

**SONS OF GWALIA LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) v MARGARETIC AND ANOR (S208/2006)**

**ING INVESTMENT MANAGEMENT LLC v MARGARETIC AND ANOR (S209/2006)**

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 27 February 2006

Date of grant of special leave: 16 June 2006

Sons of Gwalia ("SOG") was one of the largest and most successful gold miners in Australia. On 18 August 2004 Mr Margaretic purchased shares in SOG on the Australian Stock Exchange for approximately \$26,000. Eleven days later Ferrier Hodgson were appointed administrators of SOG which went into voluntary administration shortly thereafter. By this time the shares were worthless. Mr Margaretic claimed that at the time the shares were purchased SOG was in breach of its obligations under s 674 of the *Corporations Act* 2001 (Cth) ("the Act"), which required disclosure of information to the market that a reasonable person would expect to have a material effect on the price and value of SOG's shares. Mr Margaretic also contended that SOG contravened s 52 of the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 2001 (Cth) by failing to disclose matters concerning its level of gold reserves.

It was common ground that s 553 of the Act covered Mr Margaretic's claim. That section provides that in every winding up, all debts payable by, and all claims against, a company in liquidation (present or future, certain or contingent, ascertained or sounding only in damages) being debts or claims, the circumstances giving rise to which occurred before the date on which the winding up is taken to have begun, are admissible to proof against the company.

In the proceedings before Emmett J in the Federal Court, SOG, through the administrators, sought two declarations. The first was that Mr Margaretic's claim for damages would not be provable under the proposed Deed of Company Arrangement. The second was that payment of Mr Margaretic's claim under the proposed Deed would be postponed until all debts owed to all claims made by persons not in the capacity as members had been paid under s 563A of the Act. Mr Margaretic then cross-claimed seeking a declaration that he was a creditor of SOG and entitled to all the rights of the creditors under Part 5.3A of the Act. ING Investment Management LLC ("ING") which is a creditor of SOG was joined to the proceedings. ING was the true contradictor of the arguments put by Mr Margaretic.

Emmett J concluded that Mr Margaretic was a creditor as that term was defined in the proposed Deed of Company Arrangement and accordingly was entitled to attend creditor's meetings and to vote at such meetings.

SOG and ING appealed. The Full Federal Court (Finkelstein, Gyles & Jacobson JJ) agreed that the appeals must be dismissed.

Finkelstein J noted that there was some controversy regarding the ratio of this Court's decision in *Webb Distributors v State of Victoria* (1993) ("*Webb*"). Finkelstein J noted that in *Webb* the Court accepted that a subscriber for shares could not sue the company for damages for misrepresentation which induced such a subscription whilst he or she remained a shareholder. Second, to the extent that a member has a claim against a company in his or her capacity as a member, that claim must be deferred to the claims of the creditor. The ambiguity said to arise in this Court's decision in *Webb* was that the High Court accepted that a shareholder who has not rescinded his subscription contract has no claim against the company. However, the potential for ambiguity arose from the statement of the majority that a claim of a defrauded shareholder fell within the area which the statutory predecessor to s 563A sought to regulate. Finkelstein J observed that the question in *Webb* centred on claims made by subscribing shareholders and that the instant case dealt only with the position of on-market purchasers of shares. Finkelstein J indicated his view that the principle in *Webb* was confined to subscribing shareholders and there was nothing in that or any other decision which lent support to the contrary view.

The question was then whether Mr Margaretic's claim was brought in his capacity as a member of SOG. Finkelstein J approved the House of Lords approach to this issue in *Soden v British & Commonwealth Holdings* [1998] to the effect that in the absence of any contrary indication, sums due to a member "in his capacity of a member" are only those sums, the right to which is based by way of cause of action on the statutory contract between the members of the company and the members inter se. On this basis, it was clear that Mr Margaretic had a claim against SOG which was not brought in his capacity as a member and was not caught by s 563A. Gyles J agreed with Finkelstein J's approach to *Webb*. Gyles J noted that in addition, an action in tort against a company for misleading conduct in connection with the acquisition of fully paid shares from a third party had nothing to do with the return of capital which had been subscribed by that third party or its predecessors and, further, such an action had no relevant connection with the rescission of any contract with the company, as the operative contract was with a third party. Jacobson J also agreed with the approach outlined above. His Honour agreed that *Webb* was confined to the position of subscribing shareholders. Jacobson J agreed with Gyles J that an action in tort for misleading conduct in connection with the purchase of fully paid shares from a third party has nothing to do with the return of capital and was a cause of action independent of the statutory contract and was not based upon the rights of a member contained in the Act.

The grounds of appeal include:

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- The Full Court erred in construing s 563A of the Act as being applicable only to claims by shareholders against SOG arising from the acquisition of those shares by subscription. The Full Court should have found that, upon its proper construction, the section applies equally to claims by shareholders against SOG, including the claims of Mr Margaretic arising from the acquisition of those shares by transfer. Both types of

claims are brought by the shareholders in their "capacity as a member" and are postponed under s 563A of the *Corporations Act*.

**ING**

- The Full Court erred in law in holding that Mr Margaretic is a creditor of SOG in respect of the Claim which is described at paragraphs [7] and [8] of the Reasons for Judgment of Finkelstein J and at paragraphs [70] to [72] (inclusive) of the Reasons for Judgment of Jacobson J. The Full Court should have held that:
  - Margaretic is not a creditor of SOG in respect of the Claim within the meaning of Part 5.3A of the Act and the Deed of Company Arrangement in respect of SOG.
  - The Claim is not admissible to proof in competition with ordinary unsecured creditors of SOG pursuant to the Deed of Company Arrangement.