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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00267011

TITLE OF PROCEEDINGS

First Applicant	Ample Skill Limited
Second Applicant	Bright Agile Limited
Number of Applicants	10
First Respondent	Geoffrey Reidy, Andrew Barnden & Paula Smith in their capacities as the joint & several liquidators of Balamara Resources Limited (in liquidation) (ACN 061 219 985)
Second Respondent	Balamara Resources Limited (in liquidation)
Number of Respondents	3

FILING DETAILS

Filed for	Geoffrey Reidy, Andrew Barnden & Paula Smith in their capacities as the joint & several liquidators of Balamara Resources Limited (in liquidation) (ACN 061 219 985),Respondent 1
Legal representative	Mark Petrucco
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (1717_001.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No. 2025/267011
(proceeding below 2024/220393)

IN THE MATTER OF BALAMARA RESOURCES LTD (IN LIQUIDATION)

Ample Skill Ltd & Ors
Applicants

Geoffrey Reidy, Andrew Barnden and Paula Smith in their capacities as joint and several liquidators of Balamara Resources Ltd (In Liquidation)
Respondents

Respondents' Submissions

A. Introduction and Respondents' Position

1. On 9 December 2024 the Applicants directed the Respondents (the **Liquidators** of Balamara Resources Ltd (In Liquidation) (**Company**)) to convene a meeting of creditors of the Company (**Direction**). The Liquidators declined to do so, having formed the opinion, in good faith, that the Direction was unreasonable, pursuant to s 75-15(2) *Insolvency Practice Schedule (Corporations) 2016* (Cth) (**IPS**) and r 75-250 *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**). The Liquidators sought orders pursuant to s 90-15 IPS that their decision was justified. The Applicants, in response, sought orders pursuant to s 90-15 IPS that the Liquidators be directed to convene a meeting (**Applicants' Application**). By consent, His Honour was asked to consider the competing applications on the basis of circumstances as they existed as at the date of the Direction, that is, in December 2024, rather than as at the date of the hearing.[1] That consensual approach had and has consequences not only for the hearing below but also for this application (and any appeal if leave to appeal is granted).[2]

2. By their appeal, the Applicants seek to introduce arguments that were not put at first instance and to dispute rulings not objected to or opposed during the trial. Those attempts ought be rejected. As for the substantive arguments in support of the appeal, and for the reasons developed below, there was no error in the primary judge's determination that the Liquidators had formed an opinion, in good faith, that the Direction was unreasonable and that they were, therefore, justified in declining to convene the meeting.

B. Factual background

3. The Respondents do not take issue with the accuracy of the factual statements contained, by way of background, in the Applicants' Submissions dated 1 October 2025 (**AS**) at [13]-[17].

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[1] Transcript 5 June T2:15-25, Amended White Book (**AWB**) p 721; J [2], AWB p 20; orders made by consent on 13 May 2025

[2] See Respondents Summary of Argument filed 8 August 2025 at [3] and [4.2]

C. Approach to this Appeal

4. The Liquidators respond, by these submissions, to each appeal **Ground** as set out in the draft amended Notice of Appeal , without adopting or agreeing that the "Issues" identified in the AS correctly reflect those Grounds. Although any appeal is conducted by way of a re-hearing[3] it is concerned with correcting error[4]. The Respondents have proceeded on the basis that the draft Amended Notice of Appeal contains the Applicants' statement of the errors which, it is said, were committed by the trial judge and seek to address each of those matters in what follows.

5. Importantly, and contrary to the AS at [1], the "core" issue on this appeal (if leave is granted) is not whether a liquidator can refuse to convene a meeting based solely on his or her view as to the possible outcome of that meeting. That was not the Liquidators' case below and was not the basis on which the case was decided by the trial judge. The attempt by the Applicants to characterise the hearing below, and this appeal (if leave is granted), in that way overlooks the evidence which was led by the Liquidators as to the reasons for refusing the Direction and does a serious disservice to His Honour's careful analysis of the legislative provisions which are engaged and the authorities which have considered those provisions.

6. The primary *legal* issue raised by the Applicants' Grounds of Appeal is one of statutory construction, namely whether r 75-250 IPR requires that any decision by an administrator to refuse a creditor's direction to convene a meeting on the basis that complying with the direction is unreasonable (within the meaning of that provision) *must have a reasonable basis or the opinion itself must be one which can reasonably be held, ie) it must be one which, viewed objectively, can be shown to be reasonable.*

7. For the reasons set out in these submissions, that question should be answered "NO". If that is the correct response to the statutory construction issue, then the appeal becomes a pure factual one as to whether His Honour was correct in making the finding that the Liquidators did, in fact, and having acted in good faith, reach the conclusion that complying with the Direction was unreasonable for the reasons specified in r 75-250(2)(a) or (d) IPR.

8. However, even if the Liquidators' submission as to the proper construction of r 75-250 IPR be wrong, the appeal must still be dismissed because His Honour was satisfied that the Liquidators actually formed the necessary opinion in good faith and on reasonable grounds. In doing so, His Honour rejected the Applicants' challenge to the Liquidators' evidence on this topic. That finding was one based, in part, on a credibility assessment of Mr Barnden's evidence. The Applicants have not demonstrated a basis on which to overturn the factual findings of the trial judge in this regard. Even if the Applicants succeed on the construction issue, in light of the facts as found by the trial judge the orders below ought not be disturbed.

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[3] *Supreme Court Act* 1970 s75A(4)
[4] *Dwyer v Volkswagon Group Australia Pty Ltd* [2023] NSWCA 211 at [303]

Ground 1

9. Contrary to AS [26], the Applicants *did not* oppose the grant of leave to the Liquidators to adduce further evidence as to Mr Barnden's reasoning process: 21 May T61:42-62:15, Amended White Book (**AWB**) 717-718. Having indicated an intention to allow the re-opening application (and having explained, including by reference to sections 56, 61 and 62 of the *Civil Procedure Act 2005* (NSW), his reasons for doing so) His Honour invited counsel for the Applicants to make any submission as to why that course should not be followed: 21 May T61:48-49, AWB 716. In response, and beyond referring to the fact that the Liquidators had already filed two affidavits, counsel did not take any objection to the course proposed by His Honour. No prejudice was asserted in opposition to the grant of leave. In particular, it was not suggested to His Honour that any unfairness would arise from the fact that Mr Barnden had been privy to the oral submissions which had been made to that point by the Applicants as to his evidence. Nor was it said, for instance, that the grant of leave would invite "retrospective justifications shaped to remedy (supposed) defects in the Liquidator's reasons..." In any event, that the Applicants would, upon reopening, have the opportunity to cross-examine Mr Barnden (which they did) and test the credibility of any alleged "retrospective justifications" (which they also did), would have been a ready answer to that submission. The only application which was made was in relation to the timing of any resumed hearing and for the delivery of any further affidavit from the Liquidators and for the allocation of sufficient time to the Applicants to consider and respond, if necessary, to that evidence. All of those concerns were accommodated by the timetable proposed by His Honour and accepted by the Applicants: 21 May T62:48-64:9, AWB p717-719.)

10. Mr Barnden was cross-examined at the resumed hearing. It was not put to him that the evidence he had given in his third affidavit had been influenced by anything which had been said in submissions on behalf of the Applicants on the earlier occasion. It was certainly put to him that his latest evidence was a recent invention. That challenge was denied by Mr Barnden (5 June T11:9-33, AWB p 730, T17:13-15, AWB p736, T18:27-28, AWB p737) and it was not accepted by His Honour (J [69]), who, of course, had the benefit, not only of the written evidence (affidavits and documents) which was relied upon by the Liquidators but also the benefit of observing Mr Barnden, under the pressure of cross-examination, respond to those criticisms.

11. A party is ordinarily bound, on appeal, by the manner in which the case was conducted below. In particular, in this case, and given the failure, at the time, to identify any prejudice which might flow from the grant of leave to re-open, let alone any evidence of such arising from the manner in which the matter was dealt with below following the grant of leave, the Applicants can show no miscarriage of justice in the course His Honour adopted.

12. Further, when challenging an interlocutory order such as, here, the grant of leave to re-open, an appellant must show that the wrongly admitted evidence must have "affected the final result". As the High Court held in ***Gerlach*** *v Clifton Bricks Pty Ltd* (2002) 209 CLR 478; [2002] HCA 22 at [7], this reflects "*the well-established principle that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice*".[5] It is a demanding test[6] and for good reason.

13. The decision to grant leave to adduce further evidence was a discretionary judgment on a question of practice and procedure. The judge explained his reasoning including by reference to the overarching principle which governs matters of case management. No prejudice was asserted in opposition to the application and none can be established in circumstances where the Applicants had the opportunity to adduce evidence in response, to cross-examine on the further evidence, and to put submissions to the Court in light of all of that. In truth, this complaint is that, by reason of the decision to allow further evidence, the Applicants believe their prospects of success were diminished. That is not a relevant form of prejudice. Subject to the requirements of procedural fairness, which were satisfied by both the invitation granted to the Applicants' counsel to object to the proposal and by the terms on which leave was granted, cases ought be determined on their merits. That is what His Honour sought to achieve by the course which was adopted.

14. Further, the Applicants cannot demonstrate that the additional evidence led by the Liquidators had a "material effect" on the outcome in circumstances where His Honour found (at J [78]) that "costs and delay" (being reasons set out in the **Letter** from the Liquidators' lawyers dated 17 December 2024, refusing to comply with the Direction at [32] (AWB p 368), and which was annexed to Mr Barnden's first affidavit, already in evidence) were sufficient of themselves to justify the Liquidators' decision not to comply with the Direction. Ground 1 should be dismissed.

Ground 1A

15. Upon the resumption of the hearing (on 5 June), the Liquidators sought to read the affidavit of Mr Barnden affirmed 27 May 2025 (**Barnden 3**) (AWB p 640). The Applicants had indicated, ahead of the resumption, objections to parts of that affidavit. The following exchange took place after the affidavit was formally read (at 5 June T3:1-34, AWB 722):

> *His Honour: I'll indicate tentative rulings and then hear counsel, to the extent they seek to be heard…*

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[5] See too *Kumar v Primes* [2024] NSWCA 134 at [6]-[7] per Bell CJ (Stern JA agreeing at [44]); White JA at [40]-[41]

[6] *Micallef v ICI Operations Australia Pty Ltd* [2001] NSWCA 274 at [45] per Heydon JA, Sheller JA and Studdert AJA agreeing; *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 at [3]-[6] per Bell P and Simpson AJA and authorities cited therein

It seems to me that each of paras 15, 17, 18, 25 and 26 are, so far as Mr Barnden indicates what he says were intermediate steps of his reasoning process, within the scope of the leave. If there is a challenge to the fact that he held that belief, that can be put by way of cross-examination, but if he held the relevant belief, it is an intermediate step in his reasoning process, as a matter of characterisation.

Paragraph 27 I would read as a reference to the matters referred to in paras 25 and 26, and would admit it on that basis.

...

Ms Beechey, do you seek to be heard to the contrary?

Ms Beechey: No, your Honour.

16. As can be seen, the Applicants did not ultimately press their objections. In any event, His Honour's preliminary rulings on paragraphs [25], [26] and the opening words of paragraph [27] (which were only read in the limited way indicated in His Honour's ex tempore judgement) were plainly correct.

17. The terms of the leave granted to the Liquidators appear in the record of the ex tempore judgement which is at AWB p 761-762. It permitted further evidence *"directed to the intermediate steps between the factual observations he makes and the conclusions that he reaches..."* The scope of that grant is to be understood in light of what fell from His Honour in the exchanges with counsel (21 May T60:35-61:25 (AWB p 715-717). His Honour limited the grant of leave to evidence which illuminated the reasoning process undertaken by Mr Barnden and explained the connection between the factual matters to which he had had regard and his conclusion regarding prejudice and/or vexation.

18. The **Record** of the refusal decision (AWB p 654-655) and the Letter (at [32], AWB p 368) each contain a reference to the consequences of "increased costs" and "delay" which Mr Barnden believed would be caused if he complied with the Direction. In accordance with the grant of leave, the paragraphs objected to identified the basis for the view that there would be delay and his view that such would be prejudicial. That evidence explained the reasoning process which he undertook in reaching the ultimate conclusion expressed in the Letter. That is what His Honour had contemplated by the grant of leave.

19. Moreover, even if, which is not the case, those two paragraphs ought to have been excluded, this would not provide a basis for overturning His Honour's decision. As noted above, an appellant who seeks to reverse a judgement on the basis that evidence was wrongly admitted faces the hurdle of demonstrating that such evidence materially affected the outcome of the

trial.[7] His Honour examined (at J [47]-[68]) the evidence given by Mr Barnden concerning his reasons for concluding that convening the meeting would be prejudicial and/or vexatious. The "Work Minimisation Reason" (which is set out at paragraphs [25] and [26] of Barnden 3) was only one of a number of factors which led to the conclusion about delay. It cannot be said, on a fair reading of the judgment as a whole that, had those paragraphs been excluded from consideration, His Honour would have reached a different conclusion or that such was in any significant way determinative in his reasoning.

Grounds 2 and 3

20. By these Grounds the Applicants seek to challenge the factual finding made in the final sentence of paragraph [69] of the judgement. Those findings were as follows:

    20.1. That Mr Barnden recognised, when he received the Direction of 9 December 2024 that it was the second week of December and that it would be difficult to seek to have creditors attend any meeting until the new year – as to which see Letter at [2] and [32] (AWB pp 365, 368) , Record page 2, first and third bullet points (AWB p 655), Barnden 3 at [25]-[27];

    20.2. That Mr Barnden knew it would be imprudent to incur expenses on significant activities which newly appointed liquidators might consider should not have been undertaken – as to which see Barnden 3 at [25], 5 June T10:14-18, (AWB p 729), 12:16-25, 39-49 (AWB p 731);

    20.3. That uncertainty as to the identity of liquidators would inevitably delay progress of the Company's Poland Claim and the liquidation – as to which see Letter at [2] and [32] (AWB pp 365, 368), Record page 2, first and third bullet points (AWB page 655), Barnden 3 at [25]-[27], 5 June T12:16-25, 39-49 (AWB p 731); and

    20.4. That a usual consequence of delay as described is an increase in costs – as to which His Honour was entitled to draw as a matter of obvious inference given Mr Barnden's experience in the conduct of liquidations.

21. His Honour rejected the submission that Mr Barnden's evidence as to his opinion that convening the meeting would lead to additional costs and delay was "recent invention". That challenge was put to Mr Barnden in cross-examination and he had denied it: 5 June T11:9-33, AWB p 730. The thrust of this complaint appears to be that because this particular reason was not expressly detailed in the Letter or in Mr Barnden's earlier affidavit material, it should be rejected as non-genuine. As the trial judge observed at J [48], it would be odd to hold a liquidator to a higher standard of *reasons writing* than applies to a judgment of a Court which

[7] *Gerlach* at [6]; see paragraph [12] of these submissions

need not record every fact and matter to which the Court had regard in making a decision. In any event, this was not a new justification for the Liquidators' refusal (cf AS [34], Ground 3). It was part of the reasoning process which was referred to in the Letter at [32] and in the third bullet point on page 2 of the Record, albeit, as His Honour observed, the detail of the "intermediate reasoning steps" was not fully explained.

22. There is no error in the last sentence of J [69], which was expressed by the trial judge having had the advantages that derive from receiving and considering the entirety of the evidence, including cross-examination, at trial.[8] The Applicants face a "reasonably formidable" task in seeking to overturn such findings.[9]

23. Further, and as set out in paragraph 19 above, even if the "Work Minimisation Reason" evidence had not been taken into account by the trial judge, the Applicants have not demonstrated that a different conclusion would have been reached had those two paragraphs not been admitted into evidence.

Ground 4

24. If the Liquidators are correct on the construction issue and there is no objective reasonableness standard which qualifies the exercise of the Liquidators' good faith judgment under r 75-250 IPR, the Court on appeal would not entertain any complaint about reasonableness such as that articulated in Ground 4. However, the Liquidators' response to Ground 4 is otherwise set out below.

25. Mr Barnden's opinion that insolvency practitioners should refrain from incurring unnecessary substantial costs when they are put on notice of their potential replacement was based on his professional experience, including as a registered liquidator since 2007 (Barnden 3 at [25], 5 June T5:33-34, AWB p 724). His expertise was not challenged. The Court at first instance accepted Mr Barnden's evidence, including, specifically, his "plausibl[e]" view with respect to the "Work Minimisation Reason": J [64], [69], see also [77]-[79].

26. Whilst Mr Barnden was unable in cross-examination to refer to any specific case or ruling to the effect he had stated, such is an inherently sensible approach from an experienced liquidator. His evidence reflected his view that a prudent liquidator ought be astute as to issues of costs in the conduct of liquidations. Further, lest there be a question in this appeal as to the reasonableness of that view, it should be noted that Justice Gordon when sitting in the Federal Court made the very same point in *DCT v Starpicket Pty Ltd (No 2)* [2013] FCA 699 at [43], where the Court noted that once on notice of an application for removal, the liquidator:

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[8] See for example *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 including at [23]
[9] See for instance *Abolos v Australian Postal Commission* (1990) 171 CLR 167

> "...*could not simply continue to act without regard to the possibility that his appointment might be terminated. The Liquidator was required to exercise his professional judgement as to what work was reasonable and necessary prior to the hearing and determination of [that] application.*"

27. The reasoning is not distinguishable merely because the application for removal is made by way of a proposed creditor resolution rather than Court process.

28. The proposition in Ground 4(b) – that the Liquidators intended, at the time of refusing the Direction, to minimise their work in the liquidation in any event – was similarly not a proposition contended for at first instance, either orally or in writing. It is also not a matter that was established on the evidence, with the attempt to pursue that line of questioning in cross-examination having been abandoned.[10] The suggestion at AS [45] that Mr Barnden's cross-examination elucidated an intention to minimise work overstates the evidence revealed by the transcript and proceeds on a post ipso-facto basis, contrary to the parties' agreement that the hearing should be determined on the basis of facts and matters as at the time of the Direction, without reference to events that subsequently occurred. Whatever actions were taken, or not taken, by the Liquidators after the Direction (and the Letter) were, by consent, excluded from consideration by His Honour and cannot be raised, now, on appeal.

29. In light of those matters, and accepting for the purpose of this Ground that the Court would, in an application of this type, entertain a challenge to the Liquidators' decision on a ground of objective reasonableness, the supposition in the chapeau of Ground 4 that paragraphs [26] and [27] of Barnden 3 contained an opinion that was either not reasonable, or that could not be an opinion held by any reasonable person in the Liquidators' position, should not be accepted. It certainly should not be accepted that Mr Barnden did not honestly hold the opinion that such was a relevant consideration.

30. Further, even if Ground 4 is entertained and, contrary to the above, is made good on appeal, or if Grounds 2 and / or 3 are upheld, that would still not warrant a departure from the decision of the trial judge in circumstances where the Court accepted Mr Barnden's evidence in respect of each of the five reasons given for his decision, of which the Work Minimisation Reason formed part of the fourth only: J [50]-[69].

Grounds 5 and 6

31. These grounds raise an issue as to the proper construction of r 75-250 IPR. The Applicants' proposition (AS [57], [61]) is that the provision imposes, as a condition of validity, that any opinion formed by the external administrator that a request to convene a meeting is sufficiently prejudicial or vexatious as warrants its refusal on the basis that it is unreasonable must not only

[10] See 5 June T15:7-16:31 (AWB pp 734-735) for cross-examination on this topic

be honestly held as a matter of fact (being an enquiry as to the administrator's state of mind) but must also be shown to have some reasonable basis (being an objective test as to the correctness of that opinion). The Liquidators' position is that the test is entirely subjective so that, provided the administrator honestly holds the required opinion and that that opinion has been reached "in good faith" then the Direction may (not must) be refused.

32. The primary judge dealt with the competing arguments, including by reference to the authorities, at J [33]-[44], and upheld the Liquidators' submission. As a result, His Honour dealt with the challenge to the Liquidators' refusal by focussing on the decision-making process so as to determine whether it was conducted in good faith and whether it produced, in the mind of (relevantly) Mr Barnden, the requisite opinion. In doing so, His Honour declined the invitation to undertake, in effect, a merits review of the correctness or reasonableness of that opinion: J [78]. His Honour was correct to do so.

33. The proper construction of a statute requires that attention begin, and end, with a consideration of the statutory text[11]. Critically, the chapeau to r 75-250 IPR imposes a requirement as regards the process by which the administrator's opinion is reached ie) that being, that the opinion is reached having *acted in good faith* in doing so. That the requirement for good faith is directed to the decision-making process and not to its outcome is apparent from the structure of the chapeau. The "acting in good faith" predicate refers to a characteristic required of the subject of the sentence – namely the administrator – and not to its object – namely the opinion.

34. It would have been open to the legislature, as His Honour noted at J [42], to provide, as well, a "reasonableness" condition but that is not the form the provision takes. As His Honour noted, after referring at J [36] to the decision of Kenny J in *Re Spalla v St George Motor Finance Limited*[12] , the term "good faith" does not ordinarily import such a requirement either generally or in relation to liquidations: J [42].

35. That the legislature did not intend, by the reference to "good faith" in the chapeau, to introduce an objectively reviewable (including on appeal) requirement of reasonableness is also confirmed by a comparison between the provisions regarding the making of and refusal of requests for a meeting (being the subject of this proceeding) and the analogous provisions in the IPS and the IPR concerning the making of and refusal of requests by creditors for the provision of documents. Although otherwise relevantly identical, the latter expressly provides the person requesting the document with a right to apply to Court if that request was refused (at s 70-90 IPS). The absence of a similar provision in respect of a decision to refuse a meeting request is consistent with the legislature having decided that ultimately this should be a matter left in the hands of the administrator, subject only to the obligation to act in good faith.

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[11] *FCT Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] (per the Court)
[12] 2006 FCA 1177

36. The Applicants correctly note that the IPR and IPS are to be interpreted consistently with the scope and purpose of the enabling legislation (AS [63]) and they cite the Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* (Cth) and the IPS' express objective of empowering stakeholders in administrations (see for example at AS [63] and [65]). However, and despite the significance given to it by the Applicants at the trial below, and on this appeal, that material does not support the broad propositions which the Applicants seek to draw from it. It can be accepted that the introduction of s 70-15 IPS was intended to "empower" stakeholders such as creditors. However, and as His Honour noted at J [43], the legislation granted only a qualified right to have a meeting actually held (as opposed to the unqualified right to make a request for that to occur).This "new" right given to creditors is *not* undermined by the administrator's exercise of a discretion to refuse the meeting based on her/his opinion, reached in good faith, that the request was unreasonable. That is to give effect to the intention which is apparent from the terms of the chapeau in 75-250 (2) IPR.

37. The Applicants rely on ***Avon*** *Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360 and administrative law concepts developed, generally, in a very different statutory context. The Court in *Avon* was considering the power of the Federal Commissioner of Taxation to make certain decisions based on satisfaction as to the status of corporate voting power. Sir Owen Dixon said:

> *"His decision, it is true, is not unexaminable. If he does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review."*

38. The above statement goes no higher than to identify grounds upon which the decision of an administrative authority may be subject to judicial review.

39. Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (cited with approval in *Minister for Immigration and Ethnic Affairs v Liang & Ors* (1996) 185 CLR 259; [1996] HCA 6 at 275-276) said the following in respect of *Avon*:

> *"It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if*

none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts."

(emphasis added)

40. The above excerpt supports the following propositions:

40.1. *Firstly,* regard must be had to the language of the statute and "the matters" of which the decision-maker must be satisfied. R 75-250 IPR requires that the Liquidators form an opinion of one matter (arguably with two composite parts), namely that complying with the Direction would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with the Direction. The grounds or bases required for such opinion are not specified; the legislation leaves such matters to the discretion of the external administrator in each case, appropriately reflecting the wide variety of circumstances in which practitioners may be required to form such an opinion; and

40.2. *Secondly*, a distinction is drawn between a requirement to act in good faith (synonymously not to act "arbitrarily or capriciously") and the ability of an affected party to move the court to grant relief where the party can demonstrate the decision-maker has misdirected itself or failed to take appropriate considerations. The Applicants' attempt in this case to conflate the sole express statutory requirement of forming an opinion in good faith with the sorts of matters which might entitle an interested party to challenge an authority's decision in an administrative law context is misguided. It also overlooks, or pays insufficient attention to, the observation that where the requisite matter is one of opinion (as here), the authority (Liquidators) are left with a "very wide discretion".

41. The invocation of principles governing the approach to judicial review of administrative decision-making is inapt – not least of all because the text of 75-250 IPR itself describes the criterion by which the correctness or otherwise of the administrator's decision is to be assessed. The IPR has, by imposing the good faith obligation, prescribed the limits to the administrator's ability to refuse a direction to convene a meeting. The Applicants' argument seeks, impermissibly, to alter those limits.

42. The Applicants also complain (at AS [62]) that the primary judge was wrong at J [42] to find that the standard for a liquidator faced with a direction to call a meeting is a lower standard than

what is required under ss 236 and 237 of the *Corporations Act 2001* (Cth) for derivative leave. That argument ignores two of the three reasons given in J [42] as to why the Applicants' proposed "reasonable basis" requirement should be rejected, namely that such a condition is not part of the ordinary meaning of the term "good faith", including by reference to case law, and that if the intent of the IPR had been for the Court to assess whether the liquidator had a reasonable basis for his or her opinion, the text of the IPR could have so provided. No complaint can be made against either finding. Further, s 237(2) expressly incorporates objective standards in an assessment by the Court of an application for a grant of derivative leave: s 237(2)(c) and (d). Similar requirements, which could easily have been incorporated into the language of IPR 75-250, are notably absent.

43. The Applicants refer at AS [60] refers to the need for a good faith opinion to have a "reasonable basis", citing ***Re Pacific Biotechnologies*** *Ltd; Pacreef Investments Pty Ltd v Gladman (As administrator of Pacific Biotechnologies Ltd) & Pacific Biotechnologies Ltd (admins apptd)* [2020] VSC 636.

44. In that case, the Court held that the administrator was acting in good faith in forming an opinion that material was the subject of legal professional privilege, without the Court having itself to determine if such privilege did in fact exist.[13] Further, whilst the administrator had not deposed to having taken any legal advice, the Court inferred, from the grounds provided by the administrator, that he had either taken such advice or informed himself of the statutory tests for privilege and that was relevant to the "good faith" requirement.

45. The Applicants note that whilst the administrator's genuine belief in *Re Pacific Biotechnologies* was in fact incorrect, there was a reasonable basis for it. That submission is inconsistent with the Applicants' insistence in the instant case that the Liquidators base their opinion on reasons which must be correct (see for instance at AS [65]-[66]). It is also inconsistent with ***Watson & Co*** *Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 1273, referred to at first instance (see J [39]), and in which the Court was satisfied[14] that the administrators had formed an opinion, acting in good faith, that disclosure of insurance policies would found an action by the insurers for breach of confidence or risk avoidance of the policies, without the Court considering the merits or likelihood of either occurring.

46. That is not to say that consideration of the basis of the Liquidators' decision is entirely irrelevant. It may be accepted that if a liquidator did not identify any matters which were considered or which exposed his or her reasoning process, it may be easier to establish that the opinion was not actually held and/or that it was not reached in good faith. Further, if exposition of the reasoning demonstrated that the administrator had acted in a capricious or arbitrary

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[13] At [33] and [45] per Robson J
[14] At [39] per Thawley J

manner then that would undoubtedly be relevant to the question whether the administrator had acted "in good faith" but that is a different challenge to that mounted by the Applicants.

47. The context in which s 70-15 IPS and r 70-250 IPR will operate is also important. They are concerned with a routine feature of insolvency administrations, namely the convening of creditors' meetings. The Liquidators repeat the submission made below and which is reproduced at J [90]. That submission was made in respect of the Applicants' own interlocutory application but it highlights the adverse consequences which would flow from grafting, on top of the good faith requirement in r 75-250(2) IPR, a reviewable standard of objective reasonableness. It would invite or at least facilitate litigation which would complicate, rather than simplify the orderly conduct of the winding up process. It ought be concluded that the parliament enacted the provision in the form which it did, mindful of the risk which the imposition of some broader objective and reviewable standard of reasonableness would pose to the efficient conduct of these administrations.

48. There was no error by the primary judge in His Honour's conclusion as to the proper construction of r 75-250 IPR. There was also no error by the primary judge in the application of those requirements or in the outcome of the hearing below. Grounds 5 and 6 (and the related Grounds appealing from factual findings on the premise of the "reasonable basis" argued for in Grounds 5 and 6, such as Grounds 7 and 11) should be dismissed.

Grounds 7 and 11

49. The success of Grounds 7 and 11 depends on the Applicants succeeding on Grounds 5 and 6. Accordingly, it is assumed, for the purpose of this response to Grounds 7 and 11 only, that there is a requirement that the Liquidators' opinion have a reasonable basis. Even if the Court accepted that submission, the Liquidators' evidence as to the factual basis for the opinion which was reached and the trial judge's acceptance of that evidence, together with His Honour's conclusion that that opinion was justified (J [78]), means these Grounds ought be dismissed.

50. The trial judge was correct (at J [32] and [73]) to reject the submission that the question of reasonableness or otherwise of a request to convene a meeting can be divorced from consideration by the liquidator of the purpose sought to be achieved by the proposed meeting and the circumstances in which it would be achieved. His Honour held that it would be "artificial" to separate the two. Particularly where the Direction specified the particular resolutions which were to be put, that assessment was, with respect, correct. The Applicants accepted in the hearing below that the purpose of the proposed meeting was a relevant consideration when ascertaining whether a direction under s 75-15 IPS is unreasonable.[15] Creditors, who are the ones funding these processes, ought not be put to the expense and other consequences of

[15] 21 May T30:44-48, AWB p 685, T46:36, AWB p 701, 5 June T29:23-42, AWB p 748, T31:15-17, AWB p 750

convening and holding meetings without due consideration being able to be given, by the administrator, to the reasonableness of what is proposed to be achieved at the meeting.

51. The Liquidators correctly directed their attention to whether or not the direction to convene a meeting to consider a resolution for the Liquidators' removal and replacement was unreasonable and expressly considered matters that related to ***that*** question, including that:

    51.1. The Direction appeared to be an attempt to bypass the orders made by Black J as to the Liquidators' appointment (paragraph 31 of the Letter, expanded upon in Barnden 3 at [10]-[12][16] and the Record[17]). That related party creditors, who appeared from the Liquidators' investigations to be involved in transactions which were potentially voidable and which may constitute a breach of directors' duties, had, shortly before Christmas and not long after the Liquidators had been appointed without opposition by those creditors, desired the incumbent Liquidators to convene a meeting, is unquestionably a relevant factual matrix against which the Direction must be considered. The trial judge found such matters were matters "*to which liquidators would ordinarily give attention*" (J [55]). The Applicants have not contended otherwise.

    51.2. There would be an increase in costs of the liquidation and delays in the Company's prosecution of its claims against the Republic of Poland (paragraph 32 of the Letter, Barnden 3 [25]-[27], Record).[18]

    51.3. The Direction was given by a creditor (Ample Skill Pte Ltd), whose sole shareholder was bringing his own claim against the Republic of Poland and whose interests were thus considered to conflict with those of the Company's creditors and shareholders as a whole (paragraph [34]-[35] of the Letter, Barnden 3 at [28]-[29], Record)[19]. It was not inappropriate (and the Applicants do not suggest it was inappropriate) for the Liquidators to consider the Direction having regard to that context.

52. The fact that the reasons articulated by the Liquidators may be seen to impact upon the reasonableness not only of convening the meeting but also the adverse consequences of removal (were that to occur) is not to the point. The concern with the immediate impact on issues then pressing in the winding up, namely the expeditious prosecution of the Poland claim was relevant to both and the Liquidators were entitled to take that into account in responding to the request – which the evidence established was what they did.

53. The trial judge expressly accepted at J [78] that the second of the above reasons – costs and delay which would arise from convening a meeting which, in practical terms could not be held

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[16] AWB p 368 (Letter), 643
[17] AWB p 654
[18] AWB p 368 (Letter), 647 (Barnden 3), 655 (Record)
[19] AWB pp 368-369 (Letter), 647 (Barnden 3), 655 (Record)

until February, – "*were, without more, sufficient*" (emphasis added) for the Liquidators to hold the requisite opinion that complying with the Direction would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighed the benefits of complying with the Direction, and that the Liquidators so held that opinion. The Applicants led no evidence at first instance challenging that assessment by the Liquidators and have identified no basis to overturn the trial judge's finding in that regard. Similarly, there was no evidence at first instance that the first and third reasons could not similarly form a reasonable basis, and the primary judge did not find that those additional matters were incapable of satisfying any "reasonable" requirement. On the assumption, made for the purpose of this response, that objective reasonableness is required of an administrator, the onus is on the Applicants to demonstrate that the Liquidators' opinion was not reasonable or was an opinion "that no reasonable person in the Liquidators' position could hold". That onus has not been discharged.

Ground 8

54. Ground 8 posits that the trial judge impermissibly drew an adverse inference against the Applicants arising from their lack of evidence of the reasons supportive of the Direction. That complaint is developed in the AS into a purported "*Jones v Dunkel* as developed in *Ferrcom*" finding (at AS [54]). However, that analysis is not accurate. At that part of the judgement, His Honour was describing, in an orthodox way, aspects of the cross-examination of Mr Barnden. Part of that cross-examination was devoted to the proposition that, in a different context – namely when seeking to remove a liquidator – it was not incumbent on a creditor to provide a reason for wanting that outcome. Mr Barnden agreed albeit he said that it was "normally good practice" to do so: 5 Jun T5:47-49. The so-called adverse inference was simply an observation about an application of the type the subject of *that* cross-examination rather than a reference to any aspect of the application which *was* before the Court . His Honour's observation, which was plainly correct insofar as it concerned a removal application (which was the subject being considered at this point of the cross-examination) had no relevance to the application actually before the Court and played no further part in His Honour's reasoning.

55. This Ground should be dismissed.

Ground 9

56. Contrary to the observations at AS [54], the observation made at J [18] played no material role in His Honour's determination of the critical questions in the Liquidators' application.

57. J [75]-[76], to which this Ground appears to be directed, record His Honour's treatment of a submission made by the Applicants concerning alleged deficiencies in the evidence given by Mr Barnden in his third affidavit. At J [76], His Honour was explaining his rejection of the submission described in J [75]. That was a submission criticising the absence in **Mr Barnden's**

third affidavit of any reference to the balancing exercise contemplated by r 75-250(2)(a) IPR. His Honour noted, however, in J [76], that the Liquidators had earlier recorded the reasons for the conclusions they reached, those being referred to in the Record and the Letter. His Honour's reference to the absence of any explanation from the Applicants as to any benefit of complying with the Direction did not form the basis of any adverse inference against **them** but simply explained why he drew no adverse inference as to Mr Barnden's evidence based on its failure to refer explicitly to a "balancing exercise" between prejudice and benefit.

58. The trial judge was not drawing an adverse inference against the Applicants; rather, His Honour was explaining why a favourable inference need not be drawn to the advantage of the Applicants in light of their forensic decisions as to the conduct of the litigation, including their own interlocutory application. Ground 9 should be dismissed.

Ground 10

59. Ground 10 is, again, a challenge to factual findings made by His Honour. The particular findings are said to be contained in paragraphs [76] and [78] of the judgement. As already explained, J [76] contained no such finding. That paragraph was solely concerned, as pointed out above, with criticisms directed to the form and contents of Mr Barnden's third affidavit.

60. J [78] did contain a factual finding that the Liquidators had formed the opinion necessary to support a refusal of the Direction. His Honour was comfortably satisfied of that matter. This was a "conclusionary" paragraph and His Honour did not repeat all of the evidence given by Mr Barnden (and which was referred to in earlier parts of the judgement). That was an efficient approach to judgment writing and ought not be criticized. His Honour's reference to the Liquidators' express inclusion, in the Letter, of the terms of the provision and the requirement for unreasonableness (by reason of prejudice and vexation) were taken into account because that suggested that the Liquidators had actually directed their attention to the statutory criteria (Justice Robson had done much the same thing when assessing the evidence in the *Pacific Biotechnologies* case at [47]). His Honour also referred to the reasons given in the Letter and in particular to the Liquidators' concerns about additional cost and delay – matters which His Honour found, of themselves, sufficient to justify the conclusion of unreasonableness.

61. His Honour did not overlook that the Record and the Letter did not reproduce, in a formulaic way, all of the words found in r 75-250(2)(a) IPR. His Honour correctly recognised that "*even an extended account of reasons for a decision will rarely be a "complete" statement of all the steps in the decision-maker's reasoning*" (at J [15]) and that the Court should not disregard matters which the evidence establishes were taken into account, even if not expressly stated in the Letter or the Record (at J [48]). That the Record or the Letter or the affidavits for that matter did not make a specific reference to a "balancing exercise" is to focus on matters of pure form rather than substance. (It should be noted, in this regard, that the proposition that Mr Barnden

had not attempted the balancing exercise contemplated by r 75-250(2)(a) IPR, was never actually put to Mr Barnden during his cross-examination.) The material referred to and relied upon by His Honour showed that the Liquidators were alert to the adverse consequences for the winding up which would flow from convening a meeting in response to the Direction at that particular time of the year and given the then position of the administration.

62. It is thus clear that the Liquidators did undertake an appropriate consideration of the kind required by r 75-250(2) of the IPR and that His Honour was entitled to so find. The Applicants' submissions do not establish that that finding, based as it was, in part at least, on the benefit which the trial judge enjoyed of observing the cross-examination of Mr Barnden on this quintessentially factual question, was palpably wrong. Ground 10 ought be dismissed.

Ground 12

63. It is an incorrect characterisation of J [75] to suggest that it contains a finding that the Applicants were required to identify the benefits of complying with the Direction; Ground 12 must also fail.

Grounds 13 and 14

64. Firstly, there was no finding in J [76] as identified in Ground 13. As noted above, in that part of the judgement His Honour was simply considering a particular submission on behalf of the Applicants to the effect that there was no evidence that the Liquidators, or Mr Barnden in particular, had undertaken the "balancing exercise" required by r 75-250(2)(a) of the IPR. His Honour rejected that submission and the reasons for doing so have already been dealt with above.

65. His Honour's acceptance of Mr Barnden's evidence concerning his reasoning process was, for reasons already articulated, justified. It was not irrelevant to that assessment that the Applicants had not attempted to establish any particular benefit which would flow from complying with the Direction beyond suggesting that had the meeting been convened the litigation over whether the direction was unreasonable would not have erupted – but that is a bootstraps argument that His Honour rightly rejected. However, His Honour did not himself, at J [76] or elsewhere, attempt the task which the statutory provision reserved for the Liquidators and, with respect, that was the correct approach.

66. Ground 14 is a "trojan horse" type argument. It complains of a finding that was not made and then seeks to demonstrate why that finding was incorrect. The Court should reject that approach.

Ground 15

67. The finding identified in this Ground is not apparent on a reading of J [75] or [76]. It is unclear what is sought by this circular Ground. In any event, as set out elsewhere in these submissions, success on this ground or in upsetting any findings in two paragraphs of the Judgment would not result in a successful outcome on appeal, given the numerous detailed findings in support of the Liquidators at first instance.

Ground 16

68. This Ground only arises if the Applicants succeed on the construction issue such that the Court must determine whether the matters considered by the Liquidators formed a "reasonable basis" for the opinion.

69. On that assumption, and further assuming that the primary judge did err in finding that the anticipated consequences of removal were proper matters to be taken into account as one of the factors bearing on the Liquidators' reasonable analysis, that would not justify overturning the judgment in circumstances where His Honour had also found that the Liquidators held the relevant opinion on the basis of matters arising not from the outcome of the meeting, but the convening of the meeting.

70. Finally, and in circumstances where the matters relied upon by the Liquidators in coming to the view that the Direction was unreasonable are matters affecting both the convening of the meeting and its possible outcome, even if the Liquidators did ask themselves the wrong question, which is denied, and in light of His Honour's findings including at J [16], [18], [26], [32], [50]-[68], and [79], the outcome would be no different.

Grounds 17 and 20

71. These Grounds do not articulate any reasons that are not otherwise dealt with in the balance of these submissions.

Grounds 18 and 19

72. The Applicants' Application sought an order under s 90-15 of the IPS effectively that the Liquidators comply with the Direction. As the moving party, the onus was on the Applicants to establish requisite grounds to persuade the Court to exercise its discretion in granting the relief sought. The nine paragraph affidavit of Mr Hale did not persuade the trial judge accordingly. There is nothing surprising, let alone appellable, in that outcome.

73. The AS do not grapple with J [90] or the arguments articulated therein. Further, in circumstances where the Court had found the Liquidators were justified, for the reasons they identified in evidence which was accepted by the Court, in refusing to comply with the Direction,

it would be strangely anomalous to nevertheless direct that the Liquidators do comply with that Direction in the absence of any separate evidence or justification. Grounds 18 to 20 are not made out. That is particularly the case where the Applicants had, by consent, agreed that the Application was to be dealt with by reference to the circumstances as they existed at the time of the giving of the Direction. It would, as His Honour noted, be particularly anomalous if the Court, having decided that in December 2024 the request to convene the meeting was properly refused by the Liquidators on the basis that the request was unreasonable, but, sitting as if deciding the matter on the very day the refusal was made, the Court should nevertheless order the Liquidators to convene the meeting.

Other Matters

74. The Liquidators rely on their summary of argument filed on 8 August 2025 in respect of the question of leave to appeal and repeat the submission that costs should be borne by the Applicants in respect of any refused leave application and unsuccessful appeal.

31 October 2025

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