SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Colin Gregory Ryan* [2014] QSC 18
PARTIES:	**COLIN GREGORY RYAN** (applicant) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (intervenor)
FILE NO:	BS676 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	10 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2014 and 10 February 2014
JUDGE:	Peter Lyons J
ORDERS:	**1. Pursuant to s.206G of the *Corporations Act 2001*, leave is granted to the applicant to manage, on and from 15 March 2014, CMI Limited (ACN 050 542 553) (CMI), such leave to cease:** **a. if there are less than 4 directors of CMI, not including the applicant, for a period of 14 days or more; or** **b. should CMI make an offer of, or issue, debentures to members of the public in order to use the money obtained through such an issue for investment purposes.** **2. No order as to costs.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – DISQUALIFICATION FROM MANAGEMENT OF CORPORATION – LEAVE TO MANAGE OR ACT AS DIRECTOR – where applicant was convicted under the *Securities Act* 1978 (New Zealand) and automatically disqualified under section 206B of the *Corporations Act* 2001 (Cth) from managing a corporation in Australia for five years without leave of the Court – where applicant held honest belief in the truth of the statements subject to charges – where prior to the charges the applicant successfully managed companies for over thirty years – whether the applicant should be granted leave to manage a company with four other directors and companies with the applicant and his wife as directors. *Corporations Act* 2001 (Cth), s 206B, s 206G *Securities Act* 1978 (New Zealand), s 58

ASIC v Healey & Ors (No 2) (2011) 196 FCR 430, [2011] FCA 1003, followed
Duffy, Re: Westgate Ports Ltd (2010) 79 ACSR 267, [2010] FCA 608, followed

COUNSEL: B O'Donnell for the applicant
M Steele for the intervenor

SOLICITORS: Allens Lawyers for the applicant
Australian Securities and Investments Commission for the intervenor

[1] **PETER LYONS J:** On 15 March 2013, the applicant was convicted on his pleas of guilty of three offences under section 58 of the *Securities Act* 1978 (New Zealand). The result of his convictions is that, under section 206B of the *Corporations Act* 2001 (Cth), he is automatically disqualified from managing a corporation in Australia for a period of five years. He has, however, applied under section 206G of that Act for leave to manage a corporation. The application is opposed by the Australian Securities and Investment Commission.

[2] It is necessary to say something about the circumstances in which the offences were committed. On 19 December 2006, the applicant became a director of a New Zealand company Capital+Merchant Finance Limited, referred to as CMF. CMF is a New Zealand public company. It had a board of five directors. Three were executive directors and were resident in New Zealand. Two, including Mr Ryan, were non-executive directors, and were resident in Australia. CMF was a finance company. It funded its operation by investments made by members of the public, those investments being made under registered prospectuses and investment statements.

[3] On 20 December 2006, that is, the day after he became a director of CMF, the applicant signed an amended prospectus. It contained untrue statements. Consequently, he committed an offence under section 58(3) of the Securities Act. In September 2007, the applicant signed another prospectus to be issued by CMF; thus, he committed another offence under the same provision. Advertisements were issued by CMF in September and November of 2007. They contained untrue statements. As a result, the applicant was convicted of an offence under section 58(1) of the Securities Act. It was a defence to all three charges that the applicant honestly believed the untrue statements to be true, and that he had reasonable grounds for doing so.

[4] The sentencing judge accepted that the applicant had an honest belief in the truth of the statements. However, the applicant did not have reasonable grounds for that belief, and it was on that basis that he pleaded guilty and was convicted. His case was that he relied on the three resident executive directors for the truth of the statements the subject of the charges. However, the sentencing judge, while accepting that the applicant had an honest belief in the truth of those statements, held that his conduct amounted to gross negligence from about the middle of 2007.

[5] It was submitted for the applicant, and I accept, that the offences were not committed for the applicant's personal profit.

[6] The untrue statements are described in much greater detail in the outlines of argument and in the sentencing remarks. I do not propose to do more than attempt to describe them broadly. They related to third (related) party loans; to the financial management of CMF's activities; and to the status of its loans and its assets.

[7] CMF failed, going into receivership on 23 November 2007. At that time it owed approximately $167 million to 7000 secured debenture holder investors. When some of the other directors were the subject of proceedings in New Zealand, it was not expected that the debenture holders would receive any return. Nothing has been referred to before me to suggest a more favourable outcome for them.

[8] The sentencing notes for Mr Ryan's sentence record that between 20 December 2006 and 9 December 2007, approximately $56.8 million was invested or reinvested under the amended prospectus the subject of the first charge against him. With accrued interest as at 23 November 2007, the debenture holders were owed amounts totalling in excess of $72 million. From 10 September 2007 to the date of receivership, approximately $32.5 million was invested or reinvested. The amount owing to investors in respect of these investments, including interest, totalled some $33.1 million by the date of the receivership. It seems to me likely that these amounts should be regarded as cumulative, that is, that a total of about $89 million was invested pursuant to the two prospectuses.

[9] The false advertisements included one advertisement prior to Mr Ryan's becoming a director. It was said that during the period those advertisements were before the public, in excess of $23.4 million was invested. It may well be that this amount overlaps entirely with the amounts invested pursuant to the prospectuses. It is unnecessary, however, to reach a firm conclusion about this.

[10] It is apparent that the failure of CMF resulted in very large losses to investors in New Zealand and that the order of magnitude of those losses can be identified by reference to the amounts I have just mentioned. It was submitted, and I accept, that the material does not demonstrate that all of the amounts invested were invested in direct reliance on the untrue statements. Nevertheless, it seems to me the fact that investments were made pursuant, in particular, to the two prospectuses containing the untrue statements, is a matter of considerable significance in the present application.

[11] Pursuant to the convictions mentioned earlier, the applicant was sentenced to a period of seven months home detention and was required to serve 300 hours of community service. In addition, he offered to pay reparation of $100,000 and, accordingly, an order to that effect was made on his sentence.

[12] Further circumstances of the offending are detailed in the submissions for the parties, particularly those for the Commission. I do not propose to rehearse all of the circumstances here. I will, however, say something about what were referred to as the Ultratone transactions, as they were the subject of particular emphasis in the Commission's oral submissions.

[13] From about 2004, Ultratone was financed entirely through loans from CMF. Some of the directors of CMF were also directors of Ultratone. Ultratone owned 80 per cent of the shares of an Australian finance company referred to as CFAL. Over time Ultratone borrowed some $9.7 million from CMF. Of that, some $5.5 million

was lent to CFAL. Between 2005 and 2007 the loans from Ultratone to CFAL were converted to redeemable preference shares in CFAL.

[14] The Commission submitted that the conversion was on terms which were disadvantageous to Ultratone. Mr Ryan's evidence was that at the time he believed the conversions to be advantageous to Ultratone because the asset backing for the shares gave them a value which substantially exceeded CFAL debts to Ultratone. In the end, however, it would seem that they were not advantageous to Ultratone.

[15] Ultratone's liabilities exceeded its assets as from 31 March 2005. The applicant was not a director of Ultratone, nor was he said to be involved in its management. He was, however, a director of CFAL from January 2005, including six occasions on which loans were converted to redeemable preference shares to be held by Ultratone. At one point it appeared to be suggested that the applicant knew some of the statements to which the charges relate were untrue, in particular by reason of his involvement with CFAL and CMF. Subsequently, it was submitted that these transactions demonstrated the degree to which his negligence was gross.

[16] In view of the finding of the sentencing judge that the applicant held an honest belief in the truth of the statements the subject of the charges, I am not prepared to find that the applicant actually knew any of the statements to which the charges related to be untrue. I also note that the applicant was not cross-examined to suggest this.

[17] This application is made under section 206G of the *Corporations Act*. Some principles and a number of relevant considerations have been identified in earlier court decisions, in particular in *Duffy, Re: Westgate Ports Ltd* (2010) 79 ACSR 267, a decision of Gordon J. After a review of the cases, a number of principles and relevant factors were summarised by her Honour. One was that the legislative policy is one of protecting the public, not one of punishing the offender.

[18] I accept that the legislative policy which leads to disqualification of a person from acting in the management of a company, and the constraints imposed by the need to apply for leave, are intended to provide protection to members of the public from the risk of inappropriate or improper management of a corporation.

[19] To say that the policy is not one of punishing the offender may perhaps be regarded as literally true in respect of a provision which permits the grant of leave to manage a company. However, in respect of the Court's power under other provisions to disqualify a person from doing so, relevant considerations have been said to include retribution and deterrence; see *Rich v ASIC* (2004) 220 CLR 129 at [52], per McHugh J; see also *ASIC v Healey & Ors* (No 2) (2011) 196 FCR 430 at [107]. It seems to me to be difficult to divorce considerations of retribution and deterrence from punishment. In *Healey*, Middleton J held that a disqualification had a punitive aspect; see [109]. I agree. It seems to me to find that where a statutory provision imposes an automatic disqualification as a consequence of the commission of an offence, there is a punitive aspect to the disqualification. It follows that a grant of leave under section 206G involves some abatement of the punishment imposed by the Act, a matter I take into account in deciding the present application. Likewise, I note Gordon J's reference to the deterrent aspect, presumably of a disqualification, as relevant to the exercise of the discretion to grant leave. I consider that to be relevant in the present case.

[20] Of the other factors and principles referred to in *Westgate Ports* (at pages 271-272), it seems to me that, in the present case, of particular importance is the question of risk to the public, including shareholders, employees and creditors. However, the other considerations which are identified there are also relevant and I shall refer to them a little later.

[21] In the course of submissions I was referred to considerations relevant to the question whether the power to impose a disqualification should be exercised and, if so, for how long. A number of considerations have been stated at some length by Santow J in *ASIC v Adler* (2002) 42 ACSR 80 at [56]. Some modification of those principles may be appropriate after the decision in *Rich*, and a helpful summary, it seems to me, of the present position appears in *ASIC v Healey & Ors (No 2)* at [111]. In my view, such considerations are ordinarily relevant to an application of the present kind, although they are less directly relevant than those identified in *Westgate Ports*.

[22] The applicant placed weight on the fact that, had the conduct which resulted in his convictions in New Zealand occurred in Australia, that conduct would have been proscribed by section 180 of the *Corporations Act*, with the result that it would have been subject to a civil penalty and that the Court would have had a discretion to impose a disqualification under section 206C.

[23] The submissions referred to cases which had some similarity to the present one, where substantial periods of disqualifications were imposed. I should say that there are not insignificant differences between those cases and the present case.

[24] The Commission contended that the applicant's conduct, if it occurred in Australia, notwithstanding section 180 of the *Corporations Act*, could have resulted in the applicant's prosecution for criminal offences, which, if successful, would have resulted in his disqualification from acting in the management of a corporation. Reference was made to sections 1041E and 1309(2) of the *Corporations Act*. With respect to the former, for the applicant it was submitted that the principal offender would be the company, although there was a prospect of a charge against the applicant as an accessory. With respect to the latter, it was submitted that it was not directed towards conduct, and in particular statements and the like, aimed at the public generally, but to persons and entities in particular capacity and was not appropriate for the conduct which resulted in the charges in New Zealand.

[25] Although not of particular significance in the case, that submission appears to be correct. Beyond that, the Commission fairly pointed out that it was unknown whether, had the conduct occurred in Australia, the applicant would have been charged under either or both of these provisions, nor could it be said whether or not a prosecution would have been successful.

[26] It seems to me that the fact that the provision in the *Corporations Act* which appears closest to section 58 of the *Securities Act* would result in a civil penalty with a risk of an order for disqualification is of some relevance. Its significance, however, as a factor supporting the application, appears not to be particularly great. I do not consider the matters raised by the Commission further reduce its significance in any real sense; but that does not convert it into a factor of great significance in the application.

[27] I turn then to the matters raised in *Westgate Ports*. I have already referred to the importance of protection of the public. I note, consistent with the submissions made by the Commission, that the applicant bears the onus of establishing that leave should be granted. I also note, consistent with matters I referred to earlier, the deterrent aspect of a disqualification.

[28] The Commission's submissions placed weight on the approach taken in *Westgate Ports* to hardship. It was there said that that was not a persuasive ground for the grant of leave. I did not understand the application to be based to any significant extent on hardship, although it was submitted that the applicant's age, 67, was relevant. I understood the relevance of that submission to be that he has less time available to him in which he might be an effective director than would a person who was considerably younger, and in that sense the disqualification was more significant to him than it would be to a younger person. While a relevant consideration, that does not seem to me to be a matter of particular weight in the present case.

[29] I have already referred to the nature of the offence. Plainly, it was associated with very significant losses to the public. I have also previously referred to the nature of the applicant's involvement. I have mentioned that he was a non-executive director, and one of the authorities I was referred to would suggest that the culpability of a non-executive director in such a case might be treated as less significant than that of an executive director. While I accept that, particularly in view of the findings of the sentencing judge that the applicant was grossly negligent from about the middle of 2007, it does not, in my view, diminish the seriousness of the conduct which resulted in the applicant's convictions.

[30] The applicant's general character, including prior to and in the period since the commission of the offences, is relevant. I shall here mention something of his personal background. He was, from 1972 to 1987, the managing partner of Arthur Andersen, a well-regarded accounting firm. From 1983 to 2011, he was a director of, and chairman of the Board of, the Royal Children's Hospital. From 1996 to 1999 he was a director of, and for some of the time deputy chairman of, the Port of Brisbane. From 1998 to 2009 he was a director and chairman of Brisbane Airport Corporation Limited.

[31] From 2000 to 2004 he was a director of RP Data Limited, a prominent public company. From 2000 to 2013 he was a director of Softlink International Limited. Until 2011 he was the chairman of the Queensland Children's Medical Research Institute. In 2004 he was awarded the Order of Australia for services to children. The sentencing notes from the sentencing court in New Zealand add that he established the Royal Children's Hospital Foundation which raised over $180 million in funds for medical research and specialist equipment and services.

[32] There are references which were provided for the sentence relating to the applicant's character. It was not suggested that they were no longer reliable, nor was objection taken to their tender. They come from a number of people who are of considerable prominence, at least in the Brisbane, and indeed Queensland, communities. They were described in the submissions on behalf of the applicant as "outstanding". It seems to me they could be described as glowing, indeed, at times, to the point of incandescence. They all attest to the applicant's integrity, diligence and skill, in the management of corporations. I note in particular, from the reference from

Ms Nosworthy, her statement that the applicant is an extremely committed, hardworking and diligent director, who was highly ethical, and that he has significant technical competence and experience. She wrote also that he had always shown good judgment, maturity, balance and a strong awareness of risk.

[33] Mr Bowes, who was group company secretary and head of Governance, Risk, Compliance and Legal Services in the Brisbane Airport Corporate Group of companies from 1987 to 2010, said of the applicant that his experience, knowledge and application of professional non-executive directorship and leadership was exemplary, and exhibited those tenets of good governance, due diligence, accountability, transparency, stewardship and integrity that are the hallmarks of a contemporary company director.

[34] The application focuses on the applicant's desire to be involved in the management of CMI Limited. The applicant was a former director of that company and, ultimately, its executive chairman. He ceased to be a director with his convictions. His application is supported by an affidavit of Mr Danny Herceg, a practising solicitor and the current chairman of the Board of CMI. He, too, gives evidence of the applicant's capacity and honesty and speaks of his special in-depth knowledge of the business of CMI by reason of his lengthy association with that company. He supported the application on the basis that the applicant would make a significant contribution to the board if permitted to serve on it, in particular because of his very deep knowledge of its businesses.

[35] The applicant's application is also supported by an affidavit from Ms Sharon Williams, a director and chief financial officer of CMI. She confirms that the charges against the applicant and the fact that, as a result, he could no longer continue as a director of the company, were made known to the public in February and March of 2013. She, too, speaks highly of the applicant, considering him to be a highly ethical and honest man and a very effective director and managing director of CMI. She speaks of his detailed knowledge of its business and his significant commercial acumen.

[36] The applicant himself deposed, without objection, to the fact that he had the support of the board of CMI for his application. I am prepared so to find. I am also prepared to find that, save for the matters which gave rise to the convictions, the applicant has been a highly skilled and effective company director for many years, with considerable commercial acumen, who has diligently discharged his duties in relation to company management.

[37] The offending conduct appears to be significantly out of character. It is troubling that it extended over a period of time, although the period of gross negligence is shorter than the total period of offending. There is little by way of direct evidence about the applicant's conduct subsequent to these convictions, but there is no suggestion of any offending or other conduct which might weigh against the granting of leave. I shall return to the question of risk shortly.

[38] It is apparent from the sentencing notes that the applicant acknowledged his wrongdoing early and was willing to provide cooperation to the authorities in New Zealand in respect of their investigations and prosecutions. The sentencing notes suggest that his cooperation may have played a role in the decision by other

directors to plead guilty to offences relating to the events which occurred there in 2006 and 2007.

[39] It will be apparent from what I have said previously that the applicant's general character is good, that he has never before offended, and that he has been, on the whole, a very valuable member of the community, making significant contributions to it. Those matters, together with, no doubt, the impact of the sentences imposed on him in New Zealand, make it unlikely that he would offend in the future.

[40] The matters referred to in *Westgate Ports* refer to the structure of the companies. That, it seems to me, is a reference to a circumstance relevant in some cases where there is a small company and all the other shareholders are aware of the circumstances leading to a disqualification and support the grant of leave. It does not follow that the application would be refused in the case of a public company where there are a large number of shareholders and their attitude is not directly known.

[41] The next matter referred to in that case is the degree of control which the applicant would be able to exercise and the level of supervision. The applicant would, if appointed as a director, be one of at least five directors and, accordingly, would not have sole control of the company. Nevertheless, it is a position of some considerable significance and would result in his being influential in the company's operations. There is no suggestion of supervision as such. Given the applicant's background, I do not consider that to be of particular significance.

[42] Likewise, *Westgate Ports* refers to the presence or absence of a specific proposal to take part in the management of a specified corporation or corporations and whether what is proposed accords with proper commercial standards. The Commission places weight on the absence of a specific proposal to take part in the management of a specified corporation. The application is primarily an application for leave generally to manage corporations. However, in the alternative, leave is sought to act in the management of CMI and any company of which the applicant and his wife are the only members. I have already intimated that I do not intend to grant leave generally to manage corporations and that I am not particularly disposed to grant leave to manage companies of which only the applicant and his wife are members. The result, therefore, will be that there would be a relatively limited circumstance in which the applicant can take part in the management of a corporation. I also intend to impose conditions which seem to me to be appropriate and which, in principle, are not opposed by the applicant.

[43] I have, to this point, not dealt specifically with risk which might be associated with any grant of leave. CMI is not a finance company and does not solicit investment by way of deposit with it of funds which it would, in turn, reinvest. It has two divisions, an electrical division and what is referred to as the TJM product division. The electrical division apparently specialises in the manufacture of specialty electrical cables and related matters. The TJM product division specialises in designing, manufacturing, wholesaling and retailing vehicle accessories for 4WD, SUV and trade markets. These businesses are quite different from the business of CMF. It is difficult to identify a risk of loss in CMI of the kind which occurred in CMF's case

[44] Beyond that, it was submitted on behalf of the applicant that CMI is a company of which he has deep personal knowledge, supported by the evidence to which I have previously referred and which I accept. The risk that the applicant might offend because of his unquestioning and uninformed reliance on others is significantly less were he to act in the management of CMI. The offending in CMF was associated with fraudulent conduct by three of the directors other than the applicant. There is no suggestion that any of the directors of CMI are not of good character and do not discharge their duties as directors conscientiously. I have also mentioned the likely impact of the convictions and sentences on the applicant. It, therefore, seems to me that the risk of his again committing offences such as those committed in New Zealand is low and the risk of any associated loss is also significantly lower than if the circumstances are analogous to those in which the offending was committed.

[45] While the offending demonstrates that there is inevitably some risk of a repetition, the fact that it is significantly out of character with the applicant's conduct over many years, as appears from the evidence which I have referred to about his character and his conduct in relation to the management of corporations on other occasions, leaves me with the view that that risk is not at a level to be a significant bar to granting leave.

[46] The Commission's submissions, not surprisingly, refer to the serious nature of the offending, to the fact that it involved gross negligence, to the substantial losses associated with the failure of CMF and the matters I have referred to relating to investments with CMF in 2006 and 2007. These are important considerations, but it seems to me they are to be weighed in the context of the other matters to which I have referred.

[47] Weight was also placed on what was said to be the short time since the applicant was released from home detention. However, by the time any leave becomes operative, there will have been a 12 month period during which the disqualification operated in full; and the order I am proposing to make would leave the disqualification generally operative in the future. Whether any further leave should be granted would be a matter to be considered afresh at the time of any future application, based not only on the matters that have been raised before me but on events which will occur in the future. As suggested in the course of submissions, I consider that the sentence imposed, the period of disqualification already served, and the fact that limited, conditional leave would be granted, are sufficient for the upholding of proper standards of commercial morality

[48] It was submitted that no need has been shown for a grant of leave. That is, as I understood it, a submission that it was not necessary for CMI to conduct its businesses successfully that the applicant be granted leave, nor is it shown to be necessary for the proper conduct of the companies where the applicant and his wife are the only members.

[49] Need, of course, would provide strong support for the application. Its absence is not determinative. It seems to me that what the applicant has shown, from the evidence that has been advanced, is that it would be of benefit to CMI if the applicant were able to take part in its management, a benefit which is recognised by its current Board. That benefit, it seems to me, is a factor which works in favour of the application, although it would not be of such a significance as to warrant a grant of

leave if, for example, there was a substantial risk that members of the public would suffer losses if leave were granted.

[50] Weight was also placed on the fact that the disqualification was made automatic for a period of five years by the legislature. It appeared to be submitted that one should not lightly dilute the effect of the legislation. Because a discretion is granted, however, there is always a prospect, as a result of what has been adopted by the legislature, that the prima facie position resulting from the disqualification will be altered by a grant of leave. It seems to me that while I should recognise that legislature has taken what I have described as a blanket approach for all offences to which section 206B applies of imposing a disqualification of five years, I should also recognise that that relates to a range of offending and that, regardless of how significant the offending is, the legislature has made provision for the modification of the operation of section 206B.

[51] I have mentioned previously the seriousness of the offending; but I have also noted the absence of actual dishonesty on the part of the applicant and the absence of any suggestion of personal gain. I should also say that it seems to me that some limitations should be imposed on any grant of leave.

[52] Weighing up all of the considerations, it seems to me that there should be a limited grant of leave. It should permit the applicant to participate in the management of CMI. However it should do so subject to some conditions. One is that, at least generally, there should usually be at least four other directors of CMI. Another one is that it should not engage in business which is similar to that which was conducted by CMF. The precise formulation of those conditions is a matter about which I will invite some further submissions. Accordingly, I propose to grant the application, consistent with what I have said in my reasons.