SUPREME COURT OF QUEENSLAND

CITATION:	*Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission* [2018] QCA 181
PARTIES:	**GOGNOS HOLDINGS LIMITED** ACN 129 570 181 (first appellant) **DYNAMIC AGRI TECH LTD** ACN 060 891 796 (second appellant) **v** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (respondent)
FILE NO/S:	Appeal No 10448 of 2017 SC No 9696 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 207
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2018
JUDGES:	Sofronoff P and Gotterson and McMurdo JJA
ORDERS:	**1. Appeal dismissed.** **2. Appellants pay the respondent's costs of the appeal.**
CATCHWORDS:	CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – CONDUCT OF AFFAIRS OF COMPANY – where the respondent filed an application for an order that the appellant companies be wound up supported by evidence of prolonged and extensive misconduct in relation to the companies' affairs – where the companies had committed numerous contraventions of the *Corporations Act* 2001 (Cth) involving failures to lodge financial reports, report to members, hold annual general meetings and maintain accurate accounting records – where the companies had made misrepresentations to the Australian Stock Exchange and to investors – where the intended business of the companies was the manufacture and distribution of animal fodder production units – where the proposed business of the companies had not been successful and the companies were not "clearly solvent" – where former director Mr Manasseh had been the most influential person in

the conduct of the companies' affairs – where the appellants contended that the companies' affairs had been put in order by the replacement of some of the directors, including Mr Manasseh, and by the availability of a line of credit which could revive the companies and their businesses – where the primary judge ordered that the appellant companies be wound up under s 461(1)(k) of the *Corporations Act* 2001 (Cth) upon the ground that it was just and equitable to do so – where the appellants submit that the primary judge made erroneous findings about the nature and extent of the ongoing involvement of Mr Manasseh in the companies' affairs – where the appellants submit that the primary judge erred in finding that a new director, Mr Zwar, showed a "startling lack of insight" in acting as solicitor for the companies while being a director, substantial shareholder, personally associated with Mr Manasseh and a key witness in the appellants' case at trial – where the primary judge concluded that there remained a justified lack of confidence in the management of the companies such as to give rise to a real risk to the public interest that warrants protection – whether the primary judge was correct to conclude that it was just and equitable that the companies be wound up

Corporations Act 2001 (Cth), s 201A(2), s 250N, s 286(1), s 292, s 319, s 461(1)(k)

Australian Securities and Investments Commission v ABC Fund Managers (2001) 39 ACSR 443; [2001] VSC 383, cited
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2) [2013] FCA 234, cited
Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504; [1995] FCA 1663, cited
Bowen v Stott [2004] WASC 94, cited
Chapman v Rogers; Ex parte Chapman [1984] 1 Qd R 542, cited
Hempseed v Ward [2013] QSC 348, cited
Holborow v Macdonald Rudder [2002] WASC 265, cited
Jeffery v Associated National Insurance Co Ltd [1984] 1 Qd R 238, cited
Kallinicos v Hunt (2005) 64 NSWLR 561; [2005] NSWSC 1181, cited
Loch v John Blackwood Ltd [1924] AC 783; [1924] UKPC 45, cited
Mitchell v Burrell [2008] NSWSC 772, cited
Paino v MDN Mortgages Pty Ltd [2009] NSWSC 898, cited
Pearlbran v Win Mezz No. 19 Pty Ltd [2009] QSC 292, cited

COUNSEL: B Walker SC, with T S Hale SC, for the appellants
M T Brady QC, with K E Slack, for the respondent

SOLICITORS: Diamond Conway for the appellants
Australian Securities and Investments Commission for the

respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and the orders his Honour proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[3] **McMURDO JA:** On an application by the Australian Securities and Investments Commission ("ASIC"), Bowskill J ordered that the appellant companies be wound up under s 461(1)(k) of the *Corporations Act* 2001 (Cth) ("CA") upon the ground that it was just and equitable to do so.[1] The appellants argue that there were errors of fact which affected the exercise of her Honour's discretion, so that this Court should set aside the orders and dismiss ASIC's proceeding.

[4] ASIC's application was filed in September 2016 and was supported by evidence of prolonged and extensive misconduct in relation to the companies' affairs. The companies had failed to lodge financial reports, report to members, hold annual general meetings and maintain accurate accounting records, resulting in numerous contraventions of the CA. They had made misrepresentations to the Australian Stock Exchange ("ASX") and to investors. Approximately $7.7 million had been raised from investors and was likely to be lost to them. The proposed business of the companies had not been successful and, as her Honour found, the companies were not "clearly solvent".[2]

[5] ASIC's case was set out in detailed written submissions which were filed in April 2017. The companies responded by saying that ASIC's allegations were "strenuously refuted" and that, in any case, contraventions of the CA had been remedied, or would be remedied by the time of the trial. That was the effect of the companies' written submissions which were dated in April 2017 but filed on 4 August 2017, just three days ahead of the commencement of the trial.

[6] However, the companies' case changed at the trial. Nearly all of the factual allegations made by ASIC were admitted. ASIC's case was resisted upon the basis that the companies' affairs had been put in order by the replacement of some, but not all, of the directors and by the availability of a line of credit, up to an amount of $400,000, by which the companies and their businesses could be revived. The companies argued that it was not just and equitable that they be wound up, because by allowing the companies a further opportunity to carry on business, there was some prospect that not all of the money which had been contributed by investors would be lost. ASIC replied that these changes were too little and too late, and that there remained a well-founded and justified lack of confidence in the management and conduct of the affairs of the companies, such that they should be wound up.

[7] One of the directors who was displaced was Mr Manasseh, who until then, had been the most influential person in the conduct (or misconduct) of the companies' affairs. For the companies, it is argued that there were errors in the judge's findings about the nature and extent of any ongoing involvement of Mr Manasseh, if the companies

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1 *Australian Securities and Investments Commission v Gognos Holdings Ltd & Anor* [2017] QSC 207 ("Judgment").

2 Judgment at [177].

were allowed to continue but not under his directorship. Most of the grounds of appeal relate to that subject. A further ground relates to the judge's finding that one of the new directors, Mr Zwar, had shown a lack of insight by not seeing the difficulties in, at the same time, being a director, a witness at the trial and the solicitor instructing counsel for the companies. The appellants argue that no finding which was adverse to Mr Zwar could have been made.

[8] For the reasons that follow, I have concluded that the judge was correct to conclude that it was just and equitable that the companies be wound up and I would dismiss the appeal.

The history of the companies

The financial dealings between them

[9] Each of the appellants is an unlisted public company. The first appellant, which I will call Gognos, was incorporated in 2008.

[10] The second appellant, which I will call DAT, was incorporated in 1993 and prior to 2008, had been an investor in a company called Almighty Fodder Ltd, which was said to have developed valuable technology for the production of animal fodder, before that company proved unsuccessful and was wound up. In about 2008 its business was taken over by DAT. From them on, the business of DAT was intended to be the manufacture and distribution of "animal fodder production units".[3] The business of Gognos was to be the raising of funds from the public for the development of the business of DAT and to fund the listing of DAT on the ASX.

[11] The judge described the model used by the companies as follows:[4]

> "(a) investors were told that DAT would shortly (or within a certain limited period) list on the ASX;
>
> (b) shares of Gognos were sold to investors on the basis that upon a listing of DAT on the ASX, each share would be "converted" into three DAT shares;
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> (c) for accounting purposes, investor-provided funds were recorded as being loaned to either DAT or its subsidiary, Dynamic Agri Tech Finance Pty Ltd (**DAT Finance**), and then loaned by either of those companies to **Dynamic Fodder** Pty Ltd."

Investors were invited to take shares in Gognos upon representations that DAT would become listed on the ASX and that their shares would be "converted" into shares in the listed company. The funds provided by investors were to be recorded as loans by Gognos to either DAT or its subsidiary, DAT Finance, and then loaned by that company to Dynamic Fodder Pty Ltd. That company ("Dynamic Fodder") was to act as the "treasury" for the group, it being the only company within the group which had a bank account.[5]

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3 Ibid at [27].
4 Ibid at [29].
5 Ibid at [30].

[12] As at 30 September 2015, Gognos had raised $7,717,975 from some 115 shareholders.[6] Almost all of those funds was paid to Dynamic Fodder, it was said, to fund the operations of DAT. When examined under s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth), Mr Manasseh said that it was intended that Gognos would receive shares in DAT once DAT was floated.[7]

[13] In a detailed analysis which is not criticised in the appellants' argument, the judge described what she said were "inconsistent and somewhat confusing documentary explanations for the circumstances in which Gognos acquired its shares in DAT".[8]

[14] According to a document described as a Share Sale and Purchase Agreement, dated in October 2009, Gognos was to be issued with 30,629,728 fully paid shares in DAT, in consideration of a sale to DAT by Gognos of its then shareholding in DAT Finance. The same document provided for another company, associated with a Mr Purves (then a director of Gognos) to sell its shares in DAT Finance to DAT, in exchange for the issue of about 13 million fully paid shares in DAT.[9] By documents lodged with ASIC in January 2010, DAT was said to have a total of 48 million ordinary shares, which were fully paid in an amount of just over $46.5 million. But, according to documents lodged with ASIC in July 2010, DAT had approximately 19 million fully paid ordinary shares and approximately 28 million partly paid shares, with the amount paid on all shares being approximately $10 million and the amount unpaid on those shares being approximately $13 million.[10] The judge remarked that the material did not explain how or why the changes had come about.[11]

[15] The amount which was said to have been unpaid by Gognos on its shares in DAT became the subject of a deed between Gognos and DAT, at some time in late 2010, according to which Gognos was to make a payment of $4,779,721.36 by 31 December 2010, a further repayment in the same sum by 31 December 2011 and the balance of $4,217,401.20 by 30 December 2012.[12] Her Honour found that the deed was executed to satisfy a pre-condition for listing which was imposed by the ASX, being that DAT have a payment deed in respect of its partly paid shares.[13] Subsequently there were several statements, in various prospectuses that were lodged on behalf of Gognos, to the effect that those payments would be made, albeit with a revision of the date for payment of the first instalment.[14] Her Honour found that there was no reasonable basis for such statements, because of the lack of any funds held by Gognos.[15]

[16] Moreover, in a letter to the ASX in April 2011 signed by a Dr Manfield, then a director of DAT and still its secretary, it was represented that DAT had received that first instalment of $4,779,721.36 "in cleared funds".[16] Her Honour found that this statement was clearly false, a finding which is unchallenged.[17]

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6 Ibid at [31].
7 Ibid at [32].
8 Ibid at [54].
9 Ibid at [55].
10 Ibid.
11 Ibid at [56].
12 Ibid at [103].
13 Ibid at [104].
14 Ibid at [105].
15 Ibid.
16 Ibid at [106].

[17] The judge described the documentation purporting to evidence the treatment of monies transferred from Gognos to be "confusing to say the least".[18] She noted that she was "not alone in that view, as it is apparent from the s 19 examinations that the office holders of the companies did not have a clear, if any, understanding either."[19] In particular, she referred to a description by a Mr Lissa, recently reappointed a director of Gognos (having been a director from 2008 to 2012) and a director of DAT, that the state of the documentation in this respect was "messy".[20] Her Honour described the uncertainty as follows:[21]

> "The bottom line, for present purposes, is that investors paid just over $7.7 million to Gognos. That money went to Dynamic Fodder, to fund the operations of DAT. In the books, that was recorded in various ways as a loan to DAT or DAT Finance, with the intention being that the "loans" would be repaid by the issue of shares in DAT once it floated. There are conflicting explanations for how Gognos came to own its current shares in DAT. There was no attempt by the respondents, either by evidence or in their submissions, to explain these matters."

[18] In another unchallenged finding, the judge said that Gognos and DAT were interdependent, in that DAT was entirely dependent on Gognos investors for funding and Gognos was entirely dependent on DAT successfully listing on the ASX in order to return any value to its own shareholders.[22] Her Honour found that a float of DAT could not happen in the "foreseeable future", partly because that would require DAT to have three years of unqualified audits.[23] From July 2010 until August 2011, some eleven prospectuses were lodged by DAT with ASIC, as DAT continuously extended the closing date for a proposed initial public offering.[24] In October 2011, DAT withdrew its application to list on the ASX, being unable to raise the minimum subscription of $4.55 million, and has since made no further attempt to list.[25]

Changes in directors

[19] Until at least the end of July 2017, Mr Manasseh was a director and the secretary of Gognos and a director of DAT. He became a director of Gognos in December 2013, but the evidence of Mr Lissa was that Mr Manasseh was a shadow director prior to then.[26] He was a director of DAT from November 2009. The appellants' case was that Mr Manasseh, together with a Mr De Andrade, ceased to be directors of DAT on 17 July 2017 and of Gognos on 31 July 2017. They are said to have been replaced at those times by Mr Zwar and a Mr Davis on the board of DAT and by Mr Zwar, Mr Davis and Mr Lissa on the board of Gognos.

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17 Ibid at [107].
18 Ibid at [62].
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid at [66].
23 Ibid.
24 Ibid at [64].
25 Ibid at [65].
26 Ibid at [40].

[20] A Mr Dominic Ka Kuen Sum, a resident of Hong Kong, was appointed a director of Gognos in January 2017 and remained in office. Mr Zwar became the secretary of Gognos in place of Mr Manasseh. A Mr O'Leary, who was appointed to the board of DAT in September 2010, remained in the office. Dr Manfield has been the secretary of DAT since April 2015. He had been a director of DAT until October 2011 when he resigned in consequence of his bankruptcy.[27] Mr O'Leary lives in Dubbo and has had no contact with Mr Zwar since, Mr Zwar said, "perhaps [the] end of 2011".[28] Mr Zwar had never had any contact with Mr Sum or Mr Davis.

[21] During the cross-examination of Mr Zwar, it emerged that he and the other new directors may not have been appointed in accordance with the constitutions of Gognos and DAT.[29] Her Honour described the relevant facts and circumstances as follows. According to DAT's constitution, its board was able to appoint a director, by a resolution of existing directors with three directors comprising a quorum.[30] Mr Zwar's evidence was that some days before 17 July 2017, there had been a telephone hook-up involving Dr Manfield, Mr Zwar and Mr Lissa, in which they had "effectively taken control of" the companies.[31] But none of them was then a director of DAT. And Mr Zwar's evidence was that Mr De Andrade and Mr O'Leary had not been aware of the purported change in directors.

[22] In relation to Gognos, Mr Zwar said that only Mr Manasseh of the then board was involved in a decision to appoint new directors. Mr Lissa and possibly Dr Manfield were also involved, but they were not directors and the constitution of Gognos contained a similar provision whereby the directors could appoint a person as a director, although with two directors to form a quorum. Apart from Mr Manasseh, the other directors of Gognos were unaware of the change.[32]

[23] Dr Manfield gave evidence that there was a telephone hook-up on 14 July 2017, involving him, Mr Zwar and Mr Manasseh, in the course of which a resolution was passed approving the appointment of Mr Davis, Mr Zwar and Mr Lissa as directors of DAT. The judge noted that this evidence was inconsistent with Mr Zwar's account.[33] The involvement of Mr De Andrade was also necessary, but Dr Manfield said that he subsequently spoke to him and he endorsed the decision.[34] Similarly, in relation to Gognos, Dr Manfield's evidence was that Mr De Andrade agreed to the three new directors, after his discussions with Mr Zwar and Mr Manasseh on 18 July 2017. Her Honour noted this evidence was inconsistent with Mr Zwar's account.[35] No one had kept any minutes of these discussions.

[24] On the discrepancy between Mr Zwar's evidence and Dr Manfield's evidence, her Honour noted that it was only during Mr Zwar's evidence that the potential irregularities in the appointment of the new directors emerged, whereas Dr Manfield's evidence was given subsequently and therefore after the issue had arisen.[36] Her Honour was minded to accept Mr Zwar's evidence in this respect. But by the end of the trial,

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27 Ibid at [45].
28 Ibid at [184].
29 Ibid at [179].
30 Ibid at [181].
31 Ibid at [180].
32 Ibid at [183].
33 Ibid at [186].
34 Ibid at [186].
35 Ibid at [187].
36 Ibid at [185].

further steps had been taken on the appellants' side to avoid the possibility of findings that the new directors had not been validly appointed.[37] The judge said that these steps had obviated the need to address, and make findings about, whether the new directors had been validly appointed in July 2017, noting that it was then common ground that "the appointments are capable of retrospective remedy even if (as appears to have been the case) they were initially ineffective."[38] Her Honour observed that nevertheless, this issue was relevant by demonstrating a "lack of rigour … in the conduct of people charged with the responsibility to conduct the affairs of two public companies."[39] Her Honour continued:[40]

> "The fact that this was purportedly effected primarily by Mr Manasseh, together with Mr Zwar and Dr Manfield; in such loose and informal circumstances, seemingly without any attention paid to either the provisions of the *Corporations Act* or the companies' respective constitutions; with no proper meetings; without involving all necessary people in the decision-making process; without even having spoken in some cases to their fellow directors; with no minutes being kept; with conflicting explanations being given of the process of appointment, events which occurred only a matter of days or weeks before trial; and with no notice given to the shareholders about the changes – does nothing to inspire confidence, but rather serves only to reinforce the concerns already justifiably held, given the past conduct."
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> (Footnote omitted.)

[25] Further, the judge accepted, as ASIC had alleged, that Gognos did not have at least three directors, as required by s 201A(2) of the CA, from April 2012 until 12 January 2017 (when Mr Sum was appointed a director, joining Mr Manasseh and Mr De Andrade).[41] During December 2013, its only director had been Mr Purves and for most of January 2014, Mr Manasseh. Another person, a Mr Shanahan, was recorded in the ASIC records as having been a director from February 2008 until 12 January 2017, but who had died in November 2013.[42]

Reports and accounts

[26] The judge found that there were extensive failures to prepare and lodge financial reports, contrary to s 292 (which requires a public company to prepare a financial report and a directors' report for each financial year) and s 319 (which requires the company to lodge the report with ASIC within four months of the end of the financial year). The judge found that financial reports for Gognos for the years ended 30 June 2010, 2011 and 2012 were lodged past the deadline, the 2012 report being lodged more than 12 months late and after the commencement of an ASIC prosecution against the company.[43] Most relevantly, financial reports for the years ended 30 June 2013, 2014, 2015 and 2016 had not been lodged at all by Gognos.[44]

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37 Ibid at [189].
38 Ibid at [190].
39 Ibid at [191].
40 Ibid.
41 Ibid at [70].
42 Ibid at [39].
43 Ibid at [75].
44 Ibid.

In March 2016, Mr Lissa, the then accountant for Gognos, wrote to ASIC saying that the company then had no funds for the completion and lodgement of the outstanding financial reports. In June 2017, Mr Lissa advised ASIC that "there are no resources available at present to satisfy the notice requiring the company lodgement of financial statements and reports".[45]

[27] Similarly, DAT had consistently failed to lodge financial reports. Its report for the 2008 year was lodged almost two years late and the next report was lodged one year late. The most recent of its reports lodged was that for the 2010 year. No reports for any following year had been audited, let alone lodged with ASIC.[46]

[28] In his evidence at the trial, Mr Lissa estimated that about three to four months would be necessary for an auditor to complete the audits of the outstanding reports for Gognos and DAT, an exercise which would cost between $70,000 and $100,000.[47] Mr Zwar's evidence was the cost of the audits would be met by those who were funding the companies' legal representation in the case.[48]

[29] Each company has contravened s 250N, which requires a public company to hold an annual general meeting within five months of the end of its financial year. Gognos has never held an AGM.[49] DAT has not held an AGM since at least 2010.[50]

[30] ASIC also alleged that the companies had failed to comply with s 286(1) of the CA, which requires a company to keep written financial records which would enable true and fair financial statements to be prepared and audited. In their written submissions, filed on the eve of the commencement of the hearing, the companies disputed this allegation. Her Honour noted that it was not addressed during the hearing, either by evidence or argument.[51]

[31] The companies' written submission had been to the effect that s 286(1) requires a company to "keep" written financial records, but does not oblige it *produce* "accurate" records.[52] That argument, which was not abandoned at the trial, was rejected by the judge. The relevant records to be kept were to be accurate, in that, by the terms of s 286(1), they were "to "*correctly*" record and explain a company's transactions and financial position and performance", such as to enable true and fair financial statements to be prepared and audited.[53]

[32] The judge noted that according to the evidence of Mr Lissa, there had been no management accounts for Gognos since July 2012 and draft financial records for that company, which he had produced in response to ASIC's request for production of financial statements for the 2013 to 2015 financial years, were something which he had "just run off" and were "nowhere near complete".[54] In response to a similar notice addressed to DAT, for the 2011 to 2015 financial years, the only documents produced were those which related to Dynamic Fodder, rather than DAT. These accounts were said to relate also to DAT because, it was said, there was only one set of consolidated accounts produced for the group of which Dynamic Fodder and

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45 Ibid at [76].
46 Ibid at [92].
47 Ibid at [79], [94].
48 Ibid at [79].
49 Ibid at [83].
50 Ibid at [96].
51 Ibid at [90], [97].
52 Ibid at [86].
53 Ibid.
54 Ibid at [88].

DAT were members. Her Honour accepted ASIC's case the documents were insufficient and that DAT had also contravened s 286.[55]

Misrepresentations

[33] The judge found that substantial misrepresentations had been made to potential investors in Gognos, in relation to three subjects. The first was the prospective listing of DAT on the ASX, even after DAT had withdrawn its application and it was clearly not in a financial position to pursue an ASX listing. The second was a number of misrepresentations as to the existence of substantial orders for fodder units to be produced by DAT. The third concerned significant share subscriptions from overseas investors.[56] There is no challenge to those findings.

[34] When examined under s 19, Mr Manasseh said that after a prospectus was withdrawn in 2011, investors were still told that "we were going to float very shortly" and that "we had a lot of people from overseas [who] were going to put money into the company." Mr Manasseh said he would show prospective investors "the orders we have and … the commitment from people overseas who are going to give us the money."[57]

[35] As to orders for the fodder units, the judge found that the companies had engaged the services of an agent in Argentina, a Mr Libman, to sell units. Mr Lissa's evidence was that Mr Libman had been attempting for more than five years to negotiate concluded sales. There was evidence of three sales, in the form of invoices dated in May, August and September 2013. According to those invoices, deposits totalling nearly US$11 million were required to be paid. Also tendered was a letter, signed by Dr Manfield for DAT, but addressed to Mr Manasseh, dated in August 2015 which represented that there had been orders from a further six customers, for sales totalling a further US$11.32 million.[58] Mr Manasseh provided to ASIC a letter, purporting to be from a particular customer, ordering 25 fodder units in November 2013, and apologising for a delay of a deposit because of actions by the Argentinian government controlling the movement of money.[59]

[36] Mr Manasseh showed some of these sales orders to prospective investors in Gognos.[60] The judge found that none of these expected sales had "materialised" and that no funds had been paid in respect of any of the orders.[61] Her Honour accepted that there was nothing to suggest that there was any realistic basis to believe that payment (in whole or in part) for the orders will ultimately be received.[62] In that respect, Mr Zwar gave evidence that he had travelled to Argentina in January 2017, met Mr Libman and asked to meet with the individuals or entities which were said to have placed orders, but that he was unable to meet with any such person.[63] In his evidence at the trial, Mr Zwar acknowledged that there was no prospect of any money coming to DAT from the so-called orders.[64]

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55 Ibid at [99].
56 The findings were summarised at paragraph [131] of the Judgment.
57 Ibid at [112].
58 Ibid at [114] – [115].
59 Ibid at [116].
60 Ibid at [117].
61 Ibid at [118] – [119].
62 Ibid at [120].
63 Ibid at [122].
64 Ibid at [123].

The judge added that Mr Zwar was not as sceptical as he once had been about future orders, without Mr Zwar explaining why that was so.[65]

[37] The judge noted that Dr Manfield believed that something would come from the past orders, an optimism which was said to be based upon his conversations with Mr Libman.[66] Her Honour characterised Dr Manfield's evidence in this respect as little more than "wishful thinking".[67]

[38] Mr Manasseh showed to prospective investors in Gognos documents which represented that there had been substantial subscriptions for shares by overseas investors. One such document was a letter dated in April 2011 from a Mr Poletti, expressing his intention to subscribe for 16 million shares, at a cost of AUD$8 million in DAT. Mr Manasseh said, in his s 19 examination, that Mr Poletti was an investor from Argentina whose money "never ever came", again because of problems with the Argentinian government. There were other documents, which purported to be subscriptions for shares, from investors from Argentina, Panama, the USA, Italy, Uruguay and Curaçao. Those documents purported to show subscriptions for a total of AUD$77.35 million worth of DAT shares between March 2013 and March 2016. None of those funds were received. Her Honour found that Mr Manasseh's explanations for the "delays" in payment by "these supposed prospective subscribers" were "implausible".[68]

[39] Misrepresentations by Mr Manasseh were also proved by evidence given at the trial by two witnesses called in ASIC's case. One of them, a Mr Blasenstein, had acquired through his company shares in Gognos at a cost of $330,000. In another unchallenged finding, her Honour said that Mr Blasenstein had invested upon the basis of representations of Mr Manasseh which were "blatantly dishonest".[69] The other witness called by ASIC was a Mr Moses, who had invested a total of $100,000 between October 2012 and January 2013. He gave unchallenged evidence that he invested upon the basis of certain representations to him by Mr Manasseh, which, the judge found, had been "objectively dishonest".[70]

The appellants "not clearly solvent"

[40] ASIC did not ask the judge to find that either company was insolvent. Mr Lissa gave affidavit evidence that it was his opinion, based on the draft accounts of Gognos (which he had prepared) that Gognos was solvent. But her Honour said this had been qualified by Mr Lissa's oral evidence and his opinion of solvency was not to be accepted.[71] Her Honour said that "the perilous financial position of Gognos is apparent" and she found that Gognos was "not clearly solvent".[72] There is no challenge to that finding. The company could hardly be clearly solvent in the absence of reliable financial records. Its fate was dependent upon that of DAT which, again, was without reliable financial records.

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65 Ibid.
66 Ibid at [124].
67 Ibid.
68 Ibid at [129].
69 Ibid at [138].
70 Ibid at [144].
71 Ibid at [173].
72 Ibid at [173].

[41] Her Honour discussed the supposed consolidated management accounts, prepared for the Dynamic group but in the name of Dynamic Fodder, and remarked that they showed liabilities as at June 2016 which neither DAT nor Dynamic Fodder had the capacity to repay.[73] They showed that the last time that any income had been earned from trading had been in 2012, with the sale of one unit for a price of $150,000. Mr Zwar said that having looked at those accounts for the Dynamic group, and the draft accounts for Gognos, the financial position of the companies was "extremely concerning" and he agreed with Mr Manasseh's description in his s 19 examination that DAT was "broke".[74] Her Honour concluded that in the circumstances, both companies were "not clearly solvent" and did not appear to be viable.[75]

The new directors

Mr Zwar

[42] Mr Zwar is a solicitor and the member of the firm which had the conduct of the appellants' case from the commencement of this proceeding in September 2016.

[43] The judge described Mr Zwar as a long-term associate of Mr Manasseh,[76] having known him since 1998 when he acted for Mr Manasseh's daughter.[77] He acted for Mr Manasseh in a prosecution brought against him by ASIC in about 2001.[78] He advised Mr Manasseh, and one of the Dynamic group entities, in about 2013 or early 2014.[79]

[44] Mr Zwar is a shareholder in Gognos (through his superannuation fund), having purchased those shares in 2009. His evidence was that he invested approximately $130,000 in shares in Gognos, although in several ways, that is inconsistent with the share register. At the time of the hearing, he was shown in the register as owning 60,000 shares, on which $28,000 had been paid. The share register also showed that at one stage, he owned some 200,000 shares, and in his own right and at a later date, he was not a shareholder. The internal inconsistencies of the share register are yet another demonstration of the absence of any proper governance and administration of these companies. However the judge accepted that Mr Zwar was in some respect a shareholder and had been for some years.[80]

[45] Mr Zwar said that he was advancing part of the funds which were to be paid to his firm for the conduct of this case, but that his liability to contribute was capped at $150,000. He said that the other funders were "several of the shareholders". They included, he said, Mr Manasseh's wife, whose liability to contribute to the case was "potentially unlimited". The judge observed that this information about the funding of the case came to light only during the cross-examination of Mr Zwar, and after he had at first said that the litigation was being funded by "third parties … paying … my professional cost".[81]

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73 Ibid at [174].
74 Ibid at [175].
75 Ibid at [177].
76 Ibid at [37].
77 Ibid at [193].
78 Ibid.
79 Ibid.
80 Ibid at [193].
81 Ibid.

[46] Mr Zwar has not always been an ally of Mr Manasseh. In 2014, he was one of several shareholders who were complaining to ASIC about the conduct, or misconduct, of the companies' affairs. The judge set out the facts of that complaint in some detail.[82] In March 2014, Mr Zwar corresponded with Mr Rodney Adler, whom the judge said had had "some involvement in these companies at an earlier time", to express a concern that no money was forthcoming from the supposed Argentinian customers. He told Mr Adler, who had "commenced recovery action against [Mr Manasseh]", that "[a]ll of my clients are totally over it and have lodged official complaints with ASIC." Unpersuaded by Mr Adler's advice that no complaint should be made to ASIC, in August 2014 Mr Zwar assisted two of his clients, who had invested in Gognos, to write a letter to ASIC, alleging that Mr Manasseh had induced them to invest by misrepresentations "that the float was imminent and that production was already underway".[83] In the same month, Mr Zwar wrote to ASIC saying that he was aware of many other dissatisfied investors and that he would "seek to press remaining investors I know to come forward [to make a complaint to ASIC]".[84] On 31 October 2014, Mr Zwar wrote to ASIC saying that he agreed with his clients' complaints and that, indeed, he had been present when Mr Manasseh's misrepresentations were made. He wrote that he was "very concerned as to the allocation of funds … as we have no cogent explanation as to what has become of more than $5 million raised over the course of the past 4 years".[85] When asked about this correspondence in cross-examination, Mr Zwar said that he was more "prospective [sic] about it now".[86]

[47] Mr Zwar was always a potential witness because, as he had written to ASIC in 2014, he had been present when Mr Manasseh made misrepresentations to investors of the kind which was part of ASIC's case. Yet as the solicitor with the conduct of this case for the companies, he was involved in preparing affidavits on the subject and filing written submissions on behalf of the companies which "strenuously refuted" ASIC's allegations.[87] In cross-examination he denied that "he had a conflict".[88]

[48] ASIC submitted to the judge that Mr Zwar had "put himself in … an impossibly conflicted situation" and that his position was made worse by his unpreparedness to accept that to be the case. ASIC's submission was put very broadly: it was that there were conflicts between his positions as director, instructing solicitor, part-funder of the litigation, shareholder, creditor and former solicitor acting for shareholders complaining to ASIC and his "longstanding commercial and personal relationships with other witnesses and relevant people such as Mr Manasseh, Mr Lissa and Dr Manfield."[89]

[49] Having referred to several authorities, including *Jeffery v Associated National Insurance Co Ltd*,[90] *Chapman v Rogers; Ex parte Chapman*,[91] *Hempseed v Ward*,[92]

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82 Ibid at [194] – [202].
83 Ibid at [199].
84 Ibid at [200].
85 Ibid at [201].
86 Ibid at [202].
87 Ibid at [3].
88 Ibid at [204].
89 Ibid at [205].
90 [1984] 1 Qd R 238 at 245.
91 [1984] 1 Qd R 542 at 544-545.
92 [2013] QSC 348 at [39]-[40], [42].

Mitchell v Burrell,[93] *Holborow v Macdonald Rudder*,[94] *Bowen v Stott*,[95] *Paino v MDN Mortgages Pty Ltd*,[96] and *Pearlbran v Win Mezz No. 19 Pty Ltd*,[97] her Honour accepted the broad submission of ASIC, as follows:

> "[223] The concerns that arise given the numerous interests of and associated with Mr Zwar in relation to the companies and those centrally involved in them, including Mr Manasseh, are the result of the combination of what is an apparent conflict, between his current retainer *for* the companies, against the background of acting for shareholders in complaints *against and about* the companies, and the conduct of Mr Manasseh in particular; his role as one of the new directors, and as a witness giving evidence going beyond formal, uncontroversial matters; and importantly the apparent conflict between his personal interests in the companies (as a substantial shareholder, through his super fund, and a director), his financial interest in the outcome of the proceedings, his close personal relationship with the people involved in the companies, his personal reputational interests and his obligation to the court – all of which compound to strongly call into question the ability of Mr Zwar to discharge his duty to the court as an independent and objective lawyer unfettered by concerns about his own interests.
>
> [224] … In my view, the submission by ASIC that Mr Zwar has displayed a "startling lack of insight" is justified."
>
> (Original emphasis.)

[50] That reasoning is challenged by one of the grounds of appeal, which it is convenient to discuss now. The ground is that the judge's finding was not open on the evidence or was against the weight of the evidence. As the point was developed, the findings were criticised upon the basis that the judge had not articulated the nature of the conflict. It was further submitted that there was no demonstrated conflict of any kind.

[51] With respect, the judge's acceptance of ASIC's submission in such broad terms is fairly open to criticism. It is necessary to identify the particular conflict between duty and interest, or duty and duty, which might matter for the outcome of this case.

[52] As to Mr Zwar being a witness, the companies had referred the judge to r 27.2 of the *Australian Solicitors' Conduct Rules*, which provides that a solicitor, who is not appearing as an advocate, may continue to act, although a witness, "unless doing so would prejudice the administration of justice". The judge endorsed the statement of McMeekin J in *Hempseed v Ward*[98] that the rule picked up the test that was explained by Brereton J in *Kallinicos v Hunt*[99] as follows:

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93 [2008] NSWSC 772 at [20].
94 [2002] WASC 265.
95 [2004] WASC 94.
96 [2009] NSWSC 898.
97 [2009] QSC 292.
98 [2013] QSC 348 at [37].
99 (2005) 64 NSWLR 561 at 582; [2005] NSWSC 1181.

> "[W]hether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice[.]"

[53] Her Honour also adopted the reasoning of Brereton J in *Mitchell v Burrell*, namely that:[100]

> "[The] line is crossed only when the solicitor has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involves the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings. The presence of such circumstances will be a strong indication that the interests of justice – which in this field involve clients being represented by independent and objective lawyers unfettered by concerns about their own interests – require the lawyer to be restrained from continuing to act."

[54] In my view that was one way in which Mr Zwar's continuing to act as the appellants' solicitor, certainly once he was certain to be a witness, was misjudged. He had both a personal and reputational interest in the findings which might be made and in the ultimate outcome. He ought not to have been both a material, indeed a critical, witness in the companies' case whilst also acting as their solicitor. Further, there is the matter I have already mentioned, that he had witnessed at first hand some of the conduct of Mr Manasseh, but yet he facilitated a response to ASIC's allegations in that respect which was in the nature of a blanket denial.

[55] At least in those two respects, his conduct as a legal practitioner was inappropriate and, in turn, that was relevant to an assessment of his ability and willingness to act with the necessary care and diligence in his new role as a director of the companies.

[56] Ultimately, her Honour did not say that Mr Zwar's evidence ought to be rejected outright, given his conflicted position, and noted that ASIC had made no submission to that effect. Rather, she accepted ASIC's argument that "the lack of insight demonstrated by Mr Zwar" was a relevant matter to be taken into account in considering whether the court could be satisfied that there was no longer a lack of confidence in the conduct and management of the affairs of the companies.[101] I agree with that conclusion (although, as should appear, I do not entirely agree with the judge's reasons for it). Consequently, I would reject this ground of appeal.

Mr Lissa

[57] The judge described Mr Lissa as also a long-term associate of Mr Manasseh, who had provided accounting services to Gognos for many years. Further, Mr Lissa had been a director of Gognos from February 2008 until April 2012.

[58] An amount of $400,000 had been deposited into Mr Zwar's trust account by Property Magic Aust Pty Ltd, a company of which Mr Lissa and his wife are the directors. In his affidavit, Mr Lissa said that he had agreed to advance this sum to

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100 [2008] NSWSC 772 at [20].

101 Judgment at [225].

DAT "in order that the funds could be utilised at my express approval for ongoing commercial negotiations and sufficient capital for [DAT] to maintain and develop its overall business plan." He said that the money would not be used to pay for the costs of this proceeding, nor for the costs of finalising the audits for the companies. He said that DAT did not need more than $400,000 by way of immediate working capital, because any orders for its products would involve a payment of a deposit of one half of the retail price of a unit, which is US$150,000.

[59] When Mr Zwar was cross-examined, he said that although this proposed line of credit from Mr Lissa's entity had been discussed by him with Mr Lissa about three or four months earlier, the directors of DAT had not met to consider that line of credit. Mr Zwar said that he had been unable to make contact with Mr Davis and he agreed that he had not asked Mr O'Leary about the subject. Mr O'Leary, of course, is not a recently appointed director of DAT. Further evidence by Mr Zwar in cross-examination revealed that there was no agreed interest rate to be paid by DAT to Mr Lissa's company, nor was there any agreed term for repayment. Further, he said that it was his understanding that Mr Lissa would have "some sort of right of veto over the way in which the funds might be used from this line of credit". Mr Zwar's affidavit evidence was that these funds would not be used to pay for the outstanding audits or the costs of the proceeding.

[60] Her Honour said this of the proposed facility:

> "[248] What is apparent from the evidence about this proposed facility is that it is a last-minute idea; which has not been the subject of discussion with all directors; for which there is no plan or budget; and for which those involved seemingly have different ideas as to how it will be spent. Moreover, there is no proper business plan for how it is proposed to develop the business, beyond a continued reliance, indeed dependence, on the possibility of success of a sales agent in Argentina, who the evidence objectively indicates has been singularly unsuccessful in the last five years. Those matters do not assist to give confidence in the ongoing management and conduct of the affairs of the companies."

The other directors

[61] There was no evidence from Mr O'Leary (a director of DAT), Mr Sum (a director of Gognos) or Mr Davis (a director of each company). This was remarkable, given that much of the appellants' case at the trial was premised upon what were said to be the realistic possibilities of a reversal in the fortunes of the companies.

[62] As I have discussed, there was evidence from Dr Manfield, although he is not a director of either company. There was no evidence from Mr Manasseh, which raises a point to which I will return. Nor was there evidence from Mr De Andrade.

Mr Manasseh's future involvement

[63] Her Honour fairly observed that "[t]he clear strategy of the respondents at the beginning of the trial was to distance themselves from Mr Manasseh – describing him as having been "cast adrift", and effectively "thrown under the bus", with the "investors who have the money at stake … [having] now taken over the

management of … both companies"."[102] She noted that in closing submissions for the companies, it had been accepted that the change of directors was "to defeat these proceedings and to defeat the application to wind up" because, were Mr Manasseh and Mr De Andrade still directors, "one would have thought there would have been very little prospect of the companies resisting the application".[103]

[64] Her Honour found, as ASIC had submitted, that "the whole idea of the departure of Mr Manasseh as a director, the appointment of the new directors, and the $400,000 facility, was a plan put together by Mr Zwar and Mr Manasseh (with Mr Lissa and Dr Manfield) to ensure the companies could continue to operate beyond the hearing of this matter." She rejected the proposition that these changes had come from the shareholders "striking back" or taking over the companies.[104]

[65] Those findings involved a rejection of some of the evidence of Mr Zwar, as well as that of Dr Manfield, on the subject. Mr Zwar's evidence was that he had been pressuring Mr Manasseh to resign for many months, and ultimately persuaded him to do so. He rejected the proposition, put to him in cross-examination, that the change in directorships was a carefully planned strategy between him and Mr Manasseh, in order to defeat ASIC's application. Dr Manfield said that he had discussed with Mr Manasseh a change of directors for about a year, or perhaps longer.

[66] In my view, what mattered was not so much that the departure of Mr Manasseh was explicable only by the imminent prospect of winding up orders, but rather whether Mr Manasseh had been separated completely and permanently kept from any further participation in the management of the affairs of the companies. If the companies were to be permitted to continue, there was a practical necessity to exclude Mr Manasseh, because of the ways in which his misconduct had infected the proper conduct of the companies' affairs and the performance of its legal responsibilities.

[67] The judge found that "[t]he evidence strongly supports the inference that although Mr Manasseh is no longer a director of Gognos or DAT, he is still very much involved in the companies."[105] Her Honour referred to these facts and circumstances:[106]

> "(a) he remains the director of Dynamic Fodder, the trading or operating company for the Dynamic group;
>
> (b) his wife is funding this litigation, to an unlimited extent;
>
> (c) he is in regular contact with Dr Manfield (who, in response to the question how regularly he speaks to Mr Manasseh said he would "have to take off my shoes and socks to count them in a day", "we would speak very frequently"), including having spoken to him on the phone on the morning he gave his evidence;
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> (d) he also has close and frequent dealings with Mr Zwar and Mr Lissa – he spoke to Mr Lissa during the hearing, to ask how the court proceeding was going;
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> (e) Dr Manfield carefully responded to the proposition put to him, that the respondents were conducting their case on the basis

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102 Ibid at [228].
103 Ibid at [233].
104 Ibid at [232].
105 Ibid at [231].
106 Ibid.

that Mr Manasseh no longer has any involvement in the conduct of the companies by saying "I would have thought Mr Manasseh no longer has any role *as a director* of the company" – and when it was put to him that Mr Manasseh is still intimately involved in the conduct of the companies, Dr Manfield's response was "If he can bring the money in, we'd be very grateful"; and

(f) Mr Manasseh was centrally involved in the plan to replace the directors, including identifying Mr Davis and then Mr Zwar and Mr Lissa, people with whom he has longstanding relationships, as appropriate replacements – for him and Mr De Andrade."

(Footnotes omitted; original emphasis.)

[68] That reasoning is challenged by several arguments. It is necessary then to discuss each of the facts and circumstances to which her Honour referred, the first being that Mr Manasseh remained a director of Dynamic Fodder. As is submitted for the appellants, Dynamic Fodder does not control either of them, so that according to the legal structure of the Dynamic group, Mr Manasseh, as the director of Dynamic Fodder, could not affect the conduct of their affairs. That submission is correct, as far as it goes, but it does not answer the concern which the judge expressed. Dynamic Fodder is the one company within this group with a bank account. Almost all of the money raised from investors found its way to Dynamic Fodder. The legal relationship between that company and DAT or Gognos as to those funds, is unclear, especially because there are no completed, let alone audited, accounts for either of the appellant companies. Further, in his s 19 examination, Mr Manasseh described Dynamic Fodder as the "company that does the everyday work for [DAT]".[107] In any practical sense, Mr Manasseh's role as a director, indeed *the* director, of Dynamic Fodder means that he would not be divorced from the conduct of DAT's business. Her Honour was correct to identify the relevance of this circumstance in indicating a likely ongoing involvement in the affairs of the appellants.

[69] The matter referred to by the judge in (b), namely that Mrs Manasseh was funding the litigation and to an unlimited extent, was a relevant circumstance. Of itself, it might have been explained away upon the basis that Mr and Mrs Manasseh, as shareholders, were wanting the companies to survive. But this was one circumstance which it was necessary to consider with others.

[70] As to the contact between Dr Manfield and Mr Manasseh, it is submitted for the appellants that her Honour misunderstood the effect of Dr Manfield's evidence. It is necessary then to refer to the passages of his evidence to which the appellants refer, as well as that passage identified by the judge.

[71] In examination-in-chief, Dr Manfield was asked about discussions between him and Mr De Andrade, in which, according to Dr Manfield, the relevant discussion was that which occurred on 20 June 2017. He was asked whether prior to that date, he had had discussions with Mr Manasseh. He was asked "Did you have regular discussions with him or occasional discussions with him?", to which he answered "Yes". He was asked "How regularly?", and answered "I'd have to take off my

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107 Ibid at [51].

shoes and socks to count them in a day." He continued "We would speak very frequently".

[72] However, it was a passage of his evidence in cross-examination to which the judge referred. Dr Manfield was then asked: "You speak frequently to Mr Manasseh?", to which he answered "Correct". He was asked: "And if you and Mr Zwar talk to each other about an aspect of the business, you then talk to Mr Manasseh about it; is that correct?", to which he answered "Correct". A little further on, Dr Manfield said that Mr Manasseh, Mr Zwar and he "all talk to each other … it's a collective process". When asked when he had last spoken to Mr Manasseh, he said that he had spoken to him on that morning. He agreed that it was "still the case that [he was] talking to [Mr Manasseh] on a regular basis since the 17th of July".

[73] Consequently, her Honour did not misunderstand the evidence of Dr Manfield. That evidence from Dr Manfield demonstrated the ongoing participation of Mr Manasseh after his resignation as a director.

[74] As to the matter in paragraph (d), namely Mr Manasseh's "close and frequent dealings with Mr Zwar and Mr Lissa", her Honour referred to evidence from Dr Manfield about his perceptions of the dealings between those three, rather than from Mr Zwar and Mr Lissa. But read with his other evidence, which I have just discussed, Dr Manfield's perception was not without weight. The appellants' submissions point out that this matter, the close and frequent dealings between the new directors and Mr Manasseh, was not put to either Mr Zwar or Mr Lissa. This point emerged only during Dr Manfield's evidence, which was after Mr Zwar had testified. The same cannot be said about the matter not being put to Mr Lissa. However in cross-examination, Mr Lissa agreed that he was continuing to provide accounting services to Mr Manasseh and that he had spoken to him only on the previous day, when Mr Manasseh "rang up to see how the … court proceedings were going".

[75] As to Dr Manfield's evidence to which the judge referred in paragraph (e), it is submitted for the appellants that these matters are not probative of Mr Manasseh's influence. That cannot be accepted. On its face, this was evidence by Dr Manfield that Mr Manasseh would remain active in seeking further investment in the companies, which is inconsistent with the notion that he had been "cast adrift".

[76] It is said that the involvement of Mr Manasseh in identifying Mr Davis, Mr Zwar and Mr Lissa as appropriate appointees is not probative of any influence over them. But again, this is but one of the circumstances which, taken as a whole, founded the judge's conclusion that Mr Manasseh was still very much involved in the companies.

[77] The appellants argue that there was no basis for the judge to conclude that the new directors would not properly discharge their duties or that they would be influenced, improperly or otherwise, by Mr Manasseh. Further, it is argued that the judge made findings, as to the ongoing involvement and influence of Mr Manasseh, which went beyond ASIC's case. In addition to her drawing the inference that Mr Manasseh was still very much involved in the companies, her Honour found that "those now presenting as the "new management" are not "new" at all, but have long term associations with the companies and the principal offender in terms of the

misleading conduct of the past, Mr Manasseh, who remains in the shadows of these companies."[108]

[78] In this Court, counsel for ASIC disavowed an argument that the new directors would be *directed* by Mr Manasseh. Counsel said that it was not ASIC's case at the trial, or in this Court, that there had been an *abdication* of the directors' responsibilities to Mr Manasseh. But as they submitted, these were not things which the judge found. By commenting that Mr Manasseh "remains in the shadows of these companies", her Honour was not saying that he was a shadow director, as she said that he had been in previous years before being appointed a director in 2013.[109]

[79] ASIC's argument to the judge was in response to the argument for the companies that Mr Manasseh had been "cast adrift". ASIC persuaded the judge that this was not the case, in that Mr Manasseh would continue to be *involved* in the companies' affairs. The reasons which her Honour gave for that finding, as expressed in the passage set out above from paragraph [231] of the Judgment, well supported that finding. And the long-standing associations between Mr Manasseh and the new directors, especially Mr Zwar and Mr Lissa, could not be ignored in assessing the risk that Mr Manasseh would continue to be involved.

[80] A particular risk, which was indicated by Dr Manfield's evidence, was that Mr Manasseh would continue to make representations to investors in order to raise further funds. Mr Zwar gave evidence that he had been informed by Mr Manasseh of his willingness to give an undertaking "not to seek to raise funds from members of the public pending the resolution of this matter". The judge commented that such an undertaking would be "of limited value, given the qualification as to time" and that "it says nothing about raising further funds from existing shareholders".[110]

[81] A further matter identified by the judge was that given Mr Manasseh's participation over several years in these companies, Mr Manasseh would be expected to have a consolidated and relevant knowledge and expertise, at least as the new directors might see it, which he would wish to apply and they would wish to seek. Her Honour referred to the evidence of Mr Lissa, when examined under s 19, that Mr Manasseh had "pretty much run across all of the companies, because at the end of the day it's his expertise, his contacts …"[111]

[82] At the trial, undertakings signed by Mr Manasseh and Mr De Andrade were tendered, under which each undertook that for a period of five years, he would not seek or accept appointment as a director or otherwise as an officer of either company. But as her Honour remarked, those undertakings said "nothing about being [otherwise] involved in the affairs of the companies".[112]

[83] The judge inferred that any evidence which Mr Manasseh could have given on this subject would not have assisted the case for the companies.[113] That inference is criticised by the appellants. It is said that there has been no reason to call Mr Manasseh to explain or contradict any evidence which could found an inference of Mr Manasseh's ongoing involvement, because there was no such evidence to be

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[108] Ibid at [258].
[109] Ibid at [40].
[110] Ibid at [238].
[111] Ibid at [237].
[112] Ibid.
[113] Ibid at [235], citing *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8.

contradicted. That cannot be accepted. There was ample evidence, as the judge explained. It is further argued that the issue was really whether it was the new directors who would be managing the companies or whether it would be Mr Manasseh. Again, that submission misstated the judge's finding and, it seems, ASIC's submission. It was not that the new directors would do nothing and leave it all to Mr Manasseh; the finding was that he would still be a participant in the affairs of the company rather than being completely divorced from them.

[84] At the trial, as well as in this Court, it was argued that it was not for the court to assess the commercial prospects of the companies, and to be concerned with protecting the public from a risk or financial loss from a bad investment. Her Honour did not reject that proposition. She discussed the submission when dealing with a related argument for the companies, namely that the court should ask why Mr Zwar and Mr Lissa would wish to be advancing funds and devoting their time and energy if the companies were without commercial prospects. As to that second argument, the judge confessed to a difficulty in answering the question which it framed. She observed that there was no objective basis for Mr Zwar's optimism.[114] She considered that a possible explanation for Mr Lissa's support for the companies could be his long-standing friendship with Mr Manasseh, whom he had known since about 1988.[115] Her Honour's conclusion as to these submissions were expressed as follows:

> "[254] I do not purport to express a view about the broader potential commercial prospects of the manufacture and distribution of fodder units. What I have formed a view about, however, is that there is a well-founded, justified, present, lack of confidence in the conduct and management of the companies' affairs, such as to give rise to a real risk to the public interest that warrants protection, and the fact that Mr Lissa, Mr Zwar and Dr Mansfield have neither the desire nor the incentive to wind up the companies is not such as to overcome those matters."
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> (Footnote omitted.)

[85] In my conclusion, the challenges to the judge's findings about the future participation of Mr Manasseh must be rejected.

The impact of winding up on the shareholders

[86] The judge acknowledged that it would be "an extremely unfortunate outcome" that investors would lose all of their money in the event that the companies were wound up.[116] She declined to speculate upon the prospect that some investors would be able to obtain redress by their own proceedings.[117] She correctly identified that it was the public interest, and not merely those of the shareholders, which was to be considered.[118]

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114 Ibid at [252].
115 Ibid at [251].
116 Ibid at [255].
117 Ibid at [257].
118 Ibid at [254].

[87] The judge did not overlook the evidence of some shareholders, called in the case for the companies, who wished the companies to continue. Her Honour discussed the evidence of those witnesses at paragraphs [147] through [153] of the judgment. Unsurprisingly, as her Honour observed, there were matters about the companies of which at least some of these witnesses were unaware. Be that as it may, to the extent that it could be relevant, there was no proven majority opinion amongst the shareholders which opposed the winding up of the companies.

The relevant legal principles under s 461(1)(k)

[88] The legal principles governing an application brought by ASIC under s 461(1)(k) of the CA are not in dispute in this appeal, and nor were they before the primary judge. The appellants' submissions make no criticism of the judge's summary of those principles.[119] What is in issue is the application of them to the facts and circumstances of this case.

[89] These applications were made by ASIC upon the basis that it was just and equitable that the companies be wound up, because it was in the public interest to do so. The court was required to make a prospective assessment of the likely conduct of the companies' affairs, absent a winding up. That assessment had to be made according to the facts and circumstances as they existed at the time of the hearing. But the history of the companies was not to be ignored. The essential question for the court was whether the changes in directorships, together with the provision of Mr Lissa's line of credit, put paid to an unjustified risk of further misconduct in relation to these companies, so that the public interest could be protected only by a winding up.

[90] In *Loch v John Blackwood Ltd*[120] Lord Shaw of Dunfermline said that "at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs". In a proceeding such as this, which is brought by ASIC in the performance of its public interest responsibilities, that lack of confidence "comes not from within the companies, but from without".[121] Consequently, although the interests of shareholders and directors are not irrelevant, the basis for applications of the present kind is a concern with the interests of the public. In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)*,[122] Gordon J said that a risk to the public interest may take several forms. For example, her Honour said, a winding up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public; or it might be justified in order to prevent and condemn repeated breaches of the law.

[91] The solvency of a company will make a court reluctant to wind it up.[123] But in the present case, the judge found that the companies were not "clearly solvent".

The judge's conclusions

[92] Her Honour summarised her reasoning as follows:

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119 Ibid at [7] – [20].
120 [1924] AC 783 at 788.
121 *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 527; [1995] FCA 1663.
122 [2013] FCA 234 at [23].
123 *Australian Securities and Investments Commission v ABC Fund Managers* (2001) 39 ACSR 443 at 470 per Warren J (as she then was); [2001] VSC 383.

> "[258] The evidence before the court demonstrably supports the conclusion that there is a well-founded and justified lack of confidence in the conduct and management of the companies' affairs, such as to give rise to a real risk to the public interest that warrants protection – to protect existing and the prospect of any future investors, the public, and creditors, where the companies have not carried on their business candidly and in a straightforward manner with the public, and have been mismanaged, as well as to prevent and condemn the repeated and continuing breaches of the *Corporations Law*. The financial position of the companies is perilous and such that, although a finding of insolvency has neither been sought, nor will be made, it supports winding up, rather than militating against it. It is inappropriate that the respondents be allowed to continue on the basis of what could be put no higher than an "unknowable" prospect of potential commercial success which may result in a return to investors, in the face of past and continuing non-compliance with obligations, mismanagement of the affairs of the companies, and misleading representations to investors, and where those now presenting as the "new management" are not "new" at all, but have long term associations with the companies and the principal offender in terms of the misleading conduct of the past, Mr Manasseh, who remains in the shadows of these companies."

[93] Within the first sentence of that paragraph, her Honour correctly described the relevant enquiry, namely whether there was a real risk to the public interest that warranted the protection of a winding up order. She referred to the protection of the interests of both existing and future investors. In the appellants' submission, the interests of existing investors would be served better by not winding up the companies. There is no apparent prospect that they would receive any return from a winding up, whilst it is said, there is a prospect that they would see something for their investment if the companies were allowed to continue. The effect of her Honour's findings is that there is no real, as distinct from theoretical, possibility of that return. In my view, there is no demonstrated error in that assessment. However, the appellants are likely to be correct in saying that the interests of present investors would not be better served by a winding up, because either way, they are likely to have lost their entire investment.

[94] The protection of any future investors is another matter. Her Honour was correct to identify a real risk that other investments would be sought. I have referred to evidence which showed the likelihood that further funds would be sought by, in particular, Mr Manasseh.

[95] Her Honour was correct to identify the risk to creditors, given the apparent financial positions of these companies, which, in the above passage, she aptly described as "perilous".

[96] Of particular concern was the ongoing contravention by the companies of provisions of the CA which require the preparation and lodgement of financial reports, and the audit of those reports. Remarkably, the many years of outstanding reports were not brought up to date by the time of this hearing and nor was it demonstrated that this would occur within any particular time. The cost of doing so

was said to be of the order of $70,000 to $100,000, but the companies have not been provided with funds from anyone, including Mr Lissa, to enable that work to be done. All that could be offered by the companies were statements of intention, upon the basis that the funding for the audits would be provided by those who were funding the litigation. There was no evidence from them that they would do so, except perhaps from Mr Zwar, although he did not say how much he would contribute for this purpose. It was not at all explained why they had not also funded the preparation and audit of the financial records.

[97] Within that summary of her reasoning, her Honour also referred to the ongoing involvement of Mr Manasseh. As I have discussed, the challenges to her findings in that respect should be rejected.

My conclusion and proposed orders

[98] The task for the judge was to assess the nature and extent of the risks to the public interest from these companies being allowed to continue, given their lamentable history of mismanagement and misconduct. Ultimately, it was common ground that as things stood just a few weeks or days from the trial, there was a compelling case for the companies to be wound up. Her Honour had to consider whether the risk to the public interest had been eliminated, or at least reduced to an acceptable level, by what had been put in place at the eleventh hour. Her Honour's assessment of the nature and extent of the ongoing risk is not shown to have been affected by any material error. There was no error in the exercise of the discretion under s 461(1)(k). In my view the judge was right to conclude that the companies should be wound up.

[99] I would order as follows:

1. Appeal dismissed.

2. Appellants pay the respondent's costs of the appeal.