SUPREME COURT OF QUEENSLAND

CITATION:	*Furniss v Blue Sky Alternative Investments Limited* [2021] QSC 46
PARTIES:	**DAVID FURNISS** (applicant) **v** **BLUE SKY ALTERNATIVE INVESTMENTS LIMITED (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)** ACN 136 866 236 (respondent)
FILE NO/S:	BS No 10824 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2021
DELIVERED AT:	Rockhampton
HEARING DATE:	9 December 2020
JUDGE:	Crow J
ORDER:	**1. The parties are to confer and agree to an appropriate order which reflects these reasons including, if agreement is reached, costs within 14 days herein.** **2. If the parties cannot agree as to the appropriate costs order, then they are to file and serve submissions on costs as follows:** **a. The respondent within 17 days; and** **b. The applicant within 20 days.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OTHER ACTION OR REMEDIES – TO ENFORCE PERSONAL RIGHTS OF MEMBER – where the applicant is a shareholder of the respondent company – where the respondent company is in receivership – where the applicant seeks, pursuant to s 247A of the *Corporations Act* 2001 (Cth), an order for inspection of the books of the respondent company – where the applicant deposes that the purpose of the inspection is to investigate the prospect of a claim and that any such claim would likely be brought by the applicant as a member of a representative proceeding –

whether the application is brought for a proper purpose within the scope of s 247A of the *Corporations Act* 2001 (Cth) – whether an order for inspection ought be made

Corporations Act 2001 (Cth), s 247A

Cescastle Pty Ltd v Renak Holdings Ltd (1991) 6 ACSR 115, applied
Evans v Davantage Group Pty Ltd No 2 [2020] FCA 473, cited
Ingram Superannuation Fund v Ardent Leisure Limited [2020] FCA 1302, considered
Ito & Anor v Shinko (Australia) Pty Ltd & Anor [2004] QSC 268, cited
London City Equities Limited v Penrice Soda Holdings Limited (2011) 281 ALR 519; [2011] FCA 674, applied
Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd [2019] QSC 250, cited
McNeill v Hearing & Balance Centre Pty Ltd [2007] NSWSC 944, cited
Mesa Minerals Ltd v Mighty River International Ltd (2016) 241 FCR 241; [2016] FCAFC 16, applied
Re Claremont Petroleum NL (No 1) (1990) 2 Qd R 31, followed
Re Style Limited (2009) 255 ALR 63; [2009] FCA 314, cited
Simpson v Thorne Australia Pty Ltd t/a Radio Rentals No 4 [2019] FCA 1129, cited
Smartec Capital Pty Ltd v Centro Properties Ltd & Anor (2011) 83 ACSR 461; [2011] NSWSC 495, considered
Snelgrove v Great Southern Managers Australia Ltd (in liq) (recs and mgrs apptd) [2010] WASC 51, cited

COUNSEL: R Bain QC, with E Goodwin, for the applicant
A Crowe QC, with P Ahern, for the respondent

SOLICITORS: Piper Alderman for the applicant
Gilbert + Tobin for the respondent

Introduction

[1] Blue Sky Alternative Investments Limited ("Blue Sky") was incorporated on 30 April 2009. Blue Sky has paid up capital of $66,422,193.60 and 56,047,589 ordinary issued shares.[1] On 19 January 2018 the applicant, Mr Furniss, a chartered accountant, purchased 722 shares in Blue Sky at $13.80 per share, an investment of $9,963.60;[2] Mr Furniss still owns those shares.

[2] On 28 March 2018, Glaucus Research Group ("Glaucus"), a US short-seller, released a report that was highly critical of Blue Sky's financial management, and in particular, the way in which Blue Sky valued its fee-earning assets under

1 Exhibit NJB-2 to the affidavit of Nicholas John Burkett filed 9 October 2020.
2 Paragraph 5 of the affidavit of David Furniss filed 9 October 2020.

management ("AUM"). The fees earned by Blue Sky's AUM were, by far, the most significant factor in the generation of revenue by Blue Sky and accordingly, the value of Blue Sky's shares.

[3] The Glaucus report, a document of some 67 pages, contains detailed information, most of which is highly critical of Blue Sky.[3] The introduction to the Glaucus report includes a disclaimer that: "[w]e have a short interest in Blue Sky's stock and therefore stand to realize significant gains in the event that the price of such instrument declines."

[4] The report noted that Blue Sky was trading at $11.43 per share at that time, yet Glaucus' own valuation was that each share was worth less than $2.66.[4]

[5] Glaucus based its analysis of Blue Sky's financial position upon "Blue Sky's public filings". Mr Furniss deposes that he had not heard of Glaucus before the publication of its report of 28 March 2018.[5]

[6] On 3 April 2018, Blue Sky issued a public statement rejecting all criticism made by Glaucus and confirming its previous ASX releases.[6] On 5 April 2018, Glaucus released a further report which was, again, highly critical of Blue Sky.[7] On 16 April 2018, Blue Sky announced it would be undertaking a valuation review of every asset it managed. The result of this review, released June 2018, showed that Blue Sky's fee-earning AUM had decreased from $4.1 billion in March 2018 to $3.4 billion as at 31 May 2018.[8]

[7] On 20 May 2019, Blue Sky's share price was $0.185 (18.5 cents) and it was placed into receivership and voluntary administration. Mr Furniss, who deposes that he bought the shares in Blue Sky as a long-term investment for capital growth and dividends,[9] says that he has not been able, from any publicly available information, to identify the causes of the significant reduction in value of Blue Sky's fee-earning AUM immediately following the release of the Glaucus reports in March and April 2018.

[8] I accept Mr Furniss' evidence as to the purpose for which he seeks to inspect the books of Blue Sky as follows:[10]

> "24. I wish to inspect relevant books of Blue Sky AI to investigate and determine:
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> 24.1 whether Blue Sky AI had information, prior to me acquiring my shares, which was not disclosed to the market but should have been. If such information existed and had been disclosed, I might (depending on the information) not have acquired by shares in Blue Sky AI;

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3 Exhibit NJB-17 to the affidavit of Nicholas John Burkett filed 9 October 2020.
4 Exhibit NJB-17 to the affidavit of Nicholas John Burkett filed 9 October 2020.
5 Paragraph 12 of the affidavit of David Furniss filed 9 October 2020.
6 Exhibit NJB-18 to the affidavit of Nicholas John Burkett filed 9 October 2020.
7 Exhibit NJB-19 to the affidavit of Nicholas John Burkett filed 9 October 2020.
8 Paragraph 17 of the affidavit of David Furniss filed 9 October 2020.
9 Paragraph 5 of the affidavit of David Furniss filed 9 October 2020.
10 Paragraph 24-26 of the affidavit of David Furniss filed 9 October 2020.

24.2 whether Blue Sky AI acquired information after I purchased my shares which (i) was not disclosed to the market but should have been or (ii) was disclosed to the market but not in a timely way. If such information existed and had been disclosed on time, I might (depending on the information) have sold my shares or some of them, before the Glaucus reports were published or even shortly after the Glaucus reports were published;

24.3 whether there was information which was disclosed but was misleading or deceptive or otherwise inaccurate;

24.4 whether I have any potential claim against Blue Sky AI or its directors and other officers, or its auditor, Ernst & Young, for compensation for the loss in value of my Blue Sky AI shares;

24.5 whether Blue Sky AI holds insurance policies that might respond to a claim against its directors and other officers (past and present).

25. If I do bring a claim against Blue Sky AI, its directors and other officers (past or present) or Ernst & Young, it would likely be as part of a representative proceeding.

26. The existence and terms of any insurance policy covering the directors and officers of Blue Sky AI is relevant to my assessment of the utility in bringing any available claim against the directors and officers."

[9] On 9 October 2020, Mr Furniss filed an application seeking leave to proceed under s 444E(3)(c) of the *Corporations Act* 2001 (Cth) ("*Corporations Act*") and an application under s 247A of the *Corporations Act* against Blue Sky.

[10] The respondent does not oppose leave being granted pursuant to s 444E(3)(c) and for the reasons which follow, I consider it appropriate to grant leave to proceed.

[11] Section 247A(1) and (2) of the *Corporations Act* provide:

"247A Order for inspection of books of company or registered scheme

(1) On application by a member of a company or registered scheme, the Court may make an order:

(a) authorising the applicant to inspect books of the company or scheme; or

(b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.

> The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.
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> (2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise."

[12] In *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 (*Mesa Minerals*) Katzmann J, with whom Siopis and Gilmour JJ agreed, listed 13 general principles to consider when applying s 247A of the *Corporations Act*:[11]

> "…
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> (1) The stipulation that an application be made in good faith and for a proper purpose is a composite notion rather than two distinct requirements: *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151 (*Knightswood Nominees)* at 540-541. That is to say, as Brooking J put it in *Knightswood* at 156:
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> > [T]he reference to good faith colours and so reinforces the requirement of proper purpose Acting in good faith and inspecting for a proper purpose means acting and inspecting for a bona fide proper purpose. It is as if the case was one of hendiadys.
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> (2) Good faith and proper purpose must be proved objectively: *Acehill,* citing *Barrack Mines Ltd v Grants Patch Mining Ltd* [1988] 1 Qd R 606 (Full Court) (*Barrack Mines Appeal*) and *Knightswood*. See also the discussion in Mantziaris, C "The member's right to inspect the company books: Corporations Act, s 247A" (2009) 83 ALJ 621 at 628-9.
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> (3) 'Proper purpose' means a purpose connected with the proper exercise of the rights of a shareholder as shareholder and not, for example, as a litigant in proceedings against the company or as a bidder under a takeover scheme: *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 (*Cescastle)* at 117-118.
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> (4) The onus of proof is on the applicant: *Quinlan v Vital Technology Australia Ltd* (1987) 5 ACLC 389 (*Quinlan)* at 393.
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> (5) An applicant who has a significant holding and who has been a shareholder for 'some considerable time' will more easily discharge the onus than one who has recently acquired a token holding: *Quinlan* at 393.

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11 *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 at 245-246. At first instance further principles were listed, see: *Mighty River International Ltd v Mesa Minerals Ltd* [2015] FCA 462 at [25] per Barker J.

(6) It is not necessary that the applicant show that its interests are different to those of other shareholders: *Yara Australia Pty Ltd v Burrup Holdings Ltd* 80 ACSR 641 at [116].

(7) Nor is it necessary that the applicant have sufficient evidence to bring or make out an action (*Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236 (*Praetorin*) at [40]); it is enough that the issue raised by the applicant is 'substantive and not fanciful', not 'artificial, specious or contrived': *Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63 (*Style*) at [66]-[67].

(8) Pursuing a reasonable suspicion of breach of duty is a proper purpose: *McNeill v Hearing & Balance* [2007] NSWSC 942 at [17] citing *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357 and the judgment on the unsuccessful appeal: *Barrack Mines Appeal*.

(9) Provided that the applicant's primary or dominant purpose is a proper one, it is not to the point that an inspection might benefit the applicant for some other purpose: *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474 (*Humes*) at 480; *Barrack Mines Appeal* at 615; *Cescastle* at 117-118.

(10) Applicants do not necessarily lack a proper purpose merely because they are hostile to other directors: *Humes at 480.*

(11) Neither the fact that an applicant may have had sufficient information earlier nor the fact that an applicant may have other means of obtaining the information is detrimental to an application under the section: *McNeill* at [23]-[25].

(12) The procedure under s 247A is not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence the results of board decisions, rather than all board papers leading to decisions, but there may be occasions when it is proper to permit inspection of board papers: *Acehill* at [31].

(13) The Court has a residual discretion whether to order inspection: *Humes* at 481."

[13] As Katzmann J demonstrated, since *Re Claremont Petroleum NL (No 1)* (1990) 2 Qd R 31, it has been clear that s 247A is remedial in nature. The discretion to make an order authorising inspection of "books" of the company does not arise until the applicant satisfies the court that they are acting in good faith for a proper purpose. As Katzmann J points out, although most of the cases refer to the establishment of "a case for investigation",[12] that is not the test, but rather emphasizes the need for "an objective basis" to conclude good faith and proper purpose so as the enable intervention. If the court is satisfied, then the court has a broad and unfettered discretion under s 247A(1) to authorise the inspection of books.

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12 *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 at 247.

[14] The third principle referred to by Katzmann J in *Mesa* requires some further consideration. In *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115*,* the defendant Renak Holdings Ltd was a public company in which the plaintiff Cescastle Pty Ltd owned 25.8 percent of the total issued capital. The plaintiff and the defendant were in dispute with respect to a contract for sale of wine outlets and "the dispute centres around the accuracy of stock and profit figures from the outlets being sold for the end of 30 June 1986".[13]

[15] After litigation was on foot, the plaintiff sought an order under the relevant predecessor to s 247A of the *Corporations Act* (s 319 of the *Corporations Law* (NSW)). The defendant argued the application ought to be dismissed as the application for inspection of the company documents was brought for the improper purpose related to the existing litigation. Young J said:[14]

> "Section 319 cuts across the rule that shareholders must really leave the entire management of the company to directors, and are not entitled to see the company's documents…The key decisions appear to be *Re Augold NL* (1986) 11 ACLR 362…These authorities suggest that the rule, that management is left to directors and that *normally the company's documents can only be sighted by shareholders in a representative action*, remains virtually intact. Furthermore, where the statutory remedy is to be invoked it is important that the court be satisfied that the plaintiffs are acting in good faith and for a proper purpose."
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> (Emphasis added.)

[16] Young J then said:[15]

> "… I cannot really see, when something cries out for investigation like this, how it can disqualify a person as an applicant merely because he has no love towards the directors … I do think it is a proper purpose for the shareholders to see the primary documents when, *prima facie*, there is an irregularity."

[17] Young J construed the words "proper purpose" as meaning:[16]

> "a purpose connected with the proper exercise of the rights of the shareholder as a shareholder, as opposed to the purpose connected with some other interest, such as an interest as a bidder under a takeover scheme or as a litigant in proceedings against the company. Although the purpose in seeing the proxy forms may, to a degree, be tactical, the tactics are in connection with exercising rights as a shareholder, either by asking the proper questions at the next annual general meeting, or in convening a meeting, or in commencing litigation, rather than in any other way…"

[18] "Books" is defined in s 9 of the *Corporations Act* as follows:

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13 *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 at 116.
14 *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 at 117.
15 *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 at 118.
16 *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 at 118.

Books includes:

(a) a register;

(b) any other record of information;

(c) financial reports or financial records; and

(d) a document.

[19] As the cases demonstrate, the broad discretion invested in a court allows a court to authorise inspection of books or documents which are sufficiently relevant to the proper purpose for which the application is brought. Where a public company has potentially many millions of documents, the authorisation ought not to be unduly broad, as such an order may be oppressive both to the respondent company and to the applicant, who, as a matter of course will be required to pay for the reasonable costs of the provision of such information.

[20] Similarly, where it is demonstrated that a member of a company is acting in good faith and proper purpose, the inspection ought not to be circumscribed by an unduly narrow authorisation in respect of books relevant to the applicant's proper purpose.

[21] The applicant originally sought authorisation to inspect 12 categories of documents, as set out in schedule 1 to the originating application. However, by the applicant's outline in reply, items 5, 6, 7, 8, 10 and 12 are no longer pursued. The items which are no longer pursued were couched in very broad terms, such as in respect of item 5: "[a]ll valuations of the Projects in the period from the date of the inception of each of the funds the subject of each Project". Document category 12, which is no longer pursued, related to insurance documents and requested authorisation to inspect "[a]ll documents recording or relating to the notification of claims, or the notification of circumstances that might give rise to claims, under the Insurance Policies."

[22] Of the categories still pursued, category 1, 2, 3, 4, 9 and 13, are documents from between 1 July 2015 and 20 May 2019 which relate to Blue Sky's investments (such as: the launch of new investment funds; statements made relating to financial performance; valuation of assets earnings impairment of assets and earnings). For convenience I will refer to these categories as "investment and audit documents". Category 11, which is still pursued, relates to insurance policies and can be considered separately from the investment and audit documents.

Investment and Audit Documents

[23] The facts in this matter are not in dispute. On 19 January 2018, Mr Furniss purchased 722 shares in Blue Sky at $13.80 per share for a total of $9,963.60. Mr Furniss deposes to purchasing the shares as a long-term investment for both capital growth and dividends; not in anticipation of making any claim in relation to the purchase.

[24] It can be seen that by 27 March 2018, the Blue Sky share price had decreased to $11.43.[17] A little over a year later Blue Sky was placed into administration on 20 May 2019 and Mr Furniss' shares were practically worthless. It is unremarkable,

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[17] Exhibit NJB-17 to the affidavit of Nicholas John Burkett filed 9 October 2020.

in my view, that Mr Furniss would wish to inspect investment and audit documents of Blue Sky to investigate and determine whether he would have a potential claim against Blue Sky, its directors or officers, or its auditor. If Mr Furniss was to bring a claim, then as Mr Furniss candidly deposes, it would likely be as a member of a representative or class action proceeding.[18]

[25] In *Re Claremont Petroleum NL (No 1)* (1990) 2 Qd R 31 (*Claremont*) at 34, Connolly J (with whom Thomas and Ambrose JJ agreed) said of s 265B of the *Companies (Qld) Code* (the predecessor to s 247A), that "…the section gives an unfettered discretion and nothing in the Explanatory Memorandum would lead one to qualify the broad and general language which is employed."

[26] Connolly J also said, regarding s 265B:[19]

> "The *Bank of Bombay's* case was one in which the applicant had bought a single share in the Bank's capital for the purpose of harassing the bank with which he and his family were engaged in litigation. The order which was refused in that case would, in my judgment, be refused under s. 265B, not because an interest personal to the applicant is a condition precedent to the making of an order but because the application was not made for a proper purpose."

[27] His Honour went on to say:[20]

> "As to the other grounds there is very little which needs to be said. As in the *Grants Patch* case, here too it has been found that the applicant when it acquired its shares had in mind the possibility of making a takeover offer but his Honour also found that the applicant had substantial grounds for concern about a number of transactions between Claremont and the Independent Resources Group which appeared to be to the advantage of that group rather than anyone else. The applicant had a very large investment in Claremont and his Honour was persuaded that a dominant purpose of the applicant was to ensure protection of the assets of Claremont and through it of its own investment in that company and that its purpose was a proper one."

[28] In *Claremont*, the Court of Appeal unanimously upheld the order of the primary judge, who ordered the inspection of Claremont Petroleum NL's books with respect to agreements between Claremont Petroleum NL and Independent Resources Limited.

[29] In discussing the scope of s 247A(1), Barrett J in *Smartec Capital Pty Ltd v Centro Properties Ltd & Anor* (2011) 83 ACSR 461 said:[21]

> "[66] The relevant boundary is suggested by a comparison of cases in which proper purpose has been established and those in which it has not. These are conveniently collected in an article

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18 Paragraph 5 of the affidavit of David Furniss filed 9 October 2020.

19 *Re Claremont Petroleum NL* (1990) 2 Qd R 31 at 34.

20 *Re Claremont Petroleum NL* (1990) 2 Qd R 31 at 35.

21 *Smartec Capital Pty Ltd v Centro Properties Ltd & Anor* (2011) 83 ACSR 461 at 478.

by Christos Mantziaris, "The member's right to inspect the company books: *Corporations Act*, s 247A" (2009) 83 ALJ 621 quoted by Le Miere J in *Snelgrove v Great Southern Managers Australia Ltd (in liq) (rec and mgr apptd)* [2010] WASC 51 at [66]:

The court has recognised the following purposes as proper inspection purposes:

1. To allow a member to investigate prima facie irregularities in the company's financial accounts or transactions — for example, the creation of parallel financial records (*Vinciguerra v MG Corrosion Consultants Pty Ltd* (2007) 61 ACSR 583; [2007] FCA 503), or a loan transaction between companies with a large number of common directors (*Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115).

2. To allow a member to investigate the conduct of the directors in relation to 'the whereabouts and commercial benefit [to] the company of the profit and cash flow' of the company for a certain periods (*United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 404 at [27], [29]-[30]; *Vinciguerra v MG Corrosion Consultants Pty Ltd* [2007] FCA 503; (2007) 61 ACSR 583 at [57] -[59], [64], [66]).

3. To allow a member to investigate other reasonably suspected breaches of duty (*Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357 (affirmed *Barrack Mines Ltd v Grants Patch Mining Ltd [No 2]* [1988] 1 Qd R 606; (1987) 12 ACLR 630); *McNeill v Hearing & Balance Centre Pty Ltd* [2007] NSWSC 942 at [17]; *Humes Ltd v Unity APA Ltd [No 1]* [1987] VicRp 42; [1987] VR 46 7 ; [1987] VicRp 42; (1986) 11 ACLR 641).

4. To allow a member to value the members' shares, so as to: (i) negotiate a fair exit price from the company (*Tinios v French Caledonia Travel* (1994) 13 ACSR 658); [1994] FCA 1154, or (ii) to examine the effect of a corporate debt transaction on the value of the shareholding (*United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 404 at [20]- [23]; see also *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 45 ACSR 271; [2003] NSWSC 405.

5. To allow a member to prosecute a proceeding to enjoin the holding of an extraordinary general meeting on the ground that the company directors will have failed to discharge their duty of disclosure to their shareholders (*ENT Pty Ltd v Sunraysia* (2007) 61 ACSR 626; [2007] NSWSC 270 at [79]).

6. To allow a member of a corporation holding property in an apartment block in which all members reside to investigate board decisions regarding the conduct of litigation by the corporation (*Rowland v Meudon* (2008) 66 ACSR 83; 220 FLR 362; [2008] NSWSC 381)."

[30] Similarly, in *London City Equities Limited v Penrice Soda Holdings Limited*,[22] Robertson J said:

> "[29] In *Intercapital Holdings Limited* (above), Brooking J said that on such an application the court could not determine the substantive questions and should not attempt to do so. His Honour also referred to a test on the question of good faith and proper purpose as to whether a reasonable shareholder in the company could take the view that his investment in that company may be adversely affected by the transaction in question and wish to investigate whether he should take steps with a view to protecting, directly or indirectly, his investment. His Honour said it may well be that there had been no impropriety or irregularity of any kind, that the directors of the company had acted properly and that the acquisition was a sound investment, or, at all events, one made regularly and in the proper exercise of a discretion. His Honour held that there was a 'case for investigation'.
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> [30] I was also referred to the decision of Debelle J in *Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344 (*Acehill Investments*).
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> [31] Next is the decision of the Full Court of the Supreme Court of Western Australia in *Majestic Resources NL v Caveat Pty Ltd* [2004] WASCA 201. In that case Templeman J, with whom Malcolm CJ and Wheeler J agreed, held the court had the power to limit the scope of any inspection ordered under s 247A. Templeman J said (at [21]):
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> > [21] …The exercise of the discretion required the Court to consider not only whether it was appropriate to make an order for inspection but also to consider which of the books of the company should be made available for that purpose.
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> [32] In *Vinciguerra v MG Corrosion Consultants Pty Ltd (2007) 61 ACSR 583*; [2007] FCA 503. Gilmour J followed what Brooking J had said in *Intercapital Holdings*, in relation to the questions of good faith, proper purpose and any discretionary factors.
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> [33] In *Re Style Limited* (2009) 255 ALR 63; [2009] FCA 314 (*Style*), Goldberg J at [60] adopted the summary propositions set out by Debelle J in *Acehill Investments*. Goldberg J also

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[22] (2011) 281 ALR 519 at 525-526.

adopted the expression used by Brooking J in *Intercapital Holdings* in holding that there was a 'case for investigation'.

[34] At [71], dealing with the exercise of the court's discretion, Goldberg J said:

> [71] In granting an order for inspection under s 247A it is not appropriate to allow a wholesale and general inspection of Style's books. This would cause unnecessary disruption to the company. In any event the books to be inspected should be books that bear on, and be particularly relevant to, the purpose for which the inspection is sought. Merim has sought inspection of specific categories.

I shall follow this approach to assessing the relevance of the categories.

[…]

[36] In *Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236; [2009] NSWSC 1237 Barrett J dismissed an application under s 247A holding that an applicant under that section must do more than show dissatisfaction or disagreement with management decisions. The requirement of good faith and proper purposes carries with it a need for the applicant to show a 'case for investigation as regards past or future wrongful or other undesirable conduct'. His Honour followed *Intercapital Holdings* and *Knightswood Nominees Pty Ltd v Sherwin Pastoral Co Ltd* (1989) 15 ACLR 151 per Brooking J. Barrett J held that none of the 'concerns' in relation to the management of the company or the conduct of its directors established a 'case for investigation'."

[31] In *London City Equities*,[23] the chief operating officer of London City Equities, Mr Murray, said that London City Equities were considering bringing proceedings against one or more of the current or former directors of Penrice Soda. Mr Murray gave evidence accepted by Robertson J as follows:[24]

> "[20] [Mr Murray] said that LCE [London City Equities] was considering bringing proceedings against one or more of the current or former directors of Penrice, and possibly against Penrice. LCE wished to bring proceedings against the directors instead of the company as proceedings against the company would harm LCE's investment in Penrice. To decide whether to bring proceedings against the directors instead of Penrice Mr Murray said that he needed to ascertain whether LCE had a claim against the directors (and which directors) and whether the directors would be able to pay a judgment in favour of LCE. He said that he was concerned to know whether the

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[23] *London City Equities Limited v Penrice Soda Holdings Limited* (2011) 281 ALR 519.

[24] *London City Equities Limited v Penrice Soda Holdings Limited* (2011) 281 ALR 519 at 523.

directors were insured for a claim against them, and the amount and extent of cover they have.

[21] Mr Murray said that LCE sought access to the identified books to investigate and decide whether to bring a claim against Penrice's directors and, if LCE decided to bring that claim, to use the documents in pursuing the claim. LCE also sought access to the identified books to bring an application under ss 236 and 237 of the Act and, if it did so, to use the documents in pursuing that application or the ultimate proceedings."

[32] In respect of "purposes", Robertson J said:[25]

> "[39] In relation to what has been referred to as the jurisdictional question, that is the good faith and proper purpose requirement, subject to one matter considered more fully below, I accept that the application is brought in good faith and for a proper purpose. Mr Murray deposed that LCE is considering bringing proceedings against one or more of the current or former directors of Penrice and possibly against Penrice. He also said that LCE has applied for access to certain of Penrice's books, listed in the schedule to its application, so that it can investigate whether its concerns identified in his affidavit are well founded and, if so, to decide whether to itself commence proceedings against Penrice's directors and officers or Penrice or to seek leave under ss 236 and 237 of the Act to bring proceedings on behalf of Penrice.
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> [40] I take into account that, predominantly, the concerns were articulated in correspondence contemporaneous with the events of which complaint is made and that LCE attempted in that correspondence to obtain access to some of Penrice's books."

[33] Where a member demonstrates a case for investigation, that is, on an objective basis that there are reasonable grounds to inspect, then ordinarily, the shareholder will be "acting in good faith" and "for a proper purpose".

[34] As Mullins J said in *Ito & Anor v Shinko (Australia) Pty Ltd & Anor*:[26]

> "[49] It is also in the interests of the applicants as shareholders of the second respondent to ascertain whether they had any cause of action against the second respondent, its directors or any other person associated with the second respondent, as a result of their shares being valueless."

[35] As established above, Mr Furniss purchased a small shareholding as a long-term investment on 19 January 2018, and some 15 months later his shareholding was worthless. It is not merely the assertions of Mr Furniss which support a finding that there is "a case for investigation". There is also substantial support for such a

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25 *London City Equities Limited v Penrice Soda Holdings Limited* (2011) 281 ALR 519 at 526-527.

26 [2004] QSC 268 at [49].

conclusion in the material of Blue Sky. On 16 April 2018, Blue Sky released a market update, which, *inter alia*, said:[27]

> "We have listened to the market feedback and *it is clear that Blue Sky has fallen short of market and shareholder expectations around transparency and disclosure*. We are committed to making changes which will improve the business, provide greater transparency and improve shareholder value over the long term. As part of this, the Board is committed to an independent review which will examine Blue Sky's risk management framework, its valuation processes, financial reporting processes and other disclosures…"
>
> (Emphasis added.)

[36] Blue Sky released a further market update on 7 May 2018, which, *inter alia*, said:[28]

> "The Board and Mr Morison have agreed that an immediate priority is to rebuild trust with stakeholders by making significant changes to the business and management model."

[37] On 19 November 2018, the new chairman of Blue Sky said in concluding the Chairman's address:

> "This year, our reputation has suffered dearly.
>
> …
>
> Our shareholders have seen our share price fall 90% since March.
>
> …"

[38] On 28 February 2019, Blue Sky released a further market announcement for the first half of the 2019 financial year, which quoted Andrew Day, Blue Sky Executive Chairman as saying:[29]

> "'The Company's financial performance in the first half, foreshadowed earlier this month, is clearly disappointing – primarily the result of significant costs associated with the restructuring of the business…While these changes have a negative financial impact, they enable us to return to sustainable profitability more quickly.'"

Blue Sky AI was in administration three months later. There was no return to profitability. There is a serious question as to whether there was a reasonable basis for making this statement.

[39] While ordinarily it may be the case that Mr Furniss has established that he has a "case for investigation" and that he is seeking these documents for a bona fide

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27 Exhibit NJB-22 to the affidavit of Nicholas John Burkett filed 9 October 2020.
28 Exhibit NJB-23 to the affidavit of Nicholas John Burkett filed 9 October 2020.
29 Exhibit NJB-32 to the affidavit of Nicholas John Burkett filed 9 October 2020.

proper purpose, in this particular instance, the class action on the horizon looms large and it must be addressed.

[40] Mr Bain QC for the applicant has referred me to *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 ("*Ingram"*). In *Ingram* Derrington J refused an application under s 247A of the *Corporations Act* on the basis that the books were not sought for a proper purpose. Mr Ingram was a shareholder of Ardent Leisure Limited and was one of the lead plaintiffs in a class action which had already been commenced against Ardent Leisure and others stemming from the accident at Dream World in 2016. Mr Ingram wanted access to the insurance policies to ascertain the commercial viability of the class action and enhance the prospects of settlement.

[41] In *Ingram* the respondent company submitted that the applicant's purpose could not be for a "proper purpose" because the application was made subsequent to the commencement of the class action. Derrington J rejected that submission saying: "[i]f seeking inspection of the company's documents so as to ascertain the economic or commercial viability of an action were, in the circumstances, a proper purpose, it could not matter whether any proceedings had commenced or not."[30] His Honour went on to note that the class action was commenced when it was in order to prevent the "continuing daily expiration of the limitation period".[31]

[42] Here, the converse submission is made. That is, the applicant submits that as Mr Furniss has not commenced a claim (either individually or as the member of a representative proceeding), and might in fact never do so, Mr Furniss is not using s 247A to give himself an advantage in an existing claim and accordingly, the applicant must be seeking the books for a proper purpose.

[43] However, as Derrignton J said:[32]

> "79 Here, if the purpose of the application was to inspect the company's books so as to ascertain whether there was an available action arising out of the infringement of the applicant's rights as shareholders or even whether such an action might be commercially viable, the veracity of that purpose would not *necessarily* be affected by whether the application was made before or after the action was commenced."

> (Original emphasis.)

[44] In my view, Mr Furniss' evidence regarding purpose[33] ought to be accepted and therefore I find that the application has been brought only for the purpose of investigating and inspecting documents relating to the investigation or conduct of a

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30 *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 at 78.

31 *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 at 78.

32 *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 at 79.

33 Paragraph 24-26 of the affidavit of David Furniss filed 9 October 2020.

class action proceeding. The respondent submits this is an improper collateral purpose.

[45] Section 247A allows for shareholder to access certain books to ascertain whether they may have any cause of action to enforce, protect or seek remedy for an infringement upon their rights as a shareholder. Section 247A is not intended for the provisions of documents "in the nature of discovery".[34]

[46] Mr Furniss candidly admits that this application has been brought as a tool to investigate and discover documents which may result in a class action. The issue is whether that is a proper or improper purpose within the meaning of the composite terms of s 247A.

[47] In my view, the answer to this question may be seen in an examination of the principles outlined by Katzmann J in *Mesa Minerals*, namely the 3rd, 7th and 8th principles.[35] Further, and as discussed above, Young J in *Cescastle* reflected that the early authorities upon the former s 319 "suggest that the rule, that management is left to directors and that normally a companys documents can only be sighted by shareholders in a representative action, remains virtually intact."[36]

[48] When *Cescastle* was published on 26 September 1991 class action proceedings did not exist, with such actions being introduced in 1992. It seems to me that if documents relevant to existing litigation between parties could be properly discoverable "in a representative action", it is difficult to see why similar documents ought not to be disclosable prior to or during the course of a class action.

[49] Furthermore, in considering whether the purpose connected with the exercise of the rights of a shareholder as a shareholder, it seems to me that the nature and content of the shareholder right ought not alter depending upon the quantum of shares held. Certainly, the quantum of damage which may be suffered as a consequence of the breach of a shareholder's right varies significantly but the nature and content of the right ought not.

[50] In *Style* Goldberg J made inspection orders in respect of potential claims which Merim Pty Ltd wished to investigate against Style as a derivative action and against Styles' officers and former officers.[37] In that regard, the sole director of Merim Pty Ltd, Mr Yunghanns' evidence was accepted as to the purpose of his application seeking an order under s 247A. In this respect, Goldberg J said:[38]

> "[54] The evidence in support of the application is found in affidavits sworn by Mr Yunghanns. He was not cross-examined on those affidavits. In his first affidavit Mr Yunghanns said:
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>> I am concerned that certain of the directors and officers of the defendant may have, over the period ended 30 June 2008, misrepresented the position of the defendant

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34 *Re Tolco Pty Ltd* [2016] NSWSC 1069 at [16].

35 See paragraph [12].

36 *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 at 117.

37 *Re Style Ltd* (2009) 255 ALR 63 at 68.

38 *Re Ltd v Style Ltd* (2009) 255 ALR 63 at 75.

> to members, not only in terms of projected earnings, but also the application of funds, particularly the proceeds of the convertible note issue made in July 2007. I am also concerned that the defendant is or may become insolvent.
>
> …
>
> The announcements made by the defendant over the year ended 30 June 2008 have, I believe*, been seriously misleading*, especially those in the first 7 months of the year. For that purpose, I wish to inspect the books of the company to consider whether action *in the name of the defendant should be commenced against officers or former officers.*
>
> Mr Yunghanns said that there was no substantive response to the request contained in his email of 4 July 2008."

(Emphasis added.)

[51] It may be observed that the purpose attested to by Mr Yunghanns as the sole director of Merim is in essence the same as the purpose attested to by the applicant, Mr Furniss. Whilst it is true that Merim held little more than 8 percent of the issued capital of Style Ltd and that Mr Furniss owns a miniscule percentage of the issued shares of Blue Sky, this does not cause me to doubt Mr Furniss' evidence as to the purpose of obtaining the order sought against Blue Sky.

[52] With the insertion of Part 13A into the *Civil Proceedings Act* 2011 (Qld), small shareholders are able to, as a member of a representative proceeding enforce their rights in a way which is economically viable; an avenue that was often unavailable to many small shareholders prior to the insertion of Part 13A.

[53] In *McNeill v Hearing & Balance Centre Pty Ltd* [2007] NSWSC 942 Hammerschlag J said:[39]

> "[17] Pursuing a reasonable suspicion of breach of duty is a proper purpose for seeking an inspection of a company's records: see *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357 affirmed *Barrack Mines Ltd v Grants Patch Mining Ltd (No 2)* [1988] 1 Qd R 606."

[54] The cases demonstrate that the pursuit of a reasonable suspicion of a breach of duty is a proper purpose for a substantial shareholder, and in my view, it is also a proper purpose (within the meaning of s 247A) for a small shareholder, despite the quantum being much smaller, the rights of the shareholders are the same.

[55] In the present application, as I have accepted Mr Furniss' evidence, I accept that he is pursuing a reasonable suspicion of a breach of duty and accordingly that is a proper purpose for seeking inspection of a company's records. On the material there is a case for investigation, I am satisfied that Mr Furniss is, within the terms of

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39 *McNeill v Hearing & Balance Centre Pty Ltd* [2007] NSWSC 944 at [17].

s 247A, acting in good faith and brings the application for a proper purpose in respect of the investment and audit documents.

[56] I consider it appropriate that the investment and audit books be inspected as the application has been brought in good faith for a proper purpose and in a reasonably confined manner (given that items 5, 6, 7, 8, 10, 11 and 12 are no longer sought).

Insurance Policies

[57] As discussed above, the applicant does not pursue category 12 documents, namely all documents relating to notification of claims, notification of circumstances that might give rise to claims under the insurance policies. The applicants do however seek under item 11 authority to inspect:

> "[a]ny indemnity insurance policy or policies that were current between the periods 1 July 2015 to 30 June 2020 providing cover to Blue Sky AI or any director or officer of Blue Sky AI, including any cover notes, certificates of insurance, policy schedules, standard terms and conditions, run off policies and other documents that form part of the insurance contract(s) (**Insurance Policies**)".
>
> (Original emphasis.)

[58] The disclosure of insurance policies and therefore the limit of such policies, which then provides guidance for a potential claimant has, for some time, been the subject of controversy. In *London City Equities Limited v Penrice Soda Holdings Limited* Robertson J, in respect of the insurance policies sought in that case said:[40]

> "[100] In *Style* (above) dealing with the scope of the order for inspection Goldberg J specifically considered whether or not there should be inspection of documents relating to directors and officers insurance policies.
>
> [101] Goldberg J at [81] and [82] relied on the fact that Merim knew of the existence of a policy of insurance and the amount of the premium estimated by Style to be payable under it. What Merim did not know was the extent of the cover granted under the policy and whether it was current. It seems to be for that reason Goldberg J considered it was appropriate, as a matter of the exercise of discretion to order that Style produce for inspection any directors and officers insurance policies currently held by it. Goldberg J said the cover granted under any such policies would be relevant to the decisions to be made by Merim, after inspection of the other documents in respect of which an order would be made, whether to apply for leave under s 237 of the Act to bring a proceeding on behalf of Style in its name against any directors or officers of Style.
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> [102] In *Snelgrove v Great Southern Managers Australia Ltd (in liq) (recs and mgrs apptd)* [2010] WASC 51 (*Snelgrove*), *Le Miere*

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40 *London City Equities Limited v Penrice Soda Holdings Limited* (2011) 281 ALR 519 at 532 - 534.

J gave detailed consideration to the position of insurance policies. At [67]-[68] his Honour said;

> [67] It is a proper purpose to inspect the company's books for the purpose of investigating whether there are good grounds for seeking to bring a derivative action or a personal action against the company. The purpose of the plaintiffs in seeking access to the relevant insurance policies is to assist them in considering the economic viability of pursuing their proposed action against the company. That is a proper purpose.
>
> [68]. . . The nature and extent of the company's insurance cover is not in itself a matter in dispute in the action which the plaintiffs are contemplating commencing against the company. However that is not a condition for the exercise of the power under s 247A. The disclosure of the existence and extent of the relevant insurance cover is likely to assist the plaintiffs in determining whether or not to commence or proceed with the proposed action. If the company does not have insurance which covers the plaintiffs' claims or the quantum of the cover is such that it is likely to be substantially exhausted in legal costs then the plaintiffs may well not proceed with the proposed action. That would prevent the resources of the parties and public resources being wasted. The thrust of the approach to litigation enshrined in the case management rules of this court and other superior courts in Australia is to avoid waste of time and cost and to ensure as far as possible proportionate and economical litigation. It is an appropriate exercise of the discretion of the court to make an order granting access to the plaintiffs to the company's relevant insurance policies.

[103] Penrice submitted that as a matter of discretion production should be limited to documents concerning the investigation of the facts potentially in issue and not merely to the financial position of potential defendants: there was a difference of substance between documents relevant to whether or not an applicant has a cause of action and documents which go only to whether or not, in practical or commercial terms, a cause of action is worth pursuing. *The defendant also submitted that the decisions in Style and Snelgrove did not pay any or sufficient regard to competing considerations, including confidentiality and the possible 'magnet' effect of a plaintiff having access to insurance policies of the present description.*

[104] *I understand the force of the points but unless I am persuaded that the approach of Goldberg J and Le Miere J is clearly wrong I should follow it*: see *Hicks v Minister for Immigration & Multicultural and Indigenous Affairs* [2003] FCA 757 at

> [76] per French J and *Cooper v Commissioner of Taxation* (2004) 139 FCR 205; 210 ALR 635; [2004] FCA 1063 at [46] per Lander J. See also, in relation to national legislation, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; 112 ALR 627 at 629; 10 ASCR 230 at 232 referred to in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2007/22.html230 CLR 89; 236 ALR 209; [2007] HCA 22 at [135]. I am not so persuaded.
>
> [105] Category 15 is however too broad in its terms. The category should be limited to Penrice's directors and officers insurance policies for the period from 1 July 2008 to the present date."

(Emphasis added.)

[59] As can be seen above, since the judgment of Goldberg J in *Style* case in 2009,[41] it is settled that upon the balance of confidentiality, the possible magnet effect of the plaintiff having access to insurance policies, and the public and private interest in resources not being wasted, that relevant insurance policies ought to be inspected.

[60] The respondent submits that Derrington J in *Ingram*,[42] has taken a contrary view. However, his Honour declined inspection of insurance policies, as they were not sought for a proper purpose within the scope of s 247A and His Honour, as a matter of discretion, refused relief because in *Ingram* the circumstances "weighing against allowing inspection greatly outweigh those in favour."[43]

[61] In *Ingram*, Derrington J was influenced by the reasons of Beach J in *Evans v Davantage Group Pty Ltd No 2* [2020] FCA 473. However, Derrington J, conceded that the reasons of Beach J "has less direct relevance to the issues in the present matter" and "… in particular, Beach J did not have to ascertain whether the purposes for which the inspection was sought were 'proper purposes' within the meaning of s 247A."

[62] Matters considered relevant by Beach J in exercising his discretion not to order inspection of insurance policy documents pursuant to s 23 of the *Federal Court Act* 1975 (Cth) was based upon his Honour's consideration of some of the class action provisions of that Act, namely s 37Z(f)(1), s 37M and s 37P in an existing class action.

[63] As to the broad discretion in s 247A, Derrington J in *Ingram*[44] considered that the six matters referred to by Beach J in *Evans v Davantage*[45] ought to assist in guiding the exercise of the discretion. With respect, however, Beach J affords primacy to s 23 of the *Federal Court Act* 1976 (*Cth*) in His Honour's reasons which does not

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41 See also *Snelgrove v Great Southern Managers Australia Ltd (in liq) (recs and mgrs apptd)* [2010] WASC 51; *London City Equities Limited v Penrice Soda Holdings Limited* (2011) 281 ALR 519.

42 [2020] FCA 1302.

43 *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 at [81].

44 *Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302 at [84].

45 *Evans v Davantage Group Pty Ltd No 2* [2020] FCA 473.

include a prerequisite finding that the application was bought for a "proper purpose" by an applicant acting in "good faith". Beach J also carefully considers s 332F of the *Federal Court Act* 1976 (*Cth*), however, that also is not of assistance in considering a discretion under s 247A of the *Corporations Act*.

[64] As Mullins J (as her Honour was then) said in *Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd*,[46] the financial status of a defendant company is a relevant matter in an application to inspect insurer documents in a class action proceedings where s 103ZA of the *Civil Proceedings Act* 2011 (Qld) is the relevant power. Additionally, the plaintiffs in *Mallonland* were not shareholders but customers of Advanta Seeds Pty Ltd.

[65] Beach J in *Evans v Davantage*,[47] did not conclude that insurance documents ought not be inspected at all, as he identified an appropriate procedure for the inspection of insurance documents.

[66] In the present case, Mr Furniss is seeking insurance documents in good faith and for a proper purpose, namely the investigation of a potential representative claim or class action for his losses sustained as a shareholder of Blue Sky. The discretion pursuant to s 247A is unconfined, as the cases above demonstrate, and in exercising the discretion, it has been expressly recognised by Goldberg J, La Miere J, Robertson J and Gordon J that issues in respect of confidentiality, the possible magnet effect of the plaintiff having access to insurance policies, and the public and private interests in resources not being wasted are all relevant to the exercise of the discretion. I consider that those long-standing decisions are sound in principle and ought to be followed. *Evans v Davantage Group Pty Ltd No 2,*[48] which does not involve an exercise of discretion of s 247A, does not support a contrary view.

[67] As discussed by Beach J, the decision of Gleeson J in *Simpson v Thorne Australia Pty Ltd t/a Radio Rentals No 4* [2019] FCA 1129 does favour disclosure of documents relevant to the ability to recover judgment from the respondent in order to ensure that justice is done in the proceeding. In *Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd* [2019] QSC 250, Mullins J took a similar view, however the facts were significantly different with the respondent having substantial assets which her Honour held diminished the significance of the respondent's insurance position, such that in the interests of justice, there was no demonstrable need for disclosure of insurance documents.

[68] In the present case, the material that is currently available shows that there are not substantial assets and in respect of the ability to recover from the respondent the insurance position is indeed critical. As a matter of discretion, as the applicant is acting in good faith and for a proper purpose, it is appropriate to exercise the discretion contained in s 247A in his favour.

Time Frame

[69] As I consider it appropriate that I order the inspection of the books sought, issues as to the appropriate time frame now arise. The applicant submits that the time frame

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46 [2019] QSC 250 at [28].

47 *Evans v Davantage Group Pty Ltd No 2* [2020] FCA 473 at [88].

48 [2020] FCA 473.

ought to commence from 1 July 2015 and the respondent submitting that the time frame ought to commence from 19 January 2017 (one year prior to Mr Furniss purchasing his shares).

[70] The cases reviewed above show that it is appropriate to make a retrospective order for inspection, so as to allow a shareholder to inspect relevant books from prior to their membership. The cases do not give guidance as to the appropriate time frame for such retrospective order and, as Connolly J said in *Re Claremont Petroleum NL*,[49] the broad and unfettered discretion of s 247A would make it ordinarily appropriate that there be a specified or confined time period for the availability of the inspection of the books of a company. However, what is clear, is that the breadth and format of an inspection order is dependent upon the proper purpose for which the order is made; an exercise which is very fact specific.

[71] In the present case, the proper purpose for the inspection of the books of the company is to investigate past undesirable conduct. It is not in dispute that the books of account from the date of purchase of the shares, 19 January 2018, to the date Blue Sky was placed in voluntary administration, 20 May 2019, is relevant. However, as stated above the respondent concedes that the time frame ought to begin from one year prior to Mr Furniss purchasing the shares. Whereas the applicant seeks the books from sometime in 2015.

[72] There is nothing in Mr Furniss' affidavit which suggests any particular period, although it may be inferred as a long-term investor Mr Furniss would at least have had reference to the published preceding annual report of Blue Sky for the financial year ended 30 June 2017. Further, the Glaucus report of 27 March 2018 shows that Glaucus have based its research upon publicly available information concerning Blue Sky for the financial years ending 30 June 2015 until 30 December 2017.[50]

[73] Although Glaucus analysed the financial results from the financial year ended 30 June 2015, that is not sought by the applicant. The applicant seeks information essentially from the 2016 financial year commencing 1 July 2015 until the date the company is placed into administration, 20 May 2019.

[74] As can be seen from exhibit NJB-17,[51] Blue Sky had reported fee earnings from AUM $2.1 billion in 2016, increasing to $3.25 billion by 2017 with a prediction of fee earning AUM at $3.9 billion for the 2018 financial year. The consistency in percentage growth in the 2016 financial year in reported fee earnings for AUM at 56% and at 55% for the 2017 financial year does provide some basis for acceptance of the submission that the books of a company from 1 July 2015 ought to be inspected.

[75] Therefore, I consider that the time frame proposed by the applicant, that is from 1 July 2015 to 20 May 2019 is appropriate.

Conclusion

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49 *Re Claremont Petroleum NL (No 1)* (1990) 2 Qd R 31.

50 Exhibit NJB-17 to the affidavit of Nicholas John Burkett filed 9 October 2020.

51 Exhibit NJB-17 to the affidavit of Nicholas John Burkett filed 9 October 2020.

[76] Mr Furniss is not a stranger to Blue Sky, but rather a shareholder who has a right to inspect documents if he can prove, as he has, that he is acting in good faith and for a proper purpose. Having established good faith and a proper purpose, in my view, I consider it is appropriate to exercise the discretion pursuant to s 247A and order that the investment and audit documents and the insurance documents (the subject of category 11) ought to be inspected by Mr Furniss. I consider it is appropriate to exercise this discretion in favour of Mr Furniss as:

(a) Mr Furniss and Blue Sky are not strangers; Mr Furniss is a shareholder of Blue Sky.

(b) Even though Mr Furniss is a small shareholder in Blue Sky, he obtained his shareholding as an ordinary long-term investor.

(c) Mr Furniss acts in good faith and for a proper purpose of investigating his rights as a shareholder in seeking information.

(d) It is, as Beach J said,[52] a laudable objective for Mr Furniss to seek production of insurance documents to better inform himself as to:

(i) Whether it is commercially viable to prosecute a group proceeding;

(ii) Whether it is appropriate to settle the matter, and if so, for what quantum;

(iii) The extent of the indemnity potentially available may reasonably inform the nature and extent (and costs) of future group or representative proceedings.

[77] In my view as a matter of principle, if a shareholder of a company is entitled to documents to properly investigate that and other shareholders' prospects of establishing liability in respect of any wrongdoing by a company, its officers or auditors, it is also legitimate to examine not only the potential quantum of such claim but its realistic prospects of recovery.

Form of orders

[78] The books sought by the applicant (items 1, 2, 3, 4, 9, 11, and 13)[53] are to be provided to the applicant for inspection.

[79] I direct the parties to confer and email my associate with a draft order to give effect to these reasons within 14 days. I accept the submissions of the applicant that items 1, 2, 3, 11 and 13 can be located with little processing and that in respect of items 4 and 9 there are searches which may need to be undertaken;[54] the draft order ought to accommodate for such periods.

[80] The draft order should, if agreement can be reached, deal with costs. If the parties cannot agree as to the appropriate costs order:

(a) the Applicant is directed to file and serve written submissions on costs within 17 days.

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52 *Evans v Davantage Group Pty Ltd No 2* [2020] FCA 473 at 4.

53 Annexure 2 to the reply outline of the applicant filed 9 December 2020.

54 Annexure 1 and 2 to the reply outline of the applicant filed 9 December 2020.

(b) the Respondent is directed to file and serve written submissions on costs within 20 days.