FEDERAL COURT OF AUSTRALIA

Leadenhall Australia Pty Limited v Cape Lambert Resources Limited [2018] FCA 558

File number:	SAD 171 of 2017
Judge:	**CHARLESWORTH J**
Date of judgment:	26 April 2018
Catchwords:	**CORPORATIONS** ─ application for orders pursuant to s 247A(1) of the *Corporations Act 2001* (Cth) permitting two applicants to inspect a company's books ─ first applicant no longer a member of the company at time application determined ─ second applicant's current holding trivial in value ─ whether applicants acting in good faith and for a proper purpose ─ whether objective basis for investigation into suspected contraventions of the Act ─ whether consequential legal claims legally misconceived
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) Pt 10 *Corporations Act 2001* (Cth), ss 9, 198F, 236, 237, 247A, 249D, 249F,606, 611, 657A, 657D, 671B, 671C, 672A, 672B

Cases cited:	*Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344 *Hanks v Admiralty Resources NL* (2011) 85 ACSR 101 *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151 *London City Equities Limited v Penrice Soda Holdings Limited* [2011] FCA 674, (2011) 281 ALR 519 *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 *Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236 *Smartec Capital Pty Ltd v Centro Properties Ltd* (2011) 83 ACSR 461
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ORDERS

SAD 171 of 2017

BETWEEN:	**LEADENHALL AUSTRALIA PTY LIMITED** First Applicant
	TIMOTHY OWEN LEBBON Second Applicant
AND:	**CAPE LAMBERT RESOURCES LIMITED** Respondent

JUDGE:	**CHARLESWORTH J**
DATE OF ORDER:	**26 APRIL 2018**

THE COURT ORDERS THAT:

1. The application is dismissed.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. The applicants, Timothy Lebbon and **Leadenhall** Australia Pty Limited, apply for an order under s 247A(1) of the *Corporations **Act** 2001* (Cth) authorising them to inspect and make copies of certain books of **Cape Lambert** Resources Limited.

2. In March 2016, Cape Lambert placed 94,000,000 ordinary shares to **Gulf Energy** International Limited. The transaction raised $3,995,000.00 capital.

3. The applicants seek to inspect the books to ascertain whether Cape Lambert's Executive Chairman, Mr Tony Sage, has a relevant interest in the shares acquired by Gulf Energy. They submit that if Mr Sage does have such an interest, then the share issue to Gulf Energy contravened the Act in a way that may entitle them to monetary remedies.

4. At the time that this action was commenced, each of the applicants were shareholders of Cape Lambert.

5. Oral argument on the application concluded on 19 October 2017. On 4 December 2017 argument was reopened on Cape Lambert's application. The Court received evidence to the effect that on 27 September 2017, Leadenhall had divested itself of all of its shares in Cape Lambert and that on 4 October 2017, Mr Lebbon had disposed of 99,000 of his 100,000 shares, retaining a small holding with a total value of about $22.00.

6. Cape Lambert submits that, as a consequence of the divestment of its shares, Leadenhall no longer has standing to seek the relief claimed in this action. In the alternative, it disputes the fact and sufficiency of the applicants' stated purposes for seeking to inspect the books. It submits that their true purpose is to gather evidence in support of a claim against Mr Sage and/or Gulf Energy rather than to protect or advance their interests as members of the company. Alternatively, and for related reasons, it submits that relief should be refused in the Court's residual discretion,

particularly having regard to the insignificant size of Mr Lebbon's current shareholding.

BACKGROUND

7. Mr Lebbon is a director and shareholder of Leadenhall. The following chronology of events is derived from his affidavit sworn on 29 June 2017 and is largely uncontroversial.

8. Mr Lebbon personally acquired 100,000 shares in Cape Lambert on 9 November 2015.

9. On 25 November 2015, Leadenhall entered into an agreement to acquire 105,908,628 shares in Cape Lambert from African Minerals Limited (AML), a company then under external administration. AML's holding represented a 16.88% interest in Cape Lambert and made it the company's largest shareholder.

10. Cape Lambert held an Annual General Meeting the following day. Mr Lebbon alleges that "Tony Sage stated at that meeting that Cape Lambert was solvent and did not need to raise any capital at that time." I infer from the correspondence annexed to the affidavit that any statement by Mr Sage at the AGM concerning capital raising was made in response to a question on that topic put by Mr Lebbon. More will be said about the statement later in these reasons.

11. Mr Lebbon formed the view that an independent non-executive director should be appointed to the Board of Cape Lambert. Together with AML's administrators (Deloitte), he corresponded with the company expressing that view and asserting concerns about the company's governance arrangements and directors' remuneration. AML, through Deloitte, insisted upon Mr Lebbon's involvement to identify a director that would be suitable to AML as Cape Lambert's largest shareholder.

12. The day after the AGM, Mr Lebbon and Leadenhall, (through their joint solicitors) wrote to Cape Lambert stating that they looked forward to assisting the company to appoint an independent non-executive director. The letter continued:

> From the statement made at the AGM on 26 November 2015, Our Client understands that [Cape Lambert] is solvent and does not need to raise any capital at this time.

> Given the importance of Our Client's interest in [Cape Lambert], Our Client would not expect the board of [Cape Lambert] to approve a placement of shares in [Cape Lambert] without proper consultation with Our Client (via Tim Lebbon).

13. Deloitte corresponded with Cape Lambert in similar terms. It alleged dissatisfaction by shareholders with the existing governance arrangements and insisted upon Cape Lambert liaising with Mr Lebbon "around the appointment of an independent director acceptable to AML as [Cape Lambert's] largest shareholder".

14. By letter dated 4 December 2015 Cape Lambert (by Mr Sage), replied to Deloitte in terms that queried why AML sought to have a "board seat" when it had not done so in the nine months since the appointment of Deloitte as external administrator. The letter questioned the call option agreement between Leadenhall and Deloitte. It stated that Cape Lambert would ask the appropriate authorities whether Deloitte had "acted outside of [its] boundaries in effectively aiding and abetting a hostile attempt to change control of our Company". In relation to Mr Lebbon, the letter stated:

> **…** Mr Lebbon's approach at Cape Lambert's Annual General Meeting of Shareholders held on 26 November 2015 demonstrated a non-cooperative, confrontational approach with no regard to professional courtesy and due process. This would indicate Mr Lebbon's ability to make prudent decisions may be influenced by some hidden agenda which the Board of Cape Lambert could reasonably conclude is not in the best interests of all shareholders.

15. In the weeks following, the tenor of the exchanges became increasingly fractious. The position maintained by Mr Lebbon, Leadenhall and Deloitte was that the governance arrangements of Cape Lambert remained unsatisfactory and that an independent non-executive director should be appointed with the assistance of Mr Lebbon. Concerns were expressed about whether Cape Lambert might seek to raise capital by the issue of more shares, particularly having regard to what Mr Sage was alleged to have said at the AGM about the company's solvency. In the course of the correspondence, Deloitte cited s 249D and s 249F of the Act, provisions which would enable AML to use its voting power to call a general meeting.

16. As can be seen, the position of Cape Lambert was that Mr Lebbon, by himself and through the agency of Deloitte, was attempting to manipulate the control of the company in a way that was hostile to its best interests. It questioned whether AML maintained any voting rights in Cape Lambert, having regard to the call option

agreement with Leadenhall. It defended its governance arrangements and the Board's recent decisions, including the recent acquisition of a mining asset.

17. Cape Lambert issued three announcements in connection with the placement of shares with Gulf Energy. The first was issued on 11 January 2016. It was in the following terms:

> Cape Lambert Resources Limited **(ASX: CFE) (Cape Lambert** or the **Company)** is pleased to announce that it has agreed terms to raise $4m via a fully underwritten placement **(Placement)** to UK and European sophisticated investors.
>
> Under the terms of the Placement, CFE will offer approximately 94m shares at 4.25c per share, a 300% premium to last closing price. The underwriting agreement is executed and the Placement is scheduled to be finalised within 30 days.
>
> The Placement will be the first capital raising the Company has undertaken since 2005, and is being conducted to enhance working capital to sufficient levels for maintenance of the Company's portfolio of assets and address other circumstances that gave rise to the emphasis of matter in the Company's 2015 Annual Report, during a time of uncertain market conditions. Simultaneously the Company continues to monitor and seek costs savings and opportunities to sell non-core assets.
>
> 'We are proud of the fact we have not raised new capital since 2005, and during that same period returned over $250m of value to shareholders via dividends, capital returns, in specie distributions and share buy-backs, but in these tough market conditions it's important that when we can we maintain flexibility to invest in our current asset portfolio to maintain and enhance value. The underwriting of the placement at a huge premium shows support for, and belief in the Company's assets and management,' said Cape Lambert Chairman, Mr Tony Sage.

18. A second announcement was made on the following day in response to a request by the Australian Securities Exchange (ASX) for further details. It stated that Cape Lambert had entered into an underwriting agreement with Gulf Energy for the placement of approximately 94 million shares at $0.0425 per share. It relevantly continued:

> The key terms of the Underwriting Agreement are as follows:
>
> - Underwritten amount of $4m;
> - Placement with sophisticated investors in the United Kingdom or Europe;
> - Subject to shareholder approval, one option for every four shares subscribed to under the placement to be issued with an exercise price of 5c exercisable on or before 31 December 2018;
> - Proposed closing date of 11 February 2016, being 30 days from execution of the Underwriting Agreement, and settlement date of 26 February 2016; and

- An underwriting fee of 5% will be paid to Gulf Energy.

19. On 16 February 2016, Cape Lambert issued a further announcement advising that at the request of Gulf Energy it had resolved to extend the closing date for the placement to 4 March 2016 with a revised settlement date of 18 March 2016.

20. On 19 February 2016, the solicitors for Deloitte wrote to Cape Lambert's solicitors seeking information, including in respect of whether Cape Lambert would appoint any of the individuals proposed as an independent non-executive director, details of the extension of the closing date for the proposed placement, and whether Gulf Energy was a related party to any director of Cape Lambert. Further correspondence appears to have passed between the solicitors in February 2016, in which Cape Lambert relevantly stated that Gulf Energy was not a related party to the directors of Cape Lambert.

21. On 9 March 2016, Cape Lambert issued a further announcement confirming that the placement had closed and that the settlement date for remittance of the funds had been further extended to 31 March 2016.

22. On 31 March 2016, Cape Lambert notified the ASX that new shares in Cape Lambert had been issued by the company. The notice lodged with the ASX showed that 94 million shares had been issued at $0.0425 per share.

23. Subsequently, on 7 September 2016, Gulf Energy lodged a Form 603 "Notice of initial substantial holder", to the effect that it had become a substantial holder of shares in Cape Lambert. The notice stated that it held 94 million fully paid ordinary shares in Cape Lambert. This equated to 13.04% voting power, on the assumption that there were 720,686,586 shares on issue.

24. The time for Leadenhall to exercise the option to purchase AML's shares had expired by 23 September 2016. At that time, Mr Lebbon negotiated with AML to acquire additional shares in Cape Lambert, namely:

(1) 27.6 million shares in Cape Lambert on behalf of Leadenhall; and

(2) 12.5 million shares in Cape Lambert on behalf of **Noble Investments** Superannuation Fund Pty Ltd, the corporate trustee of Mr Lebbon's self-managed superannuation fund.

25. Noble Investments is not a party to the present application. It divested itself of all of its Cape Lambert shares on 19 June 2017.

26. In October 2016, at Mr Lebbon's request, the Australian Securities and Investments Commission (ASIC) issued beneficial tracing directions to Gulf Energy pursuant to s 672A and s 672B of the Act. Gulf Energy's responses to the tracing directions were broadly to the effect that:

(1) the directors of Gulf Energy are Chris Narborough and Grainne Brady;

(2) Mr Narborough is the legal and beneficial owner of Gulf Energy;

(3) no other person has a legal or beneficial ownership interest in Gulf Energy; and

(4) Gulf Energy "agreed to assist [Cape Lambert] with a potential raise of capital, and, after negotiating to potentially underwrite a [Cape Lambert] placement, it ended up purchasing a block of 94m new shares issued by [Cape Lambert]".

27. In response to questions concerning the decision to purchase Cape Lambert's shares and the exercise of voting rights attached to them, Mr Narborough said "… I call the shots, though, as with any company, significant decisions are made by the Board … ".

28. A company search annexed to Mr Lebbon's affidavit shows that Gulf Energy is a company registered in the Cayman Islands.

29. After communications with ASIC, Gulf Energy lodged a revised Notice of initial substantial holder dated 19 December 2016 pursuant to s 671B of the Act. The revised notice identified Mr Narborough as the person standing behind Gulf Energy in respect of the newly issued shares.

30. Mr Lebbon has made additional requests to ASIC for further investigation into the identity of persons or entities standing behind Gulf Energy. ASIC has declined to do so.

LEGISLATION AND PRINCIPLES

31. Section 247A of the Act provides:

> **247A Order for inspection of books of company or registered managed investment scheme**
>
> (1) On application by a member of a company or registered managed investment scheme, the Court may make an order:
>
> (a) authorising the applicant to inspect books of the company or scheme; or
>
> (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
>
> The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.
>
> (2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.
>
> (3) A person who:
>
> (a) is granted leave under section 237; or
>
> (b) applies for leave under that section; or
>
> (c) is eligible to apply for leave under that section;
>
> may apply to the Court for an order under this section.
>
> (4) On application, the Court may make an order authorising:
>
> (a) the applicant to inspect books of the company; or
>
> (b) another person to inspect books of the company on the applicant's behalf.
>
> (5) The Court may make the order only if it is satisfied that:
>
> (a) the applicant is acting in good faith; and
>
> (b) the inspection is to be made for a purpose connected with:
>
> (i) applying for leave under section 237; or
>
> (ii) bringing or intervening in proceedings with leave under that section.
>
> (6) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

32. The power to make an order under s 247A of the Act is discretionary. Its exercise is informed by principles conveniently summarised by Katzman J at [22] in *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 (Sipios and Gilmour JJ agreeing) (citing *Acehill Investments Pty Ltd v Incitec Ltd* [2002] SASC 344 at [29] and *Hanks v Admiralty Resources NL* (2011) 85 ACSR 101 at [32]) as follows:

(1) The stipulation that an application be made in good faith and for a proper purpose is a composite notion rather than two distinct requirements: *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151 (*Knightswood Nominees*) at 155-157. That is to say, as Brooking J put it in *Knightswood* at 156:

> [T]he reference to good faith colours and so reinforces the requirement of proper purpose. Acting in good faith and inspecting for a proper purpose means acting and inspecting for a bona fide proper purpose. It is as if the case was one of hendiadys.

(2) Good faith and proper purpose must be proved objectively: *Acehill*, citing *Barrack Mines Ltd v Grants Patch Mining Ltd* [1988] 1 Qd R 606 (Full Court) (*Barrack Mines Appeal*) and *Knightswood*. See also the discussion in Mantziaris C, 'The member's right to inspect the company books: Corporations Act, s 247A' (2009) 83 ALJ 621 at 628-629.

(3) 'Proper purpose' means a purpose connected with the proper exercise of the rights of a shareholder as shareholder and not, for example, as a litigant in proceedings against the company or as a bidder under a takeover scheme: *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 (*Cescastle*) at 117-118.

(4) The onus of proof is on the applicant: *Quinlan v Vital Technology Australia Ltd* (1987) 5 ACLC 389 (*Quinlan*) at 393.

(5) An applicant who has a significant holding and who has been a shareholder for 'some considerable time' will more easily discharge the onus than one who has recently acquired a token holding: *Quinlan* at 393.

(6) It is not necessary that the applicant show that its interests are different to those of other shareholders: *Yara Australia Pty Ltd v Burrup Holdings Ltd* (2010) 80 ACSR 641 at [116].

(7) Nor is it necessary that the applicant have sufficient evidence to bring or make out an action (*Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236 (*Praetorin*) at [40]); it is enough that the issue raised by the applicant is 'substantive and not fanciful', not 'artificial, specious or contrived': *Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63 (*Style*) at [66]-[67].

(8) Pursuing a reasonable suspicion of breach of duty is a proper purpose: *McNeill v Hearing and Balance Centre Pty Ltd* [2007] NSWSC 942 at [17] citing *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357 and the judgment on the unsuccessful appeal: *Barrack Mines Appeal*.

(9) Provided that the applicant's primary or dominant purpose is a proper one, it

is not to the point that an inspection might benefit the applicant for some other purpose: *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474 (*Humes*) at 480; *Barrack Mines Appeal* at 615; *Cescastle* at 117-118.

(10) Applicants do not necessarily lack a proper purpose merely because they are hostile to other directors: *Humes* at 480.

(11) Neither the fact that an applicant may have had sufficient information earlier nor the fact that an applicant may have other means of obtaining the information is detrimental to an application under the section: *McNeill* at [23]-[25].

(12) The procedure under s 247A is not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence the results of board decisions, rather than all board papers leading to decisions, but there may be occasions when it is proper to permit inspection of board papers: *Acehill* at [31].

(13) The Court has a residual discretion whether to order inspection: *Humes* at 481.

33. Whilst it is not necessary for an applicant to demonstrate that he or she has an interest separate and distinct from that of the general body of members, as Brooking J said in *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151 at 156 (of the statutory predecessor to s 247A):

> … What is capable of being regarded as a proper purpose must be affected by the consideration that the right to apply for an order is given only to members of the company. In the United States it is accepted that a 'proper purpose' must be a purpose 'germane to his status as a stockholder', or 'reasonably related to the interest of such person as a member or stockholder', or 'reasonably related to the status of a stockholder': 18A *American Jurisprudence* 2nd Series, Sections 366 and 368; 15 ALR 2nd Series 11.

LEADENHALL'S DIVESTMENT

34. The issue raised upon the reopening of argument is whether an order pursuant to s 247A(1) of the Act may be made for the benefit of a person who is a member at the time the application is commenced, but no longer a member at the time the application is determined. If Cape Lambert's submission be correct, it would follow that no order can be made permitting Leadenhall or any person on its behalf to inspect Cape Lambert's books, irrespective of whether Leadenhall is acting in good faith and irrespective of whether the inspection is sought for a proper purpose. It is convenient to resolve this construction issue first, having regard to the text, context and purpose of the provision in question.

35. The starting point is that only persons having the current status of a company member have standing to commence an application under s 247A(1). The provision is not cast in terms that permit any person acting bona fide and for a proper purpose to apply for an order.

36. It may be acknowledged that a member may have sound commercial reasons to dispose of his or her shares after making an application under s 247A(1) and before the application is determined. It may equally be observed that a member may have sound commercial reasons to dispose of his or her shares before an occasion to apply for an order under s 247A(1) arises at all. The clear legislative choice is that persons in the second category do not have standing to make an application pursuant to s 247A(1), irrespective of the circumstances explaining the divestment and irrespective of whether inspection is properly sought for purposes related to the shares formerly held. In light of that legislative choice, it is difficult to identify any clear policy objective that might be achieved by confining standing to apply for an order to those who are currently members, whilst empowering the Court to make an order in favour of a person who is no longer a member at the time that the order is made.

37. An order made pursuant to s 247A(1) is one permitting "the applicant" (or a person acting on that person's behalf) to inspect a company's books. The meaning of the word "applicant" in subs 247A(1)(a) and subs (b) is informed by its place in the text. The circumstance that the only persons who may apply for an order are the company's current members is a strong textual indication that the word "applicant" in subs 247A(1)(a) and subs (b) is a reference back to the same person having the same present status.

38. Furthermore, subs 247A(1)(b) empowers the Court to make an order authorising a person "whether a member or not" to inspect a company's books *on the applicant's behalf*. If an order pursuant to subs 247A(1)(a) could be made for the benefit of a non-member then, in my view, the clarifying phrase "whether a member or not" in subs (b) would appear to be otiose, or at least oddly placed.

39. It is also significant that the Act contains provisions expressly conferring rights and imposing obligations upon persons formerly having a particular status. A former

director, for example, has a statutory entitlement to inspect a company's books for limited purposes within seven years after ceasing to be a director: s 198F. These provisions support the view that where the legislature intends a right to be enjoyed by a person formerly having a particular status, that intention will be made express.

40. Section 236 and s 237 of the Act are also significant. Together, they confer standing on a person having the status of a "former member" of a company to apply for leave to bring proceedings on behalf of the company or to intervene in any proceedings to which the company is a party. An order may be made pursuant to s 247A(3) for the benefit of a former member, provided that:

(1) the former member has applied for, or has been granted leave pursuant to s 237 of the Act, or is eligible to apply for leave under that section; and

(2) the proposed inspection is for a purpose connected with:

(a) the application for leave under s 237 of the Act (subs 247A(5)(b)(i)); or

(b) bringing or intervening in legal proceedings in respect of which leave has been granted (s 247A(5)(b)(ii)).

In either case the Court must be satisfied that the former member is acting in good faith.

41. The express reference to a "former member" in these provisions renders it less likely that the word "applicant" in subs 247A(1)(a) or subs (b) was intended to be construed broadly so as to include a person who is no longer a member at the time of the order. In my view, the provision should be construed as one intended to strike an appropriate balance between (on the one hand) the interests of persons seeking to inspect a company's books and (on the other hand) the interests of the company to avoid exposing its books to persons having no present stake in its affairs. Confining the categories of persons who are entitled to apply for relief is one method by which that balance is intended to be struck. Whatever be the reasons for limiting the category of person who may apply for an order under s 247A(1), the preferable construction is one that so limits the category of persons for whose benefit an order may be made to that same category of persons: actual members. A former member may, of course,

apply for an order pursuant to s 247A(3) of the Act (provided that the additional criteria for the application are met) but that is not the application made by Leadenhall.

42. Construing the Act in this way better accords with the broader procedural and curial context in which the words "on application by a member of a company" are employed.

43. It is true that a court becomes seized of a justiciable controversy when an initiating process is filed by the moving party. However, that does not mean that the making of an application is a single act beginning and ending at the moment that an originating process is filed. To make an order "on" an application is to respond to a claim for relief that is made by a party continually insisting upon his or her entitlement to have the application decided in his or her favour, as Leadenhall has done. In my view the Act should not be construed so as to create a distinction between standing to make an application and standing to obtain relief upon it. The distinction is artificial: to my mind, they are one and the same thing.

44. On its proper construction, the word "applicant" in subs 247A(1)(a) and subs (b) of the Act should be understood to mean a person having the current status of a member.

45. I accept Cape Lambert's submission that no order can be made to the benefit of Leadenhall on the present application. The application commenced by Leadenhall as first-named applicant should be dismissed.

46. It remains to be determined whether an order may nonetheless be made in favour of the second-named applicant, Mr Lebbon.

MR LEBBON'S APPLICATION

Proper purpose

47. Mr Lebbon's affidavit sworn on 29 June 2017 was made before Leadenhall and Noble Investments sold their shares and before he reduced his personal shareholding from 100,000 to 1,000 shares.

48. Submissions made by the applicants' Counsel on 19 October 2017 were incorrectly premised on the assumption that Mr Lebbon and Leadenhall at that time were the

holders of 100,000 and 27.6 million shares respectively. Mr Lebbon's evidence is that he did not advise his solicitors or Counsel about the divestments until some time after that hearing had concluded. I accept that evidence. There is nothing to suggest that the applicants' legal representatives have knowingly withheld any material facts from the Court.

49. In his affidavit sworn on 11 December 2017, Mr Leadenhall states that his own intentions and those of Leadenhall asserted in his earlier affidavit remained "unaffected", notwithstanding their divestments. Those purposes are asserted jointly by the two applicants. There is no aspect of them in which Mr Lebbon personally asserts interests any different from those asserted on Leadenhall's behalf. It is nonetheless necessary to evaluate Mr Lebbon's purposes as they relate to his personal capacity as a shareholder, to the extent that that can be done.

50. There are two aspects to the purposes deposed to by Mr Lebbon. The first is a concern that Gulf Energy and Mr Sage are related parties or associates, such that their combined shareholdings amount to a 24.65% interest in Cape Lambert. That concern is said to be founded upon the following:

(1) Mr Sage's statement at the AGM on 26 November 2015 to the effect that Cape Lambert was solvent and did not need to raise any capital;

(2) the proximity of Mr Sage's statement to the substantial capital raising that then occurred;

(3) the unusual nature of the share placement, being at a price 300% above the previous closing price;

(4) the circumstance that the proposed capital raising was initially to be by way of placement to "sophisticated UK and European investors", albeit underwritten by Gulf Energy, in circumstances where shares were available to be purchased by investors at market value;

(5) the circumstance that the placement of shares to Gulf Energy occurred at a time when AML was threatening to use its voting power to call a general meeting; and

(6) Gulf Energy's apparent status as a "shelf company" situated in the Cayman Islands with no apparent history of investment.

51. As with all of the evidence, Mr Sage's statement to the AGM to the effect that Cape Lambert did not need to raise capital is to be understood in its proper context. It is Cape Lambert's position that the statement was made in response to a question concerning the company's solvency and ought not to be understood as precluding capital raising directed at other purposes, such as those stated in its announcements to the market. These are matters in respect of which the parties may be in dispute, but in my view they do not detract significantly from Mr Lebbon's stated concerns, in light of the other surrounding circumstances.

52. I consider it significant that in the weeks leading up to the share placement, Mr Lebbon (rightly or wrongly) was forcefully articulating complaints about Cape Lambert's management and Mr Sage personally and insisting upon his involvement in appointing an independent non-executive director to the company's Board. The content and tenor of the correspondence indicates that Mr Lebbon's dealings with the company were perceived by Mr Sage as improper and hostile. It may be readily inferred that Cape Lambert, by Mr Sage, perceived Mr Lebbon, through AML, to be something of a corporate pest who was engaging in an attempt to affect the composition of the Board to achieve a hidden and malign objective.

53. For Cape Lambert it is submitted that there is no reasonable basis for investigating whether Mr Sage and Gulf Energy are related parties. I reject that submission. It is unusual that "sophisticated" international investors would consider an acquisition of shares at 300% above market value and why an apparently small company situated in the Cayman Islands would agree to underwrite such a transaction. The more curious aspects of the transaction are not explained by Gulf Energy's responses to ASIC's beneficial tracing directions. Mr Lebbon's desire to investigate the matter is, I find, a bona fide one having some objective basis in the facts that are presently known to him.

54. The second aspect of Mr Lebbon's purposes is the commercial ends sought to be achieved by his inspection of Cape Lambert's books.

55. In written and oral submissions, Counsel for the applicants contended that an order pursuant to s 247A(1) may be made in circumstances where the applicant for the order has not or cannot articulate any particular cause of action that may be presently under his or her contemplation. That general proposition may be accepted. An order for inspection may be made to enable an applicant to investigate a case "at large": *Smartec Capital Pty Ltd v Centro Properties Ltd* (2011) 83 ACSR 461 at [65]; *London City Equities Limited v Penrice Soda Holdings Limited* [2011] FCA 674; (2011) 281 ALR 519 at [29], [36] – [38]; *Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236 at [38] – [39].

56. Mr Lebbon's subjective purposes are a question of fact, to be determined by reference to his affidavit evidence. It is the propriety of Mr Lebbon's actual purposes that are to be objectively assessed, not the propriety of other unarticulated purposes for which a shareholder in his position might otherwise seek to inspect Cape Lambert's books. Mr Lebbon has not alleged that he subjectively intends to investigate a case with no apparent end in mind. Rather, the affidavits disclose a desire to conduct an investigation into the relationship between Mr Sage and Gulf Energy as a means of achieving a specified legal and financial result.

57. Mr Lebbon states that if it could be established that Mr Sage and Gulf Energy were related parties or associates, then it would follow that:

(1) Cape Lambert would have breached s 606 of the Act, which prohibits certain acquisitions of relevant interests in voting shares subject to specified exceptions and, accordingly, both he and Leadenhall may obtain a declaration of unacceptable circumstances "and associated orders" pursuant to ss 606, 657A and 657D of the Act; and

(2) both he and Leadenhall may have claims for compensation pursuant to s 671C of the Act by reason of Mr Sage and Gulf Energy's failure to comply with notification requirements imposed by s 671B.

58. Section 611 of the Act sets out the exceptions to the prohibition in s 606. Among the exceptions is the acquisition of the relevant shares resulting from the acceptance of an

offer under a takeover bid. The phrase "takeover bid" is defined in s 9 of the Act to mean "an off-market bid or market bid made under Chapter 6".

59. No such takeover bid has in fact occurred.

60. Under s 657A of the Act, the Takeovers Panel (established under Pt 10 of the *Australian Securities and Investments Commission Act 2001* (Cth)) may make a declaration of unacceptable circumstances. Mr Lebbon's argument proceeded on the basis that such a declaration could be made if (among other things) s 606 of the Act has been contravened. Upon making such a declaration, the Takeovers Panel may make an order pursuant to s 657D(2). It relevantly provides:

> (2) The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:
>
> (a) if the Panel is satisfied that the rights or interests of any person, or group of persons, have been or are being affected, or will be or are likely to be affected, by the circumstances—protect those rights or interests, or any other rights or interests, of that person or group of persons; or
>
> (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
>
> (c) specify in greater detail the requirements of an order made under this subsection; or
>
> (d) determine who is to bear the costs of the parties to the proceedings before the Panel;
>
> regardless of whether it has previously made an order under this subsection or section 657E in relation to the declaration. The Panel may also make any ancillary or consequential orders that it thinks appropriate.
>
> Note: Section 9 defines ***remedial order***.

61. The Takeovers Panel is not empowered to make an order for compensation to a person affected by a contravention of s 606 of the Act. Nor does proof of a contravention of s 606 of the Act result in there being a deemed or mandated takeover bid as a matter of law. The Takeovers Panel does, however, have the power to order that "a takeover bid or proposed takeover bid" proceed in a way that it would have proceeded if the unacceptable circumstances had not occurred: subs 657D(2)(b). The phrase "takeover bid" in this context is to be understood as a takeover bid under Ch 6 that is already proceeding or one that is proposed to proceed. The power to make an order is a

power to affect the manner in which an actual bid must proceed, not to mandate that a takeover bid be made.

62. It is difficult to comprehend how the exercise of powers by the Takeovers Panel might result in the relief sought by Mr Lebbon, assuming he could first establish a contravention of s 606 of the Act. Moreover, at the present time, Mr Lebbon does not now retain the 100,000 shares he states he could and would have sold into a takeover bid, should such a bid now occur. As I have said, he presently maintains only a trivial shareholding, and Leadenhall maintains no shares at all.

63. The contemplated claim for compensation is one founded upon a suspected breach of s 671B of the Act. Relevantly, it obliges a person to give to a company and the relevant market operator prescribed information if (among other things) the person begins to have a "substantial holding" in the company (subs 671B(1)(a)) or the person makes a takeover bid for the securities of the company (subs 671B(1)(c)). A person who contravenes s 671B is liable to compensate a person for any loss or damage the person suffers "because of" the contravention: s 671C(1).

64. For Cape Lambert it is submitted that even if Mr Lebbon could establish a contravention of s 671B(1)(a) of the Act (including by way of information obtained by inspecting its books) he could not succeed in establishing a causal link between such a contravention and his alleged loss (namely, a lost opportunity to sell his shares at a premium into a takeover bid). Assuming a contravention of s 671B(1)(a) of the Act could be established, the obligation under that provision is one that would have arisen after the event of the share placement. I accept Cape Lambert's submission. It has not been shown how a failure to comply with that obligation could result in an award of compensation of the kind sought to be pursued by Mr Lebbon.

65. If it could be shown that Mr Sage and Gulf Energy were related parties or associates, it is true that that circumstance would support a conclusion that the share placement constituted a contravention of s 606 of the Act. However, that contravention would arise because none of the exceptions set out in s 611 of the Act in fact applied (including that there was in fact no takeover bid). Similarly, subs 671B(1)(c) would not have been infringed because there was, in fact, no takeover bid at all.

66. I have not overlooked that Mr Lebbon's contemplated claim for compensation may be founded upon a hypothetical counterfactual which he says could and would have occurred had a takeover bid been made in accordance with the provisions of the Act. Where a claim for compensation is founded upon a lost opportunity, it is not uncommon for a counterfactual to be alleged and proven so as to demonstrate a causal connection between a particular contravention and a claimed lost commercial opportunity. However, the contravention must be one in respect of which the claimant has an entitlement to seek compensation. A contravention of s 606 of the Act does not give rise to a claim for compensation in a shareholder who could and would have sold shares into a takeover bid, had one occurred. Nor has Mr Lebbon articulated any possible claim founded on a hypothetical takeover counterfactual in connection with a breach of s 671B.

67. In my evaluation, even assuming that information obtained by inspecting Cape Lambert's books might in some way assist Mr Lebbon to prove that Mr Sage and Gulf Energy were related parties, that circumstance would not result in Mr Lebbon personally having a claim for compensation of the kind advanced in his affidavit evidence. Whilst there is a proper objective basis to investigate whether there has been a contravention of the Act, the stated purpose for obtaining evidence of a relevant connection between Mr Sage and Gulf Energy in my view is one that is not proper in the requisite sense because the consequential claims contemplated by Mr Lebbon are legally misconceived.

68. If I am incorrect in my assessment that Mr Lebbon's purposes are confined to the causes of action specified in his affidavits, and if I am also incorrect in my conclusion that the foreshadowed claims are bound to fail, I would in any event dismiss the application for an alternative reason.

69. The circumstance that Leadenhall divested itself of all of its shares in my view weighs heavily against an order granting Mr Lebbon the relief he seeks in his personal capacity. I consider Mr Lebbon's relations in connection to the company to have been undertaken principally on behalf of Leadenhall, in that his primary purpose for seeking the order and persisting with the application is to formulate what would be a

sizeable claim for compensation on Leadenhall's behalf. Any interests Mr Lebbon may have in his personal capacity are, in my view, secondary and financially insubstantial. Leadenhall's acquisition of options in AML's shares was significant, occurring just one day before the AGM at which Mr Lebbon agitated concerns about the company's management. Mr Lebbon's personal holding was also acquired in close proximity to the AGM and was very small in comparison to the potential value of Leadenhall's derivative interests.

70. Weight should also be given to the trivial size of Mr Lebbon's current shareholding and the circumstance that the purpose for inspecting the books is not so much to protect Mr Lebbon's present investment in the company, but to advance a claim for a lost profit he claims he might have made had he divested 99,000 formerly-held shares into a takeover bid. I consider the divestment of Leadenhall's shares to create a circumstance in which Mr Lebbon's primary purpose for inspecting the books is to advance a claim on behalf of a former shareholder, being an entity that is not presently entitled to obtain an order of inspection in its own right. That is not a "proper purpose" within the meaning of s 247A(1) of the Act and in any event weighs heavily against exercising the discretion in Mr Lebbon's favour.

71. Before concluding, I should note that Cape Lambert advanced a further submission to the effect that Mr Lebbon's true purposes were to pursue causes of action against Mr Sage and Gulf Energy rather than to pursue claims against the company itself. It argued that, on its proper construction, s 247A(1) of the Act does not permit an order to be made to advance that purpose. It submitted that the purpose of the provision was to protect and advance the interests of a shareholder *qua* shareholder in its relations with the company and not to afford the means by which a shareholder may obtain what would effectively be pre-action discovery against third parties. Having dismissed the applicants' claims on other bases, I do not consider it necessary to determine whether Cape Lambert's additional submissions are correct. These additional points of construction should be determined in the context of a case in which the outcome necessarily turns upon them.

72. In the circumstances, it is unnecessary to resolve an outstanding dispute as to whether the categories of books sought to be inspected are properly adapted to achieving the purposes asserted by Mr Lebbon, and Leadenhall.

73. I will hear the parties as to costs.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.

Associate:

Dated: 26 April 2018