

BETWEEN

CONNECTIVE SERVICES PTY LTD (ACN 107 366 496)
First Appellant

CONNECTIVE OSN PTY LTD (ACN 106 761 326)
Second Appellant

AND

SLEA PTY LTD (ACN 106 752 434)
First Respondent

MINERVA FINANCIAL GROUP PTY LTD (ACN 124 171 759)
Second Respondent

MILLSAVE HOLDINGS PTY LTD (ACN 115 160 097)
Third Respondent

MARK SEAMUS HARON
Fourth Respondent

APPELLANTS' SUMMARY

1. This appeal, which concerns the operation of s. 260A(1) of the *Corporations Act 2001* (“the Act”), involves three questions:
 - (a) In light of other provisions of the Act, what is the function to be performed by s. 260A(1)?;
 - (b) What meaning is to be attributed to the words used in s. 260A?; and
 - (c) Is there material prejudice, as that term is used in s.260A?

The First question

2. Section 260A is one of a number of provisions of the Act which imposes obligations on controllers of a company. Each provision of the Act must be weighed in order to determine the proper scope of their respective application.
3. Section 260A does not sit alone, and in a dominant position, in the *Corporations Act*. Other provisions of the Act¹ directly recognise:

¹ Sections 1070A, 1072A-1072G of the Act [JB Vol.1 111-129].

- (a) the efficacy of pre-emption clauses in constitutions; and
- (b) their enforceability by a company against its members.²

4. The only fact relied on by the First and Second Respondents is that the Appellants have commenced proceedings to enforce the pre-emptive rights contained in cl.77 of their respective constitutions. They contend this is a breach of s. 260A. That leads to the conclusion that other provisions of the Act recognising the efficacy and enforceability of pre-emptive rights are otiose. The Court should avoid that conclusion.

The Second question

5. “Financial assistance” for the purpose of s 260A means, and exists where, once all of the interlocking elements of the alleged conduct are considered as a whole, there is provision to the acquirer of the company’s financial resources so that the acquirer obtains shares in the company.³
6. The First and Second Respondents’ construction of “financial assistance” for the purpose s. 260A creates dis-harmony with other provisions of the Act.⁴ Their construction leads to the consequence that by observing those provisions and enforcing legitimate powers a person is engaging in *quasi* criminal conduct.⁵
7. The text of s. 260A, and in particular the expression “financially assist” should be construed within the overall context and purpose of the Act – especially those specific provisions which permit the enforcement of pre-emptive rights.
8. Further, the Court should not accept that each of “financially” and “assist” be ascribed their separate meaning, and coupled with a simple assessment of whether the alleged assistance has a value in money terms.⁶

The Third question

² Section 140(1) of the Act [JB Vol.1 87].

³ *Independent Steels Pty Ltd v Ryan* [1990] VR 247 at 254 [JB Vol.2 693]; *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* [1998] 28 ACSR 654 at 667-669 [JB Vol.2 1021].

⁴ See fn.1.

⁵ Section 260D(1) of the Act [JB Vol.1 101].

⁶ The same error was made in *Chaston v SWP Group Plc* [2002] EWCA Civ 1999 [Supp JB 27], which the Court should decline to follow.

9. Whether giving financial assistance materially prejudices the interests of the company and its shareholders involves a comparison between the position of the company and its shareholders:
 - (a) on the one hand, if the financial assistance were not given; and
 - (b) on the other hand, the position in *consequence of*, the giving of the alleged financial assistance.
10. The position before the proceeding was commenced was that:
 - (a) each of the shareholders, including the First Respondent, was obliged to observe the pre-emptive rights in the Appellants' respective constitutions; and
 - (b) the obligation to observe the terms of the constitutions could be enforced by the Appellants, or their shareholders;
11. Thus, on a before and after comparison, nothing has changed.

Conclusion

12. This appeal should be allowed and the orders sought in Notice of Appeal dated 21 December 2018 be granted.

15 May 2019

DF Jackson QC

DG Guidolin

Counsel for the Appellants