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FEDERAL COURT OF AUSTRALIA

The Bell Group Limited v Australian Securities and Investments Commission

[2018] FCA 884

File number:	WAD 270 of 2017
Judge:	**MCKERRACHER J**
Date of judgment:	15 June 2018
Catchwords:	**CORPORATIONS** – deregistration under s 574 of the *Corporations Law* – where reinstatement of companies is sought pursuant to s 601AH(2) of the *Corporations Act 2001* (Cth) – whether the plaintiffs were aggrieved by the deregistration of the companies – whether certain plaintiffs were aggrieved by virtue of their inability to join a tax consolidated group – whether, pursuant to s 601AH(2)(b), it is 'just' to reinstate the companies to enable that possibility or for other reasons – scope of the power conferred under s 601AH(3)(d) of the *Corporations Act 2001* (Cth)
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 8, 8(5) *Corporations Act 1989* (Cth) s 82 *Corporations Act 2001* (Cth) ss 447A(1), 461(1)(k), 475, 476, 476(c), 476(d), 477(2B), 601AD, 601AD(1), 601AD(1A), 601AD(2), 601AD(3), 601AD(3A), 601AD(4), 601AE, 601AE(2), 601AH, 601AH(2), 601AH(3)(b), 601AH(3)(c), 601AH(3)(d), 601AH(5), Pts 5A, 5A.1 *Corporations Law* ss 564, 574, 574(4), 574(5) *Income Tax Assessment Act 1936* (Cth) Pt IVA s 80(4) *Income Tax Assessment Act 1997* (Cth) Pt 3-90; ss 703-5(1), 703-5(3), 703-15, 703-15(2), 703-30, 703-45, 703-50 *Taxation Administration Act 1953* (Cth) Pt IVC *Duties Act 2008* (WA) s 11 *Companies Act 1993* (NZ) s 329(4) *Companies Act 1900* (UK) s 26 *Companies Act 1948* (UK) s 353(6)
Cases cited:	*Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Ltd* (2010) 80 ACSR 670 *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000)

174 ALR 688

Australian Securities & Investments Commission v ABC Fund Managers Ltd (No 2) (2001) 39 ACSR 443

Re Bell Group Ltd (in liq); Ex parte Woodings (2013) 97 ACSR 117

Bell Group NV (in liq) v Western Australia (2016) 90 ALJR 655

Callegher v Australian Securities and Investments Commission (2007) 218 FCR 81

Re Cenco Holdings Pty Ltd (2005) 53 ACSR 484

CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd (2006) 201 FLR 296

Chalker v Clark [2008] VSCA 92

Cook v Law [2003] FCA 966

Danich Pty Ltd; re Cenco Holdings Pty Ltd (2005) 53 ACSR 484

Donmastry Pty Ltd v Albarran (2004) 49 ACSR 745

Re ERB International Pty Ltd (deregistered) (2014) 98 ACSR 124

Foxman v Credex National Australian Trade Exchange Pty Ltd (in liq) (2007) 215 FLR 392

Re GA Listing & Maintenance Pty Ltd (1994) 15 ACSR 308

GIO General Ltd v Sabko Pty Ltd (2007) 70 NSWLR 743

Harule Pty Ltd; Ex parte Olita Super Readymixed Concrete Pty Ltd (in liq) (1994) 13 ACSR 500

Re HIH Insurance Ltd (In Liquidation) [2004] NSWSC 5

Irwin v Yule [2013] SASC 132

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503

Legrande Enterprises Pty Ltd v Australian Securities and Investments Commission [2009] FCA 718

Morris v Harris [1927] AC 252

Oates v Commissioner of Taxation (1990) 27 FCR 289

Oates v Consolidated Capital Services Pty Ltd [2007] NSWSC 680

Pacanowski v Australian Securities Commission (1995) 57 FCR 173

Pilarinos and Ors v Australian Securities and Investments Commission [2006] VSC 301

Re Regional Planners Developments Co Pty Ltd (2015) 110 ACSR 457

Shaw v Goodsmith Industries Pty Ltd (2002) 41 ACSR 556

Re Sparad Ltd (1993) 12 ACSR 12

Re Spedley Securities Ltd (in liq) (1992) 9 ACSR 83

	Stork ICM Australia Pty Ltd v SFS 007.298.633 Pty Ltd (2010) 77 ACSR 517 *Tyman's Ltd v Craven* [1952] 2 QB 100 *Vukasin v ASIC* [2007] NSWSC 1341 *Wedgewood Hallam Pty Ltd v Australian Securities and Investments Commission, in the matter of Combined Building Consultants Pty Ltd* [2011] FCA 439 *White v Baycorp Advantage Business Information Services Ltd* (2006) 200 FLR 125 *Yeo v Australian Securities and Investments Commission, in the matter of Ji Woo International Education Centre Pty Ltd (deregistered)* [2017] FCA 1480
Date of hearing:	7 February 2018
Registry:	Western Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	149
Counsel for the Plaintiffs:	Mr M Richmond SC with Mr JC Vaughan SC and Mr PA Walker
Solicitor for the Plaintiffs:	Ashurst Australia
Counsel for the First Defendant:	The First Defendant did not appear
Counsel for the Second Defendant:	Mr NJ Williams SC with Mr SB Rosewarne
Solicitor for the Defendants:	Australian Government Solicitor

ORDERS

WAD 270 of 2017

BETWEEN:	**THE BELL GROUP LIMITED (IN LIQUIDATION) ACN 008 666 993** First Plaintiff
	BELL BROS HOLDINGS LTD (IN LIQUIDATION) ACN 008 695 056 Second Plaintiff
	BELL BROS PTY LTD (IN LIQUIDATION) ACN 008 672 375 (and others named in the First Schedule) Third Plaintiff
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** First Defendant
	COMMISSIONER OF TAXATION Second Defendant

JUDGE: **MCKERRACHER J**

DATE OF ORDER: **15 JUNE 2018**

THE COURT ORDERS THAT:

1. The plaintiffs, within 14 days, file and serve a minute of orders, inclusive of any costs orders to which they contend they are entitled, together with submissions not exceeding 5 pages.
2. The second defendant, within a further 14 days, file submissions in response, not exceeding 5 pages.
3. Any reply submissions be filed and served within a further 10 days.
4. Unless the Court otherwise orders, the remaining issues be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

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MCKERRACHER J:

OVERVIEW – MULTIPLE REINSTATEMENTS

1 The second to tenth plaintiffs are companies within the group of companies of which the holding company is the first plaintiff, The Bell Group Limited (in liquidation) (**TBGL**). The second to tenth plaintiffs are currently in liquidation. The eleventh plaintiff, **Mr Woodings**, is the liquidator of each of the plaintiff companies (see the First Schedule for a list of the **plaintiffs**). The plaintiffs seek orders for reinstatement of certain deregistered companies (see the Second Schedule for a list of the **Deregistered Companies**). The Deregistered Companies were also various subsidiaries of TBGL. Orders, ancillary to the reinstatement

are also sought, as well as orders as to their subsequent winding up. It is proposed that if they are reinstated by order of the Court, Mr Woodings be appointed the liquidator of the Deregistered Companies. Mr Woodings, a liquidator with over 30 years' experience, has sworn five affidavits in support of the relief sought.

2 The **Commissioner** of Taxation opposes the relief sought and while the Australian Securities and Investments Commission (**ASIC**) did not appear, it joins the Commissioner in opposing the relief sought and for the same reasons.

3 As will be seen from the analysis below, there are several bridges for the plaintiffs to cross to be entitled to the relief, or even part of the relief, they seek. While various arguments are raised in opposition to the orders sought, the oral submissions focussed mainly on the argument that the Court is not empowered to make the ancillary orders which would accompany the reinstatement relief sought. Whilst I have carefully considered the helpful arguments of senior counsel for the Commissioner, in my view, the Court does have the necessary power. I do not consider that the power is constrained in the way the Commissioner contends. I am also (separately) of the view, for the reasons which follow, that it is appropriate to exercise the Court's discretion in favour of granting relief substantially in one of the forms sought by the plaintiffs.

SPECIFIC RELIEF SOUGHT

4 By the plaintiffs' amended **Minute** of Proposed Orders dated 7 February 2018 and handed up at the day of hearing, the plaintiffs seek the following relief:

> 1. Pursuant to s 601AH(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), as applied by ss 1400 and 1403 of the Corporations Act, the Australian Securities and Investments Commission (**ASIC**) reinstate the registration of each of the companies specified in Schedule A [to the plaintiffs' Minute, in similar terms as the Second Schedule] (**[Deregistered] Companies**).
>
> 2. Pursuant to s 467(3) of the Corporations Act all notification and advertising requirements relating to an application for the winding up of the [Deregistered] Companies are dispensed with.
>
> 3. Pursuant to section 461(k) of the Corporations Act, on the ground that it is just and equitable to do so, the [Deregistered] Companies be wound up by the court forthwith upon the reinstatement of the registration of the [Deregistered] Companies.
>
> 4. Pursuant to s 472(1) of the Corporations Act, upon the reinstatement of the registration of the [Deregistered] Companies, [Mr Woodings], a registered liquidator, is appointed as liquidator of the [Deregistered] Companies for the purposes of their windings up.

5. Pursuant to s 467(3) of the Corporations Act, the requirements of section 475 of the Corporations Act and rule 70-40 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) ordinarily applicable upon the making of winding up orders be dispensed with in the case of the [Deregistered] Companies.

6. Pursuant to section 601AH(3)(d) of the Corporations Act, the shares held by:

   (a) Armstrong Ledlie & Stillman Pty. Ltd. ACN 009 656 044 (**AL&S**) in Neoma Investments Pty Ltd (in liquidation) ACN 009 234 842 at the date of the dissolution of AL&S;

   (b) TBGL Securities Pty Ltd ACN 008 713 513 (**TBGL Securities**) in Harlesden Pty Ltd ACN 008 773 411 at the date of the dissolution of TBGL Securities;

   (c) Overells' Limited ACN 009 658 020 (**Overells**) in Wanstead Pty Ltd (in liquidation) ACN 008 775 120 and Dolfinne Securities Pty Ltd (in liquidation) ACN 009 218 142 at the date of the dissolution of Overells;

   (d) Harlesden Pty Ltd ACN 008 773 411 (**Harlesden**) in Bell Bros Holdings Ltd (in liquidation) ACN 008 695 056 at the date of the dissolution of Harlesden; and

   (e) Savidge & Killer Pty Ltd ACN 009 680 639 (**Savidge**) in WAON Investments Pty Ltd (in liquidation) ACN 008 937 166 at the date of the dissolution of Savidge,

   are deemed and taken at all times from (and including) the date of dissolution of AL&S, TBGL Securities, Overells, Harlesden or Savidge (as applicable) to (and including) the date of reinstatement to have been beneficially owned by AL&S, TBGL Securities, Overells, Harlesden or Savidge (as applicable) and to have been held **by ASIC only as nominee of each of those companies**.

7. **Alternatively** to paragraph 6 of these orders, pursuant to section 601AH(3)(d) of the Corporations Act, the shares held by:

   (a) Armstrong Ledlie & Stillman Pty. Ltd. ACN 009 656 044 (**AL&S**) in Neoma Investments Pty Ltd (in liquidation) ACN 009 234 842 at the date of the dissolution of AL&S;

   (b) TBGL Securities Pty Ltd ACN 008 713 513 (**TBGL Securities**) in Harlesden Pty Ltd ACN 008 773 411 at the date of the dissolution of TBGL Securities;

   (c) Overells' Limited ACN 009 658 020 (**Overells**) in Wanstead Pty Ltd (in liquidation) ACN 008 775 120 and Dolfinne Securities Pty Ltd (in liquidation) ACN 009 218 142 at the date of the dissolution of Overells;

   (d) Harlesden Pty Ltd ACN 008 773 411 (**Harlesden**) in Bell Bros Holdings Ltd (in liquidation) ACN 008 695 056 at the date of the dissolution of Harlesden; and

   (e) Savidge & Killer Pty Ltd ACN 009 680 639 (**Savidge**) in WAON Investments Pty Ltd (in liquidation) ACN 008 937 166 at the date of the dissolution of Savidge,

are **deemed** and taken at all times from (and including) 18 December 1995 to (and including) the date of reinstatement to **have been legally and beneficially owned by AL&S, TBGL Securities. Overells, Harlesden or Savidge (as applicable).**

8. **Alternatively** to paragraphs 6 and 7 of these orders, pursuant to section 601AH(3)(d) of the Corporations Act, the shares held by:

   (a) Armstrong Ledlie & Stillman Pty. Ltd. ACN 009 656 044 (**AL&S**) in Neoma Investments Pty Ltd (in liquidation) ACN 009 234 842 at the date of the dissolution of AL&S;

   (b) TBGL Securities Pty Ltd ACN 008 713 513 (**TBGL Securities**) in Harlesden Pty Ltd ACN 008 773 411 at the date of the dissolution of TBGL Securities;

   (c) Overells' Limited ACN 009 658 020 (**Overells**) in Wanstead Pty Ltd (in liquidation) ACN 008 775 120 and Dolfinne Securities Pty Ltd (in liquidation) ACN 009 218 142 at the date of the dissolution of Overells;

   (d) Harlesden Pty Ltd ACN 008 773 411 (**Harlesden**) in Bell Bros Holdings Ltd (in liquidation) ACN 008 695 056 at the date of the dissolution of Harlesden; and

   (e) Savidge & Killer Pty Ltd ACN 009 680 639 (**Savidge**) in WAON Investments Pty Ltd (in liquidation) ACN 008 937 166 at the date of the dissolution of Savidge,

   are, **for the purposes of Division 703 of Part 3-90 of the *Income Tax Assessment Act 1997* (Cth), deemed** and taken at all times from (and including) the date of dissolution of AL&S, TBGL Securities, Overells, Harlesden or Savidge (as applicable) to (and including) the date of their reinstatement **to have been legally and beneficially owned by AL&S, TBGL Securities, Overells, Harlesden or Savidge (as applicable) and to have been held by ASIC only as nominee of each of those companies.**

9. Pursuant to section 477(2B) of the Corporations Act, alternatively section 601AH(3)(d) of the Corporations Act, upon the reinstatement of the registration of the [Deregistered] Companies and the appointment of Mr Woodings as liquidator of the [Deregistered] Companies, Mr Woodings:

   (a) has approval to execute; and

   (b) shall execute as soon as practicable,

   a deed poll substantially in the terms of [an] attachment ... to the affidavit of Mr Woodings sworn 12 June 2017.

10. The second defendant pay 50% of the plaintiffs' costs of this application, to be taxed if not agreed.

11. The legal costs of the plaintiffs and ASIC (if any) on the application otherwise be paid out of the assets of the [Deregistered] Companies as an expense of their windings up in the manner specified in Schedule C [to the plaintiffs' Minute].

(Emphasis added.)

5 It will be apparent that paras 6, 7 and 8 are in the alternative.

THE ISSUES

6 The issues between the parties, and/or for the Court, are the following:

(1) Should the Deregistered Companies be reinstated by order of the Court?

(2) If they are to be reinstated, should the Deregistered Companies be wound up?

(3) If the Deregistered Companies are to reinstated and ordered to be wound up:

(a) should Mr Woodings be appointed as their liquidator?

(b) should certain advertising, notification and reporting requirements associated with the winding up be dispensed with?

(c) should Mr Woodings, if he is appointed as liquidator, be authorised to enter into a deed poll, which will bind each of the companies to the existing terms of the settlement of the Bell Proceedings (discussed below from [7])?

(4) If the Deregistered Companies are to be reinstated and ordered to be wound up, should there be ancillary relief which, effectively, may facilitate the Deregistered Companies joining a 'tax consolidated group' with effect from the time of its formation on 1 July 2002 and, if so, on what terms?

SOME HISTORY

7 The windings up of companies within the **Bell Group** (being the collective term for those companies of which TBGL is the holding company and includes TBGL) began in July 1991 when Mr Totterdell was appointed as liquidator of TBGL. Following that appointment, and the appointment of Mr Woodings as the liquidator of Bell Group Finance Pty Ltd (in liquidation) (**BGF**) in March 1993, the liquidators and various companies in the Bell Group brought proceedings against the former bankers of the Bell Group (the **Bell Proceedings**). The Bell Proceedings were commenced in 1995 in this Court, but were then pursued in the **Supreme Court** of Western Australia. They were eventually settled (ostensibly) pursuant to a **Deed of Settlement,** executed and exchanged on 17 September 2013. The effect of the settlement and payments thereunder was to significantly change the financial position of companies in the Bell Group. Prior to December 2012, none of those companies had any significant available assets in their liquidations. Receipts following the settlement of the Bell Proceedings in 2013, totalled in aggregate some $1.7 billion. These amounts are yet to be distributed.

8 Prior to the 1995 commencement of the Bell Proceedings, certain deregistrations had occurred. Between 20 October 1992 and 12 January 1994, several Bell Group companies, including the Deregistered Companies, had their registrations cancelled by the predecessor of ASIC, the Australian Securities Commission (**ASC**), pursuant to s 574 of the *Corporations Law*. More will be seen of this section subsequently. Those companies were then dissolved pursuant to the same provision. The dissolved companies, including the Deregistered Companies, did not participate in the Bell Proceedings.

9 Mr Woodings confirmed on affidavit that in due course the monies obtained through the Bell Proceedings will be distributed to creditors and, where appropriate, to shareholders or contributories. Mr Woodings explained that this is true for the Deregistered Companies with two exceptions. **Harlesden** Pty Ltd has a prospect of receiving distributions; it is just not predicted to make distributions to any of the plaintiffs. **TBGL Securities** Pty Ltd is anticipated not to receive any distributions upon reinstatement. If reinstatement is ordered, those remaining Deregistered Companies will have a real prospect, Mr Woodings said, and (in the absence of any competing evidence) I accept, of receiving distributions of the proceeds of the Bell Proceedings as a result of a right of participation in the liquidation of other companies.

10 Mr Woodings explained that:

(a) apart from **Godine Finance** Pty Ltd, the companies are all entitled to prove as creditors of BGF, **Bell Bros** Holdings Pty Ltd or **Wigmores Tractors** Pty Ltd and each of BGF, Bell Bros or Wigmores Tractors has a real prospect of paying a distribution to its creditors; and

(b) as at 31 December 2017, BGF is estimated to have funds on hand of approximately $370 million, plus a further amount of $854 million held on trust for it. Neither Bell Bros nor Wigmores Tractors has any significant funds on hand, but are each significant creditors of BGF and, therefore, can be expected to have funds to distribute when they receive a distribution from BGF.

11 Mr Woodings indicated that Godine Finance is in a special category. It is a shareholder of **Wanstead Finance** Pty Ltd. Both of those companies are presently deregistered. Wanstead Finance has no known creditors, apart from a statute barred debt owing to Godine Finance. But Wanstead Finances is entitled to prove as a creditor of BGF and, accordingly,

Mr Woodings explained, can be expected to have funds to distribute to Godine Finance as a shareholder when it receives a distribution from BGF.

12 While the Commissioner has, to some extent, challenged the quality and detail of the evidence in relation to such matters, I am satisfied on the basis of the evidence provided by Mr Woodings that there is a proper foundation (and certainly no evidence to the contrary) for the statements to the foregoing effect on which the plaintiffs rely. These findings, like most, are not required to a degree of certainty. Most of these pertain to the current beliefs and intentions about future matters and likely outcomes.

13 There is, nonetheless, uncertainty about what monies will ultimately be available to particular Bell Group companies for distribution and also uncertainty as to how those monies might ultimately be distributed. Mr Woodings volunteered that there is uncertainty about the sums of money that might ultimately be received by the relevant Deregistered Companies due to ongoing litigation which affects them, and a large number of unresolved distribution issues affecting the windings up of TBGL, BGF and other Bell Group companies.

14 To deal with that scenario, Mr Woodings has modelled a 'high case' and a 'low case' as to likely distributions. These options identify a range of possible distributions to the Deregistered Companies. Mr Woodings explained in detail the nature of the model and its relevant inputs. He has used this form of modelling for many years. He regards the modelling as a reliable and arithmetically accurate record of the estimated flows of funds in the windings up of the Bell Group companies on the assumptions and variables adopted, and thus of the estimated distributions to the Deregistered Companies if reinstated. The plaintiffs make the point that key creditors of the Bell Group companies, including the Commissioner, have themselves, had a copy of the distribution model for several years and have not expressed concern or disputation as to the accuracy of the outcomes it produces.

15 By way of summary, the Deregistered Companies, except for TBGL Securities, may receive distributions from BGF, Bell Bros or Wigmores Tractors of between $19.56 million on a low case scenario, and up to $51.74 million on a high case scenario. These, of course, are aggregate amounts, not individual amounts. There was more precise evidence, which it is unnecessary to record, as to the specific ranges between the low case and the high case in respect of each of the companies. As will be discussed in greater detail below, because non-trust assets of the Deregistered Companies passed to ASC, whether at the low-case or high-case scenario end of the spectrum, ASIC now stands to receive significant sums if it proves

for the debts. The current indication, however, is that ASIC will not lodge a proof of debt, but of course, it cannot be bound by any present assurance as to its future intention.

16 A summary has been provided of which of the first to fourth and seventh plaintiffs in each instance has a real prospect of receiving distributions, directly or indirectly, as shareholders of each respective deregistered company. In short, there is, according to Mr Woodings, a real prospect of the Deregistered Companies making distributions to the first to fourth and seventh plaintiffs because the first to fourth and seventh plaintiffs would have a right to participate in the liquidation of one or more of the Deregistered Companies as a shareholder. Assuming that statute-barred debts will not be provable in those liquidations, and if the orders sought for reinstatement and winding up are made, the Deregistered Companies that are estimated to receive distributions, with the exception of Harlesden, will have no known creditors. The possible exception is that of ASIC proving in the liquidation for a small amount of unpaid fees, which, as indicated, is not presently anticipated. Even if ASIC does prove, there would still be a real prospect of the companies, with the exception of Harlesden, receiving sufficient funds to discharge that debt in full and then pay a surplus to their shareholders due to their right to receive distributions from the Bell Proceedings.

17 Harlesden is in a different position because it is estimated to receive a distribution, but not to have a surplus, unlike the other companies. It is expected to pay the full amount of any distribution to its creditors, which are the Commissioner and ASIC (if ASIC proves for unpaid fees).

18 For the remaining companies where a surplus is estimated, in all cases, except for that of Wanstead Finance, the distributions of such surplus would be made directly to one of the first to fourth or seventh plaintiffs as shareholders. Wanstead Finance differs in that its shareholder, Godine Finance, is also deregistered. The relevant plaintiff in that instance is **Belcap Enterprises** Pty Ltd (in liq), the fourth plaintiff, which is a shareholder of Godine Finance and has a prospect of receiving a distribution from Wanstead Finance indirectly. Again, while precise specifics of the distributed amounts are neither possible nor necessary to prove, Mr Woodings, in addition to the modelling referred to above, modelled the range of possible distributions from the Deregistered Companies if they are to be reinstated and liquidated to the benefit of the plaintiffs. A summary position of that modelling indicates that the first to fourth and seventh plaintiffs may receive distributions from around $19.15 million

in a low case aggregate to about $50.91 million in a high case aggregate. (Again, individual amounts have also been supplied.)

19 There are also important tax issues involved, in which the Commissioner is particularly interested. TBGL is currently the head company of a tax consolidated group formed on 1 July 2002 (the **TBGL tax consolidated group**). The group was formed when TBGL elected in August 2015 to do so under s 703-50 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**). Pursuant to s 703-5(1) of the 1997 Act, that choice is permitted to be retrospective to a date before the choice is made and TBGL elected the 1 July 2002 date.

20 Mr Woodings said that any monies received by the TBGL tax consolidated group as a consequence of the Bell Proceedings, will not give rise to an income tax liability because there are sufficient tax losses and other available deductions within the TBGL tax consolidated group as a whole to fully offset any assessable income received by companies in the consolidated group. That position is contested by the Commissioner.

21 An entity will be a wholly owned subsidiary of TBGL if it is a wholly owned subsidiary as defined in s 703-30 of the 1997 Act. Relevantly in the case of TBGL shares, all the membership interests in the entity must be beneficially owned by either TBGL itself, one or more wholly owned subsidiaries of TBGL, or TBGL itself and one or more wholly owned subsidiaries of TBGL. Therefore, a company in which any of the Deregistered Companies held shares will not at present be capable of being a wholly owned subsidiary of TBGL during the period of that company's deregistration because those shares (being non-trust assets) were vested in ASC upon deregistration (as explained below).

22 The relevant Deregistered Companies, holding shares in other companies, which shares are deemed to be presently vested in ASIC, are:

(a) Armstrong Ledlie & Stillman Pty Ltd (**AL&S**);

(b) TBGL Securities;

(c) **Overells'** Limited;

(d) Harlesden; and

(e) **Savidge** & Killer Pty Ltd.

23 The advantage for the plaintiffs in securing the reinstatement of the Deregistered Companies is that some of the affected Bell Group companies not presently part of the TBGL tax

consolidated group have significant tax losses, including an account of general interest charge (**GIC**), estimated to be in excess of $740 million, up to and including 30 June 2014. GIC is the main, if not the sole, focus of attention in relation to tax benefits which might be obtained by the orders sought by the plaintiffs.

24 In the meantime, Mr Woodings has received income tax assessments from the Commissioner addressed to each of the eight to tenth plaintiffs for the income year ended 30 June 2014. The assessments are for an aggregate tax liability of approximately $4.6 million. He has also received an assessment addressed to TBGL, as head company of the TBGL tax consolidated group, for that income year for a tax liability of approximately $261 million. These assessments arise from receipts from the Bell Proceedings.

25 An appeal was commenced by TBGL in this Court (NSD 2098/2016) against the Commissioner's assessment on 5 December 2016. Issues in that appeal include the amount and nature of tax losses which will be available to members of the TBGL tax consolidated group to offset assessable income received in the income year ended 30 June 2014. In the meantime, Mr Woodings has paid the approximate $4.6 million and the $261 million so assessed, whilst reserving his right of objection.

26 By a private ruling dated 29 June 2016, the Commissioner contended that the reinstatement of the Deregistered Companies would not make the eighth to tenth plaintiffs and other affected Bell Group companies part of the TBGL tax consolidated group with effect from 1 July 2002 and during the income year 30 June 2014. The Commissioner now contends that those companies would only be eligible to be part of the TBGL tax consolidated group from the time of reinstatement.

27 The plaintiffs' position is that the Commissioner is not correct and if the Deregistered Companies are reinstated, either by the ordinary operation of the provisions of the ***Corporations Act 2001*** (Cth), or by the Court making a special order under s 601AH(3)(d), the eighth to tenth plaintiffs and other affected Bell Group companies will be taken to have been part of the TBGL tax consolidated group with effect from 1 July 2002 and during the income year ended 30 June 2014.

28 Mr Woodings intends, subject to taking appropriate legal advice, and subject to the reinstatement of the Deregistered Companies, to:

(a) cause TBGL to seek leave to amend its grounds of appeal in the tax appeal to the effect that the reinstatement means that TBGL can access further tax deductions and tax losses to offset all of the TBGL tax consolidated group's assessable income during the income year 30 June 2014; and

(b) cause the eighth to tenth plaintiffs to seek relief from the assessments that have been issued to them.

RELEVANT LEGISLATION

Legislation regarding deregistration and reinstatement

29 The primary provision falling for consideration in this dispute is s 601AH of the *Corporations Act*, which provides as follows:

> **601AH Reinstatement**
>
> *Reinstatement by ASIC*
>
> (1) ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered.
>
> (1A) ASIC may reinstate the registration of a company deregistered under subsection 601AB(1B) if:
>
> (a) ASIC receives an application in relation to the reinstatement of the company's registration; and
>
> (b) the levy imposed on the company by the ASIC Supervisory Cost Recovery Levy Act 2017 is paid in full; and
>
> (c) the amount of any late payment penalty payable in relation to the levy is paid in full; and
>
> (d) the amount of any shortfall penalty payable in relation to the levy is paid in full.
>
> *Reinstatement by Court*
>
> (2) The Court may make an order that ASIC reinstate the registration of a company if:
>
> (a) an application for reinstatement is made to the Court by:
>
> (i) a person aggrieved by the deregistration; or
>
> (ii) a former liquidator of the company; and
>
> (b) the Court is satisfied that it is just that the company's registration be reinstated.
>
> (3) If:
>
> (a) ASIC reinstates the registration of a company under subsection (1) or (1A); or

(b) the Court makes an order under subsection (2);

the Court may:

(c) validate anything done during the period:

(i) beginning when the company was deregistered; and

(ii) ending when the company's registration was reinstated; and

(d) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

ASIC to give notice of reinstatement

(4) ASIC must give notice of a reinstatement in the *Gazette*.

(4A) If an application was made to ASIC for the reinstatement of a company's registration, ASIC must give notice of the reinstatement to the applicant.

Effect of reinstatement

(5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

30 Section 461(1)(k) of the *Corporations Act* is also relevant. It provides as follows:

461 General grounds on which company may be wound up by Court

(1) The Court may order the winding up of a company if:

...

(k) the Court is of opinion that it is just and equitable that the company be wound up.

31 As previously noted, the deregistration of the Deregistered Companies occurred pursuant to s 574 of the *Corporations Law*. The '*Corporations Law*', as it was titled, was set out in s 82 of the *Corporations Act 1989* (Cth) (inserted by the *Corporations Legislation Amendment Act 1990* (Cth)). The *Corporation Law* comprised the *Corporations Act 1989* (No 109 of 1989) and the *Corporations Legislation Amendment Act 1990* (No 110 of 1990). Section 574 of the *Corporations Law* provided:

Section 574. Power of Commission to deregister defunct company

(1) At the end of the time mentioned in a notice sent by the Commission under subsection 572 (2) or (3) or published under subsection 573 (5), the Commission may, unless cause to the contrary is previously shown, by notice

in writing published in the *Gazette*, cancel the registration of the company and, on the publication in the *Gazette* of the last-mentioned notice, the company is dissolved, but:

(a) the liability (if any) of every officer and members of the company continues and may be enforced as if the company Admedus not been dissolved; and

(b) nothing in this subsection affects the power of the Court to wind up a company the registration of which has been cancelled.

(2) If the Commission is satisfied that the registration of a company was cancelled as the result of an error on the part of the Commission, the Commission may reinstate the registration of the company, and thereupon the company shall be deemed to have continued tin existence as if its registration had not been cancelled.

(3) If a person is aggrieved by the cancellation of the registration of a company, the Court, on an application made by the person at any time [...] after the cancellation, may, if satisfied that the company was, at the time of the cancellation, carrying on a business or in operation or otherwise satisfied that it is just that the registration of the company be reinstated, order the reinstatement of the registration of the company.

(4) On the lodging of an office copy of an order under subsection (3), the company shall be deemed to haves continued in existence as if its registration had not been cancelled.

(5) The Court may, in an order under subsection (3), give such directions and make such provisions (including directions and provisions relating to the retransfer of the property vested in the Commission under section 576) as seem **just for placing the company and all persons in the same position, so far as possible, as if the company's registration had not been cancelled.**

(6) Where the registration of a company is reinstated pursuant to subsection (2) or (3), the Commission shall cause notice of that fact to be published in the *Gazette*, but failure of the Commission to do so does not affect the validity of the reinstatement.

(Emphasis added.)

32 The ancillary orders which are sought by the plaintiffs, referable to the income tax relief Mr Woodings seeks to obtain for the Bell Group companies, in one way or another are intended to achieve the effect that the shares held by a number of the Deregistered Companies be deemed and taken at all times from the date of dissolution of those companies to have been beneficially owned by the companies. One variant of this relief set out in para 6 of the Minute is to the effect that ASIC would be deemed to have held those shares only as nominee of each of the companies during the period of deregistration. Those ancillary orders are sought pursuant to s 601AH(3)(d) of the *Corporations Act*.

33 The Commissioner contends the Court is not empowered to make such an order because it would be contrary to the proper construction of s 601AH(5) of the *Corporations Act*.

34 The Commissioner contends that the Court should also decline making the reinstatement orders because the first to fourth and seventh plaintiffs have not demonstrated that they are persons aggrieved, as s 601AH(2)(a)(i) requires and, the Commissioner says, the plaintiffs have not discharged the onus of persuading the Court that the reinstatement of the Deregistered Companies is 'just' as required under s 601AH(2)(b).

35 Further, the Commissioner says in addition to saying that the ancillary orders are beyond power, that even if the Court had power it should, in its discretion, decline to make such orders in all the circumstances.

36 It is common ground between the parties that the issues raised by the current proceedings are to be determined by reference to the provisions contained in Ch 5A of the *Corporations Act*, consistently with the reasoning in *Re Cenco Holdings Pty Ltd* (2005) 53 ACSR 484.

37 It is important also to note that upon deregistration, according to s 601AD(1) of the *Corporations Act*, a company ceases to exist. All property that was held by the company on trust immediately before deregistration vests in the Commonwealth pursuant to s 601AD(1A). All of the company's other property, that is, property other than that held by the company on trust, will vest in ASIC pursuant to s 601AD(2) of the *Corporations Act*. Section 576 of the *Corporations Law* (detailed below) provided similar effect at the time of deregistration of the Deregistered Companies.

38 Section 576 of the *Corporations Law* provided:

> **Section 576. Outstanding property of defunct company to vest in Commission**
>
> (1) **Where, after a company has been dissolved, there remains in this jurisdiction** or elsewhere **outstanding property of the company**, at the time when the company was dissolved, together with all claims, rights and remedies that the company or its liquidator then had in respect of the property **vests** by force of this section **in the Commission**.
>
> (2) Where any claim, right or remedy of the liquidator may under this Law be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Commission may, for the purposes of this section, make, exercise or avail itself of that claim, right or remedy without such approval or concurrence.
>
> (3) Where a company is dissolved, then, notwithstanding that the books of the company vest in the Commission by reason of subsection (1), the person who was the last director of the company or the persons who were the last

directors of the company before the company was dissolved shall retain the books of the company (other than any books of the company that any liquidator of the company is required to retain under subsection 542 (2)) for a period of 3 years after the date on which the company was dissolved.

(Emphasis added.)

39 The arguments raised by the Commissioner and ASIC also call into consideration ss 601AD(3), (3A) and (4) of the current *Corporations Act*, which provide as follows:

601AD Effect of deregistration

...

Rights and powers in respect of property

(3) Under subsection (1A) or (2), the Commonwealth or ASIC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, the Commonwealth or ASIC takes the property subject to that interest or claim.

Note: See also subsection 601AE(3)—which deals with liabilities that a law imposes on the property (particularly liabilities such as rates, taxes and other charges).

(3A) The Commonwealth has, subject to its obligations as trustee of the trust, all the powers of an owner over property vested in it under subsection (1A).

Note: Section 601AF confers additional powers on the Commonwealth to fulfil outstanding obligations of the deregistered company.

(4) ASIC has all the powers of an owner over property vested in it under subsection (2).

Note: Section 601AF confers additional powers on ASIC to fulfil outstanding obligations of the deregistered company.

...

40 Section 601AE of the *Corporations Act* prescribes what the Commonwealth and ASIC may do with the property that vests under s 601AD.

41 Section 601AE provides as follows:

601AE What the Commonwealth or ASIC does with the property

Trust property vested in the Commonwealth

(1) If property vests in the Commonwealth under subsection 601AD(1A), the Commonwealth may:

(a) continue to act as trustee; or

(b) apply to a court for the appointment of a new trustee.

Note: Under paragraph (1)(a), the Commonwealth may be able to transfer the property to a new trustee chosen in accordance with the trust instrument.

(1A) If the Commonwealth continues to act as trustee in respect of the property, subject to its obligations as trustee, the Commonwealth:

(a) in the case of money—must credit the amount of the money to a special account (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or

(b) otherwise:

(i) may sell or dispose of the property as it thinks fit; and

(ii) if the Commonwealth does so—must credit the amount of the proceeds to a special account (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

Note: ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to property held on trust by the Commonwealth (see subsection 8(6) of the ASIC Act).

Property vested in ASIC

(2) If property vests in ASIC under subsection 601AD(2), ASIC may:

(a) dispose of or deal with the property as it sees fit; and

(b) apply any money it receives to:

(i) defray expenses incurred by ASIC in exercising its powers in relation to the company under this Chapter; and

(ii) make payments authorised by subsection (3).

ASIC must deal with the rest (if any) under Part 9.7.

Obligations attaching to property vested in the Commonwealth

(2A) For the purposes of subsection (3), if any liability is imposed on property under a law of the Commonwealth immediately before the property vests in the Commonwealth under subsection 601AD(1A), then:

(a) immediately after that time, the liability applies to the Commonwealth as if the Commonwealth were a body corporate; and

(b) the Commonwealth is liable to make notional payments to discharge that liability.

Obligations attaching to property

(3) Any property that vests in the Commonwealth or ASIC under subsection 601AD(1A) or (2) remains subject to all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the Commonwealth or ASIC. These liabilities include a liability that:

(a) is a security interest in or claim on the property; and

(b) arises under a law that imposes rates, taxes or other charges.

Extent of Commonwealth's and ASIC's obligation

(4) The Commonwealth's or ASIC's obligation under subsection (2A) or (3) is limited to satisfying the liabilities out of the company's property to the extent that the property is properly available to satisfy those liabilities.

Accounts

(5) The Commonwealth or ASIC (as the case requires) must keep:

(a) a record of property that it knows is vested in it under this Chapter; and

(b) a record of its dealings with that property; and

(c) accounts of all money received from those dealings; and

(d) all accounts, vouchers, receipts and papers relating to the property and that money.

42 ASIC and the Commissioner also draw attention to s 8 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), which relevantly provides:

8 ASIC is a body corporate

...

(3) Any real or personal property held by ASIC is held for and on behalf of the Commonwealth.

(4) Any money received by ASIC is received for and on behalf of the Commonwealth.

(5) ASIC cannot hold real or personal property or money on trust.

Note: Any real or personal property or money that ASIC would otherwise hold on trust is held by the Commonwealth on trust.

(6) Despite any rule of equity, ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to any real or personal property or money held on trust by the Commonwealth.

...

Legislation regarding tax consolidated groups

43 Under Pt 3-90 of the 1997 Act, a consolidated group consists at any time of the head company, which is TBGL in this instance, and all of the 'subsidiary members' of the group at the time: s 703-5(3) of the 1997 Act. For a company to be a 'subsidiary member' of such a group, item 2 of the table in subs 703-15(2) of the 1997 Act relevantly requires that:

(a) all or some of its taxable income (if any) must be taxable, apart from Pt 3-90, at a rate that is or is equal to the corporate tax rate and the company must not be a non-profit company; and

(b) the company must be an Australian resident (but not a prescribed dual resident); and

(c) the company must be a wholly owned subsidiary of the head company of that group and if there are interposed between them, the set of requirement in s 703-45 must be met.

44 Section 703-45 provides:

> **703-45 Subsidiary members or nominees interposed between the head company and a subsidiary member of a consolidated group or a consolidatable group**
>
> (1) This section describes, for the purposes of item 2, column 4 of the table in subsection 703-15(2), a set of requirements that must be met for an entity (the ***test entity***) to be a *subsidiary member of a *consolidated group or a *consolidatable group at a particular time (the ***test time***).
>
> (2) At the test time, each of the interposed entities must either:
>
> (a) be a *subsidiary member of the group; or
>
> (b) hold *membership interests in:
>
> (i) the test entity; or
>
> (ii) a subsidiary member of the group interposed between the *head company of the group and the test entity;
>
> only as a nominee of one or more entities each of which is a *member of the group.

ISSUES ON REINSTATEMENT

45 As will be apparent from the discussion above, it is common ground that the two key issues on reinstatement are, first, whether the applicant for reinstatement is a person aggrieved by the deregistration of the company and, secondly, whether the Court is satisfied that it is 'just' to reinstate the registration of the company.

Are any plaintiffs relevantly 'aggrieved'?

46 Unlike the ancillary relief sought by the plaintiffs, the parties are essentially agreed on the legal principles concerning aggrievement, but divided on their application.

47 The expression 'person aggrieved' in s 601AH should not be construed narrowly: *Yeo v Australian Securities and Investments Commission, in the matter of Ji Woo International Education Centre Pty Ltd (deregistered)* [2017] FCA 1480 per Gleeson J (at [14]-[16] and the authorities therein cited). For a person to be aggrieved for the purposes of s 601AH(2)(a)(i), an applicant for reinstatement must be able to show that the deregistration deprived the

applicant of something, or injured or damaged the applicant in a legal sense, or if the applicant became entitled, in a legal sense, to regard the deregistration as a cause of dissatisfaction: *Danich Pty Ltd; re Cenco Holdings Pty Ltd* (2005) 53 ACSR 484 per Barrett J (at [32]).

48 In *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688, Austin J (at [24]-[26]) said:

> **Is the ACCC "a person aggrieved ..."?**
>
> [24] The ACCC contends that it fits this description because its legal rights have been affected and because it has a genuine grievance that the dissolution has affected its interests: *Re Proserpine Pty Ltd* [1980] 1 NSWLR 745. It submits that it has a public duty to improve competition and efficiency in markets, and to foster a fair and competitive operating environment for businesses.
>
> [25] Amongst the strategies which it uses to achieve this objective is undertaking litigation in cases where there are serious breaches of the Act and significant public detriment, as well as the potential for litigation to have a worthwhile educative or deterrent effect. The Commission considers that the conduct which it alleges in this case is a most serious example of price-fixing and market sharing, contrary to the law; and that it has a duty in the public interest to reinstate and sue the perpetrator of some of that conduct.
>
> [26] The officers have informed the court that they accept that the ACCC has standing to apply. I find that for the reasons which it has advanced, the ACCC is a person aggrieved for the purposes of s 601AH(2).

49 There is no temporal restriction in the description 'person aggrieved' as long as there is a causal link between the grievance and the deregistration. A person can become aggrieved after the time of deregistration: see the discussion by Gillard J in ***Pilarinos** and Ors v Australian Securities and Investments Commission* [2006] VSC 301 (at [49]). In *Pilarinos*, where his Honour said:

> The question arises whether a person can be aggrieved as a result of events which occur after the deregistration. In my opinion, there is nothing in the legislation which requires that the applicant must have been aggrieved at the time of the deregistration. Indeed, the history of the legislation, and in particular, the widening of the category of persons who could be aggrieved and, further, the removal of any time limit, supports that view. The actual words of the sub-section themselves do not restrict the application to the grievance being in existence at the date of deregistration. The sub-section requires a causal link between the grievance and the deregistration, but no temporal restriction.

50 There needs, however, to be some connection other than simply being a shareholder or a director of a company that is deregistered in order to be a person aggrieved. An applicant must demonstrate that his or her interests have been, or are likely to be, prejudicially affected by the deregistration of the company. A mere dissatisfaction with an event will not render

someone a 'person aggrieved'; they must be a person who has been damaged or injured in a legal sense: ***Callegher*** *v Australian Securities and Investments Commission* (2007) 218 FCR 81 per Lander J (at [50] and the authorities therein cited). For example, a shareholder demonstrating that he or she is a creditor of the company, or that there will be a surplus of assets and rights to dividends if the company were to be reinstated: *Vukasin v ASIC* [2007] NSWSC 1341.

51 Where deregistration extinguishes a legal right of some value, or potential value, or the applicant otherwise has an interest of a 'proprietary or pecuniary nature', the applicant may be aggrieved. In ***Arnold World*** *Trading Pty Ltd v ACN 133 427 335 Pty Ltd* (2010) 80 ACSR 670, Barrett J said (at [43]):

> The question whether an applicant under s 601AH(2) is "a person aggrieved by the deregistration" is considered by reference to legal rights and legal interests. It must be seen that the applicant has a genuine grievance that the dissolution of the company affected his or her interests because, for example, a right of some value or potential value has gone out of existence: *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688 (at [24]-[26]) [...]. Under analogous English legislation, the applicant was expected to have "an interest of a proprietary or pecuniary nature in resuscitating the company": *Re Wood & Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732; [1971] 1 WLR 293; and see *Re GA & RJ Elliott Pty Ltd* (1978) 3 ACLR 523.

52 The plaintiffs contend that the first to fourth and seventh plaintiffs are aggrieved by the deregistration in regards to distributions that they would be entitled to receive as shareholders of the Deregistered Companies (with the exception of two such companies).

53 The Commissioner contends that it cannot be said that the deregistration of the relevant companies has deprived the first to fourth and seventh plaintiffs of something, or injured or damaged them, such that they are persons aggrieved. This, the Commissioner says, is because the relevant grievance that was brought about by deregistration is one belonging to the Deregistered Companies, being the loss of the ability to lodge a proof of debt. This is not a legal interest or right of the first to fourth and seventh plaintiffs. The Commissioner contends there is not the necessary causal link between the deregistration and any grievance of the first to fourth and seventh plaintiffs, as the injury or damage suffered by them is too remote.

54 The Commissioner also contends that in light of ASIC's stated position in relation to the non-lodgment of any proofs of debt, it is unclear the basis on which Mr Wooding deposes that 'up to the amount of approximately $40 million may exit the Bell group (via ASIC) and not enure

to the benefit of the first to seventh plaintiffs'. The Commissioner contends that if ASIC does not prove, and any distributions stay in the Bell Group, these amounts will be available for onward distribution and will result in higher figures for the ultimate shareholder beneficiaries. The Commissioner does not, however, dispute that the first and eighth to tenth plaintiffs would be persons aggrieved in the context of the inability to access tax losses, but has questioned whether those plaintiffs have demonstrated the availability of such tax losses on reinstatement.

55 In relation to the ASIC issue, I accept that there is a discernible benefit to the first to fourth and seventh plaintiffs in removing the uncertainty in relation to the possible future lodgment of proofs by ASIC by reinstating the companies and thus guaranteeing that there will be no 'leakage' (as the plaintiffs submit) to ASIC. The alternative is to do nothing and take the risk that ultimately ASIC, which is not now in a position to bind itself as to the future, resolves itself to having an obligation to prove for the relevant debts. There is a significant sum at stake and to leave this uncertainty overhanging for those plaintiffs is unnecessary.

56 There is, on the basis of further evidence filed for the plaintiffs by Mr Woodings, a conclusion demonstrating that in the scenario where the companies are not reinstated and ASIC does not lodge proofs of debt on account of the Deregistered Companies' debts, the first to fourth and seventh plaintiffs and, thus where relevant, their creditors, will recover less than if the Deregistered Companies were reinstated and those plaintiffs recovered a surplus from them as shareholders.

57 I am satisfied that those plaintiffs are persons aggrieved in the sense understood in the cases I have discussed. There is a genuine grievance that the dissolution of the companies affects the interests of those plaintiffs. I am satisfied on the facts that, but for the dissolution, the first to fourth and seventh plaintiffs would be direct or indirect shareholders of the Deregistered Companies. The plaintiffs' legal interests are damaged or affected by the dissolution because they are prevented by the continued deregistration from seeking to enforce their legal rights to wind up the companies and obtain a return of capital to which they would be entitled in any such liquidation.

58 With two exceptions (namely, Harlesden and TBGL Securities), if the Deregistered Companies are reinstated, the first to fourth and seventh plaintiffs' legal rights against those companies put them in a position where, on the winding up of the companies, there is a real prospect of them being entitled to receive distributions from those companies due to the

amounts which those companies are themselves entitled to prove for in the liquidations of BGF, Bell Bros, or Wigmores Tractors. I am satisfied that these facts are established on the uncontested (albeit challenged) evidence of Mr Woodings. The Commissioner takes issue with the precision of the evidence and the anticipatory nature of the evidence, which has regard to events which might take place in the future. This is not an impediment in forming a view as to whether or not persons are aggrieved for the purpose of the section. The liquidator has stated his intentions and there is no evidence or reason to conclude that they would not be carried out if possible.

59 The prospect of a distribution being received by the first to fourth and seventh plaintiffs in this way suffices to show that their legal rights against the applicable Deregistered Companies as shareholders are legal rights presently extinguished as a result of the deregistration and they are clearly of value or potential value in the sense discussed in *Arnold World* (at [43]) and in *Callegher* (at [53]), where Lander J said:

> The fact that Claremont is a shareholder is not of itself enough to make Claremont a person aggrieved. However, if a shareholder can show that the shareholder might benefit from reinstatement by sharing in the assets of the company or obtaining a dividend of some kind that may make the shareholder a person aggrieved: *Casali v Crisp* [(2001) 165 FLR 79]. In this case, ACMF, if reregistered, has the potential of obtaining a judgment in the order of $290,000 with a consequential return to the shareholder, Claremont. In my opinion, Claremont is a person aggrieved because it will stand to benefit by ACMF's reregistration which allows it to prosecute its proceedings in the District Court. It will benefit if the litigation is successful to the extent of $290,000. It is not to the point, in my opinion, that Claremont is the trustee of the Callegher Family Trust and, as such, would not benefit in its own right if the action were successful. It has the responsibilities of a trustee to maintain the trust assets. The shareholding in ACMF has a significant value if the proceedings in the District Court are successful. In those circumstances, Claremont has the responsibility as trustee of maintaining that asset, being the shareholding in ACMF.

60 It is also clear that they have 'an interest of a "proprietary or pecuniary nature" in resuscitating the companies'.

61 I accept the plaintiffs' submission that the question of whether or not ASIC would prove for the debts does not affect the fundamental question, which is whether the first to fourth and seventh plaintiffs' rights against the Deregistered Companies as shareholders are of value, namely, whether they have a proprietary or pecuniary interest in restoring the companies to the register. Doing so would remove any 'uncertainty' and, as the plaintiffs put it, ensure against the possibility of any 'leakage' of funds to ASIC.

Tax issues and aggrievement

62 Over and above what might be described as the loss of positive advantages in relation to distributions, there is the tax issue introduced above (at [19]-[28]). Separately, the first and eighth to tenth plaintiffs are said to be aggrieved by the deregistration of certain of the Deregistered Companies, specifically, AL&S, TBGL Securities, Overells, Harlesden and Savidge, because of the impact of the deregistration on their tax liabilities.

63 In the case of Harlesden and TBGL Securities, the suggested adverse tax consequences are the only form of aggrievement asserted because they would not be eligible for any distributions on reinstatement.

64 As noted, the deregistration of the five companies identified prevents the eighth to tenth plaintiffs and certain other companies from satisfying ownership rules under Pt 3-90 of the 1997 Act and therefore preventing them from becoming members of the TBGL tax consolidated group. If they are not entities within the group, they cannot access tax losses or deductions available to the entities. As explained by Mr Woodings in his first affidavit, if they become members of the TBGL tax consolidated group, significant offsetting deductions and tax loses may become available, including GIC. The income to be offset would be that which the first and eighth to tenth plaintiffs will derive in future income years and potentially, which those plaintiffs have derived in previous income years on an after 1 July 2002, when the TBGL tax consolidated group was taken to be formed.

65 The plaintiffs focus on future income years, saying there is a real prospect of income being derived by the first and eighth to tenth plaintiffs in future income years by way of interest accruing on the proceeds of the Bell Proceedings. Those plaintiffs have already received tax assessments for the income years ended 30 June 2013, 30 June 2015 and 30 June 2016. The benefit of the orders sought would not relate to past tax losses, but rather, the future consequences following the making of the order.

66 The plaintiffs contend that if AL&S, TBGL Securities, Overells, Harlesden and Savidge are reinstated and an ancillary order, under s 601AH(3)(d) of the 1997 Act is made (such as paras 6, 7 or 8 of the Minute), the eighth to tenth plaintiffs and the other companies identified with the deduction or tax losses will be eligible to join the TBGL tax consolidated group from at least the date of reinstatement when any shares originally held by those companies and presently held by ASIC would revest in the companies. This appears to be common ground as reflected in the Commissioner's opinion as set out in his private ruling. At that point, the

companies would all be wholly owned subsidiaries of TBGL as required by s 703-15 of the 1997 Act.

67 If those companies join the TBGL tax consolidated group, the plaintiffs contend they can access new deductions and tax losses otherwise available solely to those companies to offset assessable income to be derived by the tax consolidated group in future income years. The eighth to tenth plaintiffs would, upon joining the group, no longer be separate taxpayers. In effect, their future income would be attributed to the group. That income could be reduced by current year deductions and tax losses, otherwise available solely to the identified companies.

68 The Commissioner does not appear to dispute, at least for present purposes, what the effect of the reinstatement would be in this regard, subject, at least initially, to the Commissioner's contention that there was no evidence of:

(a) the income likely to be derived by the first and eighth to tenths plaintiffs in future years; or

(b) the quantum of any additional current year deductions and tax losses that would become available to offset the future assessable income, should the five Deregistered Companies be reinstated and the other Bell Group companies then join the TBGL tax consolidated group respectively.

69 The Commissioner, of course, opposes the ancillary orders being made. As indicated though, any order made should reflect the fact that the benefit sought is only in relation to future tax consequences. The plaintiffs, appropriately in my view, draw attention to the applicant in ***Pacanowski*** *v Australian Securities Commission* (1995) 57 FCR 173 (at 175), in which Moore J recognised that a 'person aggrieved', an expression not be construed narrowly, should extend to a creditor of the company in view of the fact that he had 'an interest deriving from the future use that might be made of accumulated losses for taxation purposes'.

70 There is no difficulty in recognising that in these circumstances the first and eighth to tenth plaintiffs have a real and genuine grievance with regard to the continued deregistration of the five companies and, subject to the question of evidence, would be considered as persons aggrieved for the purposes of the section. I do not consider the absence of precise evidence on financial details of contributions and losses equates to an absence of evidence. It is not necessary, in my view, for the Court to be satisfied of the precise detail of the income that

would be derived in current and future income years, or the detail of additional deductions that would become available, for a person to be aggrieved. That was not the case in *Pacanowski*. The relevantly uncontradicted evidence of Mr Woodings, an experienced liquidator, is that both factors would be present. In particular, as to income, the more than $1.7 billion in initial recoveries from the Bell Proceedings by the members of the TBGL tax consolidated group and others, including the eighth to tenth plaintiffs, has earned substantial interest. I infer that it would be inherently improbable, having regard to the size of the amounts, that substantial interest would not continue to be accrued on them from time to time. In relation to deductions, the facts are that, first, the character of the relevant deductions or tax losses has been identified as being the GIC accruing on identified tax liabilities, secondly, as the Commissioner admits, at least $740 million in GIC has been accrued to the end of the year of income ending at 30 June 2014 on account of those liabilities and, thirdly, GIC continues to accrue on those liabilities. The plaintiffs adduced evidence detailing the interest that is estimated to be earned for the foreseeable future, as well as detailing the estimated current year and future GIC liability in Mr Woodings' fifth affidavit.

71 I am satisfied the plaintiffs have also demonstrated, on these grounds relating to the TBGL tax consolidated group, that the first and eighth to tenth plaintiffs are persons separately aggrieved by the deregistration of the five companies, AL&S, TBGL Securities, Overells, Harlesden and Savidge.

Is it 'just' to reinstate the companies?

72 The question of whether it is 'just' to make these orders is not constrained by any particular legislative parameters but, as noted in *Wedgewood Hallam Pty Ltd v Australian Securities and Investments Commission, in the matter of Combined Building Consultants Pty Ltd* [2011] FCA 439 per Gordon J (at [5] and the authorities therein followed by her Honour), regard should be had to:

(a) the circumstances in which the companies came to be deregistered;

(b) the future activities of the companies, if an order for reinstatement is made; and

(c) whether any particular person is likely to be prejudiced by the reinstatement.

73 A further consideration is also raised within the case law being that of public policy: see, for example, *Re ERB International Pty Ltd (deregistered)* (2014) 98 ACSR 124 per Brereton J (at [5] and the authorities therein cited).

74 These are by no means the only considerations and they may well overlap one another. They should not be approached as though they are statutory prescriptions.

The plaintiffs' contentions as to whether it is 'just'

75 The plaintiffs argue that reinstatement is 'just' because all of the Deregistered Companies were originally dissolved under s 574 of the *Corporations Law* between October 1992 and January 1994, not by the companies themselves or their representatives, but by ASC. ASC deregistered the companies as it had reasonable cause to believe that they were not carrying on business anymore and were not in operation.

76 The plaintiffs contend that each of those companies, at the time of dissolution, had assets in the form of receivables from other Bell Group companies and actual or contingent liabilities, being a requirement to repay debts to creditors and in any winding up make a return of capital to shareholders if there was a surplus. As there was considered to be no prospect of any value for creditors or shareholders in a winding up between 1992 and 1994, those factors were not examined. The position has now changed as a result of the outcome of the Bell Proceedings. According to *Donmastry Pty Ltd v Albarran* (2004) 49 ACSR 745 per Barrett J (at [5]), a court should be more ready to reinstate a company that has not been through a winding up process. His Honour said:

> The next matter to which s 601AH(2) directs attention is the question whether the court is satisfied that it is "just" that the registration be reinstated: s 601AH(2)(b). This is not a case where deregistration occurred as an administrative measure in the nature of a cleansing of the register to remove apparently superfluous entries. **Deregistration was the culmination of the process of winding up and, in the normal course, the court would be more reluctant to disturb that kind of deregistration than it would be to resuscitate a company removed as a purely administrative measure.** The plaintiff, however, points to certain aspects of the winding up which require comment and indicate a need for certain aspects of PACI's activities to be examined.
>
> (Emphasis added.)

77 Further, the plaintiffs argue that if an order of reinstatement is made, the Deregistered Companies would, as long as the ancillary relief is granted, immediately be placed into liquidation for the benefit of their creditors or shareholders, such that their activities on reinstatement would be limited and would principally involve receiving distributions from,

and making distributions to, other companies within the Bell Group. The plaintiffs argue that no third party would be prejudiced by the reinstatement of the Deregistered Companies because immediately upon their reinstatement, the companies would be wound up and a liquidator appointed. There is, therefore, no risk of the companies trading while insolvent, or acting in a manner which would prejudice the rights of third parties as they would be in the control of a liquidator.

78 It might be thought that the Commissioner would be prejudiced by the reinstatement of the five companies because of the consequential impact the reinstatement may have on the Commissioner's right to assess the first and eighth to tenth plaintiffs for income tax liabilities in future income tax years, without having to take into account tax losses or deductions that may become available to the TBGL tax consolidated group, following reinstatement. The plaintiffs argue that properly understood, this would not constitute a 'prejudice' in any relevant sense and that, in any event, if it were, it should not be given great weight. The plaintiffs argue that this is because it is well accepted that the deregistration of a company by ASIC is not necessarily permanent. Deregistration is subject to the possibility of a retrospectively effective reinstatement, as provided for in the legislation and as was provided for under the legislative regime under which the Deregistered Companies were deregistered: see subs 574(2), (3) and (5) of the *Corporations Law*. It follows, the plaintiffs argue, that the Commissioner is not entitled to expect that a deregistered company will not be reinstated when it comes to levying income tax. Any 'prejudice' to the Commissioner from reinstatement in these circumstances would not be materially different from that suffered by a person who is exposed to being sued by a deregistered company upon its reinstatement. It is not a sufficient basis to make the reinstatement unjust for the purposes of s 601AH.

79 I would accept this submission. It is one of the reasons the Court is empowered to make ancillary orders, which would prevent, amongst other things, injustice. In that regard, it is important to recognise that the proposed relief relates to future tax consequences, and does not have potential retrospective effect on liabilities, which have already been assessed on the first and eighth to tenth plaintiffs.

The Commissioner's contentions as to whether it is 'just'

80 The Commissioner raises several arguments as to why it is not 'just' to reinstate the Deregistered Companies. The first argument is that the plaintiffs have not established that good use could be made of any reinstatement orders made in respect of the Deregistered

Companies. This is a similar argument as to the inadequacy of the detailed evidence to explain why reinstatement of the Deregistered Companies would be necessary to prevent amounts 'leaking' from the Bell Group. The Commissioner says the plaintiffs have not established the position of the first to fourth and seventh plaintiffs would be any worse off by reason of the deregistration.

81 In my view, there is sufficient evidence on this topic. It is true that it does not have the degree of particularity which would be expected when viewing events retrospectively. As previously stated, however, a highly experienced liquidator expresses views, which are uncontradicted, on issues which inferentially, at the very least, having regard to the sums involved, appear to be based on sound common sense.

82 A further reason advanced by the Commissioner concerns the length of time for which the companies have been deregistered. The Commissioner argues that the 22 to 25 years that have elapsed since the deregistration is a cause of prejudice to the Commissioner in light of the desire to access tax losses and deductions to offset otherwise assessable income. The Commissioner was not a party to the transactions said to give rise to the losses and deductions, as such, it is contended that his ability to properly assess and test such claims is compromised. These problems, he says, are compounded in circumstances where the claimed deductions and losses reside in companies that were dissolved or wound up more than 20 years ago.

83 The prejudice faced by the Commissioner by reason of the effluxion of time is contended as being similar to that which has been recognised in those cases where the courts have refused to make orders suspending the operation of limitation statutes because the reinstated company intends to make a new claim, rather than being reinstated for the purpose of being made a defendant to a proceeding: see ***Harule*** *Pty Ltd; Ex parte Olita Super Readymixed Concrete Pty Ltd (in liq)* (1994) 13 ACSR 500 per Santow J (at 502-503) and ***Chalker*** *v Clark* [2008] VSCA 92 per Osborne AJA (at [37]-[39]). In *Chalker*, President Maxwell (at [44]-[45]) also observed:

> 44 Counsel for the appellant dealt candidly with the issues raised by the Court, particularly in relation to the limitation period question. First, Mr Herbert readily conceded – as he had done in the previous proceeding in this Court – that the causes of action on which the company could rely (in the action sought to be assigned) are statute-barred. Secondly, he acknowledged that the expiry of the limitation period was seen as an insuperable obstacle to the cause of action being litigated by his client as the successor trustee to the company. That was why this application for reinstatement was brought. The

> advantage which this procedural course offered over that which had been rejected – that is, his client suing as successor trustee – was that there appeared to be scope under s 601AH(3) for the lapse of time to be disregarded. In short, there appeared to be a means of circumventing the limitation problem by using the reinstated company as the vehicle for the litigation.
>
> 45 It follows that the application for reinstatement was a device to escape the application of a limitation period, in circumstances where the limitation period should operate to secure the purpose for which it is established, that is to say, to protect defendants against litigation being commenced too long after the events the subject of the litigation. I cannot imagine that a court would have allowed s 601AH(3) to be used in that way. It is even less likely that any such extension would have been granted where the proposed litigant was not the company itself but Mr Chalker as the putative assignee from the company. I do not see how the power could ever have been exercised for that purpose, which seems to be extraneous to the purpose of the reinstatement power itself.

84 The Commissioner also points to the fact that the plaintiffs have failed to adequately explain the reasons for their substantial delay. I disagree. If the reason for the delay were not self-evident, it has certainly been clarified in the plaintiffs responding evidence. Further, it is also doubtful, in my view, whether there is any prejudice caused to the Commissioner by reason of delay. I accept the plaintiffs' submissions that the argument as to prejudice conflates the question of prejudice as a factor relevant to reinstatement on the one hand, and the question of prejudice as a factor relevant to the making of the proposed ancillary order that would result in various companies joining the TBGL tax consolidated group with retrospective effect on the other. The real point at which this alleged particular prejudice might arise is in the context of considering whether or not an ancillary order should be made. Further, it may be relevant in regards to shaping the terms and effect of such an ancillary order.

85 In any event, it is difficult to identify prejudice by reason of not being a party to historical transactions when the relevant losses or deductions are, in the way explained above, GIC accruing on tax debts owing by certain Bell Group companies to the Commissioner. The companies owing those debts and accruing the GIC liabilities are not deregistered. The relevant losses or deductions do not, therefore, reside in companies which were dissolved or wound up more than 20 years ago, as might be inferred from the Commissioner's objection. The losses are directly derived from the GIC imposed by the Commissioner himself. That is, the deductions represent GIC accruing on the Commissioner's own tax debts as a function of the tax legislation from time to time. In those circumstances, there can be no prejudice in the nature of the Commissioner's alleged inability to properly assess or test such claims. Mr Woodings has given evidence that the Commissioner routinely issues a schedule to him, as

liquidator of the relevant companies, setting out the Commissioner's calculation of the GIC accruing on those debts.

86 The plaintiffs have now also explained, in more detail, relevant historical factors which go to the question of whether there is an unexplained delay. Of course, delay usually accompanied by some other factors may be relevant to addressing the justice of reinstatement, but I am also satisfied on considering the following history that the delay is fully explained:

(a) the Deregistered Companies were originally part of a wider subset of Bell Group companies deregistered between 1992 and 1994. When, in about 1995, the liquidators of TBGL and BGF secured funding to investigate and prosecute the potential claims against the banks that later became the Bell Proceedings, the subset of deregistered Bell Group companies were all considered for reinstatement and liquidation as explained in Mr Woodings' fifth affidavit;

(b) indeed, at this time the creditors, including the Commonwealth (through the Australian Tax Office (**ATO**)), agreed to provide funding to reinstate and wind up those companies, which were then considered to be:

(i) necessary parties to the Bell Proceedings; and/or

(ii) sufficiently likely, if the Bell Proceedings were successful, to make distributions to their creditors, which would ultimately flow through to the external creditors of TBGL or BGF and which distributions would be proportionate to the then anticipated costs of reinstatement and liquidation;

(c) various Bell Group companies were duly selected for reinstatement and liquidation and the applications were brought and completed in 1995 or early 1996. Bell Bros was one of those companies and the ATO itself brought the application, supported by the liquidators. However, the funding creditors did not provide funding to reinstate and wind up the Deregistered Companies at this time. The reason for this was that the prospect of significant dividends flowing to and from the Deregistered Companies for the ultimate benefit of external creditors of TBGL and BGF was considered remote, even if the Bell Proceedings were successful. At that stage, the view was taken, on advice,

that the cost of reinstatement and liquidation was not considered to be proportionate;

(d) no funding was available for the plaintiffs to seek reinstatement of the Deregistered Companies until, at the earliest, receipt of part of the proceeds of the Bell Proceedings, that is, the amounts which were not subject to a dispute in December 2012. It was only after receipt of those funds that it became clear that there would be a worthwhile reason to reinstate the companies, namely, the prospect of a valuable return for the plaintiffs and their creditors from receipts, which would flow to the Deregistered Companies;

(e) Mr Woodings also explained that after December 2012, the Bell Proceedings remained the main focus of the Bell Group liquidations until completion of settlement with the banks in mid-2014. No distribution was possible until the Bell Proceedings were resolved;

(f) from mid-2014 onwards, although Mr Woodings had identified reinstatement of the Deregistered Companies as a necessary step to be addressed in the liquidations, it was not viewed as a step that had time sensitivity. Mr Woodings explained that the Commissioner, who was aware from at least April 2015, that the reinstatement of the Deregistered Companies may be sought in due course, did not indicate to Mr Woodings that he though the application was time sensitive;

(g) the plaintiffs say that there were good reasons not to rush to reinstate the Deregistered Companies as at 2015 because, relevantly, there were no time sensitive tax related issues to which the reinstatement of the Deregistered Companies would be relevant. Mr Woodings was in regular contact with the ATO about the groups' post-liquidation tax affairs with a view to resolving them by negotiation. The ATO had not, at this stage, issued post-liquidation tax assessments and there was no evidence of a risk of that occurring. The possibility of forming a tax consolidated group had been considered, but there was no urgency about making a final decision, according to Mr Woodings;

(h) on 6 May 2015, the Western Australian government introduced the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) **Bill** 2015 (WA). That Bill, and the subsequent **Act**, sought to put in place a legislative

scheme which, if valid, would have made it pointless to reinstate the Deregistered Companies.

(i) the announcement of the Bill also brought about a change in approach by the ATO, which communicated to Mr Woodings that it needed to issue tax assessments urgently before the Bill became an Act, so as to protect the Commissioner's rights. This required Mr Woodings to take steps urgently to form the TBGL tax consolidated group, which took place in around August 2015, just before the assessments were first issued;

(j) the Act took effect on 26 November 2015. It prevented the liquidation of the companies from continuing in a practical sense. That Act was subsequently declared to be invalid by the High Court on 16 May 2016: *Bell Group NV (in liq) v Western Australia* (2016) 90 ALJR 655. The liquidators subsequently resumed control of the Bell Group liquidations;

(k) following the High Court's determination, substantial work was required in order to overcome the effects of the Act and resume work of the liquidations. This included recovering the assets of the Bell Group companies and dealing with the payment of the tax assessments, which the ATO had issued just prior to enactment of the Act;

(l) on 7 November 2016, amended assessments were issued by the Commissioner and, on 5 December 2016, TBGL commenced an appeal against those assessments. The assessments were paid under objection on 15 December 2016, following an application for directions to the Supreme Court; and

(m) the potential impact of the reinstatement of the companies on the tax appeal made it important, after the appeal was commenced, for the reinstatement of the Deregistered Companies then to be sought. It followed that, on 13 June 2017, this application was filed and has been prosecuted by the plaintiffs.'

87 The Commissioner also contends, in written submissions, that there are 'strong public policy reasons' for refusing reinstatement. It is not entirely clear whether the Commissioner maintains this argument because, in the context of consideration of the discretion involved in granting the ancillary relief, the Commissioner abandoned reliance on the following factors. Assuming out of caution that the argument is still advanced in relation to whether reinstatement is 'just', the argument is to the effect, that the reinstatement of the companies

may have the result that Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**), containing income tax general anti-avoidance provisions, applies to permit the Commissioner to cancel any tax benefits which may follow from the reinstatement of the Deregistered Companies. I am not persuaded that this factor is presently relevant to the justice of reinstatement. This is because the Court is unable to form any view as to whether what is proposed is a relevant 'scheme' for the purposes of Pt IVA of the 1936 Act. In this context, the Commissioner refers to comments made by the General Anti-Avoidance Rules Panel (**GAAR Panel**) at a preliminary hearing to the effect that the scheme may be one to which Pt IVA could apply. But, it is clear that some of the assumptions on which the GAAR Panel was relying were debatable and, in any event, the views expressed were no more than a simple expression of a possibility. There is a whole regime under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**), with objection and appeal procedures, which might deal with the mere possibility that noting upon the ancillary orders (not the orders for reinstatement themselves) may, or may not, constitute a scheme. It is quite inappropriate to attempt to further examine the issue at this point, when no arguments have been put on by either side.

88 Further, it is important to bear in mind that this consideration concerning the application of Pt IVA, in any event, arises only in relation to two companies, as all but two companies also seek reinstatement on the basis that they would be entitled to distributions, which they cannot now receive. The Commissioner's argument would only provide a reason not to reinstate Harlesden and TBGL Securities, but I am far from satisfied that it is an appropriate consideration in relation to those companies.

Other considerations on reinstatement

89 Before moving to the contentious question of whether the ancillary orders may or should be made, it is necessary to briefly address some additional considerations relevant to the consequences of reinstatement and in respect of which there appears to be no issue. No submissions were made by the Commissioner on those topics.

90 The first of those considerations is whether it would be just and equitable to wind up the Deregistered Companies after their reinstatement. Section 461(1)(k) of the *Corporations Act* provides that a court may order that a company be wound up on the basis that it is just and equitable to do so. That is a fact to be assessed in light of all the circumstances of the case: *Irwin v Yule* [2013] SASC 132 per White J (at [48] and the authorities therein cited). The

courts will be reluctant to wind up a solvent company, but insolvency is not a precondition to winding up: *Australian Securities & Investments Commission v ABC Fund Managers Ltd (No 2)* (2001) 39 ACSR 443 per Warren J (at [119] and [124]). It will be appropriate to wind up a company on just and equitable grounds where it is without effective control: ***Legrande Enterprises*** *Pty Ltd v Australian Securities and Investments Commission* [2009] FCA 718 per Besanko J (at [33]-[34] and the authorities therein cited).

91 It can be readily inferred that a company is without effective control if it has been allowed to be deregistered and has remained in that state for a period of years or more without any action being taken to remedy the situation. Although the Deregistered Companies are apparently insolvent and could be wound up on that ground, the lack of effective control is obvious from the fact that the Deregistered Companies have been defunct for between 22 and 25 years. No action has been taken to reinstate them in the intervening period. It would certainly be questionable as to whether directors who held office more than two decades ago would be able, or willing, to assume control of those companies. It would be equally unclear as to whether it would be beneficial for that step to be taken.

92 As the plaintiffs observe, orders for winding up on just and equitable grounds were made in analogous, but less extreme circumstances in ***Re Sparad Ltd*** (1993) 12 ACSR 12, ***Shaw v*** *Goodsmith Industries Pty Ltd* (2002) 41 ACSR 556 and *Legrande Enterprises*. *Shaw* was the longest period of deregistration in that group, the company having been deregistered slightly over 11 years.

93 I am satisfied that the companies should be wound up on a just and equitable basis.

94 Next, I think it is obvious that Mr Woodings, who is the current liquidator of all the plaintiffs and numerous other companies within the Bell Group, should be the appropriate liquidator, having indicated that he is available and willing to take that appointment. This will clearly assist in the ease of administration and the minimisation of expense. To the extent that there is any risk of conflicts, Mr Woodings has given an undertaking that he will seek the Court's directions before attempting to act in any position he identifies, with several decades of experience, as being conflicted.

95 Similarly, it is appropriate for reasons that follow to make orders for the dispensing with the requirements for notification, advertising and reporting. In the case of advertising and notification, s 467(3)(b) of the *Corporations Act* authorises the dispensing of those

requirements. This power may be exercised where no useful purpose would be served by insisting on the advertising and notification: *Re Sparad* per McLelland CJ (at 14). This applies where a party moves for reinstatement of a deregistered company with winding up to follow immediately upon reinstatement. In relation to reporting requirements, the plaintiffs seek to dispense with the following requirements:

(a) for the directors and company secretary of each reinstated company to provide Mr Woodings with a report as to the affairs of the company pursuant to s 475 of the *Corporations Act*; and

(b) for the liquidator for each reinstated company to provide a report to creditors and ASIC, pursuant to rule 70-40 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**Insolvency Practice Rules**), containing the information detailed in rule 70-40(2). There has been an alteration to the definition of 'this Act', contained in s 9 of the *Corporations Act*, to include the Insolvency Practice Rules. Therefore, the Court's power under s 467(3)(b), to 'dispense with any notices being given or steps being taken that are required by this Act', includes the power to dispense with requirements prescribed under the Insolvency Practice Rules.

96 In the present circumstances, there is no reason to consider that such reporting would either be possible, or that it would be of any utility, given that the companies have been defunct for 22 to 25 years. It is very unlikely that former directors would be able to prepare an informative or accurate report under s 475 of the *Corporations Act*. There is no reason to consider that a liquidator would, therefore, be able to prepare a comprehensive report to creditors about dividends to be given, as contemplated by rule 70-40 of the Insolvency Practice Rules.

97 Orders for dispensing with such requirements will be made.

98 Finally, the plaintiffs seek an order that the liquidator execute a proposed deed poll. No objection is taken to orders in relation to the proposed deed poll. As a matter of comity, it seems appropriate to me to make the orders. That is because the order sought is a requirement of the settlement of the Bell Proceedings. Specifically, the plaintiffs and Mr Woodings are required, by the Deed of Settlement, to procure that any 'Non-Plaintiff Bell Participant' sought to be reinstated, which includes all of the Deregistered Companies, enter into a Deed upon their reinstatement in the form required by cl 8(a)(iii) of the Deed of

Settlement. The Supreme Court approved the Deed on 14 November 2013: *Re Bell Group Ltd (in liq); Ex parte Woodings* (2013) 97 ACSR 117. Each of the reinstated companies would undertake, in favour of the parties to the Deed of Settlement, to comply with its terms and carry out its obligations as if they were a 'Main Respondent' to the Deed of Settlement. The Main Respondents are, in effect, TBGL, Mr Woodings and the other parties to the Bell Proceedings. Relevant terms and obligations imposed on those parties include releasing and covenanting not to sue the banks and certain related parties in connection with various matters related to the Bell Proceedings and their substrata. It is in the interest of the banks that this order be made. It is sought by Mr Woodings and appears to me to be an appropriate order to make.

99 There is the further detail as to whether, assuming the companies are reinstated and placed into liquidation, it is appropriate to grant the order to require Mr Woodings, as their liquidator, to enter into that Deed of Settlement on behalf of each of the proposed reinstated companies. Such an order may be made under s 477(2B) of the *Corporations Act*, which directs particular attention to the need to ensure that a winding up will proceed in as expeditious as fashion as circumstances allow. It is concerned with ensuring that the Court exercises some oversight as to a liquidator's proposed action, where the action falls within the purview of the provision: see the discussion in *Re HIH Insurance Ltd (In Liquidation)* [2004] NSWSC 5 per Barrett J (at [15]), where his Honour said:

> This brings me to the approach that the court is to take in deciding whether to grant approval under s.477(2A) or s.477(2B). Although the two provisions deal with different aspects of a liquidator's powers, both are concerned to ensure that the court exercises some oversight of the liquidator's actions and, in effect, confers or completes the necessary power only where it sees that a case for exercise of the power in the particular circumstances has been sufficiently shown. The court's assessment must be made in light of the purposes for which liquidators' powers exist. One overriding purpose is to serve "the interests of those concerned in the winding up - here the creditors" (**Re Spedley Securities Ltd** (1992) 9 ACSR 83 per Giles J); the other is to do whatever needs to be done "for the proper realisation of the assets of the company" or to assist its winding up (**Re G A Listing & Maintenance Pty Ltd** (1994) 15 ACSR 308 per Young J). The court does not concern itself with the commercial desirability of the transaction. As Giles J said in the ***Spedley Securities*** case (above):
>
> > "The court pays regard to the commercial judgment of the liquidator. That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in **Re Mineral Securities (Australia) Ltd** [1973] 2 NSWLR 207 at 231-2, the court is necessarily confined in attempting to second guess a liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the

> liquidator's conduct."
>
> Although this was said in relation to s.477(2A), I consider the statement to be equally applicable to s.477(2B). As Austin J observed in **Re United Medical Protection Ltd** [2003] NSWSC 237, the considerations arising under both provisions are "much the same", although I would add that s.477(2B) focuses particular attention on the need to ensure that contractual provisions as to timing do not cut across the general expectation that winding up will proceed in as expeditious a fashion as circumstances allow: **Re G A Listing & Maintenance Pty Ltd** (above), **Re CIC Insurance Ltd** (2001) 38 ACSR 181.

100 I accept the plaintiffs' submissions that relevant factors in determining whether to grant approval under s 477(2B) include the interests of creditors (or shareholders), whether the agreement is for the proper realisation of the company's assets or whether it will assist the winding up, and any delay or uncertainty inherent in alternative courses of action: *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 (at 85); *Re GA Listing & Maintenance Pty Ltd* (1994) 15 ACSR 308 (at 311); and *Cook v Law* [2003] FCA 966 (at [12]).

101 In this instance, the execution of the proposed deed on behalf of each of the Deregistered Companies is within the realm of sound, commercial judgement by Mr Woodings. The Deed of Settlement will not impose any liabilities upon the companies. Nor does it have a tendency to prolong their windings up. It will simply oblige them to be bound by and observe the covenants in the Deed of Settlement which already bind all of the other Bell Group companies of which Mr Woodings is liquidator.

102 The execution of the Deed of Settlement by the Deregistered Companies, upon reinstatement, is part of the consideration for the original settlement of the Bell Proceedings, which was approved by the Supreme Court in 2013 and is the reason why funds are available for distribution to the Deregistered Companies in the first place. The Deregistered Companies will be recipients of funds flowing from the Deed of Settlement and they have already obtained the benefit of releases and covenants not to sue from the banks under the Deed of Settlement (by cl 6 and the definition of 'Non-Plaintiff Bell Participant'). It is commercially reasonable for the companies to give consideration for those releases and covenants by executing the Deed of Settlement. Further, a failure to execute the Deed of Settlement (and thus provide consideration) may be significant if the Deregistered Companies, following reinstatement, ever need to enforce the covenants in the Deed of Settlement which operate for their benefit. No direct opposition was made to the proposed order by the Commissioner.

103 The proposed order will not cause prejudice to any person with an interest in the liquidations of the companies to be reinstated. It is supported by the plaintiffs in this application who are the persons most directly and immediately interested in the reinstatement and liquidation of the Deregistered Companies. That order will also be made.

THE ANCILLARY ORDERS – S 601AH(3)(D) OF THE *CORPORATIONS ACT*

104 The final and firmly contested issue concerns the Deregistered Companies and other affected Bell Group companies joining the TBGL tax consolidated group with effect from 1 July 2002. There are three alternative forms of orders, which the plaintiffs have advanced. They are evident from paras 6, 7 and 8 of the proposed orders set out above (at [4]).

105 It should be reemphasised that only two Deregistered Companies are sought to be reinstated purely for the tax implications: Harlesden and TBGL Securities.

106 The main issue is whether making such an order is within the Court's power. The Commissioner strongly contends that none of the versions of the proposed orders sought is within power.

107 While s 601AH is detailed in full at [29] of these reasons, it is helpful to reiterate that s 601AH(3) provides that on reinstatement of the registration of a company, pursuant to a court order or at the determination of ASIC, the Court may validate anything done during the period beginning when the company was deregistered and ending when the company's registration was reinstated and, under s 601AH(3)(d), the Court may 'make **any** other order it considers appropriate' (emphasis added).

108 The Note to s 601AH3(d) provides:

> For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

109 The plaintiffs stress that the power under s 601AH(3)(d) is very wide, intending to confer a broad range of powers upon the Court to make ancillary or consequential orders on reinstatement of a company in order to deal with issues or matters connected with the interruption of the company's corporate existence as a result of the deregistration. Such orders clearly extend, the plaintiffs correctly argue, beyond validating things that have 'been done' during the period when the company was deregistered, as that is the province of s 601AH(3)(c). Further, the plaintiffs stress that as s 601AH(3)(c) permits orders which will

be retrospective in effect, so also should s 601AH(3)(d) be construed as permitting such an order.

110 Both the plaintiffs and the Commissioner have argued the matter partly by reference to the legislative history and partly by reference to various cases. On one view of the matter, however, one would enquire simply as to why the text should not be given its plain meaning. It seems to me that is an appropriate starting point, recognising, of course, that the apparently wide discretion should always be directed to ordering what is 'just' or to doing justice to all persons affected by the making of the order(s).

111 The parties draw different conclusions from the legislative history and the extrinsic materials, such that, while in my view, the width of the provision on its face would enable one or more forms of the ancillary orders 6, 7 and 8 to be made, for completeness it is preferable to examine both the legislative history and the cases.

112 The immediate predecessor of s 601AH(3)(d) of the *Corporations Act* was s 574 of the *Corporations Law*, which was applied prior to 1 July 1998. That provision was contained in Div 8 of Pt 5.6 of the *Corporations Law*. It is set out above (at [31]).

113 Section 574 followed substantially the same content as earlier English provisions, including subs 353(5) and (6) of the *Companies Act 1948* (UK) and subs 26(4) and (5) of the *Companies Act 1900* (UK). These provisions are discussed in English cases such as ***Tyman's Ltd v Craven*** [1952] 2 QB 100 (at 105-113) by Lord Evershed MR and ***Morris v Harris*** [1927] AC 252 (at 267-269) by Lord Blanesburgh. An order permitting the Court to give such directions and make such provisions (including directions and provisions relating to the retransmission of property) as considered 'just' for placing the company and all other persons in the same position as if the company had not been dissolved, was designed to put the company in an '**as-you-were**' situation as nearly as possible, subject to the interests of affected third parties. So it was that in *Tyman's* (where that expression was used), Lord Evershed MR articulated (at 111) the power as being 'the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened'. Hodson LJ observed (at 126) that the court was given power to clarify 'an obscure position' following restoration to the register and to 'give back to the company an opportunity which it might otherwise have lost'. Similarly, Lord Blanesburgh in *Morris* described the power as being restorative in nature (at 369):

> The company is restored to life as from the moment of dissolution but ... it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution void.

114 The Australian cases have followed the English authorities on this fundamental objective. One significant and far from incidental consequence was that an order could be made in favour of a deregistered company enabling it to take legal proceedings on reinstatement when, but for such an order, a limitation of actions provision would bar its right to sue a third party. Such an order was made, not only in English cases, but also in *Harule*, although see the remarks in *Chalker* (set out above at [82]).

115 Section 601AH(3)(d) of the *Corporations Act*, was inserted into the law following the *Company Law Review Act 1998* (Cth), when Pt 5A of the law replaced the old Div 8 of Pt 5.6. Unlike its predecessor, s 601AH(3)(d) no longer contained the wording that ancillary orders may be made that seem just for placing the company and all persons in the same position, so far as possible, as if the company's registration had not been cancelled: see the recent discussion by Brereton J in ***Re Regional Planners*** *Developments Co Pty Ltd* (2015) 110 ACSR 457 (at [24]). His Honour said, and I would respectfully agree, that:

> **The re-enacted section no longer contains the limitation** that appeared in its predecessors to the effect that the order be made for the purpose of placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. That indicates **an intention to remove what was seen in some of the cases as a constraint on the types of orders** that could be made [see in that respect, in particular, *Re Huntington Poultry Ltd* [[1969] 1 All ER 328] (at 330-1); [*Deputy Commissioner of Taxation v*] *Action Workwear* [*Pty Ltd (deregistered)* (1996) 20 ACSR 712], at 722-3]. Parliament, by re-enacting the section, should be taken to have intended to confirm the way in which it had been interpreted to that point, and to reduce the constraints which had been applied to its application. Nonetheless, I do not think the earlier cases, in directing attention to remediating any disadvantage that had been occasioned by the deregistration are irrelevant; they continue to give useful guidance as to the application of the provision, though they must be interpreted having regard to the wider power that now is available.
>
> (Emphasis added.)

116 The exposure draft of the Second Corporate Law Simplification Bill in June 1995, which was accompanied by the 'Report of the Simplification Taskforce', which gave rise to the Bill, observed, as noted in ***Foxman*** *v Credex National Australian Trade Exchange Pty Ltd (in liq)* (2007) 215 FLR 392 by White J (at [58]), that the reinstatement power had been preserved by s 601AH(2), and in relation to s 601AH(3) that:

> As under the current Law, the Court will be able to make such ancillary orders as are just for putting the company and any other person in the same position, so far as is

possible, as if the company had not been deregistered (Bill subsection 601AH(3)).

117 In ***Stork*** *ICM Australia Pty Ltd v SFS 007.298.633 Pty Ltd* (2010) 77 ACSR 517, a case emphasised by the Commissioner, Lindgren J observed (at [27]), that s 601AH(3)(b) (now s 601AH(3)(d)) would not empower the Court to make an order denying to a reinstatement the retrospective effect provided for in s 601AH(5) of the *Corporations Act*. While this is an authority on which the Commissioner places much emphasis, in my view, the conclusion reached by his Honour is, with respect, unremarkable, but does not preclude one or more of the ancillary orders sought in this case. There is certainly no suggestion that the plaintiffs are seeking to deny the retrospectivity of s 601AH(5), which was precisely what was sought in *Stork*, and which would run counter to a fundamental purpose of reversing deregistration, reflected in the opening sentence of s 601AH(5), namely, the 'as-you-were' approach, which has been adopted for many years. I note the opening sentence of the section:

> If the company is reinstated, the company is taken to have continued in existence **as if it had not been deregistered**.
>
> (Emphasis added.)

118 The effect of any of the three orders sought by the plaintiffs accords with the retrospective effect to the reinstatement of the company as contemplated in the first sentence of s 601AH(5), but will do so by varying one aspect or incident of the operation of Pt 5A.1, while the company was deregistered. That aspect would be to address the stipulation as to ASIC's custody and control of non-trust property of the Deregistered Companies during its period of dissolution and its revesting in the Deregistered Companies upon reinstatement. Accepting that *Stork* is authority for the proposition that an order made under s 601AH(3)(d) could not be inconsistent with the main purpose identified in the first sentence to s 601AH(5), the question is whether the orders proposed would have that effect.

The Commissioner's contentions on the Court's power

119 The Commissioner argues that there are two principles central to the operation of Pt 5A.1 of the *Corporations Act*:

(a) section 601AH(5) provides only a 'limited form' of retrospectivity upon the reinstatement of a deregistered company; and

(b) on deregistration, the property of the company vests in ASIC by operation of s 601AD and if an order is made to reinstate the company pursuant to

> s 601AH(2), the property of the company re-vests only from the time of reinstatement, not from the time of deregistration.

120 The Commissioner contends these propositions are well established, relying on *White v Baycorp Advantage Business Information Services Ltd* (2006) 200 FLR 125 per Campbell J (at [115]), *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd* (2006) 201 FLR 296 per Barrett J (at [17]) (***CGU v Rockwell)***, *Foxman* per White J (at [59]-[66]), ***Oates v Consolidated Capital*** *Services Pty Ltd* [2007] NSWSC 680 per White J (at [34]), *GIO General Ltd v Sabko Pty Ltd* (2007) 70 NSWLR 743 per Austin J (at [11]-[12]) and *Stork* per Lindgren J (at [28]-[30]). The orders are said to be beyond power as they are inconsistent with the operation of the provisions of Pt 5A.1, as reflected in the two principles spelt out above. In addition, they are, the Commissioner says, inconsistent with the functions, powers and rules of ASIC as provided for in the ASIC Act.

121 The Commissioner says that the proposed orders are inconsistent with the 'limited' form of retrospectivity that is provided by s 601AH(5) of the *Corporations Act* as they seek to restore beneficial ownership of the property to the Deregistered Companies during the period of deregistration.

122 In *Stork*, the applicant sought to have the reinstatement operate from the date of the reinstatement orders, rather than the period spelt out in the first sentence of s 601AH(5). As noted, Lindgren J held that s 601AH(3) cannot be used for such purpose, saying (at [27]):

> I do not think, however, that s 601AH(3)(b) empowers the court to make an order **denying to a reinstatement the retrospective effect provided for in s 601AH(5).** Subsection (3) assumes that an order has been made under subs (2), and in my view the **only order that the court is able to make under subs (2) is one having the retrospective effect provided for in subs (5).** There is a question, however, precisely what that retrospective effect is.
>
> (Emphasis added.)

123 I entirely agree with this paragraph. Any of the ancillary orders sought have the retrospective effect provided for in subs (5).

124 However, in my view, Lindgren J's comments would support, rather than detract from, the Court's power to make one or more of the orders sought by the plaintiffs.

125 The Commissioner says the attempt by the plaintiffs to treat ASIC as a nominee in the first version of the orders (para 6 of the Minute) in respect of the shares of the Deregistered Companies is inconsistent with the ownership rights, powers and obligations that were

conferred on ASIC in relation to the shares from the moment the shares vested in it. ASIC has all the powers of an owner in respect of the property vested in it as discussed. The plaintiffs, according to the Commissioner, are seeking to alter or modify the operation of Pt 5A.1. In contrast to s 447A(1) of the *Corporations Act*, which expressly provides the Court with the power to alter the operation of Pt 5.3A of the *Corporations Act*, there is nothing in the text context or purpose of s 601AH(3)(d) which would support the use of the power in this way. None of the cases, such as those which have the effect of suspending or extending a statutory limitation period, the Commissioner says, would suggest otherwise. Rather, they are examples of s 601AH(3)(d) being used to remove anomalies or impediments, as was thought to be the purpose of the provision by Barrett J in *CGU v Rockwell* (at [18]).

126 The Commissioner also contends that the decision in *Oates v Commissioner of Taxation* (1990) 27 FCR 289 per Hill J is of no assistance to the plaintiffs because in that decision the court was addressing the effect of the operation of ***Bankruptcy Act 1966*** (Cth) itself, not the making of a court order, which would have the effect of altering or modifying the operation of the *Bankruptcy Act*. The Court found that the retrospective effect of an annulment under the *Bankruptcy Act* was such that losses which might otherwise have been excluded under s 80(4) of the 1936 Act were caught by that section. In this instance, the Commissioner contends no retrospective effect of the *Corporations Act* gives a result that the shares in the Deregistered Companies were always beneficially owned by those companies. Rather, it is because the *Corporations Act* does not have this retrospective effect that the plaintiffs are seeking that the Court use discretionary power to make the ancillary orders.

127 In relation to discretion under s 601AH(3)(d), the Commissioner argues that even if the Court did have the power to make orders, such as the ancillary orders sought by the plaintiffs, it should not do so. Initially, the Commissioner directed his arguments to concerns that what might be proposed was a tax avoidance scheme as understood by Pt IVA of the 1936 Act. Senior counsel expressly abandoned those arguments and, rather, focussed on an argument that, even if the power were available, it should not be exercised as the orders sought would each be inconsistent with s 601AH(5) and, therefore, the order could only be justified in exceptional circumstances, such as where it is necessary to make such orders to protect third party rights.

128 In my view, although I make no comment at this stage as to whether the orders would have only been made in exceptional circumstances, everything to do with this application is

exceptional, including the period of time the companies have been deregistered, the amounts of money to which the plaintiffs would be denied and the entire history of the proceedings as set out above. In any event, it is clear that there are third party rights involved, including creditors' rights in the liquidation. The amount of the correct tax payable by the group will have a flow on effect for creditors in the liquidation. While the Commissioner is one of those creditors, there are others.

129 I would not wish to be acceding to the suggestion that such an order could only be made where it was justified by exceptional circumstances. There is no suggestion in the statute to support that construction. The power to make the orders is cast in very broad terms. More importantly, the Commissioner's argument depends on the correctness of the proposition that the orders would be inconsistent with subs (5).

130 The real question is the nature of the power conferred under s 601AH(3)(d).

Consideration on the ancillary orders

131 *Re Regional Planners*, as noted above, was a case in which Brereton J canvassed the authorities addressing the width of the power under s 601AH(3)(d), which his Honour viewed as being even less constrained than under its predecessor, saying (at [15]):

> The further and more difficult question is the application for an order that has the effect of suspending the limitation period in respect of any action that the plaintiff might have against the company. This application is founded on s 601AH(3)(d), which provides, in effect, that if the Court makes an order for reinstatement of a company, it may "make any other order it considers appropriate". I have expressed some reservations as to the power – and, if there is power, discretion – to make an order under that section, particularly where, as in this case, it would have the effect of suspending or extending a limitation period running against the company, after the limitation period has expired.

132 His Honour noted that, without reference to authorities, he would have seriously doubted s 601AH(3)(d) extended to authorise an order which would have the effect of suspending or extending a limitation. However, Brereton J went on to state (at [16]) that 'authority suggests it does'.

133 Observing the similarities in s 329(4) of the *Companies Act 1993* (NZ) and s 353(6) of the *Companies Act 1948* (UK) with the language of s 601AH(3)(d), Brereton J discussed a number of cases in the United Kingdom and New Zealand where reinstatement orders had been considered by the courts (at [16]-[19]) which had implications for the bringing of proceedings both on behalf and against companies. His Honour then turned his consideration

to Australian case law and decisions under the predecessor provisions of s 601AH(3)(d), stating (at [20]-[22]):

> [20] The reservations I have expressed, and the doubts that I would have had in the absence of authority, as to whether s 601AH(3)(d) confers any such jurisdiction at all are not unique. Such reservations were expressed by McLelland J (as the later Chief Judge in Equity then was) in *Solla v Scott* [1982] 2 NSWLR 832, where his Honour said (at 834-5):
>
> > It has been held that in the exercise of its powers under the equivalent of s 308(5) [the predecessor of the provision now under consideration] a court may direct that in case of creditors who were not statute barred at the date of dissolution, the period between the date of dissolution and the date of restoration to the register is not to be counted for the purpose of any statute of limitation: see *Re Donald Kenyon Ltd* [1956] 1 WLR 1397; [1956] 3 All ER 596, and cf *Re Huntingdon Poultry Ltd* [1969] 1 WLR 204; [1969] 1 All ER 328 and *Re Lindsay Bowman Ltd* [1969] 1 WLR 1443 at 1446; [1969] 3 All ER 601 at 603.
> >
> > I have some doubt as to whether such an order could properly be made under s 308(5) notwithstanding *Re Donald Kenyon Ltd*, in which the order made purported to override the provisions of the statute of limitation. For the reasons I have already given no such order is required in the present case, even if it could otherwise properly be made.
>
> [21] However, in *Harule Pty Ltd; Ex parte Olita Super Readymixed Concrete Pty Ltd (in liq)* (1994) 13 ACSR 500 (*Harule*), Santow J (as he then was) relied on *Re Donald Kenyon* and referring to McLelland J's reservations, observed that no reasons were given for them, although accepting that they invited caution on the part of the Court as to making such an order in circumstances where, as in *Harule*, it was sought for the benefit of the company as a plaintiff, rather than against the company as a prospective defendant. His Honour nonetheless made an order in that case.
>
> [22] The jurisdiction to make such an order has also been accepted by Senior Master Mahony in *Deputy Commissioner of Taxation v Action Workwear Pty Ltd (deregistered)* (1996) 20 ACSR 712 (*Action Workwear*), and by Master Burley in *Lillecrapp v State of South Australia; Golden Eggs v SA* (1996)14 ACLC 1540 at 1542.

134 Brereton J then had regard to the differences in the language of s 601AH(3)(d)'s predecessors and the current terms of the provision, observing (at [23]-[24]):

> [23] It seems to me that for present purposes the reservations entertained by McLelland J and by me can be set to one side, for two reasons. The first is the re-enactment of former s 308(5), in much wider terms, in current s 601AH(3)(d) of the Corporations Act; the second is and the acceptance of the jurisdiction by the Queensland Court of Appeal in *Pagnon v Workcover Queensland*; [2001] 2 Qd R 492 [2000] QCA 421, which I should follow unless convinced it is plainly wrong.
>
> [24] The re-enacted section no longer contains the limitation that appeared in its predecessors to the effect that the order be made for the purpose of placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. That indicates an intention to remove what was seen in some of the cases as a constraint on the types of orders that could

be made [see in that respect, in particular, *Re Huntington Poultry Ltd* (at 330-1); *Action Workwear* at 722-3]. Parliament, by re-enacting the section, should be taken to have intended to confirm the way in which it had been interpreted to that point, and to reduce the constraints which had been applied to its application. Nonetheless, I do not think the earlier cases, in directing attention to remediating any disadvantage that had been occasioned by the deregistration are irrelevant; they continue to give useful guidance as to the application of the provision, though they must be interpreted having regard to the wider power that now is available.

135 His Honour concluded his analysis by stating (at [25]-[28]):

> [25] As to the judgment of the Queensland Court of Appeal, the leading judgment was that of McPherson JA, a judge with unparalleled experience and standing in the field of company law and, in particular, the law of company liquidation. After referring to some of the cases that I have mentioned, his Honour said (at [13]):
>
> > In Australia, the jurisdiction to follow this practice was questioned in *Solla v Scott* [1982] 2 NSWLR. 832 at 835; but, as Santow J pointed out in *Re Harule Pty Ltd* (1994) 13 ACSR. 500, 501, the observation on that matter in *Solla v Scott* was obiter and no reason was given for it....
> >
> > [14] The same policy is now manifest in the provisions of Part 5A of the Corporations Law, which took effect on or from 1 July 1998.
>
> [26] His Honour then set out s 601AH, and continued:
>
> > [15] It will be seen that the Court's power to order reinstatement under s601AH(2) is predicated only on the need to be satisfied that it would be "just" to do so. That is the criterion which the courts have applied in the past in cases of this kind. Furthermore, the power conferred by s601AH(3)(b) is now very wide, and extends to making "any other order" that the Court "considers appropriate". I would have no doubt that under this provision the court could, and in a case like the present would if asked to do so, exercise the power under s601AH(3)(b) to order that the time between dissolution of the company on 11 December 1998 and the expiration of the limitation period under s11 of the Limitation of Actions Act 1974 should not be counted against the plaintiff here. There is every reason why it would be "just" to adopt that course.
>
> [27] In *Hutchinson v Australian Securities and Investments Commission* (2001) 40 ACSR 198; [2001] VSC 465, Senior Master Mahony (at [28]) cited with approval paragraph [15] of McPherson JA's judgment [see also *Del Borello v Australian Securities and Investments Commission* [2008] WASC 48, where Beech J observed that the authorities made it clear that the power under s 601AH(3) extended to making orders to the effect that the period of deregistration will not count for the purpose of any limitations period].
>
> [28] Accordingly, I am satisfied that there is jurisdiction under s 601AH(3)(d) to make the order sought. The question remains whether, as a matter of discretion, that order should be made.

136 In my view, there is no reason to limit the power in s 601AH(3)(d) of the *Corporations Act* in the manner contended for by the Commissioner. Although the parties referred to extrinsic materials, there is nothing in them which supports a suggestion that there was a legislative

intention to diminish or limit the purpose of the power. The power has always existed to achieve the primary purpose of treating a company upon reinstatement as though it had continued in existence from the date of deregistration, that is to say, the 'as-you-were' position.

137 It is also necessary to address the Commissioner's contention that any of the proposed orders would be inconsistent with the limited form of retrospectivity provided for by s 601AH(5) because they seek to restore beneficial ownership of the property to the Deregistered Companies during the period of deregistration. It is true that the adjective 'limited' has been used by the courts in relation to the retrospectivity described in the first sentence of s 601AH(5), but in my view, that retrospectivity underlies the whole purpose of reinstatement. Section 601AH(5) provides for a fictional deemed continuation of the company's corporate existence during the period of deregistration. There are no other automatic retrospective legal consequences, but that is why there is the facility within the *Corporations Act* to make both validating provisions and *any* other orders considered appropriate in the circumstances in conjunction with the reinstatement. Section 601AH(3)(d) clearly permits an ancillary order which has significant, not merely incidental, retrospective consequences.

138 In *White v Baycorp*, Campbell J decided that the first sentence of s 601AH(5) provides for a 'limited' degree of retrospectivity and does not extend to the vesting of the property of the company from the time of deregistration. His Honour noted that the real difference between the mode of operation of s 574(4) of the *Corporations Law* and s 601AH(5) of the *Corporations Act* was that retrospectivity was given only to the date of reinstatement, rather than the date of deregistration (see [115]-[117]). But his Honour went on to note that no one had, before him, sought an order under s 601AH(3) (see [128]): '[t]hat course was not followed'. By this, I take his Honour as implicitly suggesting that had an order been sought, as it is now, it may have been a different situation. It may have been within power or, at least, not obviously beyond power and would require consideration. While his Honour does not, of course, expressly say that he would exercise a discretion to make the relevant order in the circumstances and facts of that case, he does not say that he would not and certainly does not suggest that such an order would not be within power. Of course, it was unnecessary for his Honour to deal with such a hypothetical.

139 The Commissioner also relies on *Stork*. I have already discussed *Stork* and do not need to say more.

140 There was also detailed examination by White J in *Foxman*, looking at the legislative history. His Honour noted that the intended effect of reinstatement under s 601AH(5) was far from clear, observing (at [42]) that the authorities show that the first sentence is qualified by the later sentences. What is of importance in his Honour's analysis is the point, with which I would respectfully concur, is that it would be a surprising result if the amended legislation that gave rise to s 601AH narrowed the position. It is not at all inconsistent with the legislative history that at least one purpose of the enactment of s 601AH(3)(d) was to permit the Court to make an order to put the company in the same position as if deregistration had not occurred, as previously provided for under s 574(5) of the *Corporations Law*.

141 The Commissioner emphasises the point that Barrett J had noted in *CGU v Rockwell* that s 601AH(3) jurisdiction should, in his opinion, be used principally to be used to remove anomalies or impediments (at [18]). This observation was not central to his Honour's reasoning in the case, but in any event, it is clear that his Honour does not say it should **only** be used to remove anomalies or impediments or only for small anomalies. The section itself certainly does not suggest that it be used merely to remove anomalies or impediments, nor does his Honour suggest so. Where his Honour says 'principally', I would take that to mean 'usually'. It may be common for the subsection to be used for such purpose, but there is no reason to think it is exclusively so confined.

142 The Commissioner also relies upon the observations of White J in *Oates v Consolidated Capital*, where his Honour commented (at [34]) that '[t]he company's property is revested in it from the time the company is reinstated'. In doing so, his Honour was referring with approval to the approach Campbell J had taken in *White v Baycorp*. On proper analysis, *Oates v Consolidated Capital* is not a decision in relation to the scope of the power under s 601AH(3)(d), but rather a case accepting the correctness of what Campbell J said about the first sentence of s 601AH(5).

143 I note that Austin J in *GIO General* referred to Campbell J's remarks and applied them (at [11]-[12]), but again, it was only a decision on the scope of the retrospective deeming in the first sentence of s 601AH(5). It was not a decision about the scope of the power in s 601AH(3).

144 An order under s 601AH(3)(d), which revests part of a company's property at an earlier time, even for a limited purpose, does not in any way contradict or make redundant, or nugatory, the provisions of s 601AD(4) and s 601AE(2) of the *Corporations Act*. Those provisions are directed to the time prior to reinstatement and the powers of ASIC, whilst vested with the property of a deregistered company. ASIC is, at that stage, prior to any reinstatement application, empowered as an owner. Once the company is reinstated, ASIC no longer needs those powers. I am unable to discern an inconsistency on the face of the statute in recognising, consistently with the first sentence of s 601AH(5), that the powers that ASIC has during the period of deregistration ceased to have relevance on reinstatement and hence no practical impact on the Court's power under s 601AH(3)(d).

145 Accordingly, I consider that the orders sought of paras 6, 7, or 8 of the Minute are within power.

146 As to discretionary considerations, I note that:

(a) the plaintiffs objectives' are on their face entirely lawful and reasonable;

(b) if the Commissioner wishes to oppose the tax consequences of the ancillary orders, there remains ample opportunity in other administrative or judicial proceedings to do so. These orders simply allow the plaintiffs to contend for such consequences. The outcome of that debate awaits another day; and

(c) making the ancillary orders is more consistent with the primary statutory objective (described above as the 'as-you-were' effect) than not making them.

147 Further, in exercise of discretion as to whether such orders should be made and, if so, which of them, in my view, it is desirable to grant no more than the minimum relief necessary to do justice and to do so solely for the stated purpose in the way described in submissions which, in this instance, is to enable possible membership of the TBGL tax consolidated group and for the specific purpose of future tax benefit, not past benefits. To that end, para 8 of the Minute is the preferable order, but it should be further qualified for clarity that it is directed to enable the relevant companies to contend for that tax consequence.

148 Nothing in these reasons addresses the availability of such consequences or the availability of arguments as to the possibility of a Pt IVA 'scheme'. They and other tax considerations will doubtless be dealt with elsewhere. Further, I have some concern about (but no fixed view), as to whether it is necessary for ASIC to have held the shares 'as nominee'. The precise legal

consequence of that characterisation is not entirely clear. Submissions have not yet been directed to it. I consider the terminology used in the Minute may be preferred and may be adequate.

CONCLUSION

149 I would make orders in the Minute, adopting para 8, but subject to the qualifications expressed.

I certify that the preceding one hundred and fourty-nine (149) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 15 June 2018

FIRST SCHEDULE - PLAINTIFFS

First Plaintiff:	THE BELL GROUP LIMITED (IN LIQUIDATION) ACN 008 666 993
Second Plaintiff:	BELL BROS HOLDINGS LTD (IN LIQUIDATION) ACN 008 695 056
Third Plaintiff:	BELL BROS PTY LTD (IN LIQUIDATION) ACN 008 672 375
Fourth Plaintiff:	BELCAP ENTERPRISES PTY LTD (IN LIQUIDATION) ACN 009 264 537
Fifth Plaintiff:	BELL GROUP FINANCE PTY LTD (IN LIQUIDATION) ACN 009 165 182
Sixth Plaintiff:	WANSTEAD PTY LTD (IN LIQUIDATION) ACN 008 775 120
Seventh Plaintiff:	WIGMORES TRACTORS PTY LTD (IN LIQUIDATION) ACN 008 679 221
Eighth Plaintiff:	DOLFINNE SECURITIES PTY LTD (IN LIQUIDATION) ACN 009 218 142
Ninth Plaintiff:	NEOMA INVESTMENTS PTY LTD (IN LIQUIDATION) ACN 009 234 842
Tenth Plaintiff:	WANSTEAD SECURITIES PTY LTD (IN LIQUIDATION) ACN 009 218 160
Eleventh Plaintiff:	ANTHONY LESLIE JOHN WOODINGS

SECOND SCHEDULE

LIST OF DEREGISTERED COMPANIES WHOSE REINSTATEMENT IS SOUGHT

Company	ACN	Date of dissolution/deregistration	Plaintiff moving for reinstatement
Armstrong Ledlie & Stillman Pty. Ltd.	009 656 044	20 October 1992	First plaintiff and ninth plaintiff
Belcap Portfolio Pty Ltd	009 265 169	20 October 1992	First plaintiff
Bell Properties Pty Ltd	008 675 625	24 June 1993	Third plaintiff
Davsell Pty Ltd	002 235 574	24 June 1993	First plaintiff
Godine Enterprises Pty Ltd	009 237 316	20 October 1992	Second plaintiff
Godine Finance Pty Ltd	009 237 325	20 October 1992	Fourth plaintiff and/or fifth plaintiff
Group Color (W.A.) Pty. Limited	008 687 769	20 October 1992	Fourth plaintiff
Harlesden Pty. Ltd.	008 773 411	12 January 1994	First plaintiff, second plaintiff and sixth plaintiff
HJW Engineering Pty. Ltd.	008 975 746	20 October 1992	Seventh plaintiff
Overells' Limited	009 658 020	20 October 1992	First plaintiff and eighth plaintiff
Savidge & Killer Pty. Ltd.	009 680 639	20 October 1992	First plaintiff
TBGL Securities Pty Ltd	008 713 513	20 October 1992	First plaintiff, tenth plaintiff and/or fifth plaintiff
Wanstead Finance Pty Ltd	009 227 570	20 October 1992	Fourth plaintiff and/or fifth plaintiff
W & J Financial Services Pty. Limited	002 407 696	20 October 1992	First plaintiff
Wigmores Air Services Pty. Ltd.	008 742 863	20 October 1992	Seventh plaintiff
Wigmores Finance Pty. Ltd.	008 679 230	20 October 1992	Seventh plaintiff