Mullins J's decision: CA No 11018 of 2005

[49] My conclusion in relation to ASIC's appeal in CA No 11019 of 2005 means that ASIC's appeal against the decision of Mullins J is of academic interest save as to costs. That might be said to afford sufficient reason to refuse ASIC's application for leave to appeal. Nevertheless, the decision of Mullins J raises an issue of some general importance in that the principal issue on the appeal from Mullins J is whether the weekend was included in the period of four days' notice prescribed by Fryberg J.

[50] Rule 27 of the *Uniform Civil Procedure Rules 1999* provides for "at least 3 business days" notice of an application. The prescription in r 27 of the UCPR does not apply if another time is provided for under the UCPR or an Act. The period prescribed by Fryberg J is a time provided under the UCPR, in the sense that r 7 of the UCPR provides for the making of such an order.

[51] The substantive question in this appeal concerns the meaning of his Honour's order. Her Honour did not explain why the days of the weekend were not, in her view, included in the four days allowed by Fryberg J. There was no warrant for treating the reference to "days" in the order of Fryberg J as if it was to "business days". That term is defined by s 36 of the *Acts Interpretation Act 1954* (Qld) as excluding Saturdays and Sundays, but it is not the term which Fryberg J used in his order. His Honour's order simply does not refer to "business days". The reference to "days" simpliciter is clearly a reference to days as that term is ordinarily understood. [11]

[52] In CA No 11018 of 2005, leave to appeal should be granted and the appeal against the decision of Mullins J should be allowed.

[53] In summary, then, in relation to ASIC's appeals, I consider that the appeals should be allowed and the condition should be set aside. The costs of these appeals should follow the event. There is no reason why the companies should bear these costs. The need for these appeals arose from nothing said or done by the companies or their liquidator, or, for that matter, by Ms Perovich or Mr Spencer. The companies should pay ASIC's costs of the appeals and the companies should have an indemnity

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[10] Pursuant, for example, to s 1317J(2) or under s 588FH of the *Corporations Act 2001* (Cth).

[11] Cf *In re Display Multiples Ltd* [1967] 1 WLR 571 at 572.

certificate for their costs and their liability for costs to ASIC pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld).

The appeal by Ms Perovich and Mr Spencer in CA No 11052 of 2005

[54] In this appeal, Ms Perovich and Mr Spencer contend that:

(a) the winding up order was a nullity in that it purports to wind up two companies in the one order; and

(b) the winding up order was the product of a denial of natural justice, both because of the refusal of their application for an adjournment, and because Fryberg J refused to permit them to appear on behalf of the companies as opposed to on their own behalf.

[55] The first of these contentions was agitated only in the written submissions by Ms Perovich and Mr Spencer. Separate applications were indeed necessary to wind up each company,[12] and ASIC's failure to observe this requirement was an irregularity. It was, however, an irregularity of the kind which would not render the winding up order a nullity. That order was made by a superior court of record. An order of such a court, even if made in excess of jurisdiction, is valid until set aside.[13]

[56] There can be no doubt, in any event, that the order in question was not made in excess of jurisdiction: s 467A of the Act obliged the court not to dismiss an application merely because of a defect or irregularity in connection with the application, unless the court was satisfied that substantial injustice has been caused that cannot otherwise be remedied. The court, therefore, had jurisdiction to hear and determine the application, and there was no reason to apprehend that any substantial injustice would have been caused which could not otherwise be remedied. No such substantial injustice has been identified on behalf of Ms Perovich and Mr Spencer.

[57] Ms Perovich and Mr Spencer were in no way prejudiced by the irregularity. At no time did they raise any complaint about the fact that ASIC had filed only one application seeking the winding up of both companies. There was never any suggestion that there might be a relevant consideration applicable to one company but not the other. On 13 January 2006, ASIC informed Ms Perovich and Mr Spencer of its intention to have separate orders drawn up in the trial division after these appeals have been determined. That course will largely cure the formal irregularity of which Ms Perovich and Mr Spencer complain. They do not point to any prejudice which they would suffer from such a course.

[58] As to the second submission made by Ms Perovich and Mr Spencer, I will deal first with their complaint in relation to the refusal by Fryberg J to permit them to appear on behalf of the companies.

[59] By virtue of s 209 of the *Supreme Court Act 1995* (Qld), special leave was necessary to allow Ms Perovich or Mr Spencer to appear on behalf of the companies. Fryberg J declined to grant special leave. In this regard, his Honour was guided, first, by the consideration that the order of Moynihan SJA permitted Mr Spencer and Ms Perovich to be heard in their own right in opposition to the winding up of the companies, and, secondly, by the consideration that the companies and their creditors should not be prejudiced by anything said or done on their behalf by

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12 See *Re Shields Marine Association* (1867) 16 WR 69, 17 LT 308 and s 459T of the Act.

13 Cf *Cameron v Cole* (1944) 68 CLR 571 at 585, 590, 598, 607.

Ms Perovich or Mr Spencer. While Mr Spencer is admitted to practise as a solicitor, he is not currently entitled to exercise his right to practise. These considerations were appropriate guides to the proper exercise of his Honour's discretion.[14] Another consideration which supports his Honour's decision is that there was no evidence before Fryberg J to show that the companies were unable to afford legal representation. Furthermore, it was open to them to advance, on their own behalf, any substantive ground of opposition to the winding up which might have been available to the companies. His Honour's decision was clearly a sound exercise of the discretion conferred on him by s 209 of the *Supreme Court Act 1995*.

[60] On behalf of Mr Perovich and Mr Spencer, it was urged on the hearing of the appeal that they did not understand that it was open to them to make any argument they wished in opposition to the winding up of the companies. This contention must be rejected. Fryberg J explained to Ms Perovich and Mr Spencer, in terms which could not have been misunderstood, that it was open to them to advance, on their own behalf, any ground which might otherwise have been advanced by the companies in opposition to the winding up. Indeed, Fryberg J stated that Mr Spencer was entitled "to make any submissions in opposition to the winding up and … to lead evidence and to tender exhibits should he wish to do so".

[61] For the sake of completeness, I note that it was also submitted in the written outline by Ms Perovich and Mr Spencer that Fryberg J should have granted Ms Perovich or Mr Spencer leave to represent the companies pursuant to s 236 and s 237 of the Act. But no such application was made to his Honour. His Honour cannot be said to have erred in failing to rule favourably upon an application which was not before him.

[62] In any event, Ms Perovich and Mr Spencer did not seek to demonstrate to Fryberg J, as they were unable to demonstrate to this Court, that their ability effectively to oppose the making of the winding up order was in any way prejudiced by the ruling of Fryberg J.

[63] As to the order of Moynihan SJA, Fryberg J considered that the reference in that order to the name of the respondents served to identify the proceeding rather than to effect a grant of leave to Ms Perovich and Mr Spencer, either under s 209 of the *Supreme Court Act 1995*, or under s 236 and s 237 of the Act. That this view of the order of Moynihan SJA was correct is confirmed by the following considerations. First, the words used were "in the name of", not "on behalf of". Secondly, no application, either under s 209 of the *Supreme Court Act 1995*, or under s 236 and s 237 of the Act, was before Moynihan SJA. Thirdly, at the time of the order of Moynihan SJA, the companies were represented by lawyers: there was no occasion or need to permit Ms Perovich or Mr Spencer to represent the companies in lieu of those lawyers. Fourthly, Moynihan SJA acted pursuant to r 2.13 of the *Corporations Proceedings Rules*; this provision is not concerned with the issue of representation and carriage of proceedings, but with who may be heard in a proceeding.

[64] As to the submission that the refusal of an adjournment was unfair, Ms Perovich and Mr Spencer did not demonstrate, either to Fryberg J or to this Court, that any difficulty which they might have experienced in proceeding on 25 November 2005

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[14] *Hubbard Association of Scientologists International v Anderson* [1972] VR 340 at 341 - 344; *Simto Resource Ltd v Normandy Capital Ltd* (1993) 10 ACSR 776 at 781 - 783.

was due to circumstances other than those which were within their control. Nor was any basis identified for believing that material which might answer the application for a winding up would be forthcoming within a reasonable time, or at all, should an adjournment be granted.

[65] In support of its application to wind up the companies, ASIC relied upon evidence that the companies had been placed in receivership on 8 June 2005, and an affidavit of Mr Robinson, a senior accountant employed by ASIC. Among other things, Mr Robinson's affidavit showed that, in April 2005, ASIC had called upon the companies to provide ASIC with a submission demonstrating their solvency. In correspondence to ASIC from the companies' then lawyers in April and May 2005, the companies agreed to obtain and provide a report from an experienced solvency specialist to assist in providing a response to ASIC's request. Two different solvency specialists were identified. No report from either of those specialists was ever forthcoming. By November 2005, when further time was sought to enable a report as to the solvency of the companies to be obtained by them, the companies had been given more than ample opportunity to obtain a report giving a favourable view of the companies' solvency if such a report could be obtained.

[66] It may be noted as well that Mr Robinson's affidavit also exhibited an aged creditors listing which showed that Neolido Pty Ltd had creditors of $396,554.53 whose debts were said to have been outstanding for more than 90 days. An amount of $188,556.94 was said to be outstanding for rates to local authorities. An amount of $349,825.33 was said to be owing in land tax. A sum of $520,482 was said to be claimed by the Australian Taxation Office. All these outstanding debts were indicators that the companies were unable to pay their debts as they fell due from their own resources. The companies had had ample opportunity to respond to Mr Robinson's affidavit.

[67] In the end, ASIC did not seek to rely upon the affidavits which were filed and served late. The winding up order was amply justified by the appointment of the receivers and by Mr Robinson's unanswered affidavit.

[68] On the hearing of the appeal, it was submitted on behalf of Ms Perovich and Mr Spencer that it was unfair of Fryberg J not to allow them more time to obtain evidence or to seek to obtain legal advice and evidence to enable them to resist ASIC's application. This unfairness was said, at first, to lie in the sense of grievance which Ms Perovich and Mr Spencer felt as a result of Fryberg J's order. No authority was cited in support of this approach. The requirements of fairness cannot be measured by the subjective appreciations of litigants. Some litigants are unreasonable; some are dishonest. The entitlement to a fair hearing must be measured by reference to what is reasonably necessary to enable a litigant to have a reasonable opportunity to present his or her case in its best light. A party to litigation is entitled to a sufficient opportunity "for everything to be said that could be said in his [or her] favour".[15] Procedural fairness, so understood, is not denied by the refusal of the court to perform its adjudicative function in order to prevent a sense of grievance at the rejection of exorbitant demands upon, and unreasonable refusals to cooperate with, the administration of justice.

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[15] *South Australia v O'Shea* (1987) 163 CLR 378 at 405. See also at 389; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 660 - 661.

[69] It was then argued on behalf of Ms Perovich and Mr Spencer that the refusal of time to allow them to obtain fully informed legal advice was unfair in an objective sense. But, of course, the companies had been legally represented since at least April 2005. Indeed, they were legally represented on 23 November 2005. Why they were not represented on 25 November was never explained, save by Ms Perovich's assertion that the lawyers then retained were unable to cope with the volume of documentation put forward by ASIC. That assertion was quite lame. If the companies' lawyers were embarrassed in this way, they could have said so. They did not; and, more importantly for present purposes, their inability to cope with the volume of material does not explain their non-appearance. There is simply no evidentiary basis for the suggestion that Ms Perovich and Mr Spencer did not have the opportunity to obtain fully informed legal advice had they been minded to seek it. And, furthermore, no reason was identified to suggest that fully informed legal advice would have improved, in any way, the prospects of a different outcome on ASIC's application for a winding up of the companies.

[70] For the sake of completeness, I note that it was said in the written submissions filed by Ms Perovich and Mr Spencer that the matter was listed for trial without compliance with a direction by Philippides J on 9 June 2005. But the orders made on that day by Philippides J had nothing to do with setting the matter down for trial. In truth, Moynihan SJA, on 23 September, set the matter down for hearing before Fryberg J on 23 November 2005.

The appeal by Ms Perovich and Mr Spencer in CA No 382 of 2006

[71] McPherson JA, acting under s 43(2)(a) of the *Supreme Court of Queensland Act 1991* (Qld) and r 767 of the UCPR, refused the application by Ms Perovich and Mr Spencer for leave pursuant to s 471A of the Act to appeal the winding up order in the names of the companies. McPherson JA said:[16]

> "Their application under s 471A(1)(d) for the approval of the Court to their performing or exercising the function of putting the company in motion to appeal against the winding up order must, in my opinion, also fail. I can see no reason why their performance of that function should be approved by the Court in the case of a company or companies which, because of the statutory presumption created by s 459C(2)(c), are insolvent. It can only result in further wastage of costs on the part of the liquidator, with no offsetting advantage to either the companies or their creditors or, for that matter, to the applicants themselves. Insolvent companies ought to be wound up unless they are placed under some form of authorised administration."

[72] The first difficulty confronting this appeal is that there is no provision for an appeal to this Court from the decision of McPherson JA; his Honour was exercising the powers of the Court of Appeal even though he was sitting alone. But even if there were some basis upon which it was open to this Court to exercise afresh the discretion exercised by McPherson JA, I would not be disposed to exercise that discretion in favour of Ms Perovich and Mr Spencer.

[73] They have been afforded the opportunity of making such submissions in support of their appeal against the winding up order as they wish to make. No basis has been

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16 [2005] QCA 456 at [9].

identified for thinking that these submissions could be improved by attributing them to the companies.

Conclusion and orders

[74] I note that CA No 7976 of 2005 was dismissed at the hearing before this Court (see [34]). I would grant ASIC's applications for leave to appeal against the orders of Fryberg J and Mullins J. I would allow ASIC's appeals, and set aside the condition to the grant of leave to ASIC to apply for the winding up of the companies. As to the costs of these appeals, I would order that the companies pay ASIC's costs of the appeals to be assessed on the standard basis, and that the companies have an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* (Qld) in respect of their costs and their liability for the costs of ASIC.

[75] I would dismiss the appeals by Ms Perovich and Mr Spencer in CA No 11052 of 2005 and CA No 382 of 2006. I would order that they pay ASIC's costs of their appeals to be assessed on the standard basis.

[76] **HOLMES JA:** I have read the reasons for judgment of Williams and Keane JJA. I agree with their Honours' conclusions and with the orders proposed.