IN THE MATTER OF THE DUKE GROUP LIMITED (IN LIQUIDATION)

Shareholders' claims under section 438(1) of the *Companies (South Australia) Code*

1 I am asked to respond to the joint Opinion of RJ Whitington QC and SJ Doyle dated 9 July 2010 (**Opinion**).

2 Before I express my views about the Opinion, it may be useful to recall the three questions on which I was asked to advise in my own draft opinion of 6 April 2010. The three questions were:

2.1 Is it appropriate for the liquidator to proffer a fresh invitation to shareholders to submit proofs?;

2.2 If so, what form should that invitation take?; and

2.3 What categories of shareholders might have admissible claims?

3 Importantly, I was not asked to advise whether shareholders who did not rely on the misleading or deceptive conduct of the directors of the Duke Group Ltd (in liquidation) (**TDGL**) could claim loss and damages under section 82 of the *Trade Practices Act* 1974 (Cth) and whether these claims were provable debts in the liquidation of TDGL. Nevertheless, at paragraphs 20 and 28 of my draft opinion I expressed the view that the right to recover loss or damage under section 82 of the *Trade Practices Act* 1974 (Cth) is not confined to persons who rely on the representations that constitute contraventions of section 52. I specifically referred to the judgment of Lockhart J in *Janssen-Cilag Pt Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 530 to the effect that a non-reliance claim can be successful if the defendant's conduct was the 'real or direct or effective cause' of the plaintiff's loss or damage.

4 I also noted in paragraph 29 of my draft opinion that this principle had been readily applied in cases of passing off and misleading advertising. However, I expressed the view that 'it is not clear that Australian law is ready to accept a form of presumed reliance by Transferees on other persons who had themselves relied on misleading representations'. In my preliminary research, I found no case where a court had accepted a non-reliance claim by a shareholder.

5 I was instructed not to examine the 'non-reliance' issue any further as Senior Counsel had been briefed to advise on this question.

6 Against that background, let us now turn to the Opinion. I agree with the view expressed in paragraph 14 of the Opinion that 'the resolution of the controversy ultimately turns on the correct interpretation of section 82 of the *Trade Practices Act* and the principles of causation of the loss and damage it imports'. I also agree with the statement in paragraph 17 of the Opinion that it is not essential that contravention be the sole cause of the loss or damage.

7 I note that the statement quoted (in paragraph 26 of the Opinion) from the joint judgment of Gaudron, Gummow and Hayne JJ in *I & L Securities v HTW Valuers* (2002) 210 CLR 109 at 125 [49] was obiter dicta because the case concerned the liability of a valuer to a financier who relied on the valuer's negligent and misleading valuation in making a loan. It did not concern a non-reliance case. In any event, the

quotation from the joint judgment could be readily applied to a misleading advertising case where non-reliance claims are clearly recognised. Moreover, the statement in paragraph 27 of the Opinion that *Allianz Australia Insurance v GSF Australia* (2005) 221 CLR 568 endorsed the approach of the majority in *I & L Securities* at [597-598] does not indicate that this support related to the more general comments about causation quoted at paragraphs 23 and 24 of the Opinion, not the statement quoted at paragraph 26 of the Opinion.

8 I am in general agreement with the statement at paragraph 32 of the Opinion that the ultimate issue generated by section 82 of the *Trade Practices Act* is one of causal connection between the act in contravention of section 52, and the loss and damage alleged by the claimant under section 82, and not one of reliance simpliciter. However, the reliance and causation issues are inter-related.

9 I also accept that the misleading advertising cases and passing off cases show that reliance is not an essential element of a claim for damages for misleading or deceptive conduct under section 82 of the *Trade Practices Act*. This is clearly established in the cases I addressed in my draft opinion. The key question is whether this principle will be extended to the present case.

10 It may be useful to examine some non-reliance cases that do not involve misleading advertising or passing-off to determine whether there is support for a wider application of the non-reliance principle.

11 In *Bartley v Myers* [2002] SASC 24 the second defendant was guilty of misleading or deceptive conduct in putting forward a 'projection' relating to turnover and profitability of a business to the ANZ Bank. The bank relied on this misleading projection when it granted the plaintiff a loan of $140,000 to acquire the business. Without this bank loan, the first plaintiff would not have been able to purchase the business.

12 The Full Court held that the plaintiff was entitled to recover damages because she suffered loss or damage by conduct of the second defendant in the provision of the misleading projection to the bank.

13 Lander J (with whom Prior J concurred) stated at paragraph [187]:

> In my opinion, the first plaintiff is entitled to say... that the second defendant's misleading or deceptive conduct, upon which the ANZ Bank relied, gave rise to loss and damage to her. It is not necessary, in my opinion that the misleading and deceptive conduct, be directed to her for her to be entitled to damages... She is entitled to say that the ANZ's reliance upon the second defendant's misleading and deceptive conduct caused loss and damage to her.

And further at [204]:

> Whether or not the first plaintiff suffered loss or damage by the conduct of the second defendant is a factual inquiry. In my opinion, she did suffer loss or damage by reason of that conduct.

14 Wicks J delivered a separate concurring judgment. At [330]-[331] his Honour concluded:

> Ms Myers (the first plaintiff) suffered loss or damage by the conduct of Mr Bartley in breach of Part 10 of the *Fair Trading Act*. The conduct in question was the inducement by Mr Bartley of the ANZ Bank to make a loan of $140,000 to Ms Myers, a loan which would not have been made by the bank had it been fully

> informed of the true position as to the turnover and profitability of the business which Ms Myers was about to purchase. If the Bank were to refuse to make the loan, Ms Myers would have had no option but to refuse to complete the purchase of the business concerned. As already explained, there must be a causal link between the misleading conduct on the part of Mr Bartley on the one hand and the loss or damage sustained by Ms Myers on the other hand. The ANZ Bank is not concerned because it has not suffered any loss: *Janssen-Gilage Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526. In that case, Lockhart J concluded (at 537) that the entitlement to recover the loss or damage under section 82 of the *Trade Practices Act* 1974 (Cth), the equivalent of section 84 of the *Fair Trading Act*, is not confined to persons who rely on the representations which constitute contraventions of one or other of those Acts.
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> In my opinion, Ms Myers would have a claim against Mr Bartley for damages pursuant to section 56 and section 84 of the *Fair Trading Act* in consequence of the representation made to the ANZ Bank in relation to the loan from the bank of $140,000.

15 In *O'Hara v Williams* (unreported, Federal Court, 21 May 1996) Cooper J (at p24) reached a similar conclusion on similar facts.

16 On the other hand, in *Haynes v Top Slice Deli Pty Ltd* (unreported, Federal Court, 2 June 11994) Einfeld J held that the applicants were not entitled to relief under section 82 of the *Trade Practices Act* 1974 (Cth) because they entered into agreements upon which they had already determined **before** their bank relied on their accountant's misrepresentation in approving a bank loan. Any resulting loss from the failure of the business acquired by the applicants with the assistance of the bank loan was remote and indirect, not the natural and direct result of the accountants' misleading conduct.

17 The question of causation is not to be approached as some technical or mathematical exercise. In *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No. 2)* [1985] 16 FCR 410 Justice Gummow stated:

> In logic, the cause of any state of being may be not less than 'the sum of the entire conditions', but the courts both in expanding the common law and in construing statutes which present issues of causation have selected one or more out of what is an infinite number of conditions to be treated as the cause... And, as those learned judges also explained, the cause or causes so selected vary with the purpose at hand. In making that selection the law is moved by considerations of policy, not simply of logic.

18 This approach is similar to the High Court's subsequent statement in *March v E & MH Stramere Pty Ltd* (1991) 171 CLR 506 that 'considerations of policy and value judgment' are elements of the court's 'common sense' approach to causation.

19 In a case of misleading advertising, reliance by third parties, namely consumers, is precisely what might be expected to cause damage to a rival trader or competitor. Hence, the loss to the rival is direct and immediate; it is not remote or indirect.

20 The non-reliance issue in relation to shareholder is more problematic. The loss to the non-relying shareholders may have been caused by the misrepresentations made to the relying shareholders:

20.1 if policy considerations and a value judgment favour that conclusion; and

20.2 if there is a direct and casual link between the misrepresentation to the relying shareholders and the loss and damage suffered by the non-relying shareholders.

21 However, if the non-relying shareholders had already determined to buy their shares before the relying shareholders decided to act in reliance upon the misrepresentation, then any casual link between the misleading or deceptive conduct and the loss or damage suffered by the non-relying shareholders would be broken.

22 In relation to the policy and value judgment approach, it is worth noting that the continuous disclosure regime for listed companies was not introduced until 1994, long after the misrepresentations occurred in the present case. This is not to say that the casual link cannot be based upon policy and value judgment, but it cannot be based on a policy favouring continuous disclosure. The policy of consumer protection was more established than any public policy in favour of the shareholders in a takeover context in the relevant period in the present case. However, I concede that Lockhart J stated in *Janssen – Cilag v* Pfizer (1992) 37 CLR 526 at 529-530 that the ambit of activities that may cause contraventions of the diverse provisions of Parts IV and V of the *Trade Practices Act* is large. On this basis, they might extend to the present case.

23 In essence, my opinion is that the following shareholders have provable claims:

23.1 shareholders who relied on the misleading or deceptive conduct of the TDGL directors (the actual reliance cases);

23.2 shareholders who received misleading or deceptive statements from the TDGL directors in relation to the takeovers and purchased shares (presumed reliance case). In these cases the reliance upon the misleading or deceptive conduct can be presumed because the shareholders accepted the takeover offer. In my view, these shareholders are in a different category from non-relying shareholders but if all shareholders were sent the misleading information, then it may well be that all those shareholders will have provable debts because of presumed reliance. If so, it will not be necessary to examine the claims of non-relying shareholders.

For example, a misrepresentation which was likely to induce shareholders to accept a take over offer will, if proven, give rise to an inference of fact that the shareholders did so rely on the misrepresentation, unless this inference is rebutted by other evidence. See eg: *Jones v Acfold Investments Pty Ltd* (1984) 6 FCR 512 at 522-523; *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 482-483; *Huntsman Chemical Co Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242 at 245; *Gould v Vaggelas* (1985) 157 CCR 215 at 236. Put simply, if the shareholders received the misleading statements and later entered into the transaction in question by accepting the takeover offer, then there is a rebuttable presumption that they relied on the misleading information.

24 As to the non-reliance category, the causation issue will be determined as a matter of policy and value judgment. This is a matter on which the court's directions should be sought. It is not a matter on which the liquidator should rely on the opinion of Senior Counsel, however eminent. Ultimately, it does not matter whether I agree with paragraph 41 of the Opinion that there is a sufficient causal link where the

shareholder claimants suffer loss by reason of the general shareholder body relying upon misleading information which information was calculated to induce such reliance by the general shareholder body. As in *Haynes v Top Slice Deli Pty Ltd* (unreported Federal Court, 2 June 1995), the possible chain of causation might have been broken by the shareholders' decision to accept the takeover offer quite independently of the misleading or deceptive conduct.

25 Nevertheless, I agree with the Opinion that the Advice of the court should be sought under section 379 of the *Companies (South Australia) Code* and I agree with the questions which should be put to the Court in accordance with paragraph 66 of the Opinion.

26 I do, however, resile from one aspect of my draft opinion. On further reflection, the notice sent to shareholders should merely advise them that they may have a claim for damages for misleading or deceptive conduct as a provable debt in the liquidation of TDGL as a result of the misleading or deceptive conduct of the TDGL directors and recommend that they obtain legal advice in relation to their possible claims. The notice should not attempt to outline the bases of the possible claims by the shareholders. The liquidator must act impartially as between the creditors and should not be seen to be advancing the cause of one group of creditors over another.

27 Finally, I should mention that I am in total agreement with the Opinion, paragraphs 44-57 in relation to the Attribution of Conduct and the Mere Conduit issue. The normal attribution principles should apply in the present case, even though the TDGL directors were acting in their own interests, because they were not acting totally in fraud of the company. Moreover, the mere conduit argument would not prevail because the directors did more than merely 'pass on' misleading information supplied by others. See *Yorke v Lucas* (1985) 158 CLR 661.

28 Ultimately, the non-reliance claims do not affect the procedure which should be followed be the liquidator at this stage of his administration. He should seek the court's directions in relation to the advertisement inviting proofs of debt and the individual notices to shareholders who he has identified as holding shares at the relevant times. The non-reliance issue can be deferred until the liquidator sees the responses to the advertisement and the individual notices. It is a question that relates more to the admission or rejection of proofs than the invitation to lodge proofs of debt. It may turn out that all the claimants can establish their claims on the basis of actual or presumed reliance. Non-reliance could, therefore, become an academic issue.

Dr James O'Donovan

15 July 2010