IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M203 of 2018

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

FIRST AND SECOND RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Filed on behalf of the first and second respondents
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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS FOR ORAL ARGUMENT

2. Oral argument will cover three topics: (a) the proper construction of s 260A; (b) why s 260A was contravened; and (c) why the appellants fail on material prejudice.

A. The proper construction of the prohibition on financial assistance: RS [30]-[43]

3. ***First***, s 260A(1) contains an implied prohibition, beneficial and only partly penal, which is to be given a broad construction to prevent sophisticated methods of circumvention: *Darvall v North Sydney Brick & Tile Co* (1989) 16 NSWLR 260 at 291G-292E.

4. ***Second***, 'financial assistance' invokes the concepts of ordinary commerce: *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1 at 10.

5. ***Third***, there is no longer a super-added purpose or connexion enquiry. The current prohibition captures: (a) any act by which the company deploys, pledges or exposes its financial resources to assist a person to make an identifiable acquisition; (b) assistance in any form, which can include paying a dividend (s 260A(2)(b)). Assistance can come about in various ways, including relief against the acquisition price or any associated costs of acquisition or smoothing the path to the acquisition.

6. ***Fourth***, the appellants' submission that there must be a transaction – and in particular a transaction between the company and the acquirer – should be rejected as lacking basis in the statutory text. Also to be rejected is any universal requirement, at the financial assistance stage, for a net transfer of value (cf s 260C(5)(d) and the material prejudice enquiry).

7. ***Fifth***, the contravention – giving financial assistance – can arise before an acquisition occurs and irrespective of whether the acquisition is ultimately successful.

8. ***Sixth***, financial assistance given to acquire shares or units of shares is prohibited. Units of shares include an option: s 9.

9. ***Finally***, financial assistance is prohibited unless one of the circumstances referred to in s 260A(1)(a), (b) or (c) is present. Where an injunction is sought, the Court must assume a contravention of s 260A unless the company proves otherwise: s 1324(1B).

B. Reasons why the prohibition in s 260A was contravened: RS [44]-[76]

10. ***The relevant person(s)***: The persons said to be financially assisted are the majority

shareholders, Millsave and Haron.

11. ***The proposed acquisitions***: The majority shareholders propose to acquire shares or units of shares via cl 77.3 of the appellants' constitutions and prayers for relief A and D. The relief, if granted, will constitute the acquisition of an option over Slea's shares (and thus units of shares) and also a step in acquiring those shares themselves.

12. ***The impugned conduct***: In commercial reality, the real or primary beneficiaries of the proceeding are the majority shareholders.

13. The costs of bringing such a proceeding (including adverse costs exposures) are a cost of the acquisition of units of shares and a cost of a necessary preliminary to acquiring the shares themselves.

14. The majority shareholders, by forsaking a direct action and instead causing the appellants to bring these proceedings (with themselves as defendants), have shifted the burden of the costs exposures from themselves to the appellants.

15. ***Financial assistance:*** From the perspective of the *appellants*, the impugned conduct has deployed and exposed their financial resources via the two ongoing costs burdens; and the appellants will acquire from the action no asset for their balance sheets (other than, at best, a delayed partial recovery of the costs exposures). From the perspective of the *majority shareholders*, they gain the benefit of the court action and the prospect of the court ordered offer (i.e. unit of shares) and subsequent acquisition of shares *relieved of the costs burdens they would face if they, as the direct and real beneficiaries, took on the burdens of the action.*

16. The prohibition is attracted in any case where a corporation makes its resources available for a legal or regulatory proceeding, or other commercial exercise such as a due diligence, which assists an acquirer with an identifiable acquisition. Cf *Chaston v SWP Group Plc* [2002] EWCA Civ 1999.

17. The suggestion that the appellants are doing no more than asserting their standing to enforce a disputed right does not grapple with the commercial realities of the matter. There is no restriction on the mode by which financial assistance can be given. The intellectual satisfaction for the appellants of ensuring their constitutions are enforced does not deny to their actions the character of financial assistance to the identified acquisitions. CA [78] is correct.

18. ***Policy concerns:*** The policy concerns which activate the prohibition are present, namely that the appellants' capital and resources not be exposed in a way which

carries a risk that benefit will flow to individual corporators (here the majority shareholders) rather than the corporation: *Trevor v Whitworth* (1887) 12 App Cas 409 at 435-436.

19. ***Substance over form***: Section 260A cannot be evaded by formal devices. If the majority shareholders had been the plaintiffs in the action and caused the appellants to gift them the moneys to pay the legal costs, that would have been the appellants 'financially assisting' them to acquire shares or units of shares. It can make no difference that the majority shareholders proceed in the manner they have.

20. ***Contextual provisions require no different result:*** (a) Section 140 gives the corporation *standing* to enforce any part of the constitution but does not make it a necessary party, let alone a necessary plaintiff, in an action to enforce pre-emptive rights, which are fundamentally shareholders' rights: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 29; (b) If the corporation must bring a proceeding to enforce pre-emptive rights in the constitution, it may do so provided it does not 'financially assist' the acquisition or it meets one of the three gateways; (c) If s 140 always took the case outside s 260A, there would be an unjustified distinction with cases where the pre-emptive rights are in a shareholders' agreement; (d) Section 140 is not exempted in s 260C(5); (e) If directors refuse to register a transfer of shares (cf ss 1072F and 1072G), prima facie that is *preventing* an acquisition which would take the conduct outside s 260A subject to all the circumstances of the case.

21. ***Older authorities***: Authorities under earlier legislation should be distinguished.

22. ***In the alternative***: There was, if necessary, a net transfer of value and a transaction.

C. The appellants failed to discharge the onus on material prejudice: RS [77]-[81]

23. Incurring costs to enforce a constitution cannot be dismissed as *incapable* of constituting material prejudice (cf AS [61]). The appellants fail on material prejudice as they bear the onus yet called no evidence; further, they did not answer factors here pointing to material prejudice including the size of the costs exposures and the absence of explanation why the appellants (and thus Slea and creditors) are taking all the risk for no material return while the majority shareholders, who control the appellants, are getting a risk free ride.

Dated: 15 May 2019

Justin Gleeson SC **Kathleen Foley** **Geoffrey Kozminsky**