BH APARTMENTS PTY LTD (ACN 087 288 882) v SUTHERLAND NOMINEES PTY LTD (ACN 009 559 684) (subject to a deed of company arrangement) and Others

SUPREME COURT OF VICTORIA

BELL J

29 April, 13 August 2015 — Melbourne

[2015] VSC 381

Deed of company arrangement — Creditors — Meeting of creditors called at request of high-value creditor — Regulation made requesting person liable for costs of "convening" meeting — Appeal from order of Magistrates' Court of Victoria that requesting person liable for full costs of calling and holding meeting — Whether error of law — Whether requesting person liable only for costs of calling meeting — "Convene", "convening", "summon", "summoning" — (CTH) Corporations Act 2001 Pts 5.3A, 5.4B, ss 445F, 479(2) — (CTH) Corporations Regulations 2001 reg 5.6.15(1)(b).

The appellant, BH Apartments Pty Ltd, a high-value creditor, requested that the administrators convene a meeting of creditors. BH Apartments was required to lodge a security for the payment of the costs of convening the meeting pursuant to reg 5.6.15(1)(a) of the Corporations Regulations 2001 (Cth) (the Regulations). BH Apartments lodged a security of $5000.

After the meeting, the administrators required BH Apartments to pay the further sum of $42,725.48 contending that convening a meeting covered the costs of calling but not holding a meeting. In debt recovery proceedings in the Magistrates' Court of Victoria, the magistrate ordered BH Apartments to pay $42,725.48 plus interests and costs to the administrators.

BH Apartments appealed the decision of the magistrate and the question of law to be determined was whether the expression "costs of convening the meeting" in reg 5.6.15(1)(b) of the Regulations, included the costs of holding the meeting or, rather, are to be confined to the costs of calling the meeting.

Held, dismissing the appeal:

(i) By subreg(1)(a), the administrator may require the deposit of a security before the meeting was convened. This suggested that the process of convening in the regulation, including in subreg (1)(b), encompassed the calling and holding of the meeting. The payment was intended to stand as security for the full costs thereof, as ascertained after the meeting had occurred. If only the holding costs were payable, the regulation would have said so, for such costs would be readily ascertainable before the meeting was held: at [76].

(ii) The purpose of reg 5.6.15(1)(b) was to provide a safeguard against abuse of the right to request the convening of a meeting. The risk of abuse was manifested and the obligation to pay full costs of convening a meeting was intended to minimize it: at [80].

(iii) Section 445F(1) of the Corporations Act 2001 (Cth) conferred an obligation on the administrator of a company under a deed of company arrangement to convene a meeting of its creditors at the request of a high-value creditor. Regulation 5.6.15(1)(b) of the Regulations provides that the requesting person must pay the costs of convening the meeting: at [82].

Application

This was an appeal application on a question of law.

P Thiagarajan instructed by *Norton Rose Fulbright* for the appellant (BH Apartments Pty Ltd (ACN 087 288 882)).

P Agardy instructed by *Charles Fice Solicitors* for the respondents (Sutherland Nominees Pty Ltd (ACN 009 559 684) (subject to a deed of company arrangement), Paul Andrew Burness and Matthew James Jess).

Bell J.

Introduction

[1] Sutherland Nominees Pty Ltd was being administered by Paul Andrew Burness and Matthew James Jess as administrators pursuant to a deed of company arrangement under Pt 5.3A of the Corporations Act 2001 (Cth). Exercising its statutory right under s 445F(1)(b) as a high-value creditor of the company, BH Apartments Pty Ltd requested that the administrators convene a meeting of creditors, which they did.

[2] Regulation 5.6.15(1)(a) of the Corporations Regulations 2001 (Cth) required BH Apartments, as the requestor of the meeting, to lodge a security for the payment of the costs of convening the meeting, if so requested by the administrators. Before the meeting was held, the administrators nominated a security of $5000, which BH Apartments lodged.

[3] Regulation 5.6.15(1)(b) required BH Apartments to pay the costs of "convening the meeting". Interpreting that expression to include the costs of both calling and holding a meeting, after the meeting was held the administrators required BH Apartments to pay the further sum of $42,725.48. Contending that the expression "convening the meeting" covered the costs of calling but not holding a meeting, it refused to pay.

[4] In debt recovery proceedings in the Magistrates' Court of Victoria, the magistrate upheld the administrators' interpretation of reg 5.6.15(1)(b). His Honour ordered BH Apartments to pay $42,725.48 plus interest and costs to the administrators. From those orders the company now appeals on a question of law under s 109 of the Magistrates' Court Act 1989 (Vic). At issue is the interpretation of the regulation.

Deed of company arrangement and meeting of creditors

[5] The administrators were appointed to Sutherland Nominees under s 436A(1) of the Corporations Act 2001 after the directors resolved that it was, or was likely to become, insolvent. A meeting of the creditors of the company resolved that it would enter into a deed of company arrangement, which it did. The purpose of the deed was to achieve the best and quickest return for the creditors. The main obligation of the administrators was to sell as much of the company's land (which was all located in Tasmania) within 2 years as was necessary to meet the claims of the creditors. The company subsequently went into liquidation, but that is not material.

[6] Although Sutherland Nominees owned the domestic residences of the directors, the assets of the company were defined in the deed to exclude them. In consequence, the directors were occupying the residences rent free. BH Apartments wanted the deed to be amended so as to require the administrators to sell this land also. It requested that a meeting of creditors be held so as to consider that and other matters.

[7] The administrators gave notice of the meeting to the creditors under s 445F(2)(a) of the Corporations Act 2001 on 19 November 2013. The notice specified 6 December 2013 as the date of the meeting and specified a venue in Launceston, Tasmania. It stated:

> The Agenda of the meeting is to consider and vote on the following resolutions:
>
> 1. Receive an update on the administration from the Deed Administrators.
> 2. To resolve whether the Deed of Company Arrangement should be varied.
> 3. To consider, and if deemed appropriate approve, an increase to a cap on the Deed Administrators' remuneration.
> 4. Any other business with the foregoing.

It will be seen that the proposed amendment of the deed was only one of four items on the agenda. Implicit in the decision of the magistrate is a finding of fact, not called into question by any ground of appeal, that the meeting was convened in pursuance of the request by BH Apartments, and that the other items were added because it was convenient to do so.

[8] The meeting was held on the specified date. According to the minutes, the foreshadowed items of business were transacted, including BH Apartments' proposed amendment of the deed, which was put to the vote and lost.

Debt recovery proceeding in Magistrates' Court of Victoria

[9] As we have seen, after the meeting the administrators and BH Apartments fell into dispute about whether the latter was liable to pay an amount in addition to the lodged security. To recover that amount, the administrators issued a complaint in the Magistrates' Court of Victoria. As agreed between counsel for the parties in the hearing before the magistrate, the amounts in issue are listed here:

1	Calling meeting This amount includes: • Drafting the notice to creditors • Drafting the report to creditors • Costs of circulating the notice and report to creditors	$5,000.00
2	Legal costs associated with writing the notice and report to creditors	$1,500.00
3	Time spent travelling (to and from) the meeting	$4,444.00
4	Time spent waiting on 6 December 2013	$2,222.00
5	Time spent by the administrators preparing for and attending the meeting; finalising minutes on 6 December 2013	$2,519.00
6	Room hire	$200.00
7	Professional fees incurred in reading and responding to correspondence with Norton Rose Fulbright regarding proposed variations	$4,541.54
8	Professional fees incurred in preparing for the meeting of creditors held on 6 December 2013	$5,141.83

9	Legal costs Solicitor (not at meeting): $11,938.10, less $1500 (allocated above), less $1,019.99 (unrelated fees)	$9,418.11
10	Counsel (attending meeting)	$12,739.00
	Total of invoice (not including unrelated fees)	$47,725.48

Before the magistrate, BH Apartments conceded that, on the proper interpretation of reg 5.6.15(1)(b), items 1, 5 and 6 should be characterised as convening costs. Before me, the company sought to withdraw from its concession in relation to item 5. It will not be necessary to determine whether leave to do so should be granted.

[10] Upholding the administrators' interpretation of reg 5.6.15(1)(b), the magistrate decided:

> I think that the proper construction of the words "convening a meeting" mean not only the giving of written notice which is identified in the language of the section but all the other necessary steps to see that the meeting is properly held, that is presided over by the administrator ... I believe ... as a result of my decision and the concessions made by and on behalf of the defendants, all the items that I mentioned before numbered 1 through 10 both inclusive would fall [within] the proper construction of the costs of convening a meeting.

[11] In this appeal from that decision, the question of law to be determined is whether the expression "costs of convening the meeting" in reg 5.6.15(1)(b) of the Corporations Regulations 2001, properly interpreted, include the costs of holding the meeting or, rather, are to be confined to the costs of calling the meeting.

Provisions of Corporations Act 2001 and Corporations Regulations 2001

[12] Section 445F(1) is to be found in ch 5 of the Corporations Act 2001, which deals with the external administration of companies. Chapter 5 contains many parts dealing with that general subject. Part 5.3A deals with the administration of a company's affairs with a view to executing a deed of company arrangement and contains s 445F. The general object of Pt 5.3A is to ensure the return of a failing company to corporate health or, if that is not possible, to wind it up on the best terms for the creditors and members.[1]

[13] In full, s 445F(1)–(5) provides:

> (1) The administrator of a deed of company arrangement:
>
> (a) may at any time convene a meeting of the company's creditors; and
>
> (b) must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors' claims against the company.

1. Section 435A provides that the object of Pt 5.3A is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

   (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

   (b) if it is not possible for the company or its business to continue in existence — results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

(2) The deed's administrator must convene the meeting by giving written notice of the meeting:

(a) to as many of the company's creditors as reasonably practicable; and

(b) at least 5 business days before the meeting.

(3) The notice given to a creditor under subsection (2) must:

(a) set out each resolution (if any) under section 445A or paragraph 445C(b) that the deed's administrator proposes that the meeting vote on; and

(b) if the meeting is convened under paragraph (1)(b) of this section — set out each proposed resolution under section 445A or paragraph 445C(b) that is set out in the request.

(4) At a meeting convened under this section, the deed's administrator is to preside.

(5) A meeting convened under this section may be adjourned from time to time.

As can be seen, s 445F(1) confers on deed administrators a power to convene a meeting of creditors and an obligation to do so upon a request in writing by a high-value creditor. Subsections (2)–(5) contain procedural provisions. The power and obligation to convene a meeting is not qualified as to subject matter and would extend to any matter or purpose that legitimately relates to the administration of a company subject to a deed of company arrangement.

[14] The scope of the powers and duties of administrators under s 445F in relation to creditors' meetings should be noted. A meeting-holding obligation is conferred by s 445F(1)(b). Section 445F(2) requires administrators to give written notice thereof. As noted by the magistrate, administrators must preside at (and therefore conduct) the meeting (s 445F(4)), which they might adjourn from time to time (s 445F(5)). So, the powers and duties of the administrator as the convenor of the meeting are not confined to the procedural task of sending out notices and the like, but extend to attending and presiding at, and therefore conducting, the meeting. This will be relevant when interpreting s 445F.

[15] Administrators also have relevant obligations under regs 5.6.17 and 5.6.27 of the Corporations Regulations 2001. Under reg 5.6.17(1)(c), he or she must "chair" and therefore be responsible for the conduct of the meeting. As the chair, the administrator is responsible for the preparation of the minutes thereof: reg 5.6.27(1). These obligations are consistent with the provisions of s 445F to which I have just referred and will be relevant when interpreting reg 5.6.15.

[16] Now to reg 5.6.15 of the Corporations Regulations 2001, which governs the recovery of the costs of convening meetings called other than by liquidators or administrators. It provides (in full):

(1) A person (other than a liquidator or administrator of a company under administration or of a deed of company arrangement) at whose request a meeting of creditors or contributories is convened must:

(a) if the liquidator or administrator requires a security for the payment of costs before the meeting is convened — deposit with the liquidator or administrator a sum of money; and

(b) pay the costs of convening the meeting.

(2) The costs of convening a meeting of a committee of inspection or a committee of creditors must be repaid out of the assets of the company to the person causing it to be convened if:

(a) the Court so orders; or

(b) the committee by resolution so directs.

Regulation 5.6.15(1)(a) is the provision pursuant to which BH Apartments deposited the security. Regulation 5.6.15(1)(b) is the provision calling for interpretation in this appeal. Regulation 5.6.15(2)(a) and (b) makes provision for

the court to order, or the meeting of creditors to resolve, that the convening costs be met by the company. Neither happened in the present case.

[17] It can be seen that reg 5.6.15 relevantly applies to meetings of creditors requested by persons other than deed administrators. The regulation is not the source of the authority of such persons to make requests. It applies where authority to make a request is elsewhere conferred. In the present case, that authority was conferred by s 445F(1) of the Corporations Act 2001 in relation to companies being administered under Pt 5.3A. Similar authority is conferred on such persons by s 479(2)[2] in relation to companies being liquidated under Pt 5.4B. As reg 5.6.15 applies in both cases, it will be necessary to consider both provisions.

[18] The discretionary powers of deed administrators under Pt 5.3A of the Corporations Act 2001 are very wide. As will be seen, the duty of administrators under s 445F(1) to convene a meeting of creditors at the request of high-value creditors is intended to operate as a control over those powers. As submitted by BH Apartments, this should be taken into account when interpreting s 445F(1), and reg 5.6.15 of the Corporations Regulations 2001. However, the exercise of the powers of administrators under Pt 5.3A, including under those provisions, must also be understood in the context of the supervisory powers of the court. In that connection, s 447A(1) authorises the court to make such orders as it thinks appropriate in relation to the operation of Pt 5.3A.[3] Other supervisory powers are conferred on the court by s 447E(1)(a) and (b).[4] Under s 447D(1), the administrator may seek directions "about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers".

Principles of interpretation

[19] Neither the Corporations Act 2001 nor the Corporations Regulations 2001 defines the word "convene" or its cognates. The object of Pt 5.3A of that Act (see above) provides the general context for the interpretation of the word, but this is helpful only to a certain extent and is not determinative.

[20] Applicable general principles of interpretation were summarised recently by the Court of Appeal in *Treasurer of Victoria v Tabcorp Holdings Pty Ltd*.[5] Maxwell P, Beach JA and McMillan AJA stated (at [99]–[101]):[6]

2. Section 479(2) is contained in Pt 5.4B of Ch 5, which deals with winding up in insolvency or by the court.
3. Under s 447A(4)(b), a creditor of the company may make application for the making of such an order.
4. Section 447E(1) provides that the court may make such orders as it thinks just where it is satisfied that the administrator:

   (a) has managed, or is managing, the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members; or
   (b) has done an act, or made an omission, or proposes to do an act, or to make on omission, that is or would be prejudicial to such interests.

   Under s 447E(3), application for such orders may be made by a creditor of the company (among others).
5. [2014] VSCA 143 (*Tabcorp Holdings*) (1 July 2014) per Maxwell P, Beach JA and McMillan AJA.
6. *Tabcorp Holdings* at [99]–[101] (emphasis and footnotes in original).

[99] In *Alcan*,[7] the High Court plurality said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. *The language which has actually been employed in the text of legislation is the surest guide to legislative intention.* The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[8]

[100] More recently, in *Thiess*,[9] the joint judgment of French CJ, Hayne, Kiefel, Gageler and Keane JJ endorsed the following statement from an earlier decision of the Court:[10]

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text."

[101] As the High Court has pointed out, there are powerful reasons of principle for giving primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the natural and ordinary meaning of the words used, avoids the twin dangers of a court "constructing its own idea of a desirable policy",[11] or making "some a priori assumption about its purpose".[12]

[21] In the present case, the task of the court is to give the proper interpretation of the word "convening" in reg 5.6.15(1)(b) of the Corporations Regulations 2001. As we will see, in doing so it will be necessary to consider the meaning of that and cognate words in ss 445F and 479(2) of the Corporations Act 2001.

[22] The verb "convening" is derived from the root verb "convene". In the *Macquarie Encyclopedic Dictionary*, the verb "convene" is defined to include three senses, as follows:

> *Convene* v. (*—vened, — vening*) — v.i. 1. to come together; assemble, usually for some public purpose. – v.t. 2. to cause to assemble; convoke. 3. to summon to appear, as before a judicial officer. [ME, from L: come together] — *convenor, convener*, n.[13]

In the *Oxford English Dictionary*, the verb "convene" is similarly defined by reference to different senses, including:

> 1 ... To come together; to assemble, or meet, esp for a common purpose. a. of individuals. b. of a collective body: To assemble for united action; to meet in a convention ... 3 ... to cause to come together to; to convoke; a. individuals. b. a collective body, an assembly or meeting ...[14]

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7. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.
8. Citations omitted, emphasis added.
9. *Thiess v Collector of Customs* (2014) 250 CLR 664; 306 ALR 594; [2014] HCA 12 at [22].
10. *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; 293 ALR 257; 91 ACSR 359; [2012] HCA 55 at [39] (citations omitted).
11. *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; 285 ALR 27; [2012] HCA 3 at [28].
12. *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378; 293 ALR 412; [2012] HCA 56 at [26].
13. *Macquarie Encyclopedic Dictionary*, 2nd ed, Macquarie Dictionary Publishers, 2010, p 273.
14. *The Oxford English Dictionary*, 2nd ed, Oxford University Press, 1989, Vol III, p 859.

[23] It can be seen that, as a matter of plain and ordinary meaning, the word "convene" might be interpreted to mean only the calling (convoking) of a meeting or to encompass both the calling (convoking) and the holding (assembly) of a meeting. The question in the present appeal is whether, in reg 5.6.15(1)(b), the word is to be read narrowly to include only the costs of calling, or widely to include both the costs of calling and holding, the meeting. Giving full force to the statements of authority in *Tabcorp Holdings* about the primacy of the statutory language, the present case is one in which the meaning of the language must be ascertained in the context of its history and purpose.

[24] When assessing the purpose of the relevant provisions of the Corporations Regulations 2001 and the Corporations Act 2001, it will be necessary to take into account that legislation may contain provisions that have been enacted with competing purposes. In *Victorian Workcover Authority v Virgin Australia Airlines Pty Ltd*[15] I discussed the issues raised when interpreting legislation of this kind. It is sufficient here for me to refer to that discussion (at [31]–[32]):[16]

> [31] This [sic] general principles applicable to the resolution of this general problem were discussed by Gleeson CJ. In *Nicholls v R*[17] his Honour said:
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> > "Legislation such as [the provision in question] seeks to strike a balance between competing considerations and interests. A search for legislative purpose needs to take account of the fact that legislatures rarely engage in the pursuit of a single purpose at all costs. Problems of statutory construction often arise because the extent to which the legislature intends to pursue a given purpose is unclear. When, as is so obviously the case with [the provision], Parliament adopts a compromise, a court may be left with the text as the only safe guide to purpose."[18]
>
> Further, in *Carr v Western Australia*[19] his Honour made particular mention of the rule of interpretation favouring the purpose of the enactment which is to be found in federal[20] and State[21] legislation. Victoria has such legislation[22] and it applies in the present case. Of that general rule of interpretation, his Honour said:
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> > "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the Acts Interpretation Act 1901 (Cth). It is also required by corresponding State legislation ... That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."[23]

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15. [2013] VSC 720 (*Victorian Workcover*) (20 December 2013).
16. *Victorian Workcover* at [31]–[32] (footnotes in original).
17. (2005) 219 CLR 196; 213 ALR 1; [2005] HCA 1 (*Nicholls*).
18. *Nicholls* at [8].
19. (2007) 232 CLR 138; 239 ALR 415; [2007] HCA 47 (*Carr*).
20. Section 15AA of the Acts Interpretation Act 1901 (Cth).
21. See for example s 18 of the Interpretation Act 1984 (WA).
22. s 35(a) of the Interpretation of Legislation Act 1984 (Vic).
23. *Carr* at [5].

To illustrate that general point, his Honour referred to income tax legislation. The "underlying purpose" of such legislation was "to raise revenue for government".[24] Yet no one would think that:

> "s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling."[25]

[32] The judgment of Gleeson CJ in *Carr* has been cited with approval by the High Court[26] and applied by intermediate courts of appeal,[27] including the Court of Appeal of this court,[28] most recently in *MyEnvironment*.[29]

[25] These principles will most especially be relevant in relation to the competing purposes of ss 445F and 479(2) of the Corporations Act 2001 and reg 5.6.15(1)(b) of the Corporations Regulations 2001. As we will see, the purpose of the former is to control the wide discretionary powers of administrators and liquidators and the purpose of the latter is to provide a safeguard upon that control.

[26] As the issue of law in the present case involves the interpretation of regulations made under legislation, it is necessary to take into account another relevant principle of interpretation. As stated in Pearce and Geddes, the principle is that "expressions used in ... regulations are, unless the contrary intention appears, to have the same meaning as in the Act conferring the power".[30] The principle is derived from the common law as applied in *Blashill v Chambers*[31] where Grove J held that "prima facie ... the proper mode of construction is to apply the same interpretation to terms used in a by-law which is applied to the

24. *Carr* at [6].
25. *Carr* at [6].
26. See *Lee v New South Wales Crimes Commission* (2013) 251 CLR 196; 302 ALR 363; [2013] HCA 39 at [262] per Bell J; *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; 300 ALR 460; 87 ALJR 1009; [2013] HCA 36 at [40]–[41] per Crennan, Kiefel, Bell, Gageler and Keane JJ; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645; 304 ALR 116; 137 ALD 1; [2013] HCA 52 at [37] (6 December 2012) per French CJ, Crennan, Kiefel and Bell JJ.
27. *Tran v Commonwealth* (2010) 187 FCR 54; 271 ALR 1; [2010] FCAFC 80 at [67]–[68] per Rares J; *Re CSR Ltd* (2010) 183 FCR 358; 265 ALR 703; 77 ACSR 592; [2010] FCAFC 34 at [53] per Keane CJ and Jacobson J; *Parker v Parker* (2012) 47 Fam LR 122; [2012] FamCAFC 33 at [14] per Coleman J; *Jomal Pty Ltd v Commercial and Consumer Tribunal* [2010] 2 Qd R 409; [2009] QCA 326 at [29] per Keane JA (McMurdo P agreeing); *Australian Postal Commissioner v Sinnaiah* (2013) 213 FCR 449; 136 ALD 536; [2013] FCAFC 98 at [28] per Cowdroy, Buchanan and Katzmann JJ.
28. *Loader v R* (2011) 33 VR 86; [2011] VSCA 292 at [36] per Nettle JA (Warren CJ and Ashley JA agreeing); *WBM v Chief Commissioner of Police* [2012] VSCA 159 at [60] (30 July 2012) per Warren CJ (Hansen JA agreeing);
29. *MyEnvironment Inc v VicForests* (2013) 306 ALR 624; [2013] VSCA 356 at [6] (10 December 2013) per Warren CJ (Garde AJA agreeing), at [148] per Tate JA (Garde AJA agreeing).
30. D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths, 2014, p 282 at [6.35].
31. (1884) 14 QBD 479 (*Blashill*).

same terms in the Act under the powers of which the by-law is framed".[32] The rule is followed in Australia,[33] including in this court,[34] and is enshrined in the interpretation of legislation Acts in the United Kingdom[35] and here.[36] That makes the meaning of the word "convene" in s 445F (and s 479(2)) of the Corporations Act 2001 relevant to the interpretation of the word "convening" and its cognates in reg 5.6.15 of the Corporations Regulations 2001.

[27] Conversely, the general rule is that usually the provisions of delegated legislation ought not to be taken into account when interpreting the provisions of the primary legislation pursuant to which the former was enacted.[37] So, in *Hunter Resources v Melville*,[38] Mason CJ and Gaudron J were able to say curtly that "[o]f course it is not permissible to interpret the statute by reference to the regulations". An exception to the rule is made where, for example, the statute and the regulations make up a legislative scheme.[39] If I were to approach the interpretation of the s 445F of the Corporations Act 2001 upon the basis that this exception applied, it would only confirm the conclusion to which I have come about the proper interpretation of that provision and then reg 5.6.15. But, in accordance with the general rule, I will be approaching the interpretation of s 445F upon the basis that it is not permissible to do so by reference to the Corporations Regulations 2001. The rule does not prevent consideration of other relevant regulations when interpreting reg 5.6.15, such as regs 5.6.17 and 5.6.27 to which I have referred.

[28] Upon consideration, I have come to the conclusion that, in the specific context of reg 5.6.15(1)(b), the word "convening" should not be interpreted narrowly. In the explaining this conclusion, it is convenient first to discuss certain authorities upon which the parties relied then to make reference to the history of relevant provisions in primary and subordinate legislation. That will take me to a detailed analysis of the provisions in question.

Review of authorities

[29] Decisions of courts referred to in the submissions of the parties demonstrate that the meaning of words such as "convene", "summon", "call" and "hold" are susceptible to different interpretation depending upon the particular context.

[30] For example, in *Beck v Tuckey Pty Ltd*,[40] Austin J considered the proper interpretation of s 249G(1) of the Corporations Act 2001, which empowered the court to "order a meeting of the company's members to be called if it is impracticable to call a meeting in any other way". His Honour pointed out that,

32. *Blashill* at 485 (Hawkins J agreeing). Citing *Blashill*, Halsbury stated the principle at common law was that "[w]ords and expressions used in subordinate legislation prima facie have the same meaning as in the statute creating the power of legislation": *Halsbury's Laws of England*, 2nd ed, Butterworths, 1938, p 469 at [576].
33. See, for example, *Vidovic v Strickland* [1950] SASR 19 at 23–4 per Paine AJ.
34. *Cox v Edbrooke* [1954] VLR 305 at 307; [1954] ALR 641 per Dean J.
35. F Bennion, *Statutory Interpretation*, 3rd ed, Butterworths, 1997, p 191.
36. Pearce and Geddes, 2014, p 282 at [6.35]; see also *Birch v Allen* (1942) 65 CLR 621 at 627; [1942] ALR 259 per Latham CJ (Rich, Starke, McTiernan and Williams JJ agreeing).
37. See Pearce and Geddes, 2014, p 133 at [3.41].
38. (1988) 164 CLR 234 at 244; 77 ALR 8 at 14; [1988] HCA 5.
39. See, for example, *Deputy Federal Commissioner of Taxation (SA) v Ellis Clark Ltd* (1934) 52 CLR 85 at 85–95; [1935] ALR 59 per Dixon J; see also Pearce and Geddes, 2014, p 135 at [3.41].
40. (2004) 49 ACSR 555; [2004] NSWSC 357 (*Beck*).

historically, the provision was variously cast in terms of a power to order a meeting to be "convened" or "called", apparently without distinction.[41] A relevant prior amendment of the provision had changed "convene" to "call", apparently by way of simplification.[42] Although his Honour found it unnecessary to determine the point, he stated that, taking into account the legislative context and history, the word "'call' could be taken to cover the whole process of convening the meeting and bringing together the members".[43] I would hold that the word "summon", depending upon the specific context, might be interpreted in the same way (see below). This tends to support the submissions of the administrators in the present case about the proper interpretation of the word "convening" in reg 5.6.15(1)(b) of the Corporations Regulations 2001. But it is not determinative because of the different statutory context and legislative history of that provision.

[31] In *NSX Ltd v Pritchard*[44] there is discussion of the responsibility of directors to "call" a general meeting under s 349D(1) of the Corporations Act 2001 upon request by a specified minimum proportion of members. The directors had resolved to call the meeting inside, but sent a notice of meeting outside, the mandatory 21-day time period specified in s 349D(5). The requesting members took matters into their own hands by calling a general meeting themselves under s 349E(1). In deciding that the members had validly done so, Lindgren J analysed the meaning of the word "call"[45] and drew attention to the "interchangeable" manner in which, historically, the legislature had used the words "call" and "convene".[46] As we will see, I would make the same point about the interchangeable use of the word "summon" and "convene". His Honour held that, under s 349D(1), the sending of a notice was "an essential element of the calling of a meeting".[47] With respect, that conclusion seems to have been demanded by the statutory context, which is different here.

[32] A number of cases have considered s 439A(1) of the Corporations Act 2001, which requires administrators of a company to "convene" an initial meeting of creditors within "the convening period" specified in subs (5). Section 439A(3) specifies how administrators are to "convene the meeting", namely by giving and publishing a notice. By s 439A(2), the meeting must be "held" within 5 business days before, or within 5 business days after, the end of the convening period. Note the explicit use in these provisions of the terms "convene" and "held".

[33] Given this particular context, the courts have drawn a distinction between convening a meeting under s 439A(1) and holding one under subs (2). In relation to s 439A of the Corporations Law (NSW) (applying under the Corporate Law Reform Act 1992 (Cth) and the Corporations (New South Wales) Act 1990 (NSW)), the High Court did so in *Australian Memory Pty Ltd v Brien*.[48] The discussion there is descriptive of the terms of the provisions in question. In

41. *Beck* at [39].
42. *Beck* at [45].
43. *Beck* at [46].
44. (2009) 178 FCR 151; 72 ACSR 122; [2009] FCA 584 (*NSX*).
45. *NSX* at [15]–[22].
46. *NSX* at [23].
47. *NSX* at [22].
48. (2000) 200 CLR 270; 172 ALR 28; 34 ACSR 250; [2000] HCA 30 at [8]–[9] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ (the Act was later amended but not in a relevant respect).

relation to s 439A(1) of the Corporations Act 2001, the New South Wales Supreme Court did so in *Sheahan re Cedenco JV Australia Pty Ltd*.[49] In that case, Barrett J followed United Kingdom authority based on similarly explicit provisions[50] to hold that "the word convening, in this context, means summoning or calling ... so that it is only the action of summoning or calling that must be completed within the convening period".[51] This supports BH Apartment's submissions about the proper interpretation of reg 5.6.15(1)(b). Again, however, the statutory context is different, especially because the word "convene" appears in s 439A(1) and the word "held" appears in s 439A(2).

[34] BH Apartments invoked the principle that uniform national legislation such as the Corporations Act 2001 should be consistently interpreted in the different Australian jurisdictions.[52] It also invoked the principle that like words in a statute should be interpreted in a like manner.[53] Relying upon *NSX* and *Sheahan*, it submitted that the word "convene" in s 445F(1) of that Act and "convening" in reg 5.6.15(1)(b) of the Corporations Regulations 2001 should be interpreted so as to encompass the process of calling a meeting but not the process of holding one.

[35] Although these principles are well-established, they are not determinative in the present case due to the differing statutory context and legislative history of the provisions under consideration. The provisions at issue in *NSX* and *Sheahan* — as well as those in *Beck* — are different in material respects from those at issue here. As we have seen, in *NSX* the issue was whether the sending of a notice was an essential ingredient of the obligation of directors in s 349D(1) and (5) of the Corporations Act 2001 to "call" a meeting within a specified time. As to *Sheahan*, the issue was whether, under s 439A(1) and (2) of that Act, administrators had to both "convene" a meeting and ensure that it was "held" within the specified time. The analysis in these decisions is useful but the result in each case turned on the specifically applicable provisions.

[36] Now to the evolution of the provisions under consideration here.

Historical like provisions in primary and subordinate legislation

United Kingdom

[37] One of the earliest legislative provisions conferring a right on a high-value creditor to call a creditors' meeting was s 89(2) of the Bankruptcy Act 1883 of the United Kingdom, which provided:

> The trustee may from time to time *summon* general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to *summon* meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or *whenever requested in writing to do so by one fourth in value of the creditors*.[54]

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49. [2010] NSWSC 592 (*Sheahan*) (2 June 2010).
50. *Re Windward Islands (Enterprises) UK Ltd* [1983] VCLC 293, 296 per Norse J; see also *McGuinness v Bremner Plc* [1988] SLT 891 at 894 [1]–[2] per Lord Davidson.
51. *Sheahan* at [6] (2 June 2010).
52. *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; 112 ALR 627 at 629; 10 ACSR 230 at 232 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22 at [135] per Gleeson CJ, Gummow, Callinan, Hayden and Crennan JJ.
53. *Craig Williamson Pty Ltd v Barrowcliffe* [1915] VLR 450 at 452 per Hodges J.
54. 46 & 47 Vict, c 52 (emphasis added).

The purpose of the provision is indicated by its title — "Control over Trustee", and its description — "Discretionary powers of trustee and control thereof".[55]

[38] I do not make too much of this provision because it is but a distant ancestor of the one in question. But it does serve as a convenient place to commence my discussion of certain important general points. And it uses the word "summon", which BH Apartments submits is the equivalent of "call". It submits that, in reg 5.6.15(1)(b) of the Corporations Regulations 2001, "convening" should be read down to mean "summon" in the sense of "call" and not "hold".

[39] Section 89(2) of the Bankruptcy Act 1883, and the other historical provisions to be considered below, do not support that submission. Although the ordinary meaning of the word "summon" is to call people to a meeting,[56] it is capable of including, and I think in this provision would include, holding the meeting. The provision confers an important duty on trustees. The relevant duty is to ensure that creditors meetings occur as requested. That would mean ensuring that the meeting is held as called. When obeying the injunction in s 89(2), trustees can't just sit on their hands after the notices are sent out.

[40] Section 89(2) was accompanied by r 254 of the Bankruptcy Rules 1886 of the United Kingdom, which provided:

> The costs of summoning a meeting of creditors at the instance of any person other than the Official Receiver or trustee shall be paid by the person at whose instance it is summoned, to be repaid to him out of the estate if the creditors or the Court shall so direct.[57]

It will be noted that this regulation made the person requesting the meeting responsible for "the cost of summoning ... [a] meeting". I do not see here any warrant for reading the provision down by adopting a narrow meaning of the word "summoning". All the costs of the meeting — calling and holding it — have to be paid for and may be recovered from the notified creditors. This interpretation of the rule fits with s 89(2) as I would interpret it.

[41] Seven years later, an updated version of the companies legislation was enacted. It incorporated a version of s 89(2) that was adapted to apply specifically to companies in liquidation. The provision was s 23(2) of the Companies (Winding-Up) Act 1890 of the United Kingdom, which provided:

> The liquidator may from time to time *summon* general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to *summon* meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories as the case may be.[58]

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55. 46 & 47 Vict, c 52.
56. *Macquarie Encyclopedic Dictionary*, 2nd ed, Macquarie Dictionary Publishers, 2010, p 1238 gives the meaning of "summon" as "1. to call with authority to some duty, task, or performance; call upon (to do something). 2. to call for the presence of, or by command, message, or signal; call". *The Oxford English Dictionary*, 2nd ed, Oxford University Press 1989, Vol XVII, p 859 gives the meaning of "summon" as "1. ... To call together by authority for action or deliberation ... 2. To cite by authority to attend at a place named ... 3. ... To require the presence or attendance of".
57. The rule taken from George Young Robson, *A Treatise on the Law of Bankruptcy*, Reeves and Turner, 6th ed, 1887, p 936 (emphasis added).
58. 53 & 54 Vict, c 63 (emphasis added).

This provision differed from the bankruptcy legislation in that it included contributories[59] in the requesting category and reduced the qualifying value of the requesting creditor's interest from 25% to 10 per cent. As we will see, this provision was transported to Australia where it became a closer ancestor of the ones in question.

[42] I would make the same points about the meaning of the word "summon" in s 23(2) of the Companies (Winding-Up) Act 1890 as I made about the same word in s 89(2) of the Bankruptcy Act 1883. In the context, it would not receive a narrow interpretation.

[43] Section 23(2) was accompanied by r 51 of the Companies (Winding-Up) Rules 1890 of the United Kingdom, which provided:

> [t]he costs of *summoning* a meeting of creditors at the instance of any person other than the Official Receiver or Liquidator shall be paid by the person at whose instance it is *summoned*, who shall before the meeting is *summoned* deposit with the Official Receiver or Liquidator (as the case may be) such sum as may be required by the Official Receiver or Liquidator as security for the payment of such costs. The said costs shall be repaid out of the assets of the Company, if the creditors or contributories, as the case may be, shall by resolution so direct.[60]

Rule 51 was perhaps the first occasion on which a security for costs relating to a meeting requested by a creditor were required to be paid by the person who summoned the meeting. It also provided for the costs to be repaid out of the company assets if such a direction was given by resolution of the creditors' meeting.

[44] As with the relevant provision of the primary legislation, in this rule I would not read down "summoning" to mean "calling" but not "holding". The purpose of the rule was cost-recovery in respect of meetings requested by persons other than official receivers or liquidators. The primary legislation conferred the right of request. Under the rule, requestors were liable for the costs of the meeting, unless the creditors or contributories by resolution directed otherwise. The requirement for the lodgment of a security deposit supports this interpretation. The procedure was that the deposit was to stand against the full costs of the meeting once this amount was known after the meeting, with any balance being payable by the requesting persons. If they were to be liable for the meeting-calling costs only, the rule would have said so, for those costs would have been readily ascertainable before the meeting. As we will see, it is the same with the regulation in question.

59. Although the term "contributory" was not defined in the Companies (Winding-Up) Act 1890 (UK), it was defined in the previous version of the legislation (s 74 of the Companies Act 1862 (UK)) to mean "every person liable to contribute to the assets of a company".
60. Emphasis added.

Early Victoria

[45] Section 23(2) of the Companies (Winding-Up) Act 1890 of the United Kingdom was directly adopted into Victorian law as s 144(2) of the Companies Act 1896 (Vic), in identical terms. Later companies legislation in the United Kingdom and Victoria incorporated the equivalent of s 23(2) without amendment.[61]

[46] Victoria did not enact subordinate legislation with respect to companies until 1910 at which time the relevant primary legislative provision was s 160(2) of the Companies Act 1910 (Vic). As enacted, r 109 of the General Rules under the Companies Act 1910 (Vic) provided:

> The costs of *summoning* a meeting of creditors or contributories at the instance of any person other than the Official Liquidator or Liquidator, shall be paid by the person at whose instance it is *summoned*, who shall before the meeting is *summoned* deposit with the Official Liquidator or Liquidator (as the case may be) such sum as may be required by the Official Liquidator or Liquidator as security for the payment of such costs. The costs of *summoning* such meetings of creditors or contributories, including all disbursements for printing, stationery, postage and the hire of room, shall be calculated at the following rates for each creditor or contributory to whom notice is required to be sent: — Two shillings per creditor or contributory for the first 20 creditors or contributories, one shilling per creditor or contributory for the next 30 creditors or contributories, sixpence per creditor or contributory for any number of creditors or contributories after the first 50. The said costs shall be repaid out of the assets of the Company if the Court shall by order, or if the creditors or contributories (as the case may be) shall by resolution so direct.[62]

[47] While this rule stood until its repeal when the regime moved to the federal jurisdiction (see below), the wording in the primary Victorian legislation was varied slightly in a later version. Thus, s 192(2) of the Companies Act 1938 (Vic) was enacted to provide:

> The liquidator may *summon* general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to *summon* meetings at such times as the creditors or contributories by resolution either at the meeting *convened and held* under the provisions of section one hundred and eighty-two of this Act or otherwise direct or whenever requested in writing to do so by one-tenth in value of the creditors or contributories (as the case may be).[63]

As can be seen, this provision made a distinction between summoning, and convening and holding, a meeting, but not in relation to one requested by a creditor. In subsequent iterations of the Victorian legislation, the wording was amended, but not as relevant to the right of a high-value creditor to require the summoning of a general meeting of the creditors.[64] The provision continued to be described as one relating to the "Exercise and control of liquidator's powers".

[48] For the reasons given above in relation to the United Kingdom ancestors of the Victorian statutory provisions and rule, I would not adopt a narrow interpretation of the words "summon" and "summoning". Under the provisions,

61. See, for example, s 158(2) of the Companies (Consolidation) Act 1908 (UK); s 160(2) of the Companies Act 1910 (Vic); s 160(2) of the Companies Act 1915 (Vic); s 160(2) of the Companies Act 1928 (Vic); s 192(2) of the Companies Act 1929 (UK); s 246(2) of the Companies Act 1948 (UK).
62. Emphasis added.
63. Emphasis added.
64. See s 175(2) of the Companies Act 1958 (Vic) and s 237(2) of the Companies Act 1961 (Vic).

the duty of the liquidator was to summon a meeting in the sense of calling and holding it at the request of high-value creditors or contributories. Under the rule, the requesting persons were liable for the full costs thereof.

Uniform federal companies legislation

[49] With the enactment of the Companies Act 1981 (Cth), the legislative scheme was moved into the federal jurisdiction. This was intended to create a uniform scheme of companies legislation throughout Australia, one incorporated into Victorian law by virtue of s 6 of the Companies (Application of Laws) Act 1981 (Vic). Section 18(1) of that Act provided that the provisions of the Commonwealth Act would "operate to the exclusion of the provisions of the Companies Act 1961", which was the then current version of the Victorian legislation.

[49] The relevant provision of the Companies Act 1981 was s 379(2), which provided:

> The liquidator may *convene* general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall *convene* meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.[65]

It can be seen that this provision used the word "convene" rather than the word "summon". It too was entitled "Exercise and control of liquidator's powers". To my way of thinking, this use of the word "convene" rather than the word "summon" was not intended to made the provision operate differently from provisions like the Victorian antecedent. It simply confirmed that the duties of liquidators included the duty to convene (in the sense of hold) and not just to summon (in the sense of call) a validly directed or requested meeting. It was re-enacted in virtually identical form through multiple sets of legislation,[66] and has not since been altered in any relevant way. This provision is currently in force as s 479(2) of the Corporations Act 2001. As we have seen, it is one of the provisions with which reg 5.6.15(1)(b) is connected. As we will see, it was the first provision to be so connected.

[50] With the move to the federal scheme of companies legislation in 1981, the Victorian Rules were replaced by the Companies Regulations 1982 (Cth), which were incorporated into Victorian law by s 7 of the Companies (Application of Laws) Act 1981 (Vic). The federal equivalent of the old Victorian r 109 was contained in reg 87 of the Companies Regulations 1982 (Cth), which provided:

> (1) The costs of *convening* a meeting of creditors or contributories at the request of any person other than a liquidator or official manager shall be paid by the person upon whose request the meeting is *convened* and that person shall, before the meeting is *convened*, deposit with the liquidator or official manager such sum as may be required by the liquidator or official manager as security for the payment of costs.

65. Emphasis added. "Contributory" was defined in s 5(1) to mean various categories of persons who were liable to contribute to the property of the company in the event of its being wound up, and holders of fully paid up shares or members, depending on the kind of company or body corporate concerned.

66. See s 479(2) of the Corporations Act 1989 (Cth); s 479(2) of the Corporations Law, which was incorporated into the Corporations Act 1989 (Cth) pursuant to s 82 of that Act; s 479(2) of the Corporations Act 2001.

> (2) Where the Court so orders, or the committee by resolution so directs, the costs of *convening* a meeting of a committee of inspection shall be repaid out of the assets of the company to the person causing it to be convened.[67]

As with the Companies Act 1981 (Cth), these federal regulations used the word "convening" instead of the word "summoning". While the provision left out the means of calculating the costs of convening a meeting, in substance it operated in the same way as the former Victorian rule. As with the primary legislation, the move from "summoning" to "convening" simply confirmed that the regulation was to operate upon the basis that the duty of the liquidator (or official manager) was both to call and hold the meeting and that costs were recoverable accordingly.

[51] As the word "convene" was introduced into the relevant provisions when the scheme for the regulation of companies was moved into the federal jurisdiction and the meaning of the regulation is uncertain, it is appropriate to examine the extrinsic materials relating thereto.

[52] Of s 379(2) of the Companies Act 1981, the explanatory memorandum stated simply:

> [i]n administering and distributing the property, the liquidator will be required to have regard to any directions given by the resolution of the creditors or contributories at a general meeting or by the committee of inspection.[68]

The explanatory memorandum also noted that this provision was based on a section of the Companies Acts of those states that were parties to the Interstate Corporate Affairs Agreement, of which Victoria was one.[69] This statement, along with the title of the provision, seems to emphasise that the purpose of the new s 379 was the same as ever — control of the liquidator's powers by the creditors.

[53] Of reg 87 of the Companies Regulations 1982 (Cth), the explanatory statement had this to say:

> Where any person (other than a liquidator or official manager) *calls* a meeting of creditors or contributories, he is required to pay the costs of *calling* such a meeting. In addition, before the meeting is *convened*, he is required to deposit with the liquidator or official manager such sum which may be required as security for payment of the costs.[70]

When describing the operation of the costs-recovery procedure, this explanation of the effect of reg 87 uses both of the words "calls" and "convened". In doing so, I think the statement was attempting to provide a simple explanation of the procedure. It was not suggesting that, under the regulation, the recoverable costs were to be confined to the costs of calling rather than holding the meeting. This conclusion is supported by the further statement[71] that the regulation was based on r 97 of the Supreme Court Rules 1967 (NSW), which provided:

> The costs of *summoning* a meeting of creditors or contributories at the instance of any person other than the liquidator shall be paid by the person at whose instance it is

67. Emphasis added.
68. Explanatory memorandum, Companies Bill 1981 (Cth) 404 at [912].
69. Explanatory memorandum, Companies Bill 1981 (Cth) 404 at [912] and "Abbreviations" (definition of "ICAC CAs").
70. Explanatory statement, Companies Regulations 1982 (Cth) 62 at [194] (emphasis added).
71. Explanatory statement, Companies Regulations 1982 (Cth) 63 at [196].

summoned, who shall, before the meeting is *summoned*, deposit with the liquidator such sum as may be required by the liquidator as security for the payment of such costs.[72]

As I have explained above by reference to similar antecedent provisions, the word "summoning" in this rule would be interpreted to encompass the whole process of calling and holding the meeting.

[54] Under the Corporations Act 1989 (Cth), the relevant legislative provision became s 479(2), which (apart from minor inconsequential amendments) was in the same terms as the former s 379(2) of the Companies Act 1981 (Cth). As we have seen, s 479(2) is currently in force in the Corporations Act 2001.

When s 479(2) was enacted, it was accompanied by reg 5.6.15 of the Corporations Regulations 1990 (Cth), which provided:

> (1) A person (other than a liquidator or official manager) at whose request a meeting of creditors or contributories is *convened* must:
>
> (a) if the liquidator or official manager requires a security for the payment of costs before the meeting is *convened* — deposit with the liquidator or official manager a sum of money; and
>
> (b) pay the costs of *convening* the meeting.
>
> (2) The costs of *convening* a meeting of a committee of inspection must be repaid out of the assets of the company to the person causing it to be convened if:
>
> (a) the Court so orders; or
>
> (b) the committee by resolution so directs.[73]

This was the origin of reg 5.6.15 in its current terms in the Corporations Regulations 2001. Admitting obvious changes in form, this provision was no different in substance to reg 87 of the Companies Regulations 1982 on which it was based. As we will see, I think it should be interpreted in the same way.

The Corporations Law

[55] With the enactment of the Corporations Legislation Amendment Act 1990 (Cth), significant change was made to the Commonwealth legislative scheme. Section 4 in Pt 2 gave this explanation of the main purpose and effect of the Act:

> 4 *What this Part does*
>
> (1) This Part changes the Principal Act from an Act relying on the corporations and other powers, and intended to apply of its own force throughout Australia, into a law for the government of the Australian Capital Territory in relation to corporations, securities, the futures industry and some other matters.
>
> (2) Section 6 of this Act inserts in the Principal Act new Parts providing for the Corporations Law set out in new section 82 of the Act to apply as a law for the government of the Territory.
>
> (3) Section 7 of this Act then creates that Corporations Law out of the existing interpretation and substantive provisions of the Principal Act.
>
> (4) The States (including the Northern Territory) can also apply that Corporations Law as their own law, because the amendments made by this Part are designed to render that Law suitable for application as a uniform law in all States and internal Territories.[74]

72. Emphasis added.
73. Emphasis added. As enacted in 1990, reg 5.6.15(2) related only to a meeting of a committee of inspection and not to a meeting of creditors. Under reg 5.6.15(2) of the Corporations Regulations 2001, a meeting of a committee of creditors is included (see below).
74. "Principal Act" is defined in s 3 of the Corporations Legislation Amendment Act 1990 as meaning the Corporations Act 1989 (Cth).

[56] Section 6 of the Corporations Legislation Amendment Act 1990 inserted new Pts 1–13 into the Corporations Act 1989 (Cth), with ss 1–81 containing numerous provisions relating to the interpretation, application and citation of the new Corporations Law. The new Pt 13 was entitled "The Corporations Law", and contained only s 82, which provided as follows:

> 82 *The Corporations Law*
> The Corporations Law is as follows:
> *THE CORPORATIONS LAW*
> *CHAPTER 1 — INTRODUCTORY*
> *PART 1.1 — PRELIMINARY*
> 1 *Citation*
> This Law may be referred to as the Corporations Law.
> 2 *Commission has general administration of this Law*
> Subject to the ASC Law of this jurisdiction, the Commission has the general administration of the Corporations Law of this jurisdiction.

Thereafter, as noted in s 4 of the Corporations Legislation Amendment Act 1990, the existing provisions of the Corporations Act 1989 were intended to follow on as provisions of the Corporations Law existing by virtue of the new s 82 within which they were now contained. Schedules 3–6 of the Corporations Legislation Amendment Act 1990 contained amendments to the existing provisions of the Corporations Act 1989, now ostensibly provisions of the Corporations Law, consequential upon the changes made by the provisions of the Corporations Legislation Amendment Act 1990 itself. The remainder of that Act contained consequential amendments to related Commonwealth legislation, such as the Australian Securities Commission Act 1989.

[57] In spite of the changes effected by the Corporations Legislation Amendment Act 1990, s 479(2) of the Corporations Act 1989 was incorporated into the Corporations Law without change, and remained in identical form until the repeal of the Corporations Law in 2001. As we have seen, at that point the provision was re-enacted (again without amendment) as s 479(2) of the Corporations Act 2001, and has not been altered since that date.

Introduction of Pt 5.3A into Corporations Law

[58] We come now to s 445F, which was inserted as part of the new Pt 5.3A into the Corporations Law by the Corporate Law Reform Act 1992 (Cth). This marked the introduction of a scheme for the administration of a company's affairs with a view to executing a deed of arrangement (to paraphrase the title of the part). I have already referred to the purpose of Pt 5.3A and the general supervisory powers of the court thereunder.

[59] By s 56 of the Corporate Law Reform Act 1992, the Corporations Law was amended to include s 445F, originally in these material terms:

> (1) The administrator of a deed of company arrangement:
> (a) may at any time convene a meeting of the company's creditors; and
> (b) must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors' claims against the company.
> (2) A meeting under this section must be convened by the deed's administrator:
> (a) giving written notice of the meeting to as many of the company's creditors as reasonable [sic] practicable; and
> (b) causing notice of the meeting to be published:
> (i) in a national newspaper; or

(ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;

at least 5 business days before the meeting.

...

(4) At a meeting convened under this section, the deed's administrator is to preside.

(5) A meeting convened under this section may be adjourned from time to time.

When the Commonwealth companies legislation was re-enacted as the Corporations Act 2001, this provision was enacted in virtually identical form as s 445F of that Act. While the notice requirements under s 445F(2) have subsequently changed (see below), the remainder of the provision has remained intact, without amendment (see above).

[60] It is again appropriate to have regard to extrinsic materials. As explained in the explanatory memorandum, Pt 5.3A was intended to implement recommendations in the Harmer report.[75] The general purpose of these amendments was:

> ... to save companies and businesses which are experiencing solvency difficulties, rather than destroy them in the way the current law all too often does. If the new Part is successful in even a small minority of cases, the benefits available, both to the company under administration *and to its creditors*, will be very significant.[76]

The effect of the new Pt 5.3A was described as follows:

> The proposed new Part 5.3A will provide for an administrator to take over the affairs of a company, with a view to developing a "deed of company arrangement", under which the company might be restored to financial health.[77]

The new s 435A, concerning the object of Pt 5.3A, was intended to:

> ... emphasise that the primary object of the Part is to maximise the chance of a company emerging from administration with as much as possible of its business continuing in existence. The insertion of the new Part is primarily designed to redress concerns that Australia's current corporate insolvency laws are inflexible and that they too easily and too often lead to the liquidation of companies, when some such companies could have been saved.[78]

[61] Section 445F is contained in Div 11 of the new Pt 5.3A. The title of Div 11 is "Variation, termination and avoidance of a deed". In the explanatory memorandum, the objectives of Div 11 were set out as follows:

> This division will deal with the circumstances under which a deed of company arrangement might be varied or terminated. It will provide for a deed to be terminated where false or misleading information was supplied to the administrator or the creditors while the deed was being prepared and considered, where the deed is oppressive to dissenting creditors, or where circumstances have changed to the point where the creditors wish to terminate the deed.[79]

75. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) 5 at [14]–[15].
76. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) 5 at [15] (emphasis added).
77. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) at [444].
78. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) at [448].
79. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) at [593].

[62] Finally, the effect of s 445F was set out thus:

> This proposed section will set out the procedures for convening a meeting of the company's creditors to consider a variation or termination of a deed of company arrangement and will deal with minor matters concerning the conduct of that meeting.[80]

[63] It can be seen that the description of the operation of s 445F in the explanatory memorandum was in general terms. It placed emphasis upon the purpose of the convened meeting in relation to the consideration and determination of the matters in contention, specifically the termination or variation of a deed of company arrangement. The description does not support interpreting s 445F such that the process of convening ends with the notification step in subs (2).

[64] Following the insertion of s 445F into the Corporations Law, consequential amendments were made to reg 5.6.15 of the Corporations Regulations 1990. Regulation 21 of the Corporations Regulations (Amendment) 1993 (Cth) replaced the words "official manager" in reg 5.6.15(1) with the phrase "administrator of a company under administration or of a deed of company arrangement", and replaced the words "official manager" throughout the remainder of the regulation with the word "administrator". In addition, in reg 5.6.15(2), after the words "committee of inspection" were inserted the words "or a committee of creditors".

[65] The effect of these amendments may be described as two-fold. First, the replacement of the references to an official manager with references to an administrator under a deed of company arrangement made clear that reg 5.6.15 was intended to apply equally to creditors' meetings requested under both the new s 445F (in the case of companies in administration under Pt 5.3A) and under the existing s 479(2) (in the case of companies in liquidation under Pt 5.4B). Furthermore, the addition of the reference to a committee of creditors in reg 5.6.15(2) reverted to the original position under the Victorian and UK legislation whereby a high-value creditor who requested the convening of a meeting of creditors was able to have their costs repaid out of the assets of the company where so ordered by the court or directed by the committee. Importantly for present purposes, the amendments simply picked up and applied to meetings convened under s 445F the same costs-recovery procedure that applied to meetings convened under s 479(2). In my view, in both cases, full costs recovery is provided for.

[66] This amended version of reg 5.6.15 was re-enacted in identical form as reg 5.6.15 of the Corporations Regulations 2001 and has not since been amended.

[67] That brings me to the resolution of the matter in issue.

Proper interpretation of reg 5.6.15(1)(b) of Corporations Regulations 2001

[68] To repeat, the central issue in this appeal is the proper interpretation of reg 5.6.15(1)(b) of the Corporations Regulations 2001. The question is whether the scope of the phrase "the costs of convening the meeting" in that paragraph is confined to the costs of calling, or includes the costs of holding, the meeting.

[69] The meeting referred to is a meeting of creditors or contributories requested by a person other than a liquidator or administrator of a company, as mentioned in the opening words of reg 5.6.15(1). In the case of a company under

80. Explanatory memorandum, Corporate Law Reform Bill 1992 (Cth) at [605].

administration under Pt 5.3A, such a meeting of its creditors may be requested under s 445F of the Corporations Act 2001. In the case of a company in liquidation under Pt 5.4B, such a meeting of its creditors or contributories may be requested under s 479(2).

[70] Because of the rule of interpretation that the meaning of words and expressions in regulations generally follows the meaning thereof in the enabling legislation (see above), it is important to begin with ss 445F and 479(2). In my view, the word "convene" and its cognates in those provisions clearly refers to the whole process of calling and holding the meeting. In s 445F, that conclusion follows from the various steps specified in subss (1)–(5). In s 479(2), it follows from the general terms in which the meeting-convening duty is conferred.

[71] As to s 445F, subs (1)(a) and (b) confer a meeting-convening discretion and duty (the latter being presently relevant). Subsections (2) and (3) specify notice requirements. Under subs (4), the deed administrator must preside at a convened meeting which, by subs (5), may be adjourned from time to time. Having regard to these provisions, in s 445F(1)(b) the obligations of an administrator to "convene ... a meeting" encompass the whole process of calling and holding it.

[72] BH Apartments submitted that a meeting is convened under s 445F(2) "by giving written notice of the meeting".[81] On that submission, for the purposes of reg 5.6.15(1)(b), the scope of the convening process is derived from that procedure and therefore ends with notification. I cannot accept this submission. Subsection (2) serves the important but limited purpose of specifying the notice requirements for convening a meeting. The word "by" has to be read in that context. It is not a consequence of subs (2) that the convening process ends with the giving of the notice, for the purposes of reg 5.6.15(1)(b) or otherwise. The concept of convening to which s 445F gives expression is to be derived from the section as a whole, especially the duty imposed on administrators under subs (1), which is to convene, in the sense of calling and holding, a meeting.

[73] As to s 479(2), it confers a discretion or duty to "convene" a meeting in the specified circumstances. As no procedure is specified, the means of doing so are left to liquidators. The power or duty of liquidators is not just to call the meeting but to ensure that it is held. Section 445F is intended to operate in the same way. As we have seen, chronologically, s 479(2) came first. It made provision in relation to companies in liquidation. Section 445F came later. It picked up the existing provision and applied it to companies in administration under deeds of arrangement. The procedure involves a broad concept of convening in both cases.

[74] I have discussed in detail antecedent legislative provisions like ss 445F and 479(2) in the historical legislation. For the reasons given, the use in those antecedent provisions of such words as "summons" and "summoning" does not suggest that the words "convene" and "convening" in ss 445F and 479(2) are to be confined to the calling of a meeting. Under the antecedent provisions, the duty of liquidators was to ensure that the relevant meeting was called and held, just as it is under the present provisions. It is no different under s 445F or s 479(2) in relation to companies in administration under Pt 5.3A and liquidation under Pt 5.4B respectively.

81. Emphasis added.

[75] As the word "convene" and its cognates in ss 445F and 479(2), properly interpreted, encompass the whole process of calling and holding a meeting, the word "convening" in reg 5.6.15(1)(b) would be interpreted in the same way unless the contrary intention appears.

[76] As with ss 445F and 479(2), the antecedent rules and regulations do not support a contrary interpretation of reg 5.6.15(1)(b) (see above). Nor do the terms of the regulation as a whole. As we have seen, by subreg (1)(a), the administrator or liquidator may require the deposit of a security before the meeting is convened. This suggests that the process of convening in the regulation, including in subreg (1)(b), encompasses the calling and holding of the meeting. The payment is intended to stand as security for the full costs thereof, as ascertained after the meeting has occurred. If only the holding costs were to be payable, the regulation would have said so, for such costs would be readily ascertainable before the meeting is held.

[77] The terms of other relevant regulations are also against a contrary interpretation. As earlier noted, pursuant to regs 5.6.17(1)(c) and 5.6.27(1) the administrator (as the convenor) is responsible for chairing, and therefore the conduct of, the meeting, and for the preparation of the minutes thereof. This suggests that the regulations relevantly incorporate the same broad concept of convening that we find in s 445F (and s 479(2)).

[78] Turning to considerations of purpose, it is necessary to appreciate that the purposes of related statutory provisions are not necessarily the same and to some extent may conflict: see above. When interpreting one provision, the court does not simply adopt an interpretation that gives its purpose full reign to the exclusion of (possibly) competing purposes in other provisions. The competing purposes of all the relevant provisions have to be identified and taken into account.

[79] The purpose of Pt 5.3A of the Corporations Act 2001 is to ensure that failing companies are restored to corporate health or, where this is not possible, wound up on the best terms.[82] In aid of that purpose, wide discretionary powers are conferred on administrators. The purpose of s 445F is to control those powers (the purpose of s 479(2) is the same in the case of liquidators). In aid of that purpose, high value shareholders are given a right to request administrators to convene a meeting of creditors. Such requests must be acted upon. I have taken this purpose into account when interpreting s 445F.

[80] The purpose of reg 5.6.15(1)(b) is to provide a safeguard against abuse of the right to request the convening of a meeting. The risk of abuse is manifest and the obligation to pay the full costs of convening a meeting is intended to minimise it. The idea is that the obligation to pay those costs would make the nominated persons think twice before making a request. The interpretation of reg 5.6.15(1)(b) that I would adopt, which is that the requestor must pay the full convening costs, is consistent with that purpose.

[81] I do not accept that this interpretation of reg 5.6.15 is inconsistent with or unduly inhibits the achievement of the purpose of s 445F. It gives effect to the purposes of both s 445F (and s 479(2)) and reg 5.6.15 in an appropriately balanced way. In reaching that conclusion, I have taken into account reg 5.6.15(2)(a) and (b), which is an amelioration provision. It requires the costs of convening a meeting to be paid out of the assets of the company if the court

82. Section 435A of the Corporations Act 2001.

so orders or the committee so resolves. Moreover, I have referred to various general powers of the court under Pt 5.3A which would be available if the majority creditors were to oppress the minority creditors in connection with a convened meeting, if the power in reg 5.6.15(2)(b) were to be unreasonably refused or the administrators were to need direction or deserve supervision in this connection: see ss 447A(1), 447E(1)(a) and (b) and 447D(1).

Conclusion

[82] Section 445F(1) of the Corporations Act 2001 confers an obligation on the administrator of a company under a deed of company arrangement to convene a meeting of its creditors at the request of a high-value creditor. Regulation 5.6.15(1)(b) of the Corporations Regulations 2001 provides that the requesting person must "pay the costs of convening the meeting".

[83] At the request of BH Apartments (a high-value creditor) under s 445F(1), the administrators of a company under a deed of company arrangement convened a meeting of its creditors. In the Magistrates' Court of Victoria, they obtained an order that, pursuant to reg 5.6.15(1)(b), BH Apartments was liable for the payment of the full costs of convening the meeting, not just the calling costs, less the amount of a lodged deposit.

[84] BH Apartments appealed to this court on a question of law, which was whether the expression "the costs of convening the meeting" in reg 5.6.15(1)(b) was confined to the costs of calling, or included the costs of holding, the meeting. I have concluded that the magistrate correctly decided that the expression included the costs of both calling and holding the meeting. The appeal will therefore be dismissed.

SHARMILA SOORIAN
SOLICITOR