SUPREME COURT OF QUEENSLAND

CITATION:	*Re The President's Club Limited; Coeur De Lion Investments Pty Limited v Kelly & Ors* [2012] QSC 364
PARTIES:	**IN THE MATTER OF THE PRESIDENT'S CLUB LIMITED ACN 010 593 263** **COEUR DE LION INVESTMENTS PTY LIMITED ACN 006 334 872** **(applicant)** **v** **PATRICK JOHN KELLY** **(first respondent)** **MARTIN HUGH EDWARDS** **(second respondent)** **BRUCE MURDOCH WALLIS** **(third respondent)** **THE PRESIDENT'S CLUB LIMITED ACN 010 593 263** **(fourth respondent)**
FILE NO:	BS3296 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	22 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2012
JUDGE:	Mullins J
ORDER:	**The application filed on 18 May 2010 is dismissed.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where the applicant shareholder of an unlisted public company applies pursuant to s 237(1) *Corporations Act* 2001 (Cth) for leave to bring a proceeding in the name of the company against three of the four directors to recover consultancy fees paid to the directors without member approval – where there is a serious question to be tried about whether the payments were in breach of s 208(1) *Corporations Act* 2001 (Cth) or in breach of duty – where the company is not likely to bring the proceedings against the directors – whether the applicant is acting in good faith and whether it is in the best interests of the company to grant leave to the applicant

Corporations Act 2001 (Cth), s 180, s 182, s 208, s 209, s 211, s 213, s 236, s 237, s 1317H, s 1318

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, considered
Barker v Duke Group Ltd (in liq) (2005) 91 SASR 167, considered
Chahwan v Euphoric Pty Ltd (2008) 65 ACSR 661, followed
Hannon v Doyle (2011) 82 ACSR 259, considered
MG Corrosion Consultants Pty Ltd v Vinciguerra (2011) 82 ACSR 367, considered
South Johnstone Mill Ltd v Dennis (2007) 163 FCR 343, considered
Swansson v RA Pratt Properties Pty Ltd (2002) 42 ACSR 313, followed

COUNSEL: G A Thompson SC and E J Goodwin for the applicant
L F Kelly SC and M G Lyons for the first, second and third respondents
G D Sheahan for the fourth respondent

SOLICITORS: HopgoodGanim Lawyers for the applicant
Minter Ellison for the first, second and third respondents
King & Wood Mallesons for the fourth respondent

[1] The applicant is a member of the fourth respondent and applies pursuant to s 237(1) of the *Corporations Act* 2001 (Cth) (the Act) for leave to bring a proceeding in the name of the fourth respondent against the first, second and third respondents who are three of the four directors of the fourth respondent. The director of the fourth respondent who is not a party to this proceeding has instructed lawyers to represent separately the fourth respondent. All respondents oppose the application.

The parties

[2] The fourth respondent is an unlisted public company limited by shares. The fourth respondent is the lessee from the applicant under a lease for 80 years from 31 December 1988 (with an option for a further 80 years) of 144 accommodation units (villas) comprising the President's Club which operates as a timeshare scheme at the Palmer Coolum Resort (formerly the Hyatt Regency Coolum). The President's Club villas comprise about 44% of the accommodation available to operate the resort. The applicant was the developer of the resort. In 2003 entities associated with Lend Lease Developments (Lend Lease) took control of the applicant. In about July 2011 Lend Lease sold its shares in the ultimate holding company of the applicant to interests associated with Professor Clive Palmer. The change in control of the applicant in 2011 precipitated the applicant's pursuit of the payments made by the fourth respondent to the first, second and third respondents. That explains the timing of this application, but does not alter the fact that the applicant has remained the same corporate entity throughout the period that is examined in this application.

[3] The timeshare scheme was created by dividing the title to each villa into quarter shares. The constitution of the fourth respondent links 13 specifically numbered

shares to each villa quarter share and the company shares confer on the holder the right to occupy the respective villa for 13 specific weeks in a calendar year. The purchaser of a villa quarter share was allotted the relevant company shares on settlement of the purchase. Each purchaser then executed a referral agreement that relinquished the purchaser's right to occupy for the specific weeks, placed their entitlement in a letting pool managed by Coolum Resort Pty Limited (now known as Palmer Coolum Resort Pty Ltd) (the resort administrator), received the right to share equally in letting pool revenue, and received a right to occupy a villa for the number of nights in their entitlement at any time throughout the year at concessional rates, subject to certain conditions. There are about 325 members of the fourth respondent (including the applicant). Since 1991 the applicant has held about 41% of the shares in the fourth respondent and been the largest shareholder.

[4] The letting pools at the resort are conducted by the resort administrator under the resort administration agreement dated 17 January 2001 to which the applicant, the resort administrator and the fourth respondent are parties. Under the resort administration agreement, the fourth respondent must pay to the resort administrator its contribution of shared costs calculated under the agreement.

[5] The principal activities of the fourth respondent were described in its audited financial report for the 18 months ended 30 June 2004 as:

> "The principal activity of the Company during the financial period was the provision of property administration services on behalf of its members. There were no significant changes in the nature of the activities of the Company during the period.
>
> In prior periods the Company charges its members for all the expenses including a contribution for refurbishment (but net of any interest or other revenue earned) incurred by the Company and the Company does not make a profit or loss. The Company simply acts as a conduit for passing on expenses incurred by the Company to its members. The Company also acts as a conduit for passing on of letting pool income payable by the Resort Administrator to members of the Company. Such income, however, never becomes the income of the Company.
>
> In the current period, a majority of the interest was set aside for use in future refurbishment and resulted in a profit for the Company for the eighteen months ended 30 June 2004."

[6] This financial report described the main income of the fourth respondent as reimbursements received from members for costs paid by the fourth respondent on their behalf to the resort administrator and the main outgoings as distributions of letting pool income to members received on behalf of the members from the resort administrator. The subsequent financial reports for the fourth respondent up to the 2011 financial report described the principal activities of the fourth respondent and its main sources of income and outgoings in similar terms to those found in the 2004 financial report.

[7] The financial year for the fourth respondent was changed in 2004 to end on 30 June instead of 31 December, as a result of Lend Lease's involvement in the resort. Under note 12 in the 2004 financial report for related party information, consultancy

fees paid to the first respondent of $41,000 and the second respondent of $18,880 were expressly recorded under the heading "Other transactions with directors of the Company and their director related entities." This indicated the consultancy fees were different to the directors' remuneration of $67,224 that was recorded under note 11. (Although I will refer to consultancy fees paid to the directors, consistent with the terminology in the financial reports that is a shorthand way of reporting on consultancy fees to the directors or director related entities.)

[8] Similarly, in the fourth respondent's audited financial report for the six months ended 31 December 2004, consultancy fees of $14,000 paid to the first respondent and $3,200 to the second respondent are noted in the report, in addition to the amount paid as directors' remuneration of $16,434. The same pattern of disclosure is followed in the audited financial report for the six months ended 30 June 2005 in respect of the consultancy fees of $15,000 paid to the first respondent and $4,000 paid to the second respondent, in addition to the directors' remuneration of $31,969. The financial report for the six months ended 30 June 2005 reported that the fourth respondent had been granted an indefinite exemption by ASIC on 31 January 2005 in respect of the requirements for managed investments, subject to a number of conditions. These included a limit on the number of representatives of the applicant that may be appointed to the board, a limit on the voting rights of the applicant at meetings of members, and a requirement to hold moneys due to members in a designated trust bank account to be released only in accordance with the resort administration agreement.

[9] In the fourth respondent's audited financial report for the year ended 30 June 2006, note 12 (dealing with key management personnel disclosures) set out the total income paid or payable or otherwise made available to the directors of the company and showed a total amount of $50,768 for directors' fees and $51,800 for consultancy fees. In note 13 dealing with related parties, the consultants' fees are dissected and show $31,000 paid to the first respondent, $20,000 to the second respondent and $800 to the third respondent.

[10] In the fourth respondent's audited financial report for the year ended 30 June 2007, the directors' fees are shown as $41,909 and consultancy fees paid to the directors are shown as $76,700. There is also $12,932 shown as secretarial fees. The first respondent has been the secretary of the fourth respondent since 1997. The secretarial fees are included in the note about payment of income to the directors of the fourth respondent or to director-related entities. I infer the secretarial fees were paid to one or both of the first respondent's companies, but note that the secretarial fees are not the subject of the proposed proceeding. The consultancy fees are further dissected to show $60,000 paid to the first respondent, $9,400 to the second respondent and $3,000 to the third respondent. Disclosures in similar terms are made in the fourth respondent's audited financial report for the year ended 30 June 2008 in respect of directors' fees of $25,387 and consultancy fees of $70,900 which are dissected to show the first respondent received $54,000, the second respondent received $12,200 and the third respondent received $4,700. Secretarial fees are shown at $6,575.

[11] The fourth respondent's audited financial report for the year ended 30 June 2009 shows directors' fees of $17,100, consultancy fees of $54,000 paid to the directors and secretarial fees of $2,250. The consultancy fees are dissected to show $45,000 paid to the first respondent, $7,800 to the second respondent and $1,200 to the third

respondent. Similar disclosures are made in the fourth respondent's audited financial report for the year ended 30 June 2010 in respect of directors' fees of $23,719 and consultancy fees paid to the directors of $34,800 which are shown as comprising $29,200 to the first respondent and $5,600 to the second respondent. There were no secretarial fees paid in the year ended 30 June 2010. Similar disclosures are made in the fourth respondent's audited financial report for the year ended 30 June 2011 in respect of directors' fees of $18,495 and consultancy fees of $33,270 of which the first respondent is shown as receiving $32,000 and the second respondent as receiving $1,270. There were no secretarial fees paid in the year ended 30 June 2011. The 2011 financial report notes that since the end of the financial year the fourth respondent received a notice from the applicant that it intended to revoke the deed it entered into in favour of ASIC dated 31 January 2005 to support the exemption from the requirements of the managed investments legislation.

[12] The first respondent who is a registered valuer became a member of the fourth respondent in November 1992. He was first appointed a director of the fourth respondent on 26 May 1995 and has remained a director. He was appointed chairman of the board of directors on 9 November 1998. The first respondent is also a director and shareholder of Burgess Rawson (Qld) Pty Ltd (Burgess Rawson) which is a diversified property services company including sales, valuation, property management and office leasing. The first respondent owns 20% of the shares in Burgess Rawson. Pat Kelly & Associates Pty Ltd of which the first respondent is the sole director and shareholder own 40% of the shares in Burgess Rawson.

[13] The second respondent became a member of the fourth respondent in 1992. He became a director of the fourth respondent on 16 June 2003 and deputy chairman in November 2004. The second respondent is a property management and marketing specialist and a director of MCM Management Pty Ltd.

[14] The third respondent who is a chartered accountant purchased his shares in the fourth respondent in December 1994 and subsequently transferred those shares to a company controlled by his wife and him in June 1995. He has been a director of the fourth respondent since 20 October 2004.

The proposed proceeding

[15] Mr Welch (who was then the solicitor for the applicant) inspected the books and records of the fourth respondent on 6 February 2012 and ascertained from the financial reports for the fourth respondent for the period 2004 to 2011 that payments were made to the first, second and third respondents as directors of the fourth respondent that were referred to as consultancy fees. He summarised the payments in a table:

	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
P Kelly	$65,700	$29,000	$31,000	$60,000	$54,000	$45,000	$29,200	$32,000
M Edwards	$18,880	$7,200	$20,000	$9,400	$12,200	$7,800	$5,600	$1,270
B Wallis			$800	$3,000	$4,700	$1,200		
SUB-TOTAL	**$84,580**	**$36,200**	**$51,800**	**$72,400**	**$70,900**	**$54,000**	**$34,800**	**$33,270**

[16] It appears from the fourth respondent's financial report for the 18 months ended 30 June 2004 that the consultancy fees paid to the first respondent during the period of 18 months ended on 30 June 2004 was $41,000, and the figure shown in the above

table of $65,700 includes the sum of $24,700 that is shown in the same financial report as being the consultancy fees paid to the first respondent in the 2002 calendar year.

[17] Searches undertaken by the applicant's solicitors of the minutes of the general meetings of the fourth respondent ascertained there was no record of the approval of the consultancy fees by the shareholders of the fourth respondent in general meeting.

[18] By letter dated 13 February 2012 to the fourth respondent, the applicant's solicitors gave notice pursuant to s 237(2)(e) of the Act that, unless the fourth respondent confirmed within 14 days that it would bring proceedings against the directors for breach of statutory and fiduciary duties by seeking payment of, and receiving payment for, remuneration as directors which had not been authorised by the shareholders in general meeting, the applicant intended to make an application for leave to bring the proceeding on behalf of the fourth respondent.

[19] The applicant wishes to proceed on the basis of the form of the statement of claim that was circulated on 25 October 2012. The applicant alleges that between 2004 and 2011 the fourth respondent unlawfully paid consultancy fees to the first respondent in the amount of $345,900, to the second respondent in the amount of $82,270, and to the third respondent in the amount of $9,700. It is alleged the consultancy fees were unlawful because they were not permitted under the constitution of the fourth respondent, not approved by the members of the fourth respondent, in breach of the no profit duty and the no conflict duty, and made without any consideration being given to s 208(1)(a) of the Act. Each of the first, second and third respondents is alleged to be involved in the contravention alleged against each of the other respondents and thereby to have contravened s 209(2) of the Act. The applicant wishes to pursue on behalf of the fourth respondent compensation under s 1317H of the Act for the unlawful payments based upon contraventions by the directors of s 180, s 182(1), and s 209(2) of the Act, equitable compensation or an account of profits for breach of fiduciary duties, or a claim for moneys had and received. There are no allegations in the proposed statement of claim that the first, second and third respondents did not provide the respective services for which the consultancy fees were paid or that the consultancy fees were not reasonable remuneration for the services provided.

Section 237 of the Act

[20] As a member of the fourth respondent, the applicant is qualified pursuant to s 236(1)(a) of the Act to apply for leave to bring the proceeding in the name of the fourth respondent.

[21] Section 237(2) of the Act provides:

> "(2) The Court must grant the application if it is satisfied that:
>
> (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
>
> (b) the applicant is acting in good faith; and
>
> (c) it is in the best interests of the company that the applicant be granted leave; and

> (d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and
> (e) either:
> (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
> (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied."

[22] The applicant bears the onus of satisfying the requirements set out in s 237(2) of the Act and leave to bring a derivative action "must not be given lightly": *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at [24].

[23] The respondents concede that it is probable that the fourth respondent will not itself bring the proceeding, so that s 237(2)(a) is satisfied.

The circumstances of the payment of the consultancy fees to the first, second and third respondents

[24] The following summary of the circumstances of the payment of the consultancy fees has been taken from the affidavits of the first, second and third respondents and supplemented by information contained in the fourth respondent's financial reports. Except to the extent that the first respondent was cross-examined, the affidavits of the first, second and third respondents were largely unchallenged for the purpose of this application. I am not making findings to the effect of what is in the summary, but the summary provides the context for considering the issues under s 237(2) of the Act.

[25] Apart from a period of about six months around 2005 when the fourth respondent had an employee working on site, the fourth respondent has not employed staff. The directors have received administrative assistance from the staff of the resort administrator.

[26] The commencement of legislation regulating managed investment schemes which applied to the fourth respondent's timeshare scheme resulted in the then directors of the fourth respondent, including the first respondent, negotiating with ASIC over a period of 10 months to obtain an exemption that was granted on 30 March 2001 with effect until 30 June 2004. The effect of the relevant legislation on the fourth respondent's operations was described in the directors' report contained in the 2004 financial report:

> "The Managed Investments Act 1998 applies to the operations of the company.
>
> Due to its structure the Company was unable to comply with the requirements of the Corporations Law for the new managed investments regime and was granted a conditional exemption by ASIC allowing non-compliance until 30 June 2004. That conditional exemption has been extended to 31 October 2004 and negotiations with ASIC for a permanent or long-term exemption continue.

> Should any of the conditions of the current exemption be breached and/or negotiations with ASIC not result in a satisfactory extension thereof, or in a further exemption being granted, the structure of the Company's pooling arrangements will have to be substantially revised to comply with the managed investments scheme regime or, on a worst-case basis, the Company may need to cease operations.
>
> There is significant uncertainty regarding the outcomes of the current negotiations with ASIC and hence whether the Company will continue as a going concern and be able to realise its assets and extinguish its liabilities in the normal course of business and at the amounts stated in the financial report.
>
> The directors and the Company's lawyers have been working continuously on the issue and are closely monitoring the position to try to ensure an outcome that enables the pooling arrangements to continue for the benefit of villa owners and other stakeholders in the resort, and to enable the Company to continue its operations.
>
> The directors are of the opinion that the Company will meet the conditions set out in any exemption and so have continued to adopt the going concern basis for the preparation of this financial report."

[27] It was in the context of this additional work required of the directors to obtain the ASIC exemption that the board of the fourth respondent passed a resolution on 12 February 2001:

> "ADDITIONAL PAYMENT TO CHAIRMAN/DIRECTORS
> RESOLVED that the Board ratify payment to the Chairman and other Directors at the rate of $200 per hour for time spent on club business outside Board meetings."

[28] The first, second and third respondents rely on this resolution as authorising the payments made to them for consultancy fees. The first respondent's work for the fourth respondent (additional to board meetings) has been charged at $200 per hour since 2001. The first respondent claims that his personal assistant and other administrative staff at Burgess Rawson have carried out work for the benefit of the fourth respondent in order to support the first respondent and Burgess Rawson resources, such as stationery and telecommunications services, have been used for the benefit of the fourth respondent. For that reason the first respondent invoiced some of the work he carried out for the fourth respondent through Burgess Rawson, so that the consultancy fees would compensate Burgess Rawson rather than him directly for the time he spent on the fourth respondent's work. According to the first respondent, had he been aware that there was a dispute about whether the consultancy fees were authorised, he would have raised it at a general meeting for the members to vote upon and would not have issued invoices for consultancy fees until authorisation was resolved.

[29] The second and third respondents were told by the first respondent about the additional payment for work performed outside board meetings after they joined the board. According to the second and third respondents, they would not have performed the work that was the subject of the invoices, if they had known that there was a dispute as to whether the payments were authorised.

[30] The first respondent outlined the process he undertook to invoice the fourth respondent for work he performed outside board meetings. He made a "running log" in a notebook of the work he carried out. At the close of each invoice period, he estimated the amount of time spent and invoiced the fourth respondent. He explained that he did not record the amount of time spent on each task due to "the busy nature of my day to day work". The notebook records were destroyed in the January 2011 floods. From at least March 2006 onwards, each invoice was accompanied by a chairman's activity statement which he compiled from his daily notes, which listed the day on which the first respondent did work for the fourth respondent, the identity of any contact and a very brief description of the activity, but did not contain an estimate of the time spent on the activities.

[31] When the ASIC exemption period was about to expire in 2004, the first respondent spent significant time negotiating with ASIC for a further exemption. The further ASIC exemption that was obtained was conditional upon the applicant limiting its voting power in the fourth respondent to 10% of the votes that may be cast on a resolution by members of the fourth respondent.

[32] In 2005 the applicant sought to redevelop parts of the resort without the permission of the fourth respondent which the fourth respondent considered was in breach of the resort administration agreement. The fourth respondent instituted proceedings against the applicant seeking to restrain it from developing the resort without the fourth respondent's consent. The dispute was eventually settled in August 2007. This dispute with the applicant required significant input from the first, second and third respondents in instructing lawyers and negotiating the settlement. Meetings were held with members in Melbourne, Sydney, Adelaide and Brisbane.

[33] A major refurbishment of the villas commenced in 2005 which was met by levies imposed on members of the fourth respondent. The cost for refurbishing about half the villas between 2005 and 2007 was about $5.1 million. The refurbishment commenced under the control of Hyatt, the applicant and the resort administrator, but the first respondent was of the opinion that those parties were not managing the refurbishment in the interests of members of the fourth respondent and the board of the fourth respondent took control of the refurbishment. That resulted in the second respondent project managing the refurbishment with significant input from the first and third respondents. The second respondent was directly involved in the design of the interiors of the villas, the fittings used, the construction programs, the costing and the budgeting and described himself as effectively being "the members' representative for the expenditure on these programs." The first respondent considers that after the board took control of the refurbishment, there was a 30% to 40% saving on the first stage of the refurbishment, the original contractor was replaced, and there were significant costs savings in all later stages of the refurbishment.

[34] A further refurbishment of other villas occurred in 2010-2011 for $5 million. According to the first respondent, however, the refurbishment had to be planned, and he undertook meetings concerning the finances for and planning the refurbishment that are recorded in his 2008 activity statements.

[35] The tax invoices issued by MCM Management Pty Ltd contain a description of the services provided and the number of hours of work for which the second respondent's company has charged at the rate of $200 per hour.

[36] The third respondent found himself spending much additional time on the fourth respondent's dispute with the applicant over the proposed redevelopment of the resort from late 2005 and as the time that he contributed increased, he sought some reimbursement for attendance at meetings, due diligence and discussions which involved preparing material for the court proceeding, settlement of the deed and the ongoing role in monitoring the refurbishment. The third respondent's invoices specify the date of the activity on which he was engaged for the fourth respondent, the period of time that was involved and a brief description of the activity.

[37] At the hearing of the application, the applicant required the first respondent for cross-examination. He was cross-examined by reference to particular bundles of invoices and the expenses of the board meeting on 24 November 2008 (exhibits 1 to 4). Although the proposed statement of claim does not raise any issue about the reasonableness of the consultancy fees or whether the services (for which the consultancy fees were paid) were provided, some of the cross-examination of the first respondent appeared directed at those issues or used those issues to test the first respondent's credit. The nature of the application for leave under s 237 of the Act does not require any findings to be made on the ultimate facts that may be in dispute between the parties and it is not appropriate to do so. The cross-examination of the first respondent did give the first respondent the opportunity amplify the contribution of the first, second and third respondents to the business of the fourth respondent in relation to the ASIC exemption, the dispute with the applicant when it was controlled by Lend Lease that took place between 2005 and 2007 and the refurbishment of the villas.

[38] The fact of the payment of the consultancy fees to the first, second and third respondents and the quantum of those fees (which were clearly in addition to directors' fees) were disclosed in each of the financial reports from which the applicant was able to extract the details of consultancy fees for the purpose of bringing this application. The managed investments legislation meant the ASIC exemption was required to enable the fourth respondent to continue with the timeshare scheme that was operated for the benefit of its members including the applicant. When the resolution approving payment of consultancy fees was passed at the board meeting on 12 February 2001, Mr Bruce Hamilton who was then a director for the applicant was also a member of the board of the fourth respondent and was present at that meeting. The minutes of the fourth respondent's annual general meetings from 2004 to 2011 show that the relevant audited financial report was tabled and adopted at each of the meetings. According to the first respondent, the financial reports that were tabled at the annual general meetings were sent to the members of the fourth respondent with the minutes of the relevant annual general meeting. The first respondent recalls that representatives of the applicant were present at each annual general meeting, but has not located the attendance registers for the meetings before 2009 and 2010 and states that no objections were raised in relation to the consultancy fees until after Lend Lease had sold its interests in the applicant. The attendance registers for the 2009 and 2010 meetings confirm the attendance of a representative of the applicant at the meetings.

Whether there is a serous question to be tried

[39] On an application of this nature, the court is not required in deciding whether there is a serious question to be tried to enter into the merits of the proposed proceeding to any great degree: *Hannon v Doyle* (2011) 82 ACSR 259 at [48]. This is the

"relatively low threshold" test that is used on an application for an interlocutory injunction: *Swansson* at [25].

[40] The first, second and third respondents rely on either the board resolution passed on 12 February 2001 or clause 60 of the fourth respondent's constitution as a complete answer to the applicant's claims against them. Clause 60 of the constitution provides:

> "No member of the Board shall be disqualified by his or her office from contracting with the Company either as vendor, purchaser or otherwise nor shall any such contract, or any contract or arrangement entered into by or on behalf of the Company in which any member of the Board shall be interested in any way be avoided, nor shall any member of the Board so contracting or being so interested be liable to account to the Company for any profit realised by any such contract or arrangement by reason of such member of the Board holding that office or the fiduciary relationship thereby established, but it is declared that the nature of his or her interest must be disclosed by the Board Member at the meeting of the Board at which the contract or arrangement is determined or if his or her interest then exists, or in any other case at the first meeting of the Board after the acquisition of his or her interest."

[41] There is no doubt that the board resolution of 12 February 2001 is relevant to the belief of the first, second and third respondents, as to the propriety of their claims for consultancy fees, but it is arguable that its terms do not extend to future claims or could not have been intended to authorise claims made up to 10 years from the passing of the resolution. In any case, as the fourth respondent is a public company, neither the existence of the resolution passed on 12 February 2001 by the board nor clause 60 of the fourth respondent's constitution addresses the issue of member approval for financial benefits conferred on the directors of a public company, as regulated by part 2E.1 of the Act. Although the fourth respondent's audited financial reports disclosed the consultancy fees, the tabling and adoption of those reports at the relevant annual general meetings of the fourth respondent did not comply with s 208(1) of the Act. Unless one or more of the exceptions in ss 210 to 216 of the Act apply, the payments of the consultancy fees to the first, second and third respondents were made without the approval of the members of the fourth respondent and were prima facie in breach of s 208(1) of the Act. As anticipated by the proposed statement of claim in relation to the consultancy fees paid to the second respondent in 2011, s 213(1) relieves against payments in a total annual amount of less than the amount prescribed by the regulations for the purposes of s 213(1) of the Act which has been the sum of $5,000 since 1 July 2007 and was the sum of $2,000 for the preceding years. This exception also applies to most of the consultancy fees paid to the third respondent. The applicant seeks to hold each of the second and third respondents liable for their involvement in the contravention of s 208 in respect of consultancy fees paid to the other directors. The respondents have foreshadowed reliance on s 211 of the Act.

[42] If there is a serious question to be tried on whether most of the consultancy fees were paid in breach of s 208(1) of the Act or in breach of duty, it is not necessary to evaluate the prospects of the success of the claim or whether any amount that is likely to be recoverable makes the claim worthwhile. This reflects the low threshold test. The applicant is able to show from the mere fact of the payment of

the consultancy fees without member approval where (without a trial) the undisputed facts do not relieve the first, second and third respondents for possible breach of s 208 of the Act or breach of duty in relation to all impugned consultancy fees that there is a serious question to be tried in the proceeding.

Whether the applicant is acting in good faith

[43] It has been recognised that there is some overlap in the requirements of paragraphs (b), (c) and (d) of s 237(2) of the Act, and they are not mutually exclusive: *Chahwan* at [68]. The fact that the applicant has shown there is a serious question to be tried is relevant to, but not necessarily determinative of, whether the applicant can show that it is acting in good faith in seeking to bring the proposed proceeding or it is in the best interests of the fourth respondent to grant leave to the applicant to bring the proposed proceeding. It is analogous to the position that an applicant will not be successful in obtaining an interlocutory injunction by merely showing there is a serious question to be tried, as it is also necessary for the applicant to satisfy the court that the balance of convenience favours the grant of an injunction: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65].

[44] Palmer J in *Swansson* at [35]-[36] refrained from endeavouring to state all the considerations to which courts will have regard in determining whether an applicant is acting in good faith on the basis that "[T]he law will develop incrementally as different factual circumstances come before the courts." Palmer J then identified at least two interrelated factors relevant in determining whether the good faith requirement of s 237(2)(b) of the Act is satisfied:

> "The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process."

[45] That statements of Palmer J in *Swansson* at [35]-[36] were approved in *Chahwan* at [81]-[82].

[46] The applicant bears the onus to show that it is acting in good faith: *Chahwan* at [69]. The applicant relies on the fact that it is the largest shareholder of the fourth respondent and therefore has a legitimate interest in the financial affairs and governance of the fourth respondent and in recovering compensation for damage done to the fourth respondent by a director's receipt of unlawful payments in breach of duty.

[47] The first, second and third respondents contend that the applicant has failed to discharge that onus. The two reasons identified by the first, second and third respondents for why the applicant is not acting in good faith are that the applicant is advancing its own interests to gain control of the fourth respondent and the applicant has been complicit for over a decade in the conduct of the first, second and third respondents of which it now complains. It is noted by the first, second and third respondents that the only deponents who have sworn affidavits on behalf of the applicant are its solicitors.

[48] The fourth respondent submits that the circumstances in which the applicant came to institute this proceeding are relevant to the issue of good faith, in that, apart from identifying the consultancy fees in the financial reports of the company and confirming there was no relevant minute of shareholders' meetings approving the payment of the consultancy fees, it did not undertake any investigation as to the benefit obtained by the fourth respondent from the services provided by the first, second and third respondents for which the consultancy fees were paid.

[49] It is common ground that there are other proceedings between the applicant and the fourth respondent that were commenced subsequent to the notification given by the applicant on 13 February 2012 of the intention to apply for leave to bring the proposed proceeding. A company associated with Professor Palmer made a takeover bid for the shares in the fourth respondent on 12 April 2012 and the fourth respondent on 26 June 2012 took proceedings before a Takeovers Panel and obtained a declaration of unacceptable circumstances regarding the offer to acquire all the shares in the fourth respondent. The fourth respondent has also taken proceedings against the applicant in relation to specific performance of the resort administration agreement.

[50] The mere fact that there are other dealings which show that interests associated with the applicant are keen to gain total control of the fourth respondent does not mean that the applicant is otherwise not acting in good faith, as far as the proposed proceeding is concerned, where there is otherwise a serious question to be tried in respect of the proposed proceeding. It is not necessary for an officer of the applicant to swear as to the good faith of the applicant before the applicant can discharge the onus of showing that it is acting in good faith: *South Johnstone Mill Ltd v Dennis* (2007) 163 FCR 343 at [69].

[51] The aspect that causes difficulty on the issue of the good faith of the applicant is the failure of the applicant to address why it took no step from the annual general meeting in 2004 onwards to challenge the directors on compliance with s 208(1) of the Act and/or the propriety of the first, second and third respondents claiming consultancy fees, in addition to the directors' fees approved at the annual general meetings, and to request particulars of the method of charging for the services provided. This failure is particularly acute when the applicant has otherwise gained benefits as a member from the services of the first, second and third respondents in obtaining and maintaining the ASIC exemption which enabled the fourth respondent to continue to operate its timeshare scheme and the applicant's own conduct over the proposed redevelopment of the resort in 2005 that was opposed by the fourth respondent generated much additional work for the first, second and third respondents. As all members were, the applicant was informed on an annual basis of the quantum of the consultancy fees paid to the first, second and third respondents and their director related entities. The failure of the applicant to address its own inaction in these circumstances for the purpose of the application is directly relevant to its proposal that action should now be taken on behalf of the fourth respondent in respect of those consultancy fees that were paid each year since 2002. The applicant therefore has not shown that it is acting in good faith in seeking to bring the proposed proceeding against the first, second and third respondents at this point in time.

Whether it is in the best interests of the fourth respondent to grant leave to the applicant

[52] As was observed in *Swansson* at [55], s 237(2)(c) of the Act requires the court to be satisfied that the proposed proceeding is in the best interests of the company, rather than the proposed proceeding "may be, appears to be, or is likely to be, in the best interests of the company." This issue involves a "higher threshold" test than the issue of whether there is a serious question to be tried: *Swansson* at [56].

[53] On 30 August 2012 the applicant provided a letter to its solicitors in which it confirmed that the applicant undertakes to indemnify the fourth respondent in respect of any costs of this proceeding, including any adverse costs orders that might be made against the fourth respondent.

[54] The applicant puts its argument as to the proceeding being in the best interests of the fourth respondent on the basis that it is an opportunity for the fourth respondent to recover up to $437,870 in unlawful payments to the first, second and third respondents. In addition, it is put that the applicant, as the largest shareholder of the fourth respondent, is an appropriate party to bring the proposed proceeding and is well resourced and represented, and there is no evidence that the proposed statement of claim would be bad for the fourth respondent's business. The applicant submits that what constitutes a just allowance, if any, for the services for which the consultancy fees were paid is not an issue to be decided on this application. The applicant also contends that no final determination should be made about the application of a limitation period (relying on *Barker v Duke Group Ltd (in liq)* (2005) 91 SASR 167 at [100]-[104]) and that, even if only $290,000 would be repayable after applying the statutory limitation period, that is a considerable sum of money paid unlawfully to the first, second and third respondents.

[55] The respondents assert that the court cannot be satisfied that the proposed proceeding will generate any return or benefit to the fourth respondent. The respondents submit that the applicant's case is merely that the payments to the relevant directors were unauthorised and that the entire amount is recoverable without attempting to investigate the benefits accruing to the fourth respondent from the services rendered by the first, second and third respondents and what was reasonable compensation for those services.

[56] The first, second and third respondents rely on s 1318(1) of the Act and s 211 of the Act. The applicant counters that, if the respondents were to rely on these provisions, there would have to be a trial to ascertain the circumstances in which the consultancy fees were paid to assess the honesty of the conduct of the first, second and third respondents, whether it were fair to relieve them of the consequences of their default, and to determine the extent of the work done and whether it overlapped with other duties for which payments were made.

[57] The first, second and third respondents submit that, if member approval were required for the payment of the consultancy fees, they have a strong case for having their liability excused in circumstances where:

(a) the fourth respondent operates in a complicated legal framework involving relationships with its members the applicant, the resort administrator and, until recently, Hyatt;

(b) the board passed a resolution authorising the payments of the consultancy fees;

(c) the fees were openly disclosed in the fourth respondent's reports which were adopted by the members at annual general meetings;

(d) issues arose that required substantial periods of time to be devoted by the first, second and third respondents to protecting the fourth respondent's interests;
(e) the first, second and third respondents provided services for the fees;
(f) no complaint was made about the fees by the applicant until Professor Palmer became involved.

[58] The first, second and third respondents also rely on these factors to support a strong defence of laches.

[59] The proposition that "[I]t generally follows that pursuit of an action by or on behalf of a company against an officer for recovery of compensation for damage done to the company by the officer's breach of duty is in 'the best interests of the company'." was approved in *MG Corrosion Consultants Pty Ltd v Vinciguerra* (2011) 82 ACSR 367 at [60]. It is a proposition, however, that is a starting point for consideration of the issue and the circumstances in a particular case can displace the application of the proposition.

[60] There is a fundamental difference in approach between the applicant and the respondents, as to the relevance on this application of the fact that the consultancy fees were paid to the first, second and third respondents for services that were rendered to the fourth respondent, where the fact that the services were so rendered is not challenged in the proposed statement of claim. The applicant argues that the value of the work undertaken is a matter upon which each of the first, second and third respondents would bear the onus of proof in the proposed proceeding and it is therefore not a matter which has to be considered for the purpose of deciding this application.

[61] The requirement that the proposed proceeding is in the best interests of the fourth respondent adds something tangible to the requirement that there is a serious question to be tried. To the extent that the payments of consultancy fees may be found to be within the exception of s 211 of the Act or the first, second and third respondents may be excused from liability for repaying the consultancy fees under s 1318(1) of the Act, the prospects of the fourth respondent recovering an amount that makes bringing the proceeding worthwhile for the fourth respondent may be in question. It could not be in the best interests of the fourth respondent to recover little or nothing from the proposed proceeding. I accept that it is not appropriate to determine on this application the effect of statutory limitations, but obvious substantive defences to the proposed proceeding cannot be overlooked in determining what is in the best interests of the fourth respondent.

[62] Although the first, second and third respondents would have the onus of proving the application of either s 211 or s 1318(1) of the Act in the proposed proceeding, the applicant has to address the possible application of those provisions in discharging its onus of showing on this application that the proposed proceeding will be in the best interests of the fourth respondent. This is particularly so, when the form of the statement of claim for the proposed proceeding does not challenge that the consultancy fees were paid for services rendered by the first, second and third respondents of which the applicant itself had knowledge (and arguably some benefit) at the time the services were rendered. The applicant merely relied on the gross amount of the consultancy fees and made no attempt to show that the likely

recoverable amount from the proposed proceeding made it in the best interests of the fourth respondent to bring the proposed proceeding.

[63] I cannot conclude on the material put forward for this application that the applicant has satisfied the higher threshold test for this issue and discharged the onus of showing that the proposed proceeding is in the best interests of the fourth respondent.

Orders

[64] As the applicant has not discharged the onus it bears to satisfy the court of the matters set out in paragraphs (b) and (c) of s 237(2) of the Act, it follows that the application filed on 18 May 2012 must be dismissed. I will give the parties an opportunity to consider these reasons and make submissions on costs, before making orders as to the costs of the application.