Federal Court of Australia

Hammond v Quayeyeware Pty Ltd [2021] FCA 293

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **BANKS-SMITH J** |
|  |  |
| Date of judgment: | 30 March 2021 |
|  |  |
| Catchwords: | **CORPORATIONS** - directors - statutory right of access to company's financial records - general law right of access to company's books and records - where director seeks relief by way of declaration or order allowing access to all such documents - whether appropriate to order declaratory or other relief  **CORPORATIONS** - legal professional privilege - where director and company in adversarial relationship - where prior proceedings between the parties - where director seeks access to company's invoices and retainer agreements relating to legal representation in the prior proceedings - where director seeks access to company's privileged advice relating to the prior proceedings - whether statutory and general law rights of access abrogate company's claim to maintain privilege against director |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 9, 198F, 247A, 286, 290, 1303 |
|  |  |
| Cases cited: | *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102 (S)  *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 10  *Attorney‑General (NT) v Maurice* (1986) 161 CLR 475  *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199  *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN 307  *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150  *Burn v London & South Wales Coal Co* (1890) 7 TLR 118  *Carey v Korda* [2012] WASCA 228; (2012) 45 WAR 181  *Carter v The Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121  *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134  *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501  *Conway v Petronius Clothing Co Ltd* [1978] 1 WLR 72; [1978] 1 All ER 185  *Cook v Leonard* [1954] VLR 591  *Cook v Pasminco Ltd (No 2)* [2000] FCA 1819; (2000) 107 FCR 44  *Cruse v Multiplex Limited* [2008] FCAFC 179; (2008) 172 FCR 279  *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477  *Edman v Ross* (1922) 22 SR (NSW) 351  *Elevate Brandpartners Ltd v Hammond* [2019] FCA 1103  *Elevate Brandpartners Ltd v Hammond (No 2)* [2019] FCA 1598  *Elevate Brandpartners Ltd v Hammond (No 3)* [2019] FCA 1788  *Elevate Brandpartners Ltd v Hammond (No 4)* [2020] FCA 421  *Engel v National Biodiesel Limited* [2015] FCA 1114; (2015) 245 FCR 436  *Farrow Mortgage Services Pty Ltd (In liq) v Webb* (1995) 39 NSWLR 601  *Fox v Gadsden Pty Ltd* [2003] NSWSC 748  *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; (2019) 265 CLR 646  *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122  *Grant v Downs* (1976) 135 CLR 674  *Gray v BNY Trust Company of Australia Ltd (formerly Guardian Trust Australia Ltd)* [2009] NSWSC 789; (2009) 76 NSWLR 586  *Gray v Sirtex Medical Ltd formerly known as Paragon Medical Ltd* [2009] WASC 126  *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* [2019] FCA 2207  *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464  *Hawksford v Hawksford* [2005] NSWSC 1316  *Interchase Corporation Limited (in liq) v Grosvenor Hill Queensland Pty Ltd (No 1)* [1999] 1 Qd R 141  *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43  *Kang v Kang* [2013] EWHC 2828 (Ch)  *Lei, in the matter of Tai-Ao Aluminium (Australia) Pty Ltd v Cordukes* [2004] FCA 1488  *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99  *Macks v Viscariello* [2017] SASCFC 172; (2017) 130 SASR 1  *Marshin Holdings Pty Ltd v Attorney General of New South Wales* [2013] NSWSC 326  *Maryland Casualty Co v Pacific Coal & Oil Co* (1941)312 US 270  *Mills v Mills* (1938) 60 CLR 150  *Molomby v* *Whitehead & Australian Broadcasting Corporation* (1985) 7 FCR 541  *On Q Group Ltd v McDougall* [2007] VSC 184  *Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed)* [2013] FCAFC 9  *Oswal v Burrup Holdings Limited* [2011] FCA 609  *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624  *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418  *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 WAR 496  *Re Trade Practices Act 1974* (1978) 19 ALR 191  *Satz v ACN 069 808 957* [2009] NSWSC 1459  *Satz v ACN 069 808 957* [2010] NSWSC 365  *Sharpe v Grobbel* [2017] NSWSC 1065  *State of South Australia v Barrett* (1995) 64 SASR 73  *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543  *University of New South Wales v Moorhouse* (1975) 133 CLR 1  *Warramunda Village Inc v Pryde* [2001] FCA 61; (2001) 105 FCR 437 |
|  |  |
| Division: |  |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Number of paragraphs: | 237 |
|  |  |
| Date of last submissions: | 27 August 2020 |
|  |  |
| Date of hearing: | 19-20 August 2020 |
|  |  |
| Counsel for the Plaintiff: | Mr HNG Austin QC with Ms JA Findlay |
|  |  |
| Solicitor for the Plaintiff: | Gadens Lawyers |
|  |  |
| Counsel for the Defendant: | Mr ATS Dawson SC with Mr SH Hartford-Davis |
|  |  |
| Solicitor for the Defendant: | HWL Ebsworth Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 598 of 2020 |
|  | | |
| BETWEEN: | LINDA HAMMOND  Plaintiff | |
| AND: | QUAYEYEWARE PTY LTD (ACN 118 078 274)  Defendant | |

|  |  |
| --- | --- |
| order made by: | BANKS-SMITH J |
| DATE OF ORDER: | 30 MARCH 2021 |

THE COURT ORDERS THAT:

1. There be liberty to apply with respect to the manner of access by the plaintiff to:
   1. category 14 as set out in the letter of Gadens to HWL Ebsworth dated 6 May 2020; and
   2. the defendant's non-privileged communications by way of invoices, retainer agreements and receipts relating to the defendant's engagement of lawyers and counsel for the purpose of the proceedings *Elevate Brandpartners Ltd v Hammond* NSD 488 of 2019 and *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* VID 550 of 2019.
2. The parties by their counsel are to confer as to the proposed terms of a regime for the purpose of identifying privilege claims maintained by the defendant against the plaintiff and, to the extent orders are sought, are to provide to the Court a minute of consent orders or competing minutes within 21 days, or such further length of time as the parties agree.
3. There be liberty to apply with respect to the process anticipated by order 2.
4. The application is otherwise dismissed.
5. The question of costs is reserved for agreement or further hearing.

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

**Table of Contents**

|  |  |
| --- | --- |
| The events | [3] |
| Quay's business | [4] |
| Sale of majority shareholding to Elevate | [8] |
| Deterioration of relationship | [14] |
| Elevate and Quay commence breach proceedings against Hammond parties | [29] |
| Hammond parties commence access proceedings against Quay | [38] |
| The position after the December 2019 agreement | [46] |
| The 6 May 2020 letters from Gadens to HWL | [65] |
| These proceedings are commenced | [75] |
| Developments after these proceedings commence but before the hearing | [78] |
| The access that Ms Hammond seeks | [93] |
| Ms Hammond's purpose for seeking documents generally | [94] |
| Ms Hammond's purpose for seeking privileged documents | [97] |
| Mr Boyd's evidence | [102] |
| The witnesses | [108] |
| Access to company documents | [111] |
| Preliminary | [111] |
| Introduction - avenues for production | [112] |
| Statutory right of access - s 290 | [113] |
| General law right of access | [121] |
| Declaratory relief | [133] |
| Consideration - any basis for the relief sought | [146] |
| Access to privileged company documents | [183] |
| The public interest in recognising legal professional privilege | [183] |
| Rights of access and abrogation of privilege | [188] |
| Whose privilege is it anyway? | [196] |
| The privileged communications in this case | [201] |
| Invoices and retainers - non-privileged parts | [203] |
| Privileged communications and advice | [205] |
| Assumptions as to basis for privilege | [207] |
| The decision in Barrett | [213] |
| When is the privileged status to be determined? | [214] |
| Can Quay assert privilege against Ms Hammond? | [220] |
| Has the privilege been lost? | [225] |
| Conclusion | [231] |

REASONS FOR JUDGMENT

BANKS-SMITH J:

1. These proceedings concern two issues. The first is a director's power or right to access company documents. The second is the extent to which immunity from an obligation to produce or disclose information can be maintained by a company on the basis of legal professional privilege against a current director, where the relationship has become adversarial.
2. The issues are to be addressed against the background of an online and retail business selling product internationally, utilising social media influencers and adapting to COVID‑19 circumstances, whilst governed by directors and management located between Melbourne and San Francisco.

## The events

1. It is necessary to traverse the events in some detail because I am asked (amongst other things) to draw inferences as to the defendant's practices and intentions, based on its conduct over time.

### Quay's business

1. The plaintiff, Linda Hammond, and her husband, Allen Hammond, established a business known as Quayeyeware in 1999, through which they designed and sold sunglasses. In 2006 they commenced operating the business through the defendant company, Quayeyeware Pty Ltd (**Quay**), of which they were the directors and shareholders.
2. Ms Hammond marketed the business in domestic and international markets, including by promoting sales of Quay sunglasses using social media platforms (particularly Instagram) and influencers. Influencers have large followings on social media and are generally paid or given free products in exchange for posting and tagging pictures of the products, a technique which, in the case of Quay, was very effective in increasing sales. Each time an influencer posted a photo of or tagged a Quay product, there was potential for sales to increase dramatically and in a short time period. A number of international celebrities have tagged Quay or posted photos of Quay products on their Instagram profile. Quay's sales data is commercially sensitive and confidential. However, the revenue from particular products sold in this manner has in some cases been nothing short of astounding, and, according to Ms Hammond, justified entry into lucrative promotion contracts with high-profile influencers.
3. At the time of the hearing, Quay carried on business selling sunglasses in about 35 countries across online, wholesale and retail markets. The principal place of operations is San Francisco, in California, where senior management and the majority of staff are located, although there are staff located in a number of countries, including Australia, China, Europe and the United Kingdom.
4. It is not necessary to detail the financial position of Quay over time: it suffices to say that objectively the business was successful, both in Australia and overseas.

### Sale of majority shareholding to Elevate

1. In June 2016 the Hammonds sold approximately 65% of the shares they owned in Quay to Elevate Brandpartners Ltd (**Elevate**), a company registered in the United Kingdom, pursuant to a share sale deed. Those shares were sold for a substantial sum. The Hammonds retained the balance of their shareholding and remained directors, with three additional directors joining the board, nominated by the acquirer's side of the transaction. Those directors were Matthew Hamilton, Christopher Dean and Myles McCormick, and all were based in the United States. The parties referred to them collectively as the **majority directors**, and I will continue that convention.
2. The relationship between the Hammonds, Elevate and Quay is governed by a shareholders' deed dated 26 August 2016.
3. Ms Hammond, Mr Hammond and their son, Zak Hammond, had been employed by Quay prior to the transaction with Elevate, and continued to be employed for a time afterwards. Mr Hammond and Zak resigned from their employment in around July 2017. Ms Hammond continued to be employed in an executive position until August 2017.
4. In about September 2017 Mr Hammond resigned as a director of Quay and Kelvin Boyd was appointed as his replacement, nominated by Ms Hammond. Mr Boyd is a chartered accountant based in Melbourne, with some 40 years' experience as a corporate advisor, including as managing director of Bell Partners and its antecedent firm for 14 years.
5. Until about August 2017 or September 2017, it appears that a good relationship between the various board members and management was maintained.
6. According to Ms Hammond, until that time it was customary for Quay to hold quarterly board meetings either in person or over the telephone. In advance of those meetings she would receive a board pack, which would run close to 200 pages and include information such as bonuses, strategic initiatives and tactics, monthly cash flows and balance sheets, influencer strategies and other such information. Ms Hammond said that the flow of information was sufficient for her to perform her functions as a director. Ms Hammond also had a direct line of communication with the general manager of Quay at the time. Ms Hammond says that the general manager readily and promptly responded to any requests for further information that she had.

### Deterioration of relationship

1. According to Ms Hammond, from August 2017 or September 2017 the flow of information to her as a director of Quay significantly deteriorated.
2. Ms Hammond said that board meetings post September 2017 were conducted by telephone only. Further, the board packs that Ms Hammond had become familiar with were not being provided: they were significantly less comprehensive. The length of the meetings themselves was reduced.
3. Ms Hammond deposed further that the board packs no longer contained spending for large marketing or collaborations. She said she only became aware of such projects when they were announced, an example being Quay's signing of the musician [redacted].
4. A chain of emails between Ms Hammond and Mr Dean displays their deteriorating relationship. In late August 2017 Ms Hammond requested information from Mr Dean, to which he responded:

Getting 1-2 data requests per day from board members is time-consuming and distracting when trying to run a business. It would be great if you could collate your questions and submit once a month so that the team is not constantly stopping [what] they are doing to answer your questions. It takes away from important value-creation activities. Our team will plan to collect your questions and submit answers once a month as well.

1. Ms Hammond responded:

Hi Chris, are you refusing to provide the information we are entitled to?

When paying a management fee of [$ redacted] a year for this information the emails will be submitted when required.

Please have the below email answered in a timely manner.

Is there something in the constitution we are not aware of that entitles 2 of the board members to have this information once a month?

If so, please provide this extract.

1. Mr Dean responded:

Of course we are not refusing to provide information. We want you to have all the information you need to properly conduct your board role. We are just asking for a more reasonable cadence and indicating that we plan to answer your questions monthly. This is in keeping with prior precedent as we previously had a monthly call to answer your questions. Under the new format, we will provide written answers.

If it is too much trouble to collate your questions monthly, please continue to submit daily. We will collect them and provide written answers monthly to avoid the significant business interruption that answering questions on a daily basis creates.

1. Ms Hammond said in evidence that she considered Mr Dean's position was unreasonable.
2. On around 15 November 2017 a protocol was put in place between Quay's management to the effect that Ms Hammond would ask any questions through Mr Hamilton, and Mr Hamilton would then pass such questions to management.
3. In fact, as the cross-examination of Ms Hammond revealed, she considered at that time (and after) that she was entitled to ask questions and ask for documents and receive an almost immediate response, as the following exchange with senior counsel for Quay indicated:

And did you respond like that because you felt that Mr Dean's position in asking you to collate questions and submit them once a month was an unreasonable request from the management of the company?---I would say at the time, yes.

Yes?---Just the response.

I'm sorry?---Looking at this response, the reply in my email I would say yes.

You thought you were entitled to ask questions and have them answered almost immediately; was that your position at the time?---Yes.

Yes. All right. And that was whether you asked a question to which you wanted an answer given or whether you were asking for a document; is that fair?---Yes.

All right. And that, to be fair, is your position now; isn't it?---Yes.

1. Mr Boyd also emailed Mr Dean at various times seeking information.
2. Ms Hammond's position is that at around that time she asked for information and was not given it, despite the protocol that had been put in place. An example relied upon by Ms Hammond was a request that she made to Mr Hamilton on 26 January 2018 that he share the [influencer name redacted] range that was about to be launched with the board. Another example was an email to Mr Hamilton on 12 February 2018 requesting that he share details about the range and sign on costs relating to the [influencer name redacted] range that was soon to launch. Mr Hamilton's complete response of the following day to that email was 'Linda - No'.
3. By email of 16 February 2018, Ms Hammond said to Mr Hamilton:

Matt, I will continue to email until you provide a legitimate response to my email.

Perhaps I go directly to management to provide me with the answers? If they don't answer, then we know why. This is not a road you want to take.

Again you have no right to 'gag' Kelvin [Boyd] and myself in any formal way. Your meaningless policy you made up at one of the board meetings holds no legal weight or substance. [It's] just your policy.

So, how about a reply. I will email daily, and will add to your growing file of you not providing legitimate financial information to 2 board of directors. This is YOUR obligation to the board, seeing as you elected yourself as the only point of contact, which will no longer continue.

1. The request for information about the identified influencer ranges was met in March 2018, when the board members were provided with a confidential document which included information about the range including expected revenue.
2. In January 2019 Jodi Bricker was appointed as CEO of Quay. Ms Hammond said that both she and Mr Boyd had no prior knowledge that Ms Bricker was to be appointed. Subsequent communications suggest that the relationship between Ms Hammond, Mr Boyd and Ms Bricker was not an easy one. For example, although Ms Bricker visited Melbourne from the US at one point, she did not make any arrangements to meet either Ms Hammond or Mr Boyd, a decision that concerned them.
3. At this point it is appropriate to move to two sets of legal proceedings involving the parties, instituted in April 2019 and May 2019 respectively, and that continued concurrently for some time.

### Elevate and Quay commence breach proceedings against Hammond parties

1. In late 2018 the Hammonds incorporated Dream Bandits Australia Pty Ltd (**Dream Bandits**). Dream Bandits markets and sells a range of lingerie. In early 2019 they began a process towards launching Dream Bandits products for sale on the internet. This step by the Hammonds led to various allegations being made against them by Quay through its majority directors, culminating in proceedings being issued in early April 2019 by Elevate and Quay against each of the Hammonds, Mr Boyd and Dream Bandits (**Elevate Proceedings**) (this commentary is based on the reasons in the judgment referred to immediately below, but is not relevantly in issue).
2. The claims in the proceedings were summarised in *Elevate Brandpartners Ltd v Hammond* [2019] FCA 1103 (Stewart J) (***Elevate Brandpartners*)** as follows:

[13] … Elevate and Quay assert:

* claims of breaches of the shareholders deed by the Hammonds including by enticing an employee away from Quay to Dream Bandits;
* a claim of tortious interference by Dream Bandits in Quay's contractual relations with that employee;
* a claim that Ms Hammond is in breach of her director's duties;
* a claim that the Hammonds and Dream Bandits have infringed Quay's trademarks;
* a claim that Ms Hammond has infringed Quay's copyright; and
* a claim that the Hammonds and Dream Bandits have in the course of trade and commerce engaged in conduct that is misleading or likely to mislead contrary to s 18 of the Australian Consumer Law and made false and misleading representations contrary to ss 29(1)(g) and (h) of the Australian Consumer Law.

[14] The representations complained of include that Dream Bandits' products have the sponsorship or approval of Quay and that, in connection with the supply and promotion of Dream Bandits' products, Quay and its products, image and branding are designed and controlled by the Hammonds.

1. Ms Hammond said in her evidence that the commencement of the Elevate Proceedings was not approved by the board. She referred to a sub-committee of the board that had been delegated power to commence such proceedings, but disputed that it had such authority. She said further that she has not been provided with evidence that the sub-committee exercised the board's power to resolve to commence proceedings and nor has she received a copy of the legal advice upon which such action was taken.
2. There were minutes in evidence of an interim board meeting held by telephone on 14 March 2019, and recording that all directors were present. The minutes record, relevantly, that Mr Hamilton raised an issue about the resignation of one of Quay's operation managers in its Melbourne office (Ms C), her alleged subsequent employment by a business controlled by the 'Hammond Shareholders' and the alleged breach by the Hammond Shareholders of their obligations under the shareholders' deed. The minutes continue:

Mr. Hamilton proposed a resolution to establish a sub-committee of the Board comprising Matthew Hamilton, Christopher Dean and Eric Wong (VP of Finance) to conduct a confidential investigation into the circumstances surrounding [Ms C's] resignation and current employment including whether there has been a breach of [Ms C's] employment contract or other duties owed to the Company or a breach of the Shareholders Agreement and that the committee have all of the powers of the directors in connection with the investigation. Mr. Boyd seconded. The resolution passed.

…

Mr. Hamilton notified the directors that the information rights of the Hammond Shareholders will be suspended pending the outcome of the confidential investigation but that they would continue to receive a copy of the annual audited financial statements per the terms of the Shareholders Agreement.

1. On 16 April 2019 Ms Hammond and Mr Boyd, by their solicitors (Gadens), wrote to the solicitors for Elevate and Quay (**HWL** Ebsworth) informing HWL of concerns about the proceedings, notably that Ms Hammond and Mr Boyd asserted that the proceedings were commenced by Quay without any board resolution and without proper authority, and that any retainer entered into between HWL and Quay was not authorised. Gadens also asked for confirmation that Quay's funds would not be used to pay for the costs of the proceedings.
2. HWL responded by letter dated 18 April 2019, that relevantly stated:

4. As Ms Hammond and Mr Boyd are aware, during a Company board meeting on 15 March 2019 (the Meeting) a resolution was proposed by Mr Matthew Hamilton to establish a sub-committee (comprising Mr Hamilton, Christopher Dean and Eric Wong) to conduct a confidential investigation into, inter alia, the circumstances surrounding [Ms C's] resignation and whether there had been a breach of the Shareholders Agreement against the Company's interests. It was proposed that the sub-committee have all of the powers of the directors in connection with the investigation. Mr Boyd seconded the proposed resolution and it was passed.

5. Further, at that meeting, Mr Hamilton notified the Company's directors that the information rights of the Hammond Shareholders (being the first, second and third respondents) were suspended pending the outcome of the confidential investigation. Ms Hammond and Mr Boyd objected to this position …

6. Subsequent to the Meeting, Mr Boyd sent an email to the Company's directors which stated:

*For the record the minority [Hammond] shareholders have no issue in establishing the relevant subcommittee providing as agreed, you accept all written submissions and explanations in a balanced and impartial way.*

*The issue which I believe you have incorrectly determined is to withhold information rights including the monthly financials.*

7. We assume that Mr Boyd sent this correspondence on behalf of the Hammond Shareholders, in his capacity as a director of the Company.

…

9. It cannot seriously be contended that Ms Hammond and Mr Boyd ought to have been involved in that decision-making process to commence proceedings given that:

(a) Ms Hammond and Mr Boyd had ceded power to investigate the issues the subject of these proceedings to the sub-committee;

(b) subsequent to the Meeting, (to the extent that it is relevant) Mr Boyd stated, 'for the record' that the Hammond Shareholders had 'no issue' with the subcommittee being appointed; and

(c) in the proceedings, the Company is alleging that Ms Hammond and Mr Boyd breached their duties as directors of the Company.

1. Whilst I acknowledge Ms Hammond's unresolved allegation as to the authority of the sub-committee, I prefer to rely upon the minute, insofar as it supports the fact that a sub-committee was to be formed, together with the content of Mr Boyd's email, to support an inference that Quay proceeded to seek legal advice for the purpose of the investigation or arising out of the investigation on the basis that such a sub-committee had been formed.
2. As is apparent from the reasons in *Elevate Brandpartners*, allegations of breach of directors' duties were pursued against Ms Hammond in those proceedings, amongst other allegations. Shortly before the hearing of an application by Elevate and Quay for interlocutory relief, Ms Hammond offered various undertakings to Quay and to the Court, without any admission of liability (on or around 27 June 2019). The operative undertaking, expressed generally, was to the effect that Ms Hammond agreed not to use certain trademarks held by Quay, or publish images where the copyright was owned by Quay, in connection with Dream Bandits. Ms Hammond also agreed that Dream Bandits would not use certain product names which had been used publicly by Quay. The full extent of the undertakings is set out in the judgment in *Elevate Brandpartners* and it is not necessary to repeat them. Ultimately the proceedings were discontinued on 1 April 2020.
3. For completeness, I note that Stewart J published three further judgments arising out of the Elevate Proceedings: *Elevate Brandpartners Ltd v Hammond (No 2)* [2019] FCA 1598 (each party bear their own costs of the interlocutory proceedings); *Elevate Brandpartners Ltd v Hammond (No 3)* [2019] FCA 1788 (costs of amendments to be costs in the cause, save for the costs of Zak Hammond which were to be paid by the applicants on an indemnity basis, no claim having been pursued against him); and *Elevate Brandpartners Ltd v Hammond (No 4)* [2020] FCA 421 (leave for the applicants to discontinue the proceedings with the applicants ordered to pay the respondents' costs of the proceeding as agreed or assessed).

### Hammond parties commence access proceedings against Quay

1. In May 2019, and so whilst the Elevate Proceedings were on foot, Ms Hammond and Mr Boyd commenced proceedings against Quay (**First Access Proceedings**). They sought orders compelling access to and the ability to copy financial and other books and records of Quay, asserting the proceedings were necessary because although they remained directors of Quay, they alleged they were being deprived of access to documents, despite repeated requests. The orders sought were effectively the same as those sought in these proceedings.
2. Following various communications between the parties, in June 2019 Quay established an electronic data room and uploaded financial information to it, including monthly income statements, monthly balance sheets, monthly cash flow statements, audited financial accounts and quarterly reports and budgets. Quay indicated the data room would be updated monthly. Access to the data room was initially offered on the basis that Ms Hammond and Mr Boyd provide confidentiality undertakings (they were not provided). In any event, on or about 19 September 2019 Ms Hammond and Mr Boyd were given unconditional access and log‑in details that allowed them to access the data room.
3. On 24 September 2019 Gadens requested changes to the data room arrangement so that Ms Hammond and Mr Boyd could print or download documents, could receive every document that was to be received by the majority directors and could be notified when documents were uploaded to the data room. Gadens said that the changes were requested in order for Ms Hammond and Mr Boyd to properly perform their duties as directors of Quay.
4. On 14 November 2019 Gadens wrote to HWL with a list of the 'totality of the outstanding documents' sought by Ms Hammond and Mr Boyd. Following further correspondence, Gadens clarified those documents that were sought. On 9 December 2019 and 10 December 2019 HWL wrote to Gadens enclosing the remaining documents, or providing explanations as to whether and how they could be provided.
5. The substance of the First Access Proceedings was at this point resolved, save for the issue of costs. On 20 December 2019 Stewart J dismissed the First Access Proceedings by consent, but determined the dispute as to costs, ordering Quay to pay the costs of the proceedings: *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* [2019] FCA 2207.
6. The view can properly be taken that up until about this time Quay maintained an incorrect position with respect to access to company documents. For example, there was no basis for seeking to impose a condition that confidentiality agreements or undertakings be entered into before Ms Hammond or Mr Boyd were provided with access to the data room. Some of the HWL correspondence included requests for explanations as to why certain documents were sought, when no such explanation was required.
7. Under cross‑examination, however, Ms Hammond agreed that as at December 2019 there was nothing left to litigate with respect to document production, in that there were no outstanding document requests and it was contemplated that Quay would provide a standard flow of documents into the data room. In addition, Ms Hammond could make ad hoc requests of Quay for documents in the future.
8. Quay accepted by its written submissions in these proceedings that the data room was not intended to be the only means of communication with Ms Hammond, and that her rights of access were and are not limited to the documents contained within it (although Quay maintained that it was not open to Ms Hammond to re-agitate requests for access to documents that had been addressed by the resolution of the First Access Proceedings, an issue that was not fully ventilated before me).

### The position after the December 2019 agreement

1. The data room was accessible by Ms Hammond and Mr Boyd from around September 2019. From around December 2019 it was loaded with information in the categories that had been sought by Ms Hammond in the First Access Proceedings. There were issues with the manner in which it was accessible: it was accessible by Ms Hammond and Mr Boyd in a 'read only' format until August 2020, requiring them to take screen grabs in order to print information, a process that objectively would be cumbersome and inefficient. It was not possible to simply download the information. However, access was provided and Ms Hammond accepted that there was a 'fair amount of financial information' provided by way of the data room.
2. In addition to raising issues about access to the data room, Ms Hammond and Mr Boyd continued to ask questions of management about the operations of Quay that they contend were not properly answered at the time. The following provide examples.
3. On 23 January 2020 Ms Hammond emailed Ms Bricker as follows:

Hi Jodi, can you please share with both Kelvin and I the following information.

I have heard that the [influencer A] contract is not being continued, and would like a better understanding of what will fill the gap of the sales of [influencer A] and [influencer B]?

Both Kelvin and I have no information on when and where the new Quay stores will open in 2020, please share this information with us?

I understand you are in Melbourne at the moment, when do you leave? Kelvin and I would have liked the opportunity to meet you while you were here.

Can we also have the following reports provided monthly as we had in the past:

1) Periodic weekly PR highlights

2) Periodic weekly Social Analytic

3) Periodic weekly Web results

I look forward to your response on the above.

1. There are two things to note about this email. First, Ms Hammond accepted that in the second and third paragraphs of the letter, she was seeking information, rather than documents. Second, as to the weekly reports that were requested, Ms Hammond asserted that such documents had been provided up until February 2018, and said that she believed such information must have been provided to management in the ensuing period. If not, according to Ms Hammond, such reports should have been generated and provided to the directors. Ms Hammond did not assert that the documents had been produced but deliberately withheld from her.
2. On 24 January 2020 Mr Boyd emailed Ms Bricker, saying, relevantly:

If you had made yourself available [in Melbourne] we could have had a discussion about the issues raised by Linda below and my concerns about the continuing monthly sensitivity/volatility in performance (both cash and profitability) of the Company. My questions go beyond the explanations set out in your regular reports … to a deeper strategic understanding of the direction of the business. Both Linda and I do not have this information or understanding which of course is crucial to our role as directors.

Once the financials are complete for the full financial year … I would like you to address the Board on this issue; particularly around the trend in market share in your various markets, competitor pressure etc.

In the meantime I would like you to address one particular 'expense line' in the November Financials … Non recurring costs [$ redacted] Could we please have a full breakdown of the costs incurred, particularly as it relates to legal fees with respect to the recently concluded Federal Court Decision in the 'Documents Case'. Further, I anticipate that there will be further legal expenses in December 19 and therefore request that those expenses be included in your analysis.

1. Various follow up emails were also sent by Ms Hammond and Mr Boyd.
2. On 7 February 2020 Mr Boyd sent a detailed email to the board, requesting log-in details for the data room so that he was not limited to screen grabs, and raising a number of questions:

As Linda and I have been effectively prevented from participating in the underlying management and strategic decisions, particularly for most of the 2019 financial year including the underlying assumptions used in the preparation of the 2019 budget, we now request answers to our questions below. Our questions go beyond the explanations contained in the CEO report, to trying to understand the strategic imperatives underpinning the current business operating model and the extent to which the majority directors provide guidance to management, in particular the CEO.

1. Have the majority directors set a series of KPI'S for management reporting purposes beyond just a sales focus … to include both Gross Profit margin and EBITDA? If not why not?

2. Have the majority directors met with management to discuss and understand the worsening trend in the gross profit margin particularly over the last 3 months of FY19?

3. Have the majority directors met with management to discuss and understand the increase in the monthly operating expense including head count from [redacted] in January to [redacted] in December. (what price market share?)

4. Are the majority directors aware of the increase in the stock reserve and its effect on EBITDA, cash and the gross profit margin in December 2019. Did the majority directors approve the inventory write down?

5. Are all major decisions made by management approved by the majority directors and are these management decisions recorded in management minutes? If so can we please have a copy of these management minutes.

6. We understand that the [influencer A] Contract has terminated … have management addressed the loss of sales?

7. Please confirm the number, location and timing of stores to be opened this year. Is management and the majority directors confident in this strategy and that the budgets and margins are achievable? Please provide a summary of the performance of each store and the budgets for each store as they are opened.

8. Do you expect to continue the online aggressive (discount) sales strategy for the current financial year? … if so can you please advise us as to the underlying strategic goal behind building market share … e.g.:

a. Do you have a market share percentage for each market as a goal?

b. How are your competitors reacting to this strategy?

c. Is your strategy working?

d. Is the market share trend improving in each market?

9. Can we please have a breakdown of the non-recurring expenses of [$ redacted]. Within this breakdown can we please have a further breakdown of the legal expense between the '[Ms C] case' and the 'Documents case'.

10. We request that the majority directors advise if they accept the current accounting treatment of this outgoing? Specifically, do they consider these outgoings to be an expense of Quay for reporting purposes or an outgoing that should properly be reimbursed to Quay.

11. Are the majority directors concerned with the current cash position of the company in the context of the current trading trend?

12. Are the majority directors confident that the costs of opening new stores can properly be covered by the current cash reserves, again in the context of the current trading trends?

1. As is apparent, in particular from Mr Boyd's 7 February 2020 email, two of the questions asked for specific financial documents that may or may not have existed, but the majority of the questions related more generally to the strategic operations of the company. Some questions were directed at the legal expenses of the ElevateProceedings and the First Access Proceedings.
2. Having failed to receive substantive responses to the emails at director level, on 11 February 2020 Gadens wrote to HWL, seeking a response to the outstanding information requests by 14 February 2020, and indicating that absent a response, they would seek instructions as to whether Ms Hammond would 'enforce her rights as a director and shareholder of Quay forthwith'.
3. Also on 14 February 2020, Mr Hamilton responded to Mr Boyd's email of 7 February 2020. Mr Hamilton did not address the particular requests made by Mr Boyd. Relevantly, Mr Hamilton said that that both Ms Hammond and Mr Boyd already had log-in details for the data room and that:

You will continue to receive business information via the data room. That information addresses your questions. If you have further questions you may reach out to me and I will see about having those questions addressed.

1. On 27 February 2020 Gadens sent a further letter to HWL, stating relevantly that:

Your client's data room has always been and remains inadequate. We need not recite our client's concerns with the data room, which were expressly set out in Proceeding VID 550/2019. Mr Hamilton is plainly wrong to assert that the information in the data room addresses our client's questions.

As Mr Boyd's email sets out, our client has been and remains concerned about the strategic direction and financial performance of the Company. The reasons for that concern are clear from the CEO's Report Q4 2019 and the November and December 2019 financial statements which were uploaded by your client to the data room.

Given the history of Mr Hamilton's non-provision of information, our client understandably has no confidence that his statement - '*If you have any further questions you may reach out to me and I will see about having those questions addressed*.' - will be acted upon in good faith.

That being the case, our client demands that your client provide a complete written response to all of the questions in Mr Boyd's email by no later than 5.00pm 3 March 2020 (AEDT).

Our client also demands that your client provide us with a copy of the final minutes of the Quay Board meeting held on 19 December 2019 (AEDT) by the time and date stipulated above.

If we do not receive your client's response, then we reserve our client's rights to commence proceedings without further notice, and if successful, to apply to the Court seeking an order that your client pay our client's costs on an indemnity costs as required. Our client otherwise reserves all rights and remedies.

1. On 3 March 2020 HWL responded, stating that the demands made by Ms Hammond extended beyond requests for books and records of the company and, to the extent that they did relate to books and records, Quay intended to upload those documents into the data room in the next seven business days. The letter stated that some of Ms Hammond's and Mr Boyd's requests demanded commentary from Quay, and that such questions should be included on an agenda for a board meeting, as 'our client cannot be compelled to answer your client's questions or provide advice'. HWL also said that Quay maintained that the data room remained adequate as a means for the provision of documents.
2. During March 2020 the severity and impact of the COVID-19 pandemic was becoming apparent across the world.
3. On 30 March 2020 Ms Hammond sent an email to the Quay board members, asking for a weekly update with Ms Bricker and Mr Wong (Quay's vice president, finance), and stating that it was important 'as both a board member and shareholder' that there be weekly updates on the issues being faced. Ms Hammond said that the data room 'is not sufficient enough in the current [COVID-19] situation'.
4. Ms Hammond sent a further email on 1 April 2020 to (relevantly) Ms Bricker seeking a weekly call to keep up to date:

We don't need a presentation prior to a call, I'm sure your time is best spent elsewhere, but it is important both Kelvin and I are kept up to date.

In particular we need to understand the current trading position, cash position of the company at the 31st of March and whether the company is experiencing any pressure from Creditors.

I ask that you make time for this, as Kelvin and I are directors of Quay and management have an obligation to all board members, not just 3 in the case of the past 12 months or so you have been the CEO of Quay.

1. It is apparent that there was a board meeting on 8 April 2020 at which it was agreed that a weekly memorandum would be produced by management and circulated to all directors each Wednesday (**COVID-19 weekly update**).
2. On 9 April 2020 Gadens wrote to HWL emphasizing that under cl 9 of the shareholders' deed, Quay must provide to each shareholder prescribed information about the business. Gadens said they were instructed to demand from Quay that it would comply with its obligations under cl 9; that information was to be sent to the Hammonds' email addresses; that Quay would describe the content of information and when it would be provided; and that the continuing impact of COVID‑19 meant that it was critical that directors and shareholders were to be 'properly and promptly informed' in accordance with their respective rights at law and under the shareholders' deed.
3. Quay commenced issuing COVID-19 weekly updates, the first being provided on 15 April 2020 (and the evidence suggests updates were also provided on 22 April 2020, 30 April 2020, 7 May 2020, 14 May 2020 and 21 May 2020, ceasing when these proceedings commenced).
4. On 15 April 2020 Ms Bricker emailed the Quay board members listing a range of efforts and strategies intended to mitigate the impact of COVID-19, including the standing down of its workforce in its Melbourne warehouse.

### The 6 May 2020 letters from Gadens to HWL

1. On 6 May 2020 dissent between the parties heightened. On that date, Gadens sent three letters to HWL, respectively relating to alleged directors' rights, access to privileged documents and alleged shareholder rights.
2. The first letter (**6 May 2020 categories letter**) demanded that Ms Hammond, as a director of Quay, be provided forthwith with categories of documents by 11 May 2020, as set out in the following reproduced table:

|  |  |
| --- | --- |
| **Category** | **Description** |
| 1. | Contracts or agreements executed with influencers and/or celebrities since 1 January 2017, and any unexecuted contracts or agreements proposed to be executed with influencers and/or celebrities. |
| 2. | Any strategy matrixes for new talent prepared since August 2017 in a similar or like form to the document enclosed and marked 'Q1'. |
| 3. | Any document or report evidencing the performance of influencers and/or celebrities contracted with Quay on revenue and sales, in a similar or like form to the document enclosed and marked 'Q2'. |
| 4. | Any public relations analyses prepared since 1 January 2018 in a similar or like form to the document enclosed and marked 'Q3'. |
| 5. | Any social media analyses prepared since 1 January 2018 in a similar or like form to the documents enclosed and marked 'Q4', 'Q5', and 'Q6'. |
| 6. | Listing of current employees for Quay and its related entities in the UK and USA. |

|  |  |
| --- | --- |
| 7. | Records of employee movements from 1 January 2019 to 31 December 2019, for each business unit and geographic area. |
| 8. | Listing of current Quay stores, any stores proposed to be opened, and documents evidencing the costs (including forecast costs) of each store. |
| 9. | The calculation methodology of any bonuses paid to staff for the 2019 Financial Year. |
| 10. | Records evidencing sales and gross profit margins for the December quarter for the 2019 Financial Year. |
| 11. | Minutes of meetings of senior management for the period 1 January 2019 to date (and documents and emails relating to each meeting). |
| 12. | All accounting and/or taxation advice requested of and/or provided by Price Waterhouse Coopers. |
| 13. | Cash flow projections prepared by management on a weekly and/or monthly basis since the provision of the 2020 Budget in December 2019. |
| 14. | Aged creditors' analysis, and any document or correspondence with creditors which are outside ordinary trading terms. |
| 15. | All current D&O Policies and premiums paid in accordance with Clause 7.8 of the Shareholders' Deed. |
| 16. | All Deeds of Access and Indemnity executed by Quay in accordance with Clause 7.9 of the Shareholders' Deed. |

1. Gadens also asked in the letter that HWL separately respond to each category of documents, undertaking the following tasks:

(a) If you say the documents have already been provided, identify:

(i) the documents answering the category, by reference to the date and description of each document;

(ii) the date on which the documents were provided to our clients; and

(iii) by what means the documents were provided to our clients;

(b) If you say the documents have not been provided, identify:

(i) the documents answering the category, by reference to the date and description of each document;

(ii) unless copies of the documents are attached to your response, the date by which the documents will be provided to our clients;

(iii) unless copies of the documents are attached to your response, by what means the documents will be provided to our client; and

(c) If your client refuses to produce documents, identify:

(i) the documents answering the category, by reference to the date and description of each document; and

(ii) the basis on which Quay says it is entitled to refuse to produce those documents to our clients.

1. The scope of information sought in terms of both the period of years and the tasks requested might fairly be described as very broad.
2. The second 6 May 2020 letter from Gadens to HWL demanded that Ms Hammond, as a director, be provided by 11 May 2020 with the following documents ('including but not limited to') in relation to the Elevate Proceedings and the First Access Proceedings (referred to together in the extract as 'the Proceedings'):

(a) all letters of engagement or retainer between any solicitors or other legal counsel (including your office, as the solicitors on the record for Quay in the Proceedings);

(b) all written advice(s) provided to Quay by any solicitors or other legal counsel (including your office, Mr Dawson SC and Ms Cairns) in relation to the Proceedings; and

(c) all invoices rendered by your office (and all disbursements) to Quay in relation to the Proceedings, and all documents evidencing payment by Quay of those invoices.

1. For the purpose of these proceedings it is not necessary to detail the contents of the third 6 May 2020 letter from Gadens to HWL relating to shareholders' rights.
2. On 11 May 2020 HWL responded to the 6 May 2020 letters. HWL sought a reasonable opportunity to respond to the 6 May 2020 categories letter. As to the second letter, HWL asserted that the requested documents and communications are the subject of legal professional privilege and on that basis refused access.
3. On 15 May 2020 HWL wrote to Gadens, referring to the 6 May 2020 categories letter and stating that the requests for production of documents were broad and burdensome on Quay; many resources have been consumed attempting to review the requests; Ms Hammond was aware of the impact of COVID-19 on the business operations; Quay continued to provide COVID-19 weekly updates; documents and records within some categories had been provided already and others did not exist; and that Quay was uncertain as to why the request for such documents was urgent; and it was not clear to Quay why Ms Hammond required copies of certain documents and so it sought some background to some requests.
4. On 20 May 2020 Gadens responded to HWL, relevantly asserting that two weeks was sufficient for Quay to provide its complete response, and stating that Ms Hammond required the documents to enable her to perform her functions as a director.
5. On 25 May 2020 HWL wrote to Gadens seeking further time for Quay to respond with respect to the documents, noting the significant time and resources involved in addressing Ms Hammond's list of requests. HWL said:

4. As your client should appreciate, the world is currently in the midst of a global pandemic which has put the management teams of many businesses under significant pressure. These events impose a tremendous burden on management resources and it is unreasonable for your client to impose additional burdens on our client's management team, particularly where the reasons are not clear. For example, we do not understand why your client considers that contracts with influencers from 2017 must be urgently provided when management is working 100 hour weeks to protect the business. To put this in further perspective:

(a) our client's offices in Melbourne and San Francisco are currently closed and its staff have either been furloughed or are working remotely; and

(b) our client's management team is located in California, a state which largely remains in lockdown, given that there are an estimated 100,000 cases of COVID-19 and approximately 3,700 deaths as a result of COVID-19. Your client may not be aware that the situation in California is markedly different from the circumstances Australia is experiencing.

5. Despite the current challenges, our client has continued to provide timely information to all directors (including your client). This includes the provision of weekly board reports prepared by management, a quarterly CEO update and detailed financial reporting via an online data room that your client has been accessing.

6. We trust that your client will understand the extraordinary and unprecedented circumstances faced by our client in light of the global pandemic. In the circumstances, our client is not currently in a position to respond to the request for documents as contained in Your Letter however, a complete response is anticipated to be provided in June 2020.

### These proceedings are commenced

1. Despite Quay's explanation of the difficulties it was facing arising out of the COVID‑19 pandemic and its request for further time, on 28 May 2020 Ms Hammond commenced these proceedings (a claim for relief under s 247A of the *Corporations Act 2001* (Cth) was abandoned).
2. Relevantly, by her originating process in these proceedings Ms Hammond seeks the following:

1. Pursuant to section 290 of the Act:

(a) a declaration that the Plaintiff has a right of access to the financial records of the Defendant at all reasonable times;

(b) an order authorising the Plaintiff and/or her solicitors and accountants to inspect the financial records of the Defendant and to take copies; and

(c) an order that the Defendant by its servants and agents provide all reasonable assistance to the Plaintiff and/or her solicitors and accountants in locating, inspecting and copying the financial records of the Defendant to facilitate the right of access referred to in paragraph 1(a) and the inspection and taking of copies referred to in paragraph 1(b) above.

2. Pursuant to section 1303 of the Act, an order compelling:

(a) the immediate inspection of the books of the Defendant by the Plaintiff and her authorised agents; and

(b) the provision of copies of such books of the Defendant as are requested by the Plaintiff or her authorised agents.

3 Further or alternatively, pursuant to the general law:

(a) a declaration that the Plaintiff has a right of access to the books and records which relate to the affairs of the Defendant;

(b) an order authorising the Plaintiff and/or her solicitors and accountants to inspect the books and records which relate to the affairs of the Defendant and to take copies; and

(c) an order that the Defendant by its servants and agents provide all reasonable assistance to the Plaintiff and/or her solicitors and accountants in locating, inspecting and copying the books and records which relate to the affairs of the Defendant to facilitate the right of access referred to in paragraph 3(a) and the inspection and taking of copies referred to in paragraph 3(b) above.

1. Senior counsel for Ms Hammond referred to the declaration sought in para 3(a) as a 'general access order', distinguishing it from the declaration as to access provided by statute under para 1(a).

### Developments after these proceedings commence but before the hearing

1. On 10 June 2020 HWL provided a partial response to the 6 May 2020 categories letter, providing answers, with respect to items 2, 3, 4 and 5 (no such documents exists); item 6 (schedule attached); item 7 (no records exists); and item 9 (information already provided by weekly COVID-19 weekly updates).
2. HWL also stated:

We continue to seek instructions regarding the documents sought by your client and anticipate to respond to the balance of your client's requests during this month. In the meantime, we note the issues outline in Our Letter with respect to the global pandemic continue to exist and have been further exacerbated by the ongoing civil unrest in San Francisco and other parts of the United States of America. Despite your client's understanding of these circumstances, we note that your client has still not provided any reason why she considers her requests to be so urgent.

1. On 19 June 2020 HWL sent a further letter to Gadens, addressing: item 15 of the categories (evidence and copy D&O policies already provided); item 8 (referring to the list of stores on the website, noting the execution of leases and indicating information on costs had already been provided under the heading 'capital expenditure' in the 2020 budget); item 12 (no taxation or accounting advice was requested of and/or provided by PricewaterhouseCoopers (**PWC**) for the legal costs incurred by Quay in respect of the Elevate Proceedings or First Access Proceedings); item 13 (cash flows provided in COVID-19 weekly updates); and item 16 (no documents).
2. On 23 June 2020 Gadens wrote to HWL, referring to the 'belated' production of documents and contending that such production did not 'quell the necessity' for an order for 'unfettered access to documents', because Ms Hammond did not want to come back to court 'every time there is a dispute about an individual document'.
3. On 30 June 2020 HWL responded to Gadens, addressing the only remaining categories from the 6 May 2020 letter, being: item 1 (the requested contracts would be uploaded to the data room); and item 14 (aged creditors information has been provided in the COVID-19 weekly updates and CEO reports). HWL also noted that in light of the preceding letter from Gadens of 23 June 2020, it appeared that the response was in any event otiose, given the request for unfettered access.
4. Therefore, following provision of the 30 June 2020 letter, from HWL's perspective there was and remained no extant outstanding request for documents that pre‑dated the issue of the proceedings. There was no evidence that Ms Hammond complained about the sufficiency or the adequacy of particular responses (and in this regard Ms Hammond filed an affidavit on 18 August 2020, so post‑dating receipt of the responses). The only complaints were made by way of submissions in these proceedings.
5. In this regard, three matters were raised by senior counsel for Ms Hammond. During closing submissions, senior counsel asserted that there must have been further documents that would fall within the scope of category 8 of the 6 May 2020 categories letter (costs of stores). By the 19 June 2020 letter HWL had informed Gadens that the costs for the existing and new stores were already in Ms Hammond's possession as they were included in the 2020 budget, under the heading 'capital expenditure'. Senior counsel referred to the 2020 budget entry and submitted that there must have been individual figures for stores that were not provided. I have some sympathy for the complaint from senior counsel for Quay that a matter of such specific detail was raised in closing submissions, but in the end I am not persuaded in any event that this difference of views as to the level of detail that was required to respond to the request represents a sound basis upon which to infer that Quay was refusing to provide access to documents.
6. The next item to which senior counsel referred in closing submissions was category 13 (cash flow projections). In this regard Quay's response was that the information was provided in the COVID-19 weekly updates (which were provided until these proceedings commenced). For example, the 22 April 2020 weekly update stated that 'now expect cash to be at [$ redacted] at 30 April, [$ redacted] at 31 May'. Senior counsel submitted that such information comprised a statement of future cash at a particular time, 'but not the projections arrived at to get there'. Again, I am not persuaded that a difference of views as to what may have been required to meet the request represents a sound basis upon which to infer that Quay was refusing to provide access to the documents: nor is it apparent that the type of projection, in a form that senior counsel suggested was required, had in fact been prepared by Quay.
7. The third request said to have been unmet was category 14 ('aged creditors' analysis, and any document or correspondence with creditors which are outside ordinary trading terms'). It was submitted in the written opening submissions that this category of documents had not been supplied. The 30 June 2020 letter stated that the information had been provided in the CEO reports and the COVID-19 weekly updates, citing the following example:

Approximately [$ redacted] of current liabilities are outside of normal payment terms; expect to satisfy those current liabilities which are properly due and payable within the next 3-4 quarters.

1. It is apparent that the response does not address part of the category, being 'any document or correspondence with creditors which are outside ordinary trading terms'. I accept that Quay has not responded to this part of the request, at least on the evidence before me.
2. Regardless of Quay's responses, Ms Hammond's evidence under cross-examination was that she would have issued these proceedings against Quay anyway, even if she had received a complete and adequate answer to the 6 May 2020 categories letter by 11 May 2020.
3. On 1 July 2020 Ms Bricker sent an email to the board, including Ms Hammond, in which Ms Bricker outlined the view of Quay's management as to different options regarding Australian staff and a potential strategic shift to the approach to the business in Australia (**Proposed** **Strategy**) (I am resorting to general language in light of the confidential nature of the information disclosed by the email).
4. On 23 July 2020 Gadens wrote to HWL about the matters raised, seeking information as to Ms Bricker's authority to devise and implement the Proposed Strategy; seeking production of documents relevant to Quay's consideration of the Proposed Strategy; and on the assumption that there may be an effect on Quay's prior wholesale strategy, requiring the Proposed Strategy to be put before the board of Quay.
5. HWL responded to the Gadens letter on 29 July 2020, noting that instructions were being sought as to its content and the documents that had been requested.
6. On 17 August 2020 HWL wrote to Gadens, stating that the matters raised by Ms Hammond about the Proposed Strategy could be put on the agenda for the next board meeting and seeking Ms Hammond's availability for such meeting. HWL attached a copy of a relevant email that had already been provided to the Board. It indicated that there were no formal reports on the subject. It explained the basis of Ms Bricker's authority, stating that the conduct was within Ms Bricker's ordinary role as CEO. HWL suggested that any further questions from Ms Hammond about the Proposed Strategy could be submitted in advance of the proposed board meeting so that they could be incorporated into the presentation. A recent 'summary of options' document dated 31 July 2020 was also provided with the response.

### The access that Ms Hammond seeks

1. By the written submissions filed on her behalf, Ms Hammond asserts that she is not being provided with the most basic information concerning the company, and that the company continues to refuse to provide her with access to its books and records. Ms Hammond asserts that the Court should make an order to 'ensure ongoing access' to the company's books and records 'to avoid the need for the matter to be litigated every time she seeks to enforce her rights'. It was said that Ms Hammond did not want to 'keep coming back to court once a year' to argue about categories of documents and accordingly she sought an order that (in effect) would operate more generally for the future.

### Ms Hammond's purpose for seeking documents generally

1. Ms Hammond was asked why she brought proceedings seeking a general access order, when in the First Access Proceedings she requested categories of documents, Quay had responded to that request and it had been agreed there was nothing further to litigate (see [41]-[42] above). Ms Hammond's response was that she had read Stewart J's findings on the costs order and that his Honour had said access is not confined to just documents. She said the Australian directors should not be ignored if they asked legitimate questions or raised concerns about the business, referring to the email exchanges of January 2020 and February 2020.
2. Ms Hammond appeared to rely on various statements by Stewart J in *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* to the effect that directors had rights to 'information' as an indication that her rights extended to a right to make any request for an answer to any question about Quay's operations and business. On a proper reading of Stewart J's reasons, on what was a decision on costs, and having regard to the authorities to which his Honour referred, I do not consider such references were intended to extend the breadth of the statutory and common law directors' rights of access beyond the established principles relating to access to financial records and other company books and records. Such documents by their nature record information, and that is how, in my view, Stewart J's reference to 'information' is to be understood.
3. Ms Hammond explained the purpose for which the documents in the 6 May 2020 categories letter were sought. Ms Hammond said that the documents in categories 1 to 5 all related to the development and performance of Quay's brand. The documents in categories 6‑14 related to the financial performance of Quay (and Ms Hammond relied upon Mr Boyd's expertise in this regard, relying on the fact that he sought such documents). The documents in categories 15‑16 related to the current directors & officers (**D&O**) insurance policies and premiums. Ms Hammond said she wished to ensure that insurance had been placed and on what terms, having regard to the potential that Quay might have a claim against its (majority) directors. She was also concerned to ascertain whether there existed any deed of access and indemnity between Quay and the directors.

### Ms Hammond's purpose for seeking privileged documents

1. Ms Hammond gave a number of reasons as to why she seeks documents over which Quay asserts legal professional privilege (see documents requested at [69] above in the second 6  May 2020 letter). Ms Hammond said:
   1. she was aware from the non-recurring costs outlined in the Quay 2020 Budget that [$ redacted] was categorised as 'Legal Fees - shareholders'for 2019 and she expected that the final costs incurred by Quay for both proceedings would be substantially higher;
   2. in her position as a director of Quay, she wished to enquire as to 'what steps Quay took' with respect to the committee investigating the [Ms C] allegations;
   3. in her position as a director of Quay she wished to enquire as to what legal advice was provided to Quay in both proceedings and how much money was spent by Quay; and
   4. upon reviewing those documents, she wished to assess what legal rights Quay may have against the majority directors or Elevate in relation to the commencement and maintenance of the Elevate Proceedings.
2. Ms Hammond said further that she wanted to view the actual written advice because that would be relevant to the appropriateness of who 'was fighting the case'; whether Quay should have been involved in the proceedings or whether the dispute was properly to be seen as a shareholders' dispute. But when asked whether her concern was simply about which parties the fight was between, Ms Hammond said:

No, it's about the merit - it's the overall. It shouldn't be a privileged issue, the case is closed. As a director, I should have access to know what went on, who paid …

…

We would like to see information on both cases to see whether … what advice are they given as to their legal stance …

1. It was apparent from her evidence that Ms Hammond considered that the legal costs of the Elevate Proceedings should be expenses of the majority shareholder, and that she wanted to see any advice relevant to that issue, including any invoices, who they were sent to, who paid them, what the directors were told about who should pay the legal bills, and copies of any retainers or agreements with solicitors and counsel.
2. Ms Hammond said that it would be a misappropriation of funds if money was taken from Quay to pay legal fees of the proceedings: the company funds would have been used for a shareholders' fight.
3. Beyond that, Ms Hammond did not enunciate any specific claim that Quay might be able to bring. As senior counsel for Quay said, it appeared that she wanted access to the privileged documents because she wished to 'investigate whether there's something [she] can get the company to do adversely [to] the majority directors'.

### Mr Boyd's evidence

1. In an affidavit filed in May 2020, Mr Boyd referred to his 2017 appointment as a director, and said that he considered it essential that he and Ms Hammond be properly informed about the business of Quay, so that they could have input as to the strategic direction of Quay and make decisions about its business. He said that without sufficient financial information it is difficult to assess the solvency of Quay. He said that he did not consider the information he had received since his appointment in 2017 was sufficient for those purposes.
2. Mr Boyd accepted during the course of the hearing that on various occasions since he had been appointed, he had voted in favour of dividend payments, and that he would not have done so had he not been satisfied as to the solvency of Quay. Mr Boyd accepted that in assessing whether a dividend should be paid, it is necessary to consider whether such payment might materially prejudice the ability of the company to pay its debts, and that involves considering the financial position of the company over a longer period of time than simply the date of the intended dividend payment. Mr Boyd accepted that he voted in favour of dividend payments in each of the years 2017, 2018 and 2019, although he said that he proposed the dividend for the 2018 year (recommended in April 2019) only on the condition that there had been no dilution in the value of the cash division of Quay during the period 1 January 2019 to 31 March 2019. He accepted that he received enough financial information from Quay to assess solvency in order to make or support those dividend proposals.
3. Mr Boyd's qualification as to the dividend approved in April 2019 was based on the absence at that time of financial reports to the preceding month end, that is, to 31 March 2019.
4. Mr Boyd's evidence about dividend recommendations indicated that, contrary to the impression given by his affidavit evidence, over much of the period of his directorship he had been provided with sufficient information to assess Quay's solvency. Mr Boyd accepted that since December 2019 he has been able to access Quay's financial information by access to the data room. He said he has no ongoing concerns about its solvency.
5. In March 2020 Mr Boyd did not vote in favour of approving the draft 2019 audited accounts as final accounts. However, his decision was not based on any question of solvency but on the treatment of legal fees in those accounts. Mr Boyd said that in February 2020 he made contact with Ms [R] of PWC (Quay's auditors) and asked about the treatment of the legal fees in the 2019 accounts. Despite Ms [R's] confirmation that there was sufficient treatment of the legal fees in the accounts, he remains concerned that the fees should not have been treated as an expense of Quay; that they should have been treated as shareholder expenses; and so there may have been a loss of shareholder value if Quay made payments it did not need to make.
6. Mr Boyd confirmed and adopted Ms Hammond's purpose for seeking the categories of documents listed in the 6 May 2020 categories letter. As to categories 6‑14, Mr Boyd said that: head count documents are relevant as he considered that an increase in employee direct costs as a percentage of sales seemed high; lists of current Quay stores and their costs was relevant to assessing the underlying profitability of the stores; the method of calculating any payment of staff bonuses was relevant to ascertaining whether they were properly payable; documents reflecting gross profit margins, cash flow projections and aged creditors analysis were relevant to the financial position of the company; management minutes were relevant to understanding the company's sales discount strategy; and PWC's accounting advice was relevant to the treatment of legal fees.

### The witnesses

1. Much of the relevant evidence was documentary. But before moving to the principles and their application, it is appropriate to say something about the witnesses. As is already apparent, both Ms Hammond and Mr Boyd gave evidence and were cross‑examined. I have referred to an element of exaggeration in Mr Boyd's affidavit evidence that was acknowledged by him under cross‑examination. In general, however, no issues as to his credibility arose.
2. Ms Hammond was inclined to provide strong opinions and conclusions as to her perceived legal rights (and the admissibility of parts of her affidavit evidence was accordingly limited by a ruling under s 136 of the *Evidence Act 1995* (Cth)), but she otherwise gave her evidence in a forthright manner. As with Mr Boyd, no real issue as to credibility arose. Ms Hammond was very closely involved in Quay prior to the introduction of Elevate, and the impression I gained was that she may have had difficulty in adapting to the dilution in her control and day to day involvement in the company. She rightly feels very proud of the business that Quay became under her stewardship, and retains a sense of ownership that perhaps colours her view of the level of detail and information to which she should be entitled, and her view of the manner in which management should continue to report to her.
3. The somewhat terse communications evidence the tension between Ms Hammond and Quay's management and majority directors. Quay gave evidence by its solicitors, and there was no cross-examination. There is no doubt that, based on the documentary evidence, Ms Hammond received some perfunctory treatment from Quay that at times provoked similarly toned responses from her. Some of Quay's early communications also came across as disrespectful. But perfunctory and disrespectful conduct alone does not comprise a breach of legal obligations. Whether or not it can be inferred that Quay has a practice or pattern of refusing to comply with its obligations is the next issue to be addressed.

## Access to company documents

### Preliminary

1. The discussion below addressing the rights of access to documents of a company does not address the potential for privileged company documents to be withheld from a current director. This will be dealt with separately.

### Introduction - avenues for production

1. There are three avenues by which directors (in that capacity) may access financial and other documents in the possession of the company about its affairs: the statutory right conferred by s 290 of the *Corporations Act* to access financial records at all reasonable times; the statutory right under s 198F of the *Corporations Act* to inspect books for the purposes of legal proceedings; and a director's general law right of access to books and records. This case concerns the first and third avenues. At the outset, it must be said that Quay (in these proceedings) did not deny that the authorities establish that a director has a power to inspect documents, require their production and to copy them. Despite that agreement, some analysis of the authorities is required in order to address whether or not relief should be granted in this case.

### Statutory right of access - s 290

1. Section 290 of the *Corporations Act* provides:

**Director access**

*Personal access*

(1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

*Court order for inspection on director's behalf*

(2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.

(3) A person authorised to inspect records may make copies of the records unless the Court orders otherwise.

(4) The Court may make any other orders it consider appropriate, including either or both of the following:

(a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection;

(b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

1. 'Financial records' are widely defined in s 9 of the *Corporations Act* to include invoices, receipts, payment orders and vouchers, documents of prime entry and working papers needed to explain financial statements.
2. The obligation on the company to keep financial records is set out in s 286(1) of the *Corporations Act*. It provides:

**Obligation to keep financial records**

(1) A company, registered scheme or disclosing entity must keep written financial records that:

(a) correctly record and explain its transactions and financial position and performance; and

(b) would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines ***financial records***.

1. Section 1303 of the *Corporations Act*, upon which Ms Hammond relies for the purpose of relief, provides a further means to compel compliance with s 290 by requiring inspection of a particular book. It provides:

**Court may compel compliance**

If any person in contravention of this Act refuses to permit the inspection of any book or to supply a copy of any book, the Court may by order compel an immediate inspection of the book or order the copy to be supplied.

1. In the context of a costs decision, but addressing a director's statutory right of access to financial records, Austin J observed in *Fox v Gadsden Pty Ltd* [2003] NSWSC 748 that directors cannot be expected to carry out any of their substantial responsibilities, including their fiduciary duties and their duties to attend to the solvency of the company and its general management, unless they can be sure of having full and unfettered access to the documents of the company (at [23]). It is not necessary for a director to itemise and request particular documents by a particular name: 'What should happen, when documents are demanded by a director, is that the gate is opened wide and the director has full and unfettered access at all reasonable times' (at [23]).
2. In *Hawksford v Hawksford* [2005] NSWSC 1316, Palmer J said:

[7] The Applicant is clearly entitled to access and to inspect the records of the companies, but in a way that is reasonable in all of the circumstances, and also bearing in mind the context in which the access and inspection is being carried out.

1. Whilst s 290 provides for an absolute right of inspection, because an applicant will invariably seek declaratory relief or an injunction, issues of discretion will in any event arise. As Owen J stated in *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 WAR 496 (although obiter), 'the mere fact that reliance is placed on a mandatory statutory obligation does not necessarily deprive a court of all discretions when called upon to grant equitable relief' (at 507).
2. Further, in *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150, Mahon J considered the operation of s 117 of the *Companies Act* (NZ), and held that it created a statutory right of inspection of books (at 163). Mahon J stated that the right was unqualified, 'but that where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears' (at 163). Mahon J explained (at 164‑165) that, speaking strictly, the right of access was not a 'right' but a 'power' to inspect corporate records as and when necessary. However, if the 'power' was to be exercised for a corrupt purpose, Mahon J was of the view that such conduct 'would be analogous to that proscribed in equity jurisdiction as being a fraud upon a power'. Mahon J's approach was endorsed by Finkelstein J with respect to s 290 of the *Corporations Act* in *Lei, in the matter of Tai-Ao Aluminium (Australia) Pty Ltd v Cordukes* [2004] FCA 1488 at [2] (where access was denied because it was apparent the director would only remain in office for a matter of hours and had no need to perform further duties).

### General law right of access

1. The principles derived from common law are important because the statutory right of access to books and records does not extend significantly beyond accounting records: *Re Geneva Finance* at 507. The general law right of access to documents is not limited to financial information and so has a broader ambit. For this reason it is significant to Ms Hammond's case.
2. Directors' duties to a company carry with them powers and discretions which the directors must exercise for the benefit of the company and for the purpose for which they were conferred, rather than for 'some private advantage or purpose foreign to the power': *Mills v Mills* (1938) 60 CLR 150 at 185 (Dixon J); and *Re Geneva Finance* at 504.
3. The onus of establishing that a power or discretion has been used for an improper purpose lies on the person who asserts it: *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199 at 219 (Isaacs J).
4. A right of access to books of a company was recognised at common law prior to the introduction of statutory rights of inspection conferred on directors. In *Burn v London & South Wales Coal Co* (1890) 7 TLR 118 the Court held that a director had a right to inspect and take copies of company documents in the custody of the company's solicitors and that the right could be exercised at any time, and not only at formal meetings. Books and records are a prime, and sometimes the only, source of information as to the actions and state of affairs of a company. It follows that unless a director has access to these sources of information, they will be inhibited in the performance of their duties to the company: *Re Geneva Finance* at 504.
5. However, there may be scope for exercise of the right to be restrained. In *Edman v Ross* (1922) 22 SR (NSW) 351 the Court considered a request by a person who was both a director and a shareholder to inspect documents. He claimed an entitlement in both capacities, and wished to have the documents inspected by an agent. The company resisted the claim on the basis that the director had indicated an intention to become a competitor by going into business on his own account. The Court rejected the claim that the applicant had authority to inspect in his capacity as a shareholder but held that, as a director, he was so entitled as of right and could exercise his authority through an agent. Street CJ in Eq said the following (at 361):

The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the Court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that its exercise is, generally speaking, not a matter of discretion with the Court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the Court must assume that he will exercise it for the benefit of his company.

1. There is a residual discretion as to whether to order inspection. In *Conway v Petronius Clothing Co Ltd* [1978] 1 WLR 72; [1978] 1 All ER 185, Slade J cited the extract from *Edman v Ross* referred to above, and concluded that the common law right left the court with a residue of discretion as to whether or not to order inspection, and considered that the court would restrain the person in the exercise of the right if satisfied affirmatively that the intention was to abuse the confidence reposed in the person as director and materially to injure the company (at 89‑90, 201). That position has been accepted in other authorities, including by Owen J in *Re Geneva Finance* at 505‑506 and by Beaumont J in *Molomby v* *Whitehead & Australian Broadcasting Corporation* (1985) 7 FCR 541 at 551. In *Oswal v Burrup Holdings Limited* [2011] FCA 609, Barker J said that such residual discretion 'does not connote a discretion at large whereby the Court determines the appropriateness of the request for information' (at [8] - affirmed on appeal in *Oswal v Burrup Fertilisers Pty Ltd (Receivers and Managers Appointed)* [2013] FCAFC 9).
2. That there is a residual discretion is also consistent with the earlier authority of *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN 307 (Street J). The case concerned an application by Mr Bennetts, a member of the Board of Fire Commissioners, for a declaration permitting access to counsel's advice to the Board regarding an appeal from a decision of the Commissioner of the Industrial Commission. The finance committee of the Board (constituted by three members not comprising Mr Bennetts) had resolved to bring an appeal against the Commissioner's decision on the basis of the advice. The President of the Board said he would provide the advice if Mr Bennetts undertook that its terms would not be passed to the union. Mr Bennetts declined to give an undertaking. Mr Bennetts disclosed under cross‑examination that he wanted to see the advice so that he could disclose it to union members who had elected him to the Board, and to whom he felt he had an obligation as their representative. However, the union members would be the Board's opponent in the appeal. Having been referred by way of analogy to *Edman v Ross*, Street J said that this was an example where there was the necessary clear evidence that supported a refusal to grant a declaration permitting access to the legal opinion and injunctive relief. Mr Bennetts' overriding duty was to the Board and it was not to be compromised, despite the difficult position of conflict in which Mr Bennetts found himself. This decision was cited with approval by Beaumont J in *Molomby v Whitehead* at 551.
3. It may be that undertakings as to limitations on the manner of inspection might be proffered by a person seeking access that might provide a mechanism for curing residual difficulties which might otherwise cause the discretion to be exercised against a director's right of access: *Re Geneva Finance* at 515.
4. A director is not required to furnish reasons before exercising the right of access to documents: *Re Geneva Finance* at 507; and *Molomby v Whitehead* at 554.
5. A right to access documents carries with it a right to take copies and a right to engage agents to carry out the inspection: *Re Geneva Finance* at 507, 515.
6. There is authority for the view that a director's common law right to inspect documents does not compel the company to create documents that do not exist, and does not oblige the company to provide a narrative account of the events which the documents record: *Kang v Kang* [2013] EWHC 2828 (Ch) at [14], [16] (Norris J).
7. Against the backdrop of those authorities, it is necessary to consider the terms of the relief sought by Ms Hammond, as set out at [76] above.

### Declaratory relief

1. Senior counsel for Ms Hammond highlighted in his opening that what is sought by these proceedings are declarations and orders that permit the general access to documents that is recognised at common law, and relied on two authorities in support of his submission that there is precedent for the Court to grant such relief.
2. The first authority referred to is *Satz v ACN 069 808 957* [2009] NSWSC 1459 (***Satz (No 1)***), an extempore decision of Austin J. It involved an application for leave to commence proceedings against a company in administration to seek an order for inspection under s 247A of the *Corporations Act* (a member of a company or scheme may apply to inspect books). Importantly, the applicant member of the company sought inspection of 'certain books of the company' (at [2]). According to communications between the applicant's solicitor and the administrator, the administrator was not concerned by the application and had told the member that he 'could have access to the documents' and queried why a court order was needed. He also said it was 'fair enough' that the member have access to back-up tapes. So, there was no challenge to the orders or contradictor. Austin J said the following:

[6] Having reviewed the affidavit, and in the absence of any challenge, I am satisfied, for the purpose of 247A(1), that the plaintiff is acting in good faith and that inspection is to be made for a proper purpose. The plaintiff wishes, in particular, to have access to some back-up tapes which will either confirm that certain documents not yet seen are in existence or make it clear that the documents do not exist. In all the circumstances, I shall make an order under s 247A.

[7] The orders I shall make are:

(1) The plaintiff has leave to begin and continue these proceedings.

(2) The Court directs the defendant by its administrators to permit the plaintiff to inspect and make copies of the books of the defendant including but not limited to:

(a) hard copy records;

(b) electronic records and back up tapes;

(c) books within the possession of Johnson Winter and Slattery.

1. An application to set aside the decision on the grounds of non-disclosure was refused by Barrett J: *Satz v ACN 069 808 957* [2010] NSWSC 365 (***Satz (No 2)***). It was not necessary for the merits of the earlier decision to be considered (at [93], [95]).
2. The second authority upon which senior counsel relied is *On Q Group Ltd v McDougall* [2007] VSC 184 (Hargrave J), which concerned an application for access to financial records under s 290 of the *Corporations Act*. In that case a request for access to nine specific categories of documents had been formally rejected and a dispute had therefore crystallised. Accountants, on the applicant's behalf, sought to inspect the particular documents. Hargrave J said the following:

[26] … Nine categories of documents were specified. It is these nine categories of documents which form the subject of Mr McDougall's application for personal access by him and for an order authorising access by accountants nominated by him.

…

[31] Second, although he was not required to do so, Mr McDougall has provided some reasons for his request to have access to the financial records of the company. It is impossible for me to resolve, on an application such as this, whether the concerns expressed by Mr McDougall are soundly based or not. However, it does not matter. A director of a public company has expressed concerns about the integrity of the accounts and accounting practices of the company. Having regard to his shareholding, Mr McDougall is likely to remain a director of the company for the foreseeable future. No good reason has been shown as to why he should be denied access to the nine categories of documents referred to in the Ernst & Young letter or, indeed, to any of the financial records of the company.

[32] I will order that the company provide Mr McDougall with unfettered personal access to all of the financial records of the company.

…

[37] I will hear the parties as to the precise form of orders to be made, in particular, as to the nature of appropriate restrictions to be ordered under sub-s. 290(4) of the *Corporations Act*.

1. I do not consider either decision relied upon provides compelling authority for the making of the general orders sought by Ms Hammond, having regard to the circumstances of this case. In *Satz (No 1)*, there was no contradictor and the documents sought, including the back‑up tapes, had been identified. It was not necessary for Austin J to descend into any debate about the scope of relief.
2. *McDougall* relates only to access to financial records under s 290, and the final orders made are not apparent. The reasons do not address any debate about the scope of the relief. Even having regard to what appears at [32] of the reasons, it is to be recalled that the order was made in the face of an express refusal to provide access to particular identified documents. That is not the present scenario, where there is agreement by Quay that Ms Hammond is entitled to access financial records under s 290, subject to any privilege claims.
3. It must be noted that Ms Hammond does not seek a declaration that any identified conduct comprised a breach of Quay's obligations to permit access to Ms Hammond: see, for example, *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624; and *Cruse v Multiplex Limited* [2008] FCAFC 179; (2008) 172 FCR 279. Nor is it clear how s 1303, which is directed at inspection of particular books or copies, would assist Ms Hammond in those circumstances, and it was not developed in submissions. Rather, Ms Hammond seeks a declaration that she may rely upon in the future, so as to facilitate ongoing access without being required to seek further orders from the court if there is a refusal of access, and so that she is not required to rely on Quay's cooperation (to paraphrase the submission made on her behalf).
4. Quay points to the difficulties with the manner in which the claim for relief has been framed, pointing to the lack of assistance provided by *Satz (No 1)* or *McDougall* but, more particularly, pointing to the difficulties having regard to the relevant principles.
5. A declaratory judgment is 'a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs': Lord Zamir and Woolf J, *Zamir & Woolf's The Declaratory Judgment* (4th ed, Sweet & Maxwell, 2011) at 1; cited in *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134 at [58]. The effect of a declaration is not to create rights but to merely indicate what they have always been: *Macks v Viscariello* [2017] SASCFC 172; (2017) 130 SASR 1 at [660].
6. The principles with respect to the grant of declaratory relief, and this Court's jurisdiction to make declarations, were recently extensively analysed and addressed by the Full Court in *Clarence City Council* at [57]‑[75]. The following summary of the factors that it is said must be present before there can be a declaratory order, from Young P AO, *Declaratory Orders* (2nd ed, Butterworths, 1984), is also useful and has been cited in, relevantly, *Macks* at [677] and *Clarence City Council* at [68]:

1. There must exist controversy between the parties …;

2. The proceedings must involve a 'right' …;

3. The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi' …;

4. The controversy must be subject to the court's jurisdiction both within the court's own charter and also within the jurisdiction so far as private international law rules are concerned …;

5. The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim …;

6. The issue must be ripe … It must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

1. The factors that Quay says are of particular relevance, and are absent in this case, are the need for substantial controversy and the utility of any relief. As to the first, it submits that there must be a 'substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality' to warrant the declarations: *Re Trade Practices Act 1974* (1978) 19 ALR 191 at 208 (Brennan J), citing *Maryland Casualty Co v Pacific Coal & Oil Co* (1941)312 US 270 at 273.
2. As to the second, Quay notes that utility is an important relevant factor: *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43 at 53 (Street CJ). There must be a purpose or utility in the declaratory relief sought, a controversy that the declaration would quell: *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122 at 137 (Young J); and *Marshin Holdings Pty Ltd v Attorney General of New South Wales* [2013] NSWSC 326 at [20] (White J). The matter cannot be simply theoretical or hypothetical.
3. To those authorities the following may usefully be added:
   1. *University of New South Wales v Moorhouse* (1975) 133 CLR 1 - an applicant may not have a sufficient status to seek relief where it is claimed in circumstances that have not occurred and might never happen;
   2. *Gray v Sirtex Medical Ltd formerly known as Paragon Medical Ltd* [2009] WASC 126 (Le Miere J) - where a controversy that gave rise to the proceedings is, as a result of subsequent events, no longer in dispute between the parties, a court may nonetheless make the declaration applied for if it will retain some value or benefit for the plaintiff:

[59] The court may exercise its discretion to refuse relief if the result of the proceedings will be of little practical value: Young op cit [703]. Utility does not mean that it is imperative that the court give the plaintiff relief. It is sufficient that the declaration is of some value or benefit to the plaintiff. The court may make a declaration when it will serve a useful purpose in settling the legal question at issue and when it will terminate any uncertainty, insecurity and controversy giving rise to the proceeding.

* 1. *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99 at [3], citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581‑582 - declarations should not be made where they will produce no foreseeable consequences for the parties; see also to the same effect *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102 (S) at [8] (Edelman J); and
  2. *Warramunda Village Inc v Pryde* [2001] FCA 61; (2001) 105 FCR 437, where the Full Court said:

[8] … The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows.

### Consideration - any basis for the relief sought

1. The starting point in this case is that it is not in issue that Ms Hammond, as a director, has a statutory right of access to the financial records of Quay and a general law right to access the books and records of Quay at all reasonable times. Quay accepts that is the position at law.
2. Whilst Ms Hammond seeks by this application declarations to the effect that she has those rights, there is no real contention to the contrary. Quay does not cavil with the existence of such rights or powers. Nor does Quay suggest, leaving aside the separate question of privilege, that there is any improper purpose on the part of Ms Hammond in seeking the documents she has sought. I note for completeness that Quay contended that there are real reasons to question the purpose for the 6 May 2020 categories letter, having regard to Ms Hammond's evidence that proceedings were to be issued regardless, and submitted that there may be reasons to suspect there was an improper purpose behind it, but says that because the letter has been answered, Quay has no need to explain any non-production, so the question as to improper purpose does not relevantly arise for present purposes. For completeness, I add that Mr Boyd's evidence supported the view that access to the non-legal documents requested in the 6 May 2020 categories letter was not for any improper purpose (see [107] above).
3. Therefore, acknowledging that privilege will be dealt with separately below, the live issue between the parties distils to whether or not Ms Hammond has established by the evidence a basis for the grant of relief.
4. Having considered the evidence, I am not persuaded that declaratory relief should be granted or that the orders as proposed should be made. I am not persuaded that there is any utility in granting such relief.
5. To start with, Ms Hammond seeks the declaratory order by way of a sword to be utilised in the future if she perceives that Quay has not responded to a request for immediate access to documents, so that she does not have to return to Court. So much was clear from her evidence.
6. It cannot be said that the relief sought would give Ms Hammond the comfort as to limiting future litigation that she seeks. It cannot be said that disputes between the parties would be quelled. The potential subsists for litigation, even if a declaration in the terms sought were made; for example, litigation as to its scope and enforceability; as to whether there is any reason for access to particular documents to be excluded; as to the reasonableness of any time stipulation for access; and as to the manner of inspection being reasonable in the circumstances.
7. However, that subsisting potential for dispute is not of itself determinative in this case. It is necessary to consider whether there is any basis upon which such an order should responsibly be made in the circumstances of this case.
8. In my view, there is insufficient evidence from which I can properly draw an inference that Quay will not comply with its obligations to provide access to documents and financial records in a reasonable period when requested going forward. I have formed this view taking into account a number of matters.
9. First, whilst it is fair to say that there is some evidence that Quay did not recognise the scope of the directors' access rights at the time of the First Access Proceedings, it must by now have been disabused of any misapprehension. For example, in HWL's letter to Gadens of 15 May 2020, a request was made that the directors explain why they needed certain financial documents. As is clear from the authorities (see [129] above), directors do not need to provide reasons, particularly where there is no suggestion that documents are to be used for an improper purpose. So much was accepted by senior counsel for Quay in closing submissions in reply. Further, to the extent that Quay may have perceived through the majority directors that it was only necessary for it to respond to a finite list of documents at a particular point in time, it now has clear guidance by way of the statement to the contrary in Stewart J's costs reasons in *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* to the effect that directors are entitled to continue to ask for documents (at [12]‑[13]).
10. In addition, Quay made a number of concessions in these proceedings: it accepted that directors have the power at law to access, inspect and take copies of documents, and it did not claim that Ms Hammond had an improper purpose for seeking access to the non‑legal documents.
11. Therefore, I do not infer from the fact that the First Access Proceedings were brought that Quay has any tendency or future intention to deliberately or wrongfully withhold access to documents that might properly be requested by the directors.
12. Second, turning then to circumstances after December 2019, it is apparent that from February 2020 the data room contained a significant amount of relevant documentation. Ms Hammond's second affidavit filed in the proceedings referred to a number of financial documents that she had been able to access and which permitted her, for example, to reproduce different aspects of the 2020 budget, including the mix of online, wholesale and net sales in the various regions in which Quay sold its products.
13. Third, Mr Boyd accepted that since December 2019 he has been able to access Quay's financial information by access to the data room. Leaving aside the question of access to documents relating to legal fees, the overall effect of Mr Boyd's evidence was that he had been able to access the documents he required post December 2019, and he accepted (quite properly) that the concerns he expressed in his affidavit were somewhat exaggerated.
14. Fourth, in considering the circumstances from December 2019, it is artificial to only view Quay's conduct. Ms Hammond's own conduct, to some extent based on a level of misapprehension as to her rights, no doubt had some impact on Quay's conduct.
15. It was apparent from Ms Hammond's evidence during the hearing that she held the belief during this period that she had a right, as a non‑executive director, to ask questions of either management or the majority directors and have them answered, and that such right could be enforced. For example, Ms Hammond was asked during cross‑examination about the company's proposal that, in light of the number of questions being received, the company might collate those questions and put in place a structure to have them answered. Ms Hammond's response was that such an approach was not reasonable, particularly in light of COVID-19, and that if she had a question about the company's strategy, she should receive answers, particularly having regard to the fact that she and Mr Boyd were 'sitting in a totally different country'.
16. As the correspondence disclosed, after the resolution of the First Access Proceedings, Ms Hammond continued to seek information from Quay. It was her view that she had not received information in a manner which she had anticipated would occur. However, viewed objectively, up until 6 May 2020, the various emails from Ms Hammond addressed to Ms Bricker or the majority directors requested information (not documents); they requested opportunities to discuss or obtain answers to various questions; or they requested the production of documents that it appeared were not being generated and did not exist (see [48] above). Further, it is not to be assumed that new management and a new board will require company information and reports to be collated or recorded in the same manner as in previous years. It does not follow from the absence of the provision of reports to the board in the same format as may have occurred previously that documents have been withheld.
17. Ms Hammond accepted that the letter from Gadens to HWL of 27 February 2020 was an attempt to enforce her rights (as she understood them to be) by seeking a written response to the many questions that had been asked and anticipating that proceedings would be instituted by Ms Hammond as early as March 2020. Ms Hammond said she considered that the company would also be obliged to answer any further questions that arose out of any response. Ms Hammond said she did not recall why the proceedings were not instituted until May 2020.
18. It was clear from Ms Hammond's evidence that she decided to issue proceedings as a result of the absence of response to those emails of January 2020 and February 2020. It was that failure that she relied upon as a development that distinguished the position from that in December 2019, a time at which Ms Hammond agreed there were no other outstanding issues to be litigated.
19. I accept that there was some delay by Ms Bricker or the majority directors in ensuring that there was a response to Ms Hammond and Mr Boyd in January and February 2020. I take into account that there were five communications made over a two week period. Ms Hammond's 23 January 2020 email sought information rather than existing documents. Mr Boyd's 7 February 2020 email was broad-ranging and asked many questions. The first letter from Gadens imposed a three day turn around in circumstances where there was no apparent urgency, based on Ms Hammond's evidence. I accept that Ms Hammond was not treated with the courtesy she deserved in that period - it would not have been difficult for the recipients of her emails to at least acknowledge receipt and to provide a short email holding response or other explanation. However, HWL did respond to the emails on 3 March 2020, indicating that to the extent the requests included requests for documents, they would be uploaded to the data room.
20. To my mind, the communications and responses during January 2020 and February 2020, and the following period, reflect an unhappy and strained relationship between two opposing sides who, by that time, had both instituted litigation against each other and had subsisting litigation between them (the Elevate Proceedings was not resolved until April 2020). Quay's answers to the chain of requests do not establish that it was denying its obligations to provide access to documents or was deliberately refusing to provide documents. The involvement of lawyers, and short periods of delay, was perhaps to be expected. The delay in providing the requested documents (rather than answering the questions), although not inordinate, is regrettable, but does not in the circumstances indicate that there was a pattern of non-compliance with requests for financial records or documents.
21. Fifth, despite the tension between the parties, it is relevant to note that the relationship between the directors was not completely dysfunctional (to adopt the phrase used by senior counsel for Ms Hammond). For example, Ms Hammond considered that she was entitled to ask for a weekly telephone call in order to be updated by management. Despite holding that belief, the parties, including Ms Hammond, were able to agree that the COVID-19 weekly updates would be provided.
22. Sixth, the fact that there was a board meeting in April 2020 at the time of the elevation of the pandemic, the fact that Quay agreed to generate and provide COVID-19 weekly updates (and did so until these proceedings commenced) and the fact that on 15 April 2020 Ms Bricker provided information to the board members about the strategy to manage the pandemic, all suggest that Quay was seeking to keep its board informed of current events in a challenging period.
23. Seventh, turning specifically to the 6 May 2020 categories letter, from Ms Hammond's perspective, whether or not the company responded to the 6 May 2020 categories letter was not relevant to the decision to commence proceedings. Ms Hammond accepted that a complete and adequate answer to that letter would not have avoided the commencement of litigation.
24. As it happens, Quay responded to the requests in the 6 May 2020 categories letter, as set out above. HWL by its letter of 30 June 2020 asserted that the requests made in that letter had been responded to in full, and there was no evidence that anything was said to HWL or Quay at the time that sought to disabuse Quay of that understanding, other than by way of submissions in these proceedings.
25. I have found that one category of documents was not answered by the correspondence: see [87] above (documents or correspondence with creditors which are outside ordinary trading terms). However, I do not consider that the one concrete example of a failure to respond is, in all of the circumstances, sufficient to establish any pattern of non-compliance or sufficient to justify the relief sought. Nor do I consider other examples referred to by Ms Hammond were compelling: see [84]‑[85] above.
26. Eighth, and also relating to the 6 May 2020 categories letter, Ms Hammond was unable to explain during cross‑examination why it was that she required answers urgently to her numerous requests set out in that letter, some of which encompassed a considerable period of time, and particularly having regard to the other events unfolding in the United States at the time relating to the COVID‑19 pandemic and protests (as referred to in the HWL letter of 10 June 2020).
27. The 6 May 2020 categories letter was very detailed (and sought explanations about the documents akin to a request for discovery and answers to interrogatories). It sought responses at a time that due to COVID‑19, the Melbourne and San Francisco offices were closed; but regardless, 'many resources' were deployed to answer it. Quay did not suggest it would not comply: it informed Ms Hammond that in the particular circumstances, it needed until the end of June 2020 to do so. It responded by the end of June 2020, as it had anticipated. In the meantime (according to the 25 May 2020 HWL letter) it continued to provide COVID‑19 weekly updates, a CEO report and other financial information via the data room.
28. Even the authority on which Ms Hammond placed great weight (*Fox v Gadsden*) speaks of access at 'all reasonable times'. *Hawksford* speaks of access that is 'reasonable in all of the circumstances, and also bearing in mind the context in which the access and inspection is being carried out'. I accept that Quay was obliged to provide access to requested documents as soon as was reasonably practicable, without delay and without obfuscation. However, facilitating speedy access in the case of a small company with limited documentary records might be quite different to doing so in the case of a large-scale, international business with records kept at various levels of management and with internal hierarchies of access and confidentiality, particularly if access is sought to a very broad range of documents, let alone to all documents.
29. Ninth, it is regrettable that Quay initially chose to provide access to Ms Hammond to the data room which was in 'read only' format. No malevolent reason for that course was revealed. However, it was clearly a cumbersome and ill thought out restriction. It should have been remedied more quickly than it was. However, access was not denied.
30. Tenth, as to further requests for information in July 2020 and August 2020 about strategic matters, the communications on behalf of Quay suggest requests for documents were met (to the extent they existed) and a board meeting was to be scheduled for further discussions: nothing in these communications points to the withholding of access.
31. Eleventh, to the extent access was denied by Quay on the basis of legal professional privilege, having regard to the complexity of that issue, such denial should not be seen as indicative of a more general predisposition to deny access to documents.
32. Having regard to all of those matters, I am not satisfied that there are clear, unanswered requests for access to documents, nor sufficient other evidence, from which to draw an inference that Quay, by its majority directors or CEO, has any continuing intention to refuse to permit access to company documents to Ms Hammond, such that any general access declaration as sought should be granted. In coming to this view, although I have separated some of the events, I have also assessed the overall effect of the evidence. I have accepted that there may have been a limited number of documents that may have fallen within the scope of the document requests that were not provided by the time of the hearing. However, against the broader backdrop I have addressed, and absent a request for an order or declaration as to a breach relating to any specific documents, I do not consider that the non‑production of any such documents viewed in all the circumstances, is sufficiently probative or of sufficient force to ground the inference the Court is requested to draw.
33. The declaratory relief sought, in effect, seeks to restate the directors' rights at law, a position that Quay and its majority directors now accept, even if they did not do so before. I see no utility in making a general declaration of rights in those circumstances. It follows that I would not make inspection orders as sought: there is no real controversy between the parties as to the existence of such powers (as against the breadth).
34. For those reasons I decline to grant the relief sought in the originating process.
35. I should add that whilst not referred to in the originating process, in her submissions Ms Hammond suggested that the Court should make the declaration as to general access, and 'should also make orders that facilitate such access'. As I have declined to make the declaration, it follows that it is not appropriate to make access orders of any general nature. However, I will address the submission. It was said that general access could be facilitated by an order granting Ms Hammond access to Quay's electronic recording system known as NetSuite, which it was said contained all of Quay's electronic records including accounting information (referred to as an enterprise resource planning program). There was evidence from Ms Hammond's solicitor, Kier Svendsen, that he had been told by Ms Hammond that she had access to that system when she was an employee, but had not had access since she resigned (despite request); that she had been told in January 2018 that no director (apart from the chairman) was to have access to such system; and that correspondence from Quay in September 2017 was to the effect that Quay did not consider any directors needed access to the system for any of them to fulfil their duties as directors. Mr Svendsen's evidence was that Ms Hammond believes (but cannot be sure) that Quay continues to operate such an electronic program.
36. Ms Hammond gave no evidence about the program, or information stored in it that she was able to and needed access to in the past. To the extent that it continues to exist (and I am prepared to assume that a company the size of Quay would make use of electronic programs), then it apparently contains accounting information. Quay is obliged to provide access to all financial records, as already discussed. Quay claims to be doing that already, primarily through the data room. Provided access to accounting information is being provided by access to the data room or separately upon reasonable request, then it is not apparent why Quay should be obliged to duplicate such access.
37. However, the greater concern in making an order that entitles Ms Hammond to have access to such a program on the basis of very limited evidence is that it would seem to go beyond what may be required in order for Quay to provide the necessary access to a director to financial records and documents. Such access may compromise aspects of the company's operations. Ms Hammond apparently seeks complete access: I do not know whether any issues of confidentiality, privacy, third party rights, privilege or otherwise might arise from such unilateral open access. No parameters for or monitoring of access were suggested to address such obvious matters. It is not for the Court to speculate as to how such access might operate in practice. Going forward, it is entirely open to the parties to come to terms as to the reasonable manner in which ready access to financial accounts and records might be maintained. It might be that access to certain electronic programs might achieve that end. However, on the limited evidence available to the Court, I would not make an order permitting Ms Hammond to have apparently unrestricted access at any time, without any prior request or notice to Quay, to all electronic records of the company.

## Access to privileged company documents

### The public interest in recognising legal professional privilege

1. It is trite law that legal professional privilege may take two forms - advice privilege or litigation privilege. Legal advice privilege covers communications between a lawyer in their professional capacity and the client if the communications are confidential and for the dominant purpose of seeking or giving legal advice. Litigation privilege covers confidential communications made after litigation is commenced or contemplated, between a lawyer and their client or third parties for the dominant purpose of such litigation, and includes seeking or giving advice in relation to it and obtaining information for the purposes of the litigation (and see generally s 117 and s 118 *Evidence Act 1995* (Cth)).
2. The nature of the privilege was confirmed by the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; (2019) 265 CLR 646 as follows:

[21] Legal professional privilege has been described as a right which is fundamental to persons and to our legal system. It has also been described as 'a practical guarantee of fundamental, constitutional or human rights'. Such descriptions point up the importance of the privilege. They serve to show that it is not merely an aspect of curial procedure or a mere rule of evidence but a substantive right founded upon a matter of public interest. The same distinction has been drawn in New Zealand and the United Kingdom.

[22] What cannot be discerned from these cases is that the 'right' spoken of in connection with the privilege is an actionable right. If one asks what this 'right' gives to a person, the answer could be stated as 'a right to resist the compulsory disclosure of information' or 'the right to decline to disclose or to allow to be disclosed the confidential communication or document in question', as the Privy Counciland the House of Lords respectively have held. So understood it is a freedom from the exercise of legal power or control, which is to say an immunity, and that is what *Daniels Corporation* held its true character to be.

[23] In *Daniels Corporation* Gleeson CJ, Gaudron, Gummow and Hayne JJ, having observed that it is now settled that legal professional privilege is a rule of substantive law and not merely a rule of evidence, made the statement referred to earlier in these reasons that:

'It is an important common law right or, perhaps more accurately, an important common law immunity.'

[24] McHugh Jlikewise described it as 'a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters' between lawyers and clients.

(footnotes omitted)

1. The High Court, having referred to *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543, *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, and *Carter v The Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121, continued:

[26] The statements in *Daniels Corporation* accord with what Gummow J had said in *Propend*. His Honour described legal professional privilege as 'a bar to compulsory process for the obtaining of evidence'. In his Honour's view, the privilege is 'not to be characterised as a rule of law conferring individual rights, breach of which gives rise to an action on the case for damages, or an apprehended or continued breach of which may be restrained by injunction'. And they accord with the view expressed by Brennan J in *Carter*, that the justification for the privilege is not to be found in the enforcement of some private right, but rather in the public interest.

(footnotes omitted)

1. The public interest referred to in that paragraph was described in *Glencore International AG* as the enhancement of the administration of justice by facilitating the representation of clients by legal advisers (citing *Grant v Downs* (1976) 135 CLR 674 at 685), a public interest that is paramount to the more general public interest which requires the production of evidence for the purpose of litigation (at [29]).
2. The High Court also emphasised the importance of the confidentiality of legal advice in *Attorney‑General (NT) v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ):

Legal professional privilege is an ancient doctrine which has assumed a life of its own. Succinctly stated, the privilege protects from disclosure 'communications made confidentially between a client and his legal adviser for the purpose of obtaining or giving legal advice or assistance': *Reg. v Bell; Ex Parte Lees*, per Gibbs J. The raison d'être of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client. The privilege is based on:

'…the need of laymen for professional assistance in the protection, enforcement or creation of their legal rights. They should have the benefit of that assistance, free of any restraint which fear of the disclosure of their communications with those advisers would impose' (*Reg. v Bell* per Stephen J.)

### Rights of access and abrogation of privilege

1. The breadth of a director's right of access is apparent. Generally, that right of access will include access to privileged information of the company, but not always.
2. I do not consider the terms of s 290 abrogate a claim to legal professional privilege. In *Hawksford*, Palmer J said:

[15] … As a general rule, I would think it unlikely that the Court would permit a director who is engaged directly in litigation against a company to have access under CA s 290 to documents otherwise subject to legal professional privilege arising in the course of that litigation so that the director may, in effect, by recourse to the section become privy to the most privileged communications between the company and its legal advisers regarding the conduct of the case against him. However, I do not need to make a decision on that question today …

1. In the context of s 247A of the *Corporations Act*, which also provides for access to company documents, it has been found that the privilege has not been abrogated. In *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464, Gordon J said:

[20] In its terms, s 247A of the Corporations Act fails to express any clear words of abrogation of the privilege, nor is it written in the unmistakable and unambiguous language required to give rise to a necessary implication to that effect. The general words of s 247A of the Corporations Act cannot be read as authorising the production of documents protected by legal professional privilege.

1. A similar view was expressed by Markovic J in *Engel v National Biodiesel Limited* [2015] FCA 1114; (2015) 245 FCR 436:

[44] I accept NBL's submission that the terms of s 247A do not abrogate legal professional privilege: see *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464 at [20]. There is no evidence before me as to whether there are in fact documents which are caught by category 15 which would be subject to a claim for legal professional privilege, and if so, the nature of those documents. In the circumstances, while I am of the view that such documents need not be made available for inspection they should be identified to Mr Engel or his solicitors by way of a list setting out a brief description of them. If any issues or a dispute arises and Mr Engel wishes to challenge a claim for privilege the parties may exercise their liberty to restore the matter to the list for further orders or directions.

See also Barrett J in *Satz (No 2)* at [85]‑[86]; and *Areva NC (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2008] WASC 10 (Martin CJ).

1. In *Sharpe v Grobbel* [2017] NSWSC 1065, Brereton J said:

[21] Moreover, directors are entitled, at common law, to access the books and records of the company as a necessary incident of the office of director, in order that they may properly perform their duties. The statutory right of access under *Corporations Act,* s 198F, now permits access for the purpose of legal proceedings to which a director or former director is or may become a party, notwithstanding that the director's purpose may be a private one. For present purposes I am content to accept, without deciding, that consistently with the authorities on s 247A, s 198F may not abrogate legal professional privilege and thus may not override legal professional privilege in respect of advice to the company in connection with a dispute between it and the director. But subject to that exception, a company cannot insist on privilege against its director.

1. In my view the authorities that address s 247A and s 198F apply by analogy to the position under s 290. Orders may be made for access and inspection whilst preserving the position as to privilege. I also endorse the observation of Palmer J in *Hawksford* included at [189] above.
2. In *State of South Australia v Barrett* (1995) 64 SASR 73 (***Barrett***), it was assumed that the common law right of access to documents did not abrogate the company's legal professional privilege as against its directors, as explained by Olsson J at 77:

It is clear, then, that, as a matter of principle, even whilst they held office as directors, the personal respondents were only entitled to access to documents privileged in the hands of the Bank for the limited due diligence purposes for which their power of access existed, and not for any reasons private and personal to them. The common law principle did not negate the existence of legal professional privilege qua the directors, it merely qualified it to the extent of a bona fide exercise of their power so far as it was necessary to enable them to discharge their legal obligations. That is to say, the power would be enforced by the courts only for the purpose for which it existed and not for a purpose antipathetic to the best interests of the corporation.

1. It will be necessary to return to *Barrett.* For immediate purposes it suffices to say that I do not consider directors' rights of access, whether statutory or at common law, override or abrogate a company's right to maintain legal professional privilege immunity against a director in respect of confidential advice to the company relating to a dispute between it and the director.

### Whose privilege is it anyway?

1. Generally, disclosure by the company to its directors involves no waiver of privilege because it is disclosure by the company to its 'mind and will'. As explained by Sheller JA in *Farrow Mortgage Services Pty Ltd (In liq) v Webb* (1995) 39 NSWLR 601 at 608‑609:

The privilege attached to legal advice obtained by a company is not lost when the advice is disclosed to its directors but this is not because of their common interest. The company can only manifest its acts and intentions by the actions and declarations of human beings: *Black v Smallwood* (1966) 117 CLR 52 at 61, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 171. The directors' knowledge of the decision to obtain advice and the contents of that advice cannot be treated as a disclosure to a party separate from the company itself. The directors receive and act upon this information as the mind and directing will of the company. Accordingly the disclosure involves no waiver of the company's privilege.

1. Therefore, where a company obtains advice through the request of the directors (or some of them) as its directing mind and will, there is no separation of the legal entities. The privilege belongs to the company, and not to the directors.
2. There are various other reasons why a company might provide access to privileged material to its directors, albeit that the company and its directors are separate legal entities. The company may do so without waiving that privilege where, for example, there is a commonality of interest in receipt of the advice or where there is joint privilege (see, for example, *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418 at 423).
3. Generally, commonality of interest may be assumed, particularly as it is the directors who need to evaluate and act on advice in the performance of their duties, but it may be defeated. In his article *The Corporation, its Former Directors and Legal Professional Privilege* (1997) 9 Bond LR 10, Nicholas Iles described the potential for commonality of interest to be defeated as follows (at 24‑25):

… there may be specific occasion where there is no 'commonality of interest', even among existing directors. As the cases show, such occasions will be few and far between. Nonetheless, it is conceivable that advice might be sought in the name of the corporation by a majority of directors who apprehend a breach of duty to the corporation by a hostile minority and in respect of which the latter cannot sensibly assert a 'commonality of interest'. The best example of this is where the corporation has identified breaches of duty on the part of certain directors and has sought and obtained legal advice on the corporation's entitlement to sue.

1. So,it does not follow that directors will always be entitled to access privileged information in exercise of their access rights. The issue will be fact dependant. It is therefore necessary to understand the basis upon which Quay purports to maintain privilege against Ms Hammond.

### The privileged communications in this case

1. Ms Hammond seeks production of invoices, advices and retainer letters relating to both the Elevate Proceedings and the First Access Proceedings: see [69] above. She claims to seek access to those documents in her capacity as a director.
2. It was not seriously in issue between the parties that:
   1. invoices of themselves are not privileged, unless and to the extent that they disclose privileged information, and any such information can be dealt with by appropriate redactions (*Carey v Korda* [2012] WASCA 228; (2012) 45 WAR 181 at [63]‑[68]);
   2. retainer agreements are not privileged, subject to the same qualification (*Cook v Leonard* [1954] VLR 591 at 592; and *Cook v Pasminco Ltd (No 2)* [2000] FCA 1819; (2000) 107 FCR 44 at [47]); and
   3. confidential legal advice is privileged.

#### Invoices and retainers - non-privileged parts

1. To the extent that no privilege attaches to invoices and retainer letters, then those documents must be produced, as Ms Hammond is entitled to access them in accordance with the principles already discussed. As invoices and related contractual terms, they would fall within s 290 as financial records of the company. So much appears to be accepted by Quay, the result being that there would be further production of documents once these reasons are provided.
2. I consider Ms Hammond is entitled to access non-privileged content of retainer agreements and invoices, as I am of the view such documents fall within the ambit of s 290 of the *Corporations Act*. I do not consider it improper for a director to access such financial records and in that manner have the ability to check how invoices have been calculated and paid. I am not satisfied that Ms Hammond is seeking those non-privileged invoices and retainers (or parts thereof) for an improper purpose. I have recorded at [108]‑[109] above my impression of Ms Hammond's commitment to Quay, based upon her evidence and demeanour during the hearing. To my mind, that factor, taken with the deteriorating nature of the relationship between her and Quay, may have driven her desire to find out information about costs spent and how they have been paid for, but as a director she is entitled to inquire about the quantum of expenses incurred and how a payment obligation is satisfied. However, seeking to access privileged advice as to whether, why and in what manner proceedings might have been issued or defended is another matter entirely.

#### Privileged communications and advice

1. If the relevant communications attract a proper claim of legal professional privilege, then the question is whether it can be asserted as against Ms Hammond as a director of the company. A director's access rights would ordinarily extend to privileged documents, as reflected, for example, in *Bennetts v Board of Fire Commissioners of New South Wales*, at [127] above.
2. The competing positions of the parties, expressed in summary, are these:
   1. Ms Hammond contends that documents of the company are not privileged as against its directors where they are sought for the purpose of performing their duties; that they are sought by her for that reason; and that in any event the Elevate Proceedings and First Access Proceedings are at an end; and
   2. Quay contends that legal professional privilege may be asserted against its directors where they are acting in their personal capacity or outside their duties as directors, such that their interests are adverse to those of the company; that the interests of Quay and Ms Hammond were adverse so that Quay was and is entitled to maintain its privilege against her; and says that reliance on access rights will not abrogate that privilege or lead to a different result.

#### Assumptions as to basis for privilege

1. I have set out above Ms Hammond's stated purpose for seeking the privileged documents. If the issues were limited to the identity of the parties to any retainer agreements, the standard payment terms of a retainer, the identity of the party to which invoices were issued and the identity of the party who paid the invoices, it would be difficult to see how privilege could be maintained. However, Ms Hammond seeks copies of legal advice in both proceedings, and therein lies the real contest between the parties.
2. Quay has not described the basis of the privilege claim, but its solicitor, Neil Wallman of HWL, deposed to the fact that he was instructed by Quay and Elevate in the Elevate Proceedings and was instructed by Quay in the First Access Proceedings; that the relevant Quay documents are privileged; and that Quay does not waive privilege over those documents.
3. It is safe to assume, based on the summary of the claims made in the Elevate Proceedings and Quay's submissions, that the relevant legal advice is likely to have addressed whether Quay might have claims for tortious interference by Ms Hammond in Quay's contractual relations with its employees; for breach of directors' duties; for infringement of trade mark or copyright; for allegedly misleading comments about Quay's branding; and whether Quay was entitled to seek to restrain any such ongoing conduct on Ms Hammond's part.
4. As to the First Access Proceedings, it is safe to assume that relevant legal advice would have addressed whether Quay was obliged to respond to Ms Hammond's demands for document production and information, and if so, when and how.
5. On those assumptions, it can also safely be assumed that Quay sought the advice on the basis that it would be confidential and would not be disclosed to Ms Hammond.
6. It must be borne in mind that Quay has not as yet particularised any privilege claims, and so these reasons proceed on the basis of the assumptions.

### The decision in Barrett

1. Because the parties referred to *Barrett* extensively, it is appropriate to make some observations:
   1. in *Barrett*, the privileged documents in question were advice or requests for advice related to commercial transactions entered into by the Bank some years earlier (at 74);
   2. the advice was sought by and given to the Bank when the respondents seeking access to the advice all held office as directors of the Bank (at 75), and there is no suggestion it related to advice sought by the Bank at the time about actions it might have taken against the then directors;
   3. it appears to have been accepted that although the then directors may not have accessed the privileged advice at the time, they were entitled to do so. There was no suggestion that the relationship between the directors and the Bank was adverse at the time the advice was sought and received. There was a commonality of interest between the directors and the Bank in the advice at that time; and
   4. the respondents sought access to the advice only after they had retired as directors, and the Full Court came to the view that they were not at that time entitled to access the documents because the directors no longer had any rights of access or role as a director, and the bank was entitled to rely on its privilege.

### When is the privileged status to be determined?

1. Generally, the time at which the question of privilege is to be determined is the time at which the communications are created. Whether they are privileged depends on the relationship between the parties when the documents were created, the purpose for which the documents were created and their confidentiality. That is not to say a different time is not relevant in other contexts. The time when documents were shared will be important in the context of common interest privilege. Subsequent facts will be relevant to whether privilege has been waived.
2. The focus on the relationship between the parties is reflected in a number of other scenarios. For example, in *Gray v BNY Trust Company of Australia Ltd (formerly Guardian Trust Australia Ltd)* [2009] NSWSC 789; (2009) 76 NSWLR 586, Bergin CJ in Eq said the following:

[54] The real issue for determination in this application is whether the privilege claim made by the defendant is unsustainable by reason of the court's order that the plaintiff pay part of the defendant's costs and that the defendant was entitled to indemnification out of the assets of the Estate for its costs of the previous litigation. The cases referred to above do not address this particular issue. However the *South Australia v Barrett* case points up the character of the relationship between the plaintiff and the defendant in this case. In aspects of the previous litigation the plaintiff was an adversary of the defendant. His present purpose in seeing the documents is, in part, to support his claims in the Accounts Motion in which he is attempting to allege, inappropriately in my view, that the defendant was not justified 'in recovering indemnity from the estate' for the costs that were awarded by Austin J. Austin J has already decided that matter adversely to the plaintiff. Be that as it may, it is necessary to focus on the relationship at the time the documents were created. There is no doubt that at the time the documents were created in relation to the main proceedings in which the plaintiff was suing the defendant the communications were privileged. The plaintiff's claim against the defendant for revocation was unjustified and he was ordered to pay the defendant's costs. The defendant was also entitled to be indemnified out of the assets of the Estate for its costs. This does not in my view mean that the plaintiff has a proprietary interest in the documents in the sense that the cases recognise beneficiaries' entitlement to access trust documents. These documents were not for the benefit of the plaintiff. They were documents created for the purpose of the defendant defending itself against the unjustified litigation against it by the plaintiff. The fact that an order was made that the plaintiff pay the defendant's costs coupled with an order of its entitlement to indemnification, does not in my view convert the privileged advice received by the defendant to defend itself into an advice for the benefit of the plaintiff and thus a trust document to which the plaintiff is entitled to access.

1. In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477, Macaulay J said:

[30] In my view it is plain beyond doubt that the position of Dura and Hue in this period was adverse and that, relevantly, they did not share any common interest in the legal advice which Hue was obtaining. In obtaining its legal advice, Hue was plainly acting in its personal interests. None of the advice was sought, either implicitly or explicitly, about its obligations as trustee under the trust but, rather, in connection with the personal interest of Hue as the owner under the building contract.

[31] … Furthermore, applying the focus, referred to by Bergin CJ in *Gray's* case, on the relationship between the parties at the time the documents were created, there is no doubt that when the disputed documents were created the parties were engaged in clear conflict, each separately represented by lawyers and heading towards the commencement of the very litigation in which the parties are now engaged.

[32] Dura relies on an inference it says I should draw from the evidence, that the costs of the legal advice the subject of the claimed privilege has been paid out of the assets of the estate. Whilst Judd J used a similar feature in *Krok's* case to corroborate his conclusion that the advice concerned the administration of the trust, and the beneficiary was entitled to see the documents in question, that fact alone cannot be determinative of the issue. It depends upon the circumstances in each case. For example, in *Gray's* case the privilege was upheld despite the fact that the advice had been paid for by trust funds. In any event, whether or not a trustee has properly used trust funds to pay for legal advice raises an issue quite independent of the question of privilege attaching to that advice.

(footnote omitted)

1. In *Barrett*, Mullighan J stated that the appropriate time to consider whether the privilege extends to relevant persons is when it is claimed (at 83‑84, Cox and Olsson JJ seeming to have the same view). This aspect of *Barrett* has been the subject of considerable academic and extra-judicial debate: for example, see Iles N, *The Corporation, its Former Directors and Legal Professional Privilege* (1997) 9 Bond LR 10 at 22, 27‑28; and Higgins A, *Legal Professional Privilege for Corporations* (Oxford University Press, 2014) at [6.98]‑[6.99].
2. It is not clear to me that Mullighan J's statement in *Barrett* should properly be read as suggesting that other points in time might not be relevant, depending on the facts. In any event, the emphasis on timing was important in *Barrett* because the directors sought access to the relevant documents after they had resigned. In this case, the question does not relevantly arise in the same manner. Ms Hammond has remained a director at all relevant times.
3. In this case, the question is whether Quay could claim privilege against Ms Hammond from the time any confidential advice documents were created. It is then necessary to consider whether there have been intervening events such that any privilege can no longer be maintained.

### Can Quay assert privilege against Ms Hammond?

1. I consider that Quay is entitled to withhold privileged legal advice obtained for the purpose of the claims the subject of the Elevate Proceedings and the First Access Proceedings from Ms Hammond on the basis that the advice was confidential to Quay and at all material times her position in the litigation was hostile to Quay's interests.
2. Taking into account the given assumptions (see [208]‑[211] above), confidentiality clearly attached to the legal advice when it was created. The advice was always privileged. At the time the advice was apparently prepared and provided, Quay and Ms Hammond were adversaries with different interests. At that time, it must have been intended by Quay that confidentiality was to be maintained against the very person who was an adverse party in the litigation. Quay was entitled to seek confidential legal advice about any claim it might have against Ms Hammond or to defend the claim being brought against it by Ms Hammond, without the fear that such advice would be provided to her. So, it follows, this is not a case where the corporation assumed all its directors would evaluate and act upon the legal advice (see [199] above). To the contrary, it can be inferred that Quay sought the advice on the basis it would not be provided to Ms Hammond. In this regard it is important to recall that a sub‑committee was formed (see [31]‑[34] above). Even if there was a commonality of interest between Quay and the majority directors in seeking the advice, in the adversarial circumstances of that context - litigation or anticipated litigation - such commonality did not extend to Ms Hammond.
3. If privilege in advice obtained by a company in such circumstances could not be maintained against hostile directors, then the company would in effect be constrained in its ability to seek and obtain legal advice and the content of such advice may well be compromised. Indeed, one can envisage that if the majority directors who sought the advice (or authorised that course) on behalf of Quay and the lawyers they retained had understood at the time that all legal advice would be disclosed to Ms Hammond, the content of any advice given may have been very different and potentially qualified.
4. At the heart of this issue lies the importance of the capacity of a client to seek confidential legal advice: the 'need of laymen for professional assistance in the protection, enforcement or creation of their legal rights' and the furtherance of the administration of justice through the fostering of trust and candour, referred to in *Attorney General (NT) v Maurice*; and the overarching public interest in the administration of justice, a public interest that is paramount to the more general public interest which requires the production of evidence for the purpose of litigation, as affirmed in *Glencore International AG.* The conclusion I have reached is consistent with that paramount public interest.
5. It is then necessary to turn to Ms Hammond's arguments to the effect that:
   1. even if advice was privileged at the time it was created, she should have access to it now on the basis that the Elevate Proceedings and the First Access Proceedings are at an end; and
   2. she should have access to the documents in her capacity as a director because she wishes to investigate claims that Quay might have.

### Has the privilege been lost?

1. Ms Hammond asserted and submitted that as the Elevate Proceedings and the First Access Proceedings have been finalised and are defunct, any privilege attached to the legal advice no longer survives.
2. That contention is contrary to authority. Generally, the privilege 'survives the end of the case, the end of the solicitor-client relationship and even the death or dissolution of the party on whose behalf the [privileged] statement was obtained': *Interchase Corporation Limited (in liq) v Grosvenor Hill Queensland Pty Ltd (No 1)* [1999] 1 Qd R 141 at 146. Although there is some acceptance of the view that privilege might be spent in time in some circumstances (see the discussion in Desiatnik R, *Legal Professional Privilege in Australia* (3rd ed, Lexis Nexis, 2017) at 67; and in Thanki B, *The Law of Privilege* (3rd ed, Oxford University Press, 2018) at [1.68]‑[1.74]) this case is not one where any suggestion that it might be spent arises on the facts, as currently disclosed. Quay continues to maintain its claim of privilege; there is no suggestion that confidence in any advice has been disclosed; the parties continue to have mutual rights and obligations under the shareholders' deed; litigation has occurred and may continue to occur; the parties by these proceedings are involved in adversarial litigation as to which there is some overlap with the subject matter of the prior proceedings; and Quay and Ms Hammond have at all times had their own lawyers.
3. Nor are other circumstances established that might suggest that the privilege does not endure. On the materials before me (and acknowledging that the basis of individual privilege claims has not as yet been particularised by Quay), there has been no loss of confidentiality in the privileged documents or conduct by Quay which establishes any waiver of privilege. There is no relevant statutory abrogation on the facts (see [193] above). The advice has not been pleaded into issue, as far as I am aware.
4. Having regard to her evidence, it appears that Ms Hammond also contends (in effect) that she has an interest in the legal advice consistent with the discharge of her duty to the company, and that she is therefore entitled to access the privileged legal advice in her capacity as a director in order to ascertain whether Quay might have some claim with respect to costs incurred by Quay arising out of the litigation in which she was a party. This contention ignores the circumstances in which the privileged documents came into existence. As already stated, the purpose for the creation of the advice related to adversarial litigation or anticipated litigation between, relevantly, Quay and Ms Hammond and it is apparent that confidentiality was never intended to be waived such that the advice would be shared with Ms Hammond. Those circumstances subsist and the privilege in the advice subsists. That Ms Hammond may no longer consider herself an adversary of Quay does not change the nature of her adverse relationship with the company as at the time the advice was prepared and the privilege attached, absent waiver or some other relevant circumstance that might arise in the future.
5. Further, there are a number of other difficulties or factors relevant to Ms Hammond's contention:
   1. the nature of the potential claim that Ms Hammond referred to regarding costs and use of funds was speculative and was not explained or disclosed other than in a very general manner. It seemed, perhaps, to be a claim that might be brought by Ms Hammond as a shareholder, rather than the company (and Mr Boyd's evidence supported the prospect that any dispute related to shareholder value), but regardless, it was not clear why access to the content of the legal advice would be necessary to pursue a claim that seemed to have at its heart a complaint about costs that were incurred;
   2. as I have indicated above, I consider Ms Hammond is entitled to access the non-privileged content of retainer agreements and invoices, as I am of the view such documents fall within the ambit of s 290 of the *Corporations Act*. I do not consider it improper for a director to access such financial records and so have the ability to check the manner in which invoices have been calculated and paid. Ms Hammond should be provided with the information she seeks about retainer agreements, invoices and any receipts in due course;
   3. issues relating to costs of litigation (such as assessment and taxations) are ordinarily dealt with without the disclosure of privileged advice to the opposing party;
   4. whether or not Quay has any basis or right at this point for challenging its solicitor/client costs is not a matter on which I make any comment, but if there were such potential, then that would seem to be a task that might sensibly be undertaken without the disclosure of the content of privileged advice to a hostile party against whom the advice otherwise remains privileged; and
   5. it is not the case that absent access to privileged information, Ms Hammond would be attempting to assess the litigation commenced by Quay in an information vacuum. Ms Hammond has knowledge of the Elevate Proceedings initiated by Elevate and Quay, was a party to those proceedings and has knowledge of the outcome.
6. Having regard to the paramount public interest described in *Glencore International AG*, I am not satisfied that Ms Hammond has disclosed a valid basis upon which her access to documents should be facilitated at the cost of Quay's fundamental right to seek confidential legal advice and rely on legal professional privilege.

## Conclusion

1. It remains to consider what orders should be made, having regard to these reasons.
2. It is apparent that Ms Hammond is entitled to have access to all financial records and documents, including non-privileged legal retainer documents and invoices at all reasonable times.
3. At present, I am not satisfied that any orders facilitating access are sufficiently certain or justified (see proposed orders in the originating application numbered as 1(c) and 3(c) at [76] above), and no steps were proposed by Ms Hammond, save for the suggested NetSuite access, which I have rejected. The only document request that I am satisfied prima facie had not been met at the time of the trial was the request for documents relating to category 14 (the aged creditors' analysis), addressed above. I understand that the parties may have divergent views as to the level of detail that might be required to provide the documents that Ms Hammond seeks in that regard. However, it should be clear from these reasons that Ms Hammond is entitled to request and receive access to all relevant supporting source documents (should that depth of documentation still be requested), and not simply a summary. Similarly, the parties should resolve the manner in which access to the non-privileged retainer agreements, invoices and receipts is provided. I will reserve liberty to apply as to any difficulties that arise as to access to those categories of non-privileged documents only.
4. However, to the extent that Quay maintains a privilege claim over any documents, the parties did not propose the manner by which the process of stating or testing such claim might be undertaken, although it seemed to be common ground that a staged regime would be considered once these reasons were available to the parties.
5. I encourage the parties to agree a sensible and efficient regime for identifying those documents for which privilege is maintained. The parties should also consider how and when disputes as to privilege might be resolved, should any arise. To allow for the potential that the parties are unable to resolve such matters by agreement, I will order that the parties are to confer through counsel, and are to provide any minute of consent orders or competing minutes to address privilege claims over company documents within 21 days, or such further time as the parties agree. There will be liberty to apply in relation to any proposed privilege regime.
6. Otherwise, the application is dismissed.
7. I will hear the parties as to costs.

|  |
| --- |
| I certify that the preceding two hundred and thirty-seven (237) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith. |

Associate:

Dated: 30 March 2021