FEDERAL COURT OF AUSTRALIA

RBC Investor Services Australia Nominees Pty Limited v Brickworks Limited

[2017] FCA 756

File number(s):	NSD 2387 of 2013
Judge(s):	**JAGOT J**
Date of judgment:	10 July 2017
Catchwords:	**CORPORATIONS –** oppression – whether maintenance of cross shareholding in publicly listed companies oppressive – whether an agreement, arrangement or understanding between directors to maintain cross shareholding – whether cross shareholding depresses value of shares in companies – whether cross shareholding entrenches position of incumbent boards – whether cross shareholding disenfranchises shareholders – application dismissed
Legislation:	*Corporations Act 2001* (Cth) ss 232, 233, 250B, 259D, 259E *Evidence Act 1995* (Cth) ss 81, 87 *Federal Court of Australia Act 1976* (Cth) ss 37M, 37N
Cases cited:	*Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614 *Bateman v Newhaven Park Stud Ltd* [2004] NSWSC 566; (2004) 49 ACSR 597 *Briginshaw v Briginshaw* (1938) 60 CLR 336 *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 *Carson v Dynasty Metals Australia Ltd* [2011] FCA 621 *Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55; (2014) 314 ALR 62 *Corbett v Corbett Court Pty Ltd* [2015] FCA 1176; (2015) 109 ACSR 296 *Equiticorp Finance Ltd (In liq) v Bank of New Zealand* (1993) 32 NSWLR 50 *Falkingham v Peninsula Kingswood Country Golf Club* [2014] VSC 437 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 *HNA Irish Nominee Ltd v Kinghorn (No 2)* [2012] FCA

	228; (2012) 290 ALR 372 *Insurance Commissioner v Joyce* (1948) 77 CLR 39 *Joint v Stephens* [2008] VSCA 210 *Jones v Dunkel* (1959) 101 CLR 298 *Latimer Holdings Ltd v Sea Holdings New Zealand Ltd* [2004] NZCA 226; [2005] 2 NZLR 328 *Mackay Sugar Ltd v Wilmar Sugar Australia Ltd* [2016] FCAFC 133; (2016) 338 ALR 374 *Maine v Chelia* [2005] NSWSC 860 *Morgan v 45 Flers Ave Pty Ltd* (1986) 10 ACLR 692 *Nadinic v Drinkwater* [2017] NSWCA 114 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 *Ngurli Ltd v McCann* (1953) 90 CLR 425 *Re Spargos Mining NL* (1990) 3 WAR 166 *Territory Realty Pty Ltd v Garraway* [2009] FCA 292 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446 *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 26 ALR 609 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285
Date of hearing:	22 - 26 May 2017, 1 - 2 June 2017
Registry:	New South Wales
Division:	General Division
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Category:	Catchwords
Number of paragraphs:	408
Counsel for the Cross-Claimant:	Mr A L J Bannon SC with Mr J A C Potts SC and Ms L E Hulmes
Solicitor for the Cross-Claimant:	Clayton Utz
Counsel for the First Cross-	Mr I M Jackman SC with Mr D F C Thomas

Respondent:

Solicitor for the First Cross-Respondent:	King and Wood Mallesons
Counsel for the Second Cross-Respondent:	Mr N Hutley SC with Mr D Sulan and Mr A Hochroth
Solicitor for the Second Cross-Respondent:	Baker & McKenzie

ORDERS

NSD 2387 of 2013

BETWEEN:	**RBC INVESTOR SERVICES AUSTRALIA NOMINEES PTY LIMITED ACN 097 125 123 AS NOMINEE FOR RBC INVESTOR SERVICES TRUST IN ITS CAPACITY AS CUSTODIAN FOR PERPETUAL INVESTMENT MANAGEMENT LIMITED ACN 000 866 535** Cross-Claimant
AND:	**BRICKWORKS LIMITED ACN 000 028 526** First Cross-Respondent
	WASHINGTON H SOUL PATTINSON AND COMPANY LIMITED ACN 000 002 728 Second Cross-Respondent
JUDGE:	**JAGOT J**
DATE OF ORDER:	**10 JULY 2017**

THE COURT ORDERS THAT:

1. The second cross-claim be dismissed.
2. The cross-claimant pay the cross-defendants' costs of the second cross-claim as agreed or taxed.
3. Publication of the reasons for judgment apart from paragraphs 1 to 5 other than to the parties and their legal representatives be suppressed for 48 hours to give the parties an opportunity to notify the Associate to Jagot J whether there is any confidential matter disclosed in the reasons and an explanation of why the matter continues to be confidential.
4. Any application to vary order 2 may be made within 14 days by way of email to the Associate to Jagot J, copied to the parties, which includes details of the costs order sought and a proposed timetable for resolving the issue of costs.

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

REASONS FOR JUDGMENT

JAGOT J:

1. OVERVIEW

1 In this case a major institutional investor contends that a cross shareholding between two large publicly listed Australian companies is oppressive to shareholders primarily because by allegedly disenfranchising minority shareholders the cross shareholding is said to entrench the incumbent boards and, as a result, the control of the "Millner family", and depresses the price of shares in each company.

2 A finding of oppression is an outcome of an evaluative exercise in which potentially competing considerations are brought to account. This is why in an oppression suit a court asks whether reasonable directors would consider the impugned conduct unfair. The impugned conduct in the present case is the maintenance of the cross shareholding in the face of repeated attempts since 2011 by the investor, Perpetual, to have the cross shareholding dismantled.

3 In the present case it would be apparent to reasonable directors that the cross shareholding has a range of potential effects which should be considered in context. In particular, and as explained in these reasons:

(1) the cross shareholding has been in place for more than 40 years;

(2) the cross shareholding would not now be able to be created (or recreated if unwound) but is lawful because of transitional provisions in the legislation;

(3) Perpetual acquired its shares knowing the cross shareholding existed and, in its capacity as an institutional investor, presumably understood the implications of it;

(4) it is not apparent that the cross shareholding has caused any related party or improvident transaction;

(5) it is possible that the cross shareholding has contributed to shares in the companies trading at below net asset value per share, but whether that is so or not has not been demonstrated to date and the extent of any such contribution, if it exists, is presently unknown;

(6) the cross shareholding may reasonably be seen as having provided each company with material benefits as a result of diversification which has reduced earnings volatility;

(7) there are available ways in which the cross sharing could be unwound which would not cause adverse tax consequences, but it is not possible to be satisfied on the presently available material that any proposal dismantling the cross shareholding will yield material longer term financial benefits to shareholders of either company;

(8) Perpetual's attempt to prove that there is an agreement, arrangement or understanding between members of the "Millner family" and/or various members of the boards of each company to maintain the cross shareholding in order to entrench control of the companies by the incumbent boards and thus the Millner family has failed;

(9) the cross shareholding has a range of other implications for both companies. In particular, the cross shareholding operates to discourage any takeover of the companies, impacts on liquidity, facilitates retention of board membership, and is a circumstance which, as the present case demonstrates, is capable of giving rise to actual and perceived conflicts of interest which require continued vigilance and prudent management. It does not, however, disenfranchise minority shareholders in either company who must generally be taken to have acquired their shares knowing that the majority shareholder in each company was the other company given that the cross shareholding was created in 1969;

(10) in terms of takeover and liquidity implications, as noted, no demonstrable impact on the share prices of either company has been proved;

(11) in terms of corporate governance implications, if the boards are perceived to be performing well, this could be characterised as a positive attribute of the cross shareholding by facilitating stability and thus decision-making with a view to longer term benefits. By the same token, if either or both of the boards are perceived to be under-performing, this could be characterised as a negative attribute of the cross shareholding by facilitating entrenchment of the boards despite lack of performance. Perceptions are likely to change depending on circumstances but the underlying governance issues remain that the cross shareholding facilitates retention of board membership and may give rise to potential actual or perceived conflicts of interest;

(12) to date, there is no suggestion that either board has under-performed and, to the contrary, the consensus appears to be that both boards have performed well and both companies are well managed, lending weight to the perception that the cross shareholding, to date, has facilitated stability and a capacity for long term decision-making;

(13) the cross shareholding is a complex structure which makes it more difficult than would otherwise be the case for market participants to assess the true value of the companies because it creates a form of valuation circularity;

(14) a number of market analysts have recognised the range of implications of the cross shareholding, both positive (including earnings stability by reason of diversification, takeover defence, board stability and consequential capacity for long term decision-making) and negative (including lack of liquidity, entrenchment of boards, conflicts of interest, complexity, possible depression of share prices);

(15) on any reasonable view of the evidence, the directors of each company have diligently considered the structure of the companies with their obligations to act in the best interests of the company firmly in mind;

(16) there is good reason to infer that the directors of each company are committed to continuing to consider the structuring issues in future with their obligations to act in the best interests of the company firmly in mind;

(17) Perpetual has been selling its shares in both companies and cannot suggest it is unable to continue to do so given the recent increases in share prices for both companies;

(18) there is no evidence that any shareholder in either company other than Perpetual wishes orders to be made to the effect Perpetual seeks; and

(19) the effect of the orders Perpetual seeks on other shareholders, in terms of share price, company performance, and dividend yields cannot be known.

4 Weighing all of the circumstances, reasonable directors would not consider maintenance of the cross shareholding to date to be unfair or oppressive. Accordingly, Perpetual's claim must be rejected.

5 My reasons follow.

2. SOME UNCONTROVERSIAL FACTS

6 Soul Pattinson (or **WHSP** or **SOL**) was incorporated in 1903. **Brickworks** (or **BKW**) was incorporated in 1934. The companies are each listed on the Australian Securities Exchange (**ASX**), Soul Pattinson being listed in 1903 and Brickworks in the early 1960s.

7 In 1969 Soul Pattinson and Brickworks acquired shares in each other, an arrangement referred to as the cross shareholding. At that time such an arrangement was permissible. Section 259D of the *Corporations Act 2001* (Cth), as in force from 1998, would not now

permit creation and maintenance of such an arrangement, but the provision does not apply to the cross shareholding given its creation in 1969.

8 There is no evidence of any similar cross shareholding arrangement in any other publicly listed company in Australia.

9 Brickworks currently owns approximately 42.7% of the shares in Soul Pattinson and Soul Pattinson currently owns approximately 44.23% of the shares in Brickworks. Each is thereby the single largest holder of shares in the other.

10 The total value of Brickworks' shares on issue exceeds $2 billion of which the holding of Soul Pattinson represents about $1.010 billion (as at 16 May 2017). The total value of Soul Pattinson's shares on issue exceeds $4 billion of which the holding of Brickworks represents about $1.902 billion (as at 16 May 2017).

11 There are about 7,689 shareholders in Brickworks and 15,617 shareholders in Soul Pattinson.

12 One such shareholder, which owns shares in both companies, is the cross-claimant. The cross-claimant, referred to as **Perpetual** (or **PIML**), through its custodian's nominee (referred to as **RBC**), is an institutional investor. Perpetual first acquired shares in each company in the 1980s, after establishment of the cross shareholding.

13 At the time it filed the cross-claim Perpetual, via RBC, owned about 8.95% of the shares in Brickworks and about 6.49% of the shares in Soul Pattinson. Perpetual subsequently sold a number of its shares in each company and presently owns, via RBC, about 3.06% of the shares in Brickworks and 1.46% of the shares in Soul Pattinson.

14 Under the Constitution of Brickworks the company must have not less than three and not more than 10 directors (cl 6.1(a)). The directors and the company at a general meeting by ordinary resolution may appoint any person as a director (cl 6.2(a) and (b)). Directors must retire from office after three years (cl 6.3(b)) but may be re-appointed. The company may remove any director by ordinary resolution at a general meeting (cl 6.3(h)). The company's business is managed by or under the direction of the directors (cl 8.1(b)). The directors may elect a director as the chairperson (cl 9.6(a)). Resolutions of directors are made by vote of the majority with the chairperson having a casting vote in the event of an equal number of votes (cl 9.7).

15 Under the Constitution of Soul Pattinson cll 34, 35, 36, 37, 45, and 50 provide equivalent provisions for not less than three and not more than 10 directors, retirement of a director after three years subject to a capacity for re-appointment, removal of any director by an ordinary resolution at a meeting, management of the company's business by or under the direction of the directors, election by the directors of a chairperson, and resolutions of directors made by vote of the majority with the chairperson having a casting vote in the event of an equal number of votes.

16 When the cross shareholding was established James (or Jim) Millner was the chairman of Soul Pattinson. On establishment of the cross shareholding James Millner was appointed as a director of Brickworks. He remained a director of both companies until November 1998. The current chairman of both companies is Robert Millner, the nephew of James Millner. The current directors of Brickworks include Robert's cousin, Michael Millner. The current directors of Soul Pattinson include Robert's son, Thomas Millner and David Wills, Robert's brother-in-law. David Wills proposes to retire as a director in the near future and Soul Pattinson is engaged in a search for a new director.

17 Given the various members of the Millner family involved it is necessary to refer to each by his given name in order to avoid confusion. Given that other people are referred to below in a more formal manner, it is appropriate to record that my intention is clarity, not disrespect to those referred to by their given name.

18 The directors of each company at the hearing dates and their dates of appointment are as follows:

- **Brickworks**
    - (a) Mr Robert Millner (chairman) –28 July 1997;
    - (b) Mr Michael Millner –26 October 1998;
    - (c) Mr Lindsay Partridge – 26 September 2000;
    - (d) The Hon Robert (RJ) Webster – 13 August 2001;
    - (e) Mr David Gilham – 1 August 2003;
    - (f) Mr Brendan Crotty – 10 June 2008; and
    - (g) Ms Deborah Page – 1 July 2014.
- **Soul Pattinson**

(a) Mr Robert Millner (chairman) – 11 January 1984;

(b) Mr David Wills – 1 April 2006;

(c) Mr Robert Westphal – 1 April 2006;

(d) Mr Thomas Millner – 1 January 2011;

(e) Mr Michael Hawker – 10 October 2012;

(f) Mr Warwick Negus – 1 November 2014;

(g) Ms Melinda Roderick – 1 November 2014; and

(h) Mr Todd Barlow – 14 October 2015.

19 Perpetual's case involves the concept of the **Millner family**. The Millner family means the relatives by blood or marriage to Robert Millner. They include Michael Millner, Thomas Millner and David Wills, and also Peter Robinson, a former director of Soul Pattinson. Perpetual's case also refers to **Millner entities**, which are companies controlled by a member or members of the Millner family.

20 The Millner family owns about 0.95% of the shares in Brickworks and about 1.18% of the shares in Soul Pattinson. Millner entities own about 2.88% of the shares in Brickworks and about 7.37% of the shares in Soul Pattinson.

21 The concepts of the Millner family and Millner entities are relevant to Perpetual's case because Perpetual pleads that:

(1) the Millner family customarily exercise voting rights as directors of and shareholders in the companies consistently with each other to maintain the cross shareholding;

(2) alternatively, there is an implied agreement, arrangement or understanding between the Millner family that they will exercise voting rights as directors of and shareholders in the companies consistently with each other to maintain the cross shareholding;

(3) at least three directors of Brickworks who are not members of the Millner family, Lindsay Partridge, the Hon RJ Webster and David Gilham, when making decisions as directors of Brickworks customarily act consistently with the Millner family to maintain the cross shareholding or there is an implied agreement, arrangement or understanding between these directors and the Millner family to exercise their voting rights consistently with the Millner family to maintain the cross shareholding;

(4) at least two directors of Soul Pattinson who are not members of the Millner family, David Fairfull (a director between 14 August 1997 and 2014) and Robert Westphal, when making decisions as directors of Soul Pattinson customarily act consistently with the Millner family to maintain the cross shareholding or there is an implied agreement, arrangement or understanding between these directors and the Millner family to exercise their voting rights consistently with the Millner family to maintain the cross shareholding; and

(5) as a result of the above, the Millner family is able to and does exercise control or a disproportionate influence over the companies having regard to their shareholdings in each.

22 Perpetual also pleaded that the cross shareholding is oppressive because each member of the Millner family who is also a director of either company has an interest in maintaining the cross shareholding as it enables the Millner family to exercise control of or a disproportionate influence over the affairs of both companies, and that interest is in conflict with the interests of other shareholders in each company who wish to have the cross shareholding dismantled. This appears to be another way of making the same contentions as identified above. Perpetual did not develop this aspect of its contentions separately from the case as identified above.

23 Perpetual believes that the cross shareholding is outdated and inappropriate, in that it entrenches control of both companies in the incumbent boards and thus the Millner family and thereby disenfranchises other shareholders (those who are not members of the Millner family, the Millner entities and the companies which each has shares in the other company), and also depresses the value of shares in each company.

24 Since 2011 Perpetual has made a number of proposals which it believed would ameliorate the position. None came to fruition. Perpetual contends that this is a result of the control of the companies by the Millner family and that the conduct of the directors of each company in relation to and failure of each of its proposals, and the continued existence of the cross shareholding, demonstrate both the fact of control by the Millner family and consequential oppression.

25 In 2011 Perpetual proposed to Soul Pattinson that Robert Fraser be appointed as a director. This is referred to as the **first proposal**. Mr Fraser's appointment did not find favour at an annual general meeting of Soul Pattinson on 2 December 2011.

26 In early 2012 Perpetual proposed to Brickworks an *in specie* distribution of all of Brickworks' shares in Soul Pattinson to the shareholders of Brickworks, the effect of which would be to remove the cross-shareholding (with Soul Pattinson remaining a shareholder in Brickworks but Brickworks no longer being a shareholder in Soul Pattinson). This is referred to as the **second proposal**. The second proposal did not proceed on the basis that Perpetual accepted that the taxation consequences appeared adverse.

27 In July 2012 Perpetual proposed to the companies a nil premium merger under which shareholders in Soul Pattinson would be issued shares in Brickworks in exchange for their Soul Pattinson shares and Brickworks would cancel the shares in it held by Soul Pattinson. This is referred to as the **third proposal**.

28 Whilst the third proposal was being considered Perpetual, along with another shareholder Mark Carnegie, proposed that a scheme for the unwinding of the cross shareholding be taken to a vote of shareholders of each company by a number of steps including the cancellation of all shares held by Brickworks in Soul Pattinson in exchange for consideration paid by Soul Pattinson, as well as the appointment of Elizabeth Crouch as a director of Brickworks. This is referred to as the **fourth proposal**. The restructuring component of the fourth proposal foundered on the failure to obtain a favourable tax ruling, and Ms Crouch was not elected to the board at an annual general meeting on 24 November 2015.

29 Thereafter Perpetual has continued to press for the unwinding of the cross shareholding, including by reference to variants of the third proposal, the nil premium merger. This is referred to by the companies as the **fifth proposal**. Both companies have decided not to pursue any variant of the nil premium merger proposal or to take any other step to unwind the cross shareholding at this time.

30 Perpetual contends that, whether or not the cross shareholding depresses the value of shares in the companies or the unwinding of the cross shareholding would increase the value of those shares, the maintenance of and failure to take steps to dismantle the cross shareholding entrenches the control of the companies by the incumbent boards and thus the Millner family and thereby effectively disenfranchises shareholders other than the companies in each other, the Millner family and Millner entities. Accordingly, maintenance of and failure to take steps to dismantle the cross shareholding is not in the interests of members as a whole, is unfair and involves oppression.

3. OPPRESSION

31 The relevant provisions are ss 232 and 233 of the Corporations Act. By s 232, an order may be made under s 233 if the conduct of a company's affairs, an actual or proposed act or omission by or on behalf of a company, or a resolution, or a proposed resolution, of members or a class of members of a company is either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity. Under s 233 a court can make any order that it considers appropriate in relation to the company including, relevantly, an order regulating the conduct of the company's affairs in the future, restraining a person from engaging in specified conduct or from doing a specified act, or requiring a person to do a specified act.

32 The most succinct statement of the overarching principles remains that in ***Wayde*** *v New South Wales Rugby League Ltd* [1985] HCA 68; (1985) 180 CLR 459 at 472-473 where Brennan J said:

> Section 320 requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court's jurisdiction to intervene. In the case of some discretionary powers, any prejudice to a member or any discrimination against him may be a badge of unfairness in the exercise of the power, but not when the discretionary power contemplates the effecting of prejudice or discrimination. It is not necessary now to decide whether "oppressive" carries in the context of s 320 the meaning which it carried in the context of the statutory precursors of s 320. At a minimum, oppression imports unfairness and that is the critical question in the present case.
>
> It is not necessarily unfair for directors in good faith to advance one of the objects of the company to the prejudice of a member where the advancement of the object necessarily entails prejudice to that member or discrimination against him. Prima facie, it is for the directors and not for the Court to decide whether the furthering of a corporate object which is inimical to a member's interests should prevail over those interests or whether some balance should be struck between them. The directors' view is not conclusive, but an element in assessing unfairness to a member is the agreement of all members to repose the power to affect their interests in the directors: see s 78 of the Code. Nevertheless, if the directors exercise a power — albeit in good faith and for a purpose within the power — so as to impose a disadvantage, disability or burden on a member that, according to ordinary standards of reasonableness and fair dealing is unfair, the court may intervene under s 320. The question of unfairness is one of fact and degree which s 320 requires the court to determine, but not without regard to the view which the directors themselves have formed and not without allowing for any special skill, knowledge and acumen possessed by the directors. The operation of s 320 may be attracted to a decision made by directors which is made in good faith for a purpose within the directors' power but which reasonable directors would think to be unfair. The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes

> (whether it be the fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision.

33 Referring to *Wayde* and other decisions in New Zealand and England, Young J in ***Morgan*** *v 45 Flers Ave Pty Ltd* (1986) 10 ACLR 692 at 704 explained that the unifying principle is one of commercial unfairness, saying:

> it has been accepted that one no longer looks at the word 'oppressive' in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair…In my view a court now looks at [the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member"] as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness.

34 In ***Campbell*** *v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304:

(1) French CJ made the point at [72] that "language and history indicate that ss 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution"; and

(2) Gummow, Hayne, Heydon and Kiefel JJ at [176] observed that the issue is not the motive for, but the effect of, the allegedly oppressive conduct. Accordingly, directors who believe they are acting rightly may nevertheless cause oppression, unfair discrimination or unfair prejudice.

35 In *Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55; (2014) 314 ALR 62 at [9] Siopis, Rares and Davies JJ put the question this way:

> The test of unfairness requires an objective assessment of the conduct in question with regard to the particular context in which the conduct occurs. The question is whether objectively in the eyes of the commercial bystander there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the conduct or decision fair. As the test is objective, whether or not the conduct is oppressive will not depend upon the motives for what was done. It is the effect of the acts that is material: *Wayde* 180 CLR at 472–473; *Campbell* 238 CLR at 360 [176].

36 In *Mackay Sugar Ltd v Wilmar Sugar Australia Ltd* [2016] FCAFC 133; (2016) 338 ALR 374 Gilmour and White JJ and I referred to these observations and, at [14], those of the

Victorian Court of Appeal (Nettle, Ashley and Neave JJA) in *Joint v Stephens* [2008] VSCA 210 at [136] that:

> …the task of deciding whether there has been commercial unfairness is to be undertaken in the context of the particular relationship which is in issue. As is observed in *Ford* [Austin and Ramsay, *Ford's Principles of Corporations Law*, 13th Ed [11.450].], the assessment of commercial unfairness will not infrequently involve a balancing exercise between competing considerations. In turn that may involve an examination of the conduct of the applicant.

37 Sections 232 and 233 apply to a "company" which is defined in s 9 of the Corporations Act to mean "a company registered under this Act". Accordingly, companies listed on the ASX are subject to ss 232 and 233.

38 As explained by the Court of Appeal of New Zealand in ***Latimer*** *Holdings Ltd v Sea Holdings New Zealand Ltd* [2004] NZCA 226; [2005] 2 NZLR 328 the fact that a company is listed is a relevant aspect of the context within which the relationship between the member(s) alleging oppression and the other members and directors is to be evaluated. Referring to the earlier decision of the Court in *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 the Court (Glazebrook, Hammond and O'Reagan JJ) at [66] said:

> This Court held that fairness is not to be assessed in a vacuum, or from the point of view of one member of a company, and that all the interests involved must be balanced against each other, including the policies underlying the Act and those underlying s174 [the equivalent provision to s 232]. For unfairness in this broad sense to be grounded, there must be a "visible departure" from the standards of fair dealing, "viewed in the light of the history and structure of the particular company, and the reasonable expectations of [its] members" (at 695).

39 Their Honours continued:

> [101]…there are a number of reported decisions in the United Kingdom, Canada and Australia in which proceedings of this character have been brought with respect to listed companies with publicly traded shares, and we are not aware of a jurisdictional objection having been taken, let alone succeeding. Relief has on occasion been granted against such companies. (See as only some examples: *Re Westfair Foods* (above; Canada [(1991) 79 DLR (4th) 48,]); *Re Spargos Mining NL* (1990) 3 ACSR 1 (Australia); *Re Blue Arrow plc* [1987] BCLC 585 (UK)). It would be incongruous if New Zealand law was to be put on a different footing (particularly as between Australia and New Zealand).
>
> [102] That said, there are considerations which may well make it more difficult for plaintiffs to succeed in the case of listed companies.
>
> [103] The first and most obvious point is that the exit strategy for an investor in a listed company (as an alternative to litigation) is to sell his or her shares. There is a continuous market in the shares of listed companies, save in extraordinary circumstances which create an illiquid market. This exit strategy is more cost effective than litigation. However it must be said - and it is part of what Mr Rennie

> said in this case - that a shareholder may, in a company which is being run in a manner that is prejudicial to members, face a share price which has fallen before the shareholder decides to, or can, liquidate his or her investment.
>
> …
>
> [109] The short point is that, even in a listed company, a corporate constitution and the related nexus of agreements may not address all pertinent issues. There may be considerations that give rise to reasonable expectations that are not reflected in strict legal documentation. However, clearly the forensic burden on an applicant will be considerably more difficult in the case of a listed company.
>
> [110] This consideration shades into another, and more recent, development in company law. For a number of reasons which it is unnecessary to traverse here, there is increasing recognition of the very real difficulties of this kind of litigation, and a greater recognition of shareholder rights. This has led to greater recognition by companies of Shareholder Committees, the purpose of which is to give shareholders (and particularly minority shareholders) a greater voice in the corporation's affairs (see for instance McConvill and Bagaric, "Towards Mandatory Shareholder Committees in Australian Companies" [2004] MelbULawRw 4; (2004) 28 Melbourne U L R 125). Alternative dispute resolution is another option which ought to hold real attraction in this subject area.
>
> [111] In our view, s174 can and does apply to listed companies with tradeable shares, but the considerations which will apply to them will not necessarily be the same as obtain with respect to closely held companies. But it would be quite wrong for the New Zealand corporate community to think that the activities of listed companies are beyond the reach of this provision.

40 In *Re Spargos Mining NL* (1990) 3 WAR 166 the petitioning shareholder contended that directors of Spargos Mining NL had entered into a number of transactions for the benefit of other companies in the company group and not for the benefit of Spargos Mining NL. The group held 37-38% shares in Spargos Mining NL, sufficient to give it the controlling interest. The board of directors contained a number of the group's nominees. Murray J at p 191 held that:

> Effectively since Spargos was brought into the IRL Group there has, in my view, been an endemic incapacity on the part of its Board, at least until the Board attained its present composition, to deal with Spargos' affairs by giving sole attention to its interests. Some of the factual examples discussed above are clear cases where a conflict of interest arose and remained unresolved to the detriment of Spargos, its shareholders generally and the minority shareholders.

41 At p 196 his Honour concluded in these terms:

> Having regard to all the foregoing, I propose to make an order which will effectively replace the existing elected Board of Spargos with a Board of my own choosing. I propose that Spargos under the management of that Board should not be given any special protection as to its future, but for a period of twelve months from the date of my order I will secure the existence of the Board I propose. That will provide the independent management necessary for the relief of Spargos and its members, but without the appointment of a receiver and in the expectation that within that period progress will be made to again place the company on a sound footing and pursue

remedies in respect of past defaults.

42 The touchstone of oppression, that conduct be so unfair that reasonable directors who consider the matter would not have thought the conduct or decision fair, may appear circular but is designed to reinforce that the role of the court is not to step into the shoes of the directors and unilaterally decide what it thinks to be in the best interests of the company as a whole. The courts recognise that it is the responsibility of the directors to weigh the competing considerations with which they will be routinely confronted and determine what is in the best interests of the company as whole. They recognise also that as the task of the directors is evaluative it is necessarily one about which reasonable minds may differ. In performing its own evaluation, accordingly, the courts do not merely substitute what appears to them to be the preferable commercial decision. As Mansfield J summarised in *Territory Realty Pty Ltd v Garraway* [2009] FCA 292 at [312]:

> The authorities indicate that the Court should not readily find either s 232(d) or (e) is made out: *Edwards v Idaville Pty Ltd* (1996) 22 ACSR 1. Such a finding requires consideration of all the circumstances, viewed cumulatively, but not with a hypercritical approach, as the measure is the standard of reasonable directors: *De Tocqueville Private Equity Pty Ltd v Linden & Conway Ltd* (2006) 59 ACSR 587. It is not a finding to be made because the Court may, on the information available, disagree with the decision of the directors, or because the wisdom of hindsight may show that the decision of the directors was unwise and perhaps grossly so, or because the directors or management did not conduct the affairs of the company as well as the Court considers they may have: *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688. As Murray J said in *Re Spargos Mining NL* (1990) 3 ACSR 1 at 44, the Court should not in substance adopt an approach to those provisions without clear justification, so that it does not simply take "over the management of the company".

4. THE CROSS SHAREHOLDING

43 Apart from the treatment of its various proposals with which I deal separately below, Perpetual relies on a number of other circumstances to support its contention that maintenance of the cross shareholding is not in the interests of members as a whole and involves oppression. I consider those circumstances now.

4.1 Creation of the cross shareholding

44 The reasons for the establishment of the cross shareholding in 1969 are relevant to, but not necessarily determinative of, the reasons for its continuation in 2017.

45 Perpetual contends that the cross shareholding was established as an anti-takeover mechanism; that is, to prevent persons other than the then existing controllers of each company gaining control by acquisition of a sufficient number of shares. To function as

such, each board must be (and according to Perpetual is) of the one mind about maintenance of the cross shareholding. By controlling the votes attached to their shares in each other (over 40% of the shares in each company are subject to the cross shareholding) the boards of each company, over which the Millner family allegedly exercise control or a disproportionate influence, can defeat any attempt by shareholders to change the compositions of the boards or unwind the cross shareholding. In other words, the cross shareholding was established for a particular purpose, to resist takeovers of the companies, and continues to fulfil that purpose.

46 At the time the cross shareholding was established (by mechanisms which are not in dispute and need not be recorded) Soul Pattinson acquired about 25.75% of the shares in Brickworks and Brickworks acquired about 18.73% of the shares in Soul Pattinson. At the same time, the chairman of Soul Pattinson, James Millner, was invited to join the board of Brickworks.

47 Brickworks' annual report for 1969 recorded that:

> The brick industry is one closely geared to the building industry which is notorious for violent fluctuations of trade. Your directors considered it would be a wise precaution to have assets outside the brick industry to cushion it against building trade fluctuations…
>
> Washington H Soul Pattinson & Co Limited shares provide a substantial source of future income from diversified activities not associated with the Building Industry…
>
> Because of the extremely liquid position of Brickworks Limited the Directors also felt it was very vulnerable to takeover bids which might not be in the interests of shareholders generally. The association with Washington H Soul Pattinson & Co Limited, does not prevent a takeover bid but it does ensure that the bid would have to be a substantial one before shareholders would feel it was in their interests to accept any such offer.
>
> …
>
> … The investment in Washington H Soul Pattinson & Co Limited was not made with a view to Brickworks Limited acquiring any short term benefit therefrom. It has been considered by the Directors as essentially a long term form of insurance for the future, because of their confidence that substantial capital benefits and substantially increased revenue will accrue to that Company from its widespread share portfolio and its own trading activities and those of its subsidiaries.

48 Each company is the subject of a corporate history the contents of which, I infer, were made under and with the authority of each company. As such, representations in the books about the cross shareholding, being made both with and within the authority of each company, are admissible as admissions by the relevant company under ss 81 and 87 of the *Evidence Act 1995* (Cth).

49 The first book, published in 1993 under and within the authority of Soul Pattinson, is "*A singular success Washington H. Soul Pattinson 1872-1993*", with an introduction written by James Millner. This introduction included the following:

> Washington H. Soul Pattinson and Co Ltd is one of the very few successful public companies which has always been, and still is, controlled and managed by the same family.
>
> All have had the ability to appoint and train the right people to senior and middle management positions and, above all, have been able to adapt to changing industry and general economic conditions.
>
> Management has always been supported by able, loyal and long-serving staff. It is not practical in this history to mention the hundreds of shop managers and the many others who have contributed so much to the success of Washington H. Soul Pattinson and Co Ltd over the last 120 years. Nevertheless, their contribution is acknowledged.
>
> Washington H. Soul Pattinson and Co Ltd has over forty staff who have served the company for over fifty years. Five families – Pattinson, Dixson, Spence, Rowe and Letters – have had three generations with the company, and a large number of sons and daughters have followed on from their fathers or mothers.
>
> There has also been a large number of brothers and sisters who have served the company making it a 'family business' in the broadest sense of the term.

50 The text of this book included these statements:

> The Brickworks Cross Shareholding. In the late 1960s Soul Pattinson made another impressive share purchase - this time buying 25 per cent of Brickworks Ltd. The purchase was in fact a share swap and gave each company a minority interest in each other. The theory behind these cross acquisitions was that each company would be impervious to the possibility of a successful takeover.
>
> At a time when takeovers were becoming more frequent among Australian financial and industrial companies this move was seen by many as a sound, albeit protective move. Analysis in the Bulletin on 23 August 1969 reported the move this way: The share swap was a masterly stroke on the part of Jim Millner, the shrewd tactician who in the managing directors chair of Washington H. Soul Pattinson and Co made a wonderful kill and gained a real bargain in the deal.. . To all intents and purposes, Mr James Millner may find himself inheriting the Golden Egg.
>
> …
>
> For Jim Millner the cross shareholding was a means to protect his company from the hostile takeovers that were becoming more and more frequent He had been concerned for some years that Washington H. Soul Pattinson was a potential takeover target and had, on occasion, approached a number of companies with a view to exchanging shares thus minimising the threat of takeover.
>
> Coincidentally William Dawes, the chairman of Brickworks, then in his seventies, had come to the same conclusion about the company he headed. There were rumours in the market that Brickworks was under threat of takeover by London Brick and possibly the Slater Walker group who had just launched a hostile takeover for Drug Houses of Australia. To prevent this Dawes and Millner struck a deal which left the market open-mouthed, a share swap.

> Millner explained the swap this way: It wasn't primarily defensive. We both thought it was a good investment. The thing you have to remember about companies like ours, where the directors and chief executives are major shareholders, is that these people are mainly interested in the companies on a long-term basis, and what they can get out of them in dividends as well as salary. A lot of professional management only want to be as big as possible so they can get the largest possible salary.
>
> It's also very much in the shareholder's interest to have an increasing return without having to put in more money. To do this, you have to be self-financing, as Brickworks and Soul Pattinson have been, by retaining profits for expansion and being conservative.
>
> The danger in doing this is that you become a prime takeover target, and a group of outsiders can buy the company for less than its really worth and reap the benefits which rightly belong to shareholders.
>
> The companies agreed to swap 1,000,000 shares at $10.00 each. The result was that Washington H. Soul Pattinson owned 25 per cent of Brickworks Ltd and Brickworks Ltd owned 22 per cent of Washington H. Soul Pattinson. Jim Millner joined the board of Brickworks Ltd as deputy chairman, sitting alongside W K Panes, Lawrence Taylor, George Travis, Arthur M Dawes and William F Dawes. In 1981, upon the death of William Dawes, Jim Milner became chairman of Brickworks.
>
> Washington H. Soul Pattinson's holding edged up to 28.6 per cent in 1977, to 33.2 per cent by 1978 and to 38 per cent in 1979. By 1992 it held 49.9 per cent of the company. Brickwork's interest in Washington H. Soul Pattinson is currently 43 per cent.
>
> The arrangement has proved a good one in the long term despite the building recession in the early 1970s which caused Brickworks profits to slump. Net profit fell from $3,248,000 in 1974 with an earning per share of 80 cents to $2,396,000 in 1977 and 59.2 cents earning per share.
>
> Chanticleer writing in 1979 in the Australian Financial Review referred to this arrangement as 'one of the most comfortable of its type in Australia'. As Jim Millner said at the time: '…we no longer have to look over our shoulders anymore. It is an arrangement based on a handshake.' But James Millner is quick to add, 'if somebody came along with a bloody good offer either block would be for sale.'

51 The book also included quotes from newspaper articles in these terms:

> James Millner heads three companies, which are reasonably healthy operations in their own right, although he often prefers to think of them as one entity.
>
> Indeed, the tripartite link between Sydney pharmaceutical group Washington H. Soul Pattinson, Brickworks Ltd and the Keith Harris and Co fruit juice group, forms a crucial part of Millner's corporate strategy — to be ready to repel raiders.
>
> …
>
> "Quite frankly," James Millner told Business Review "all three companies at one time or another have been vulnerable. That's one of the very important reasons why we are so involved with each other — to make sure that something like that does not happen again".

52 The second book, published in 2008 under and within the authority of Brickworks, is "*The Brickmasters 1788-2008*" authored by Ron Ringer. It said this:

WATCH YOUR BACK

People get married for all sorts of reasons: love, family tradition, fear of being left on the shelf, or as a matter of convenience. When Brickworks Limited met Washington H. Soul Pattinson for the first time in early 1969 it wasted no time popping the question. And surprisingly, the answer was 'yes'. But why now, and for what reason, did these two eligible parties unite in what turned out to be a most successful and mutually beneficial union? In early 1969, with brick sales from its various plants continuing to flourish, all was going well, yet Dawes [William K. Dawes, the then chairman of Brickworks] was a worried man. Unwelcome news was beginning to filter down the grapevine from his friends at The London Brick Company. Those pin-striped City gents in bowler hats mentioned previously were none other than corporate raiders from the UK firm of Slater Walker. For the first – and last – time in his life Dawes and his creation, Brickworks Limited, were being stalked.

Several years later he confided in Peter Mahony, a brickmaker with nearly 50 years' experience, that he would have done anything to repel the unwanted advances of Slater Walker. What Dawes had in mind was a most unusual plan which he announced at a crisis meeting of directors. A selection of companies listed on the Australian Stock Exchange was being drawn up, he informed his worried colleagues. The idea was to find a business with similar market capitalisation that might consider a share swap of about 20 per cent for each party. This would make it difficult, if not impossible, for anyone to take over either company. In the weeks that followed Dawes and another director, George Travis, the former auditor for Brickworks, sifted through the pages of The Australian Financial Review and held confidential discussions with the company's share broker. The hunt was not an easy task for it required background research on likely partners, their company structures, shareholders and leadership. At the top of the list was the firm of Howard Smith Limited with its interests in shipping, transport and hardware, but when approached it dismissed the idea of out hand …

WASHINGTON H. SOUL PATTINSON

We cannot be sure of the precise date, but in the early months of 1969 George Travis put forward the name of Washington H. Soul Pattinson, or 'Soul Patts', a pharmacy chain controlled by the late James 'Jim' Millner. The company is now an investment house with substantial shareholdings in coal, pharmacies, telecommunications, investment banking, fund management and media (a TV station). Millner was from a Beecroft family and had earned a formidable reputation as an astute investor and businessman. He later recalled: 'initially, we were approached by a broker who said that Brickworks Limited was looking for someone like ourselves – a like-minded partner that was conservative and afraid of takeover.' The broker he was referring to may have been Patrick Brothers.

George Travis then met with Millner at Eastwood Rugby Club. During the tete a tete Travis laid Dawes' carefully prepared cards on the table, explaining how a share swap would offer protection for both firms. Millner had a nose for a good investment and was struck by the hugely profitable business of Brickworks. He agreed in principle and the two men exchanged handshakes before going their separate ways. Several days later, Dawes went to meet Millner at his office at the 1886 Soul Pattinson's shop in Pitt Street …

Having weighted each other up the two men got down to business, with Millner voicing similar concerns that his company might one day find itself having to fend off unwelcome advances. …

RAISED EYEBROWS

The exchange of shares took place on 23 August 1969 and was widely reported in the financial columns of the daily papers. Both companies were roundly criticised and the arrangement attacked by stockbrokers who claimed that 'bricks and pills didn't mix'. In reality, the swap was a remarkable coup and provided a two-way flow of investment income, as well as security. In November 1969 the annual report of Brickworks Limited endeavoured to put an end to press speculation.

…

> We might also mention that despite newspaper hints of rumours of takeover offers, they are completely without foundation. The investment in Washington H. Soul Pattinson & Co. Limited was not made with a view to Brickworks Limited acquiring any short term benefit therefrom. It has been considered by the Directors as essentially a long term form of insurance for the future …

This was certainly true, but it was most definitely the case that a hostile take-over was on the cards, according to those who witnessed these events. Clearly, it made no sense for the board to alarm shareholders, which may account for the lengthy statement in the annual report for 1969.

GETTING TO KNOW YOU

Following the swap Jim Millner took a seat on the board of Brickworks, although his first appearance as a director did not take place until 7 October 1970 …

Strangely, Dawes spurned a reciprocal offer to sit on the board of Soul Patts, claiming to know little about pharmaceuticals, and that in any case he was flat out running brickyards. The reality was that William King Dawes was a controlling personality, and what lay beyond his control held little interest. And was it really a partnership of equals, in view of the fact that Brickworks Limited had initiated the share swap? As we shall see his refusal to engage set in motion a chain of events which stymied any succession plan Dawes may have been contemplating for a family member to take over the helm.

53 A footnote to this text included the following:

> James 'Jim' Millner (1919-2007) was the eldest of three boys and grew up in Cheltenham, Sydney. His mother was the daughter of the founder of Soul Pattinson. His father was a decorated war hero who returned to Australia from active service in 1919 with the Military Cross. He went on to establish Commonwealth Imperial Gases (CIG) in Australia.

54 Perpetual made this submission:

> Although Brickworks has denied it, and Soul Pattinson has refused to admit it, it is clear given the history recounted in these books, and from the words attributed in those histories to Mr Jim Millner himself, that the cross-shareholding was implemented in 1969 to make it more difficult for a proposed takeover of Brickworks and Soul Pattinson to succeed. The cross-shareholding was, from its outset, an anti-takeover mechanism, designed to entrench control in the incumbent management. Neither Brickworks nor Soul Pattinson has led any evidence from any witness giving any other explanation for the reason for the creation of the cross-shareholding.

55 I accept that the cross shareholding was created to make it more difficult for a proposed takeover of Brickworks and Soul Pattinson to succeed. That is not the whole of the story, however. Perpetual cannot pick and choose those parts of the histories of the company which suit it and disregard those parts which do not suit it. It is also apparent that:

(1) each company considered that acquiring shares in the other was a good investment for a number of reasons including diversification of their holdings and confidence that the other company held a similar conservative long term view about the company's activities; and

(2) neither company suggested that the anti-takeover object was to be maintained irrespective of circumstances (for example, if it was no longer seen to be in the best interests of the company as a whole to retain the shares in the other) and, indeed, James Millner expressly referred to the prospect that the shares of each company could be sold if the offer was good enough.

4.2 The family business

56 Perpetual contends that it is clear that former and current members of the Millner family regard Brickworks and Soul Pattinson as their own "family business". According to Perpetual they have made numerous public statements to this effect, and their actions are entirely consistent with this view. Further, said Perpetual, the actions of other board members suggest that they are equally content for the companies to be viewed and treated by the Millner family as in substance their "family business".

57 Perpetual notes (and it is not in dispute that) that:

(1) James Millner was a director on the board of Brickworks from on or about 28 August 1969 until on or about 6 November 1998 and was a director on the board of Soul Pattinson from on or about 20 June 1962 until about 20 November 1998; and

(2) Robert Millner, the current chairman of Brickworks and Soul Pattinson is:

(a) the great grandson of Lewy Miall Pattinson, founder of Soul Pattinson;

(b) the nephew of James Millner;

(c) the father of Thomas Millner, a current director of Soul Pattinson;

(d) a cousin of Michael Millner, a current director of Brickworks, and a former director of Soul Pattinson;

(e) a brother-in-law of David Wills, a current director of Soul Pattinson; and

(f) a cousin-in-law of Peter Robinson, a former director of Soul Pattinson.

58 In the 2002 annual report on the centenary of Soul Pattinson as a public company Robert Millner said:

> Washington H. Soul Pattinson is one of the few successful public companies that has been managed by the same family from the outset – and therein lies the key to its strength. Its leadership has been grounded in successive family members who value the history of the company, yet are able to adapt to changing times and economic conditions. All have had the ability to spot talented people to fill senior and middle management positions. In turn, management has always been supported by able, loyal and long-serving staff.
>
> More than 40 employees have worked for the company for over 50 years. Four generations of the Pattinson family have served the company, as have three generations of the Dixson, Spence, Rowe and Letters families.

59 Soul Pattinson company minutes record that in 2011 at the annual general meeting the answer to a question about the appointment of Thomas Millner as a director was:

> He had been appointed for succession planning and possesses relevant skills.

60 Perpetual also relies on a series of newspaper articles containing statements attributed to Robert Millner and others to support its contention that the Millner family considers the companies to be "family companies" and other directors are content for the companies to be viewed as such. These include the following statements:

(1) 29 May 2004 in the Australian Financial Review:

(a) Robert Millner - "Family culture, stability, loyalty and trust are important values, says Millner";

(b) Peter Robinson - "There's nothing worse than these big organisations where you've got to run everything through. And with five of us round the table, if there's one person who doesn't agree with something, it is normally one in, all in or one out, all out."

(2) 2009 in the Sydney Morning Herald:

(a) Robert Millner - "Like most of the best companies in Australia, this is a family company".

(b) Robert Millner - "I always said I would like to work for the family business. My uncle and the board had to be convinced I was up to standard and I joined the board in 1984…*Will there be a fifth generation succeeding you?* My son is the only fifth generation involved in the company. He is 32 and is running

> Brickworks Investment company. It would be nice, but I don't know what is in store. It is up to him to make that decision."

(3) 2015 in afrsmartinvestor.com.au: "Robert Millner - It's clear [Robert] Millner is a believer in the sharemarket as a place to invest savings and earn returns. And that's where he expects his legacy to continue – his 37-year-old son Thomas Millner, CEO of funds management firm BKI Investments (Robert is chairman), 'should be interested in taking over the business at some stage'."

61 The companies object to admission of the newspaper articles on the basis that they cannot constitute admissions against interest, being mere representations by journalists of what Robert Millner and Peter Robinson said and thus not representations by a person with authority to make statements on behalf of either company in relation to the matter with respect to which the representation was made. The question to which s 87 of the Evidence Act gives rise is thus the character of the representations – are the representations by journalists as to what the makers of the statement said or are they representations by the makers of the statement as to the substance of the statements? I consider that they are of the former character, the result of which is that the statements are inadmissible. Nevertheless, in case I am incorrect in this regard, I propose to express my conclusions in these reasons for judgment assuming the statements are admissible as admissions by a person with authority from the companies. I take the same approach below to other newspaper articles on which Perpetual relies.

62 Perpetual also submitted that:

> The mere fact of the appointment of Mr Thomas Millner to the board of Soul Pattinson evidences the intention of the family that there should be a fifth generation of Millner family control. The evidence as to the circumstances of Mr Thomas Millner's appointment…demonstrates the complicity of other directors of both Brickworks and Soul Pattinson in this "family" arrangement.
>
> In evidence are the minutes of a meeting of the so-called nomination committee of Soul Pattinson on 8 December 2010 (only 5 days after the 2010 AGM), comprised of Messrs Robert Millner, Robert Westphal and David Wills (Robert Millner's brother-in-law), recommending to the board the appointment of Mr Robert Millner's son as a director of Soul Pattinson. No doubt the decision to appoint him by resolution of the board, as distinct from election at the AGM, a mere 5 days after it had occurred was to enable him to have the maximum possible time in office as a director before having to offer himself for re-election at the 2011 AGM, and to present himself as an already established director.

63 I do not doubt that Robert Millner sees the companies as "family companies" if by that it is meant that:

(1) members of the Millner family have had a long history of shareholding, board and management roles in each company and, for Soul Pattinson at least, multiple members and generations of other families have had a long history of working for the company; and

(2) those histories are perceived to have contributed to the success of the companies over a lengthy period of time.

64 Whether other board members shares this view is unknown, but they would be aware of the history of both companies and the role the Millner family has played in that history.

65 Beyond this, the broadly held view appears to be that the companies have been successful over a lengthy period and it would be surprising if the views of Robert Millner, given his lengthy involvement with the companies, did not carry weight in the meetings of directors as a result (a matter I return to below). But influence by reason of a history of success (even if proved) is not "undue" provided each member of the board brings his or her own judgment to bear. Nor does it prove the existence of an agreement, arrangement or understanding of the kind Perpetual alleged.

66 In any event, Perpetual cannot have the benefit of newspaper articles insofar as they suit its case and ignore the balance. Relevantly:

(1) there is no suggestion in the material that the Millner family's long history of board and management roles in each company should continue irrespective of their capacity and performance;

(2) there is no suggestion in the material that Thomas Millner does not possess the relevant skills to function as a director of Soul Pattinson;

(3) there is no suggestion in the material that the directors of Soul Pattinson did not believe that Thomas Millner had the relevant skills to function as a director of Soul Pattinson and, to the contrary, it would be inferred that they believed he did have those skills;

(4) there is no suggestion in the material that any of the directors of Soul Pattinson, including Robert Millner, considered that Thomas Millner would become the chairman of Soul Pattinson irrespective of his capacity and performance; and

(5) there is no basis for drawing an inference that "the decision to appoint [Thomas Millner] by resolution of the board, as distinct from election at the AGM, a mere 5

days after it had occurred was to enable him to have the maximum possible time in office as a director before having to offer himself for re-election at the 2011 AGM, and to present himself as an already established director".

67 The fact that Robert Millner considers family culture, stability, loyalty and trust to be important values is hardly of moment. Perpetual appears to be reading into this and other statements such as "family company" a meaning I do not accept that they can bear. Perpetual is asserting that such statements should be taken to mean that members of the Millner family have agreed between themselves that they each must exercise voting rights as shareholders and as directors (if they are a director) of both companies to ensure that the cross shareholding is to be maintained as a means of entrenching control of the companies by the Millner family. Perpetual is also asserting (beyond its pleaded case, which is confined to some directors only) that from their silence in the face of such statements other directors of each company must be taken to agree with or accept this as appropriate. None of these allegations have come up to proof.

68 Insofar as the other directors of each company are concerned, the notion that they must be taken to agree with Perpetual's interpretation of statements in the press because they did not correct the record, assumes Perpetual's interpretation is the only one open or the most likely interpretation, when neither proposition is sound. Moreover, even if a statement was made which could bear Perpetual's interpretation, it is not apparent why I should infer that every other director must be taken to agree with the statement by reason only of having not openly corrected the statement. It does not take much to suppose that directors of a publicly listed company would strive to avoid airing internal board disputes in the press. Nor, for reasons also explored below, does the fact that no directors have given evidence in this proceeding assist Perpetual. On the evidence, I can draw no inference that other directors of the boards of each company agreed with any of the statements attributed to Robert Millner or others in various articles. Further, and as noted, the reasons for which the cross shareholding was created are not necessarily the reasons it has remained to date.

69 Insofar as the position of Thomas Millner is concerned, Perpetual's approach is also untenable. For example, it is apparent from one of Robert Millner's statements that Thomas Millner is the only fifth generation Millner involved in the companies. The natural inference one would draw from this statement is that there are other fifth generation Millners who are not involved. This does not support the notion of "Millner family control". The statement

that it is "up to him to make that decision" cannot be read as meaning that it is for Thomas Millner alone to decide if he wishes to be chairperson of the boards of the companies. It can only mean that it is his decision if he wishes to continue his involvement with the companies, subject to the boards as a whole and shareholders considering that appropriate. The reference to "succession planning" in the minutes is innocuous. Presumably, Thomas Millner is younger than many members of the Soul Pattinson board. Perpetual's high point seems to be the statement that Thomas Millner "should be interested in taking over the business at some stage" but a case such as this cannot be sustained by an expression of paternal hope.

70 Mr Robinson's statement that "with five of us round the table, if there's one person who doesn't agree with something, it is normally one in, all in or one out, all out" does not advance Perpetual's case. Mr Robinson was a director of Soul Pattinson between 1984 and 2015. His statement discloses that board members had disagreed with each other but worked through the disagreements to achieve consensus. It is not apparent how this supports the notion that the Millner family, let alone other directors, agreed between themselves that they each must exercise voting rights as shareholders and as directors (if they are a director) of both companies to ensure that the cross shareholding is to be maintained. Moreover, as Brickworks rightly said:

> In the quotation from the *Australian Financial Review* of 29 May 2004 relied upon by Perpetual, reference is made not only to the concept of "one in all in" but also to the equally important proposition "one out all out". Accordingly, the practice referenced in the article is inconsistent with Perpetual's contention that Mr Robert Millner was accustomed to getting his own way.

71 Accordingly, the thread of Perpetual's argument which depends on the notions of "family companies" or "family business" does not provide material support to its case. To the extent Perpetual's submissions assume the Millner family is greater than the sum of its parts, I adopt the submissions of each company that, as Barrett J observed in *Bateman v Newhaven Park Stud Ltd* [2004] NSWSC 566; (2004) 49 ACSR 597 at [34]:

> A point to be made at once in relation to these questions is that the mere fact of family relationship should be left to one side. King George V and Kaiser Wilhelm II were first cousins. They did not act in concert between August 1914 and November 1918 and probably at other times as well. In the absence of evidence of agreement or dependency or actual influence implying commonality of action, family relationships, like the personal friendships considered in the Elders IXL case, above, of themselves prove nothing relevant to an inquiry such as the present.

72 For the same reasons directorships of other companies along with one or other member of the Millner family or long association do not materially advance Perpetual's case.

73 One other point should be made. I have said above that it would be surprising if the views of Robert Millner, given his lengthy involvement with the companies, did not carry weight in the meetings of directors. This is because, in the ordinary course, I would expect that perceived success engenders influence and it was not in dispute that the companies are perceived to have been successful. Perpetual's case, however, does not rest on the notion of influence. Influence on boards must be ubiquitous. Directors are not required or expected to make decisions in a vacuum free from knowledge of the strengths and weaknesses of their colleagues as directors. They do not fail to act in the best interests of the company merely because they might take into account or even be persuaded by the views of their colleagues.

74 Accordingly, Perpetual's case is necessarily framed as one of control or what it terms "disproportionate" or "undue" influence by the Millner family over the boards of each company. In context, this must mean that Perpetual alleges that the obligations of each director of each company have been and are being subordinated to the maintenance of the cross shareholding as a mechanism of entrenching control of the companies by them and thus the Millner family. These matters should be kept in mind when assessing the evidence which is said to support this aspect of Perpetual's case because to assert that a director of a publicly listed company is acting other than in accordance with their obligations is no small thing and the likelihood of that being so is to be assessed with regard to the seriousness of the allegations (s 140(2)(c) of the Evidence Act and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362).

4.3 The cross shareholding could not now be created

75 Perpetual places weight on the fact that creation and maintenance of the cross shareholding would not now be permitted by operation of ss 259D and 259E of the Corporations Act. As Perpetual submitted:

> Section 259D provides:
>
> (a) if a company obtains, or increases, control of an entity which holds shares in the company, then, within 12 months of either obtaining or increasing control, the entity must cease to hold the shares, or the company must cease to control the entity (s. 259D(1));
>
> (b) any voting rights attached to the shares cannot be exercised while the company continues to control the entity (s. 259D(3));
>
> (c) if, at the end of the 12 months (or any extension to that period granted by ASIC pursuant to section 259D(1)), the company still controls the entity and the entity still holds the shares, the company commits an offence for each day while that situation continues (s. 259D(4)); and

(d) the offence is an offence of strict liability (s. 259D(4A)).

Section 259E(1) provides that a company controls an entity if the company has the capacity to determine the outcome of decisions about the entity's financial and operating policies. Pursuant to section 259E(2), in determining whether a company has this capacity:

(a) the practical influence the company can exert (rather than the rights it can enforce) is the issue to be addressed; and

(b) any practice or pattern of behaviour affecting the entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

…

Sections 259D and 259E were introduced into the then Corporations Law by the Company Law Review Act 1998 (Cth), which commenced 1 July 1998. Section 259C was introduced at the same time, and it provided that the issue or transfer of shares of a company to an entity controlled by the company would generally be void (unless certain exceptions applied). The provisions remain substantially the same today (although s. 259D(4A), referred to above, was inserted in 2001).

…

ASIC has issued Regulatory Guide 233 "Indirect self-acquisition: Relief for investment funds", which explains the conditional relief ASIC may grant under s 259C(2) of the Corporations Act from the indirect self-acquisition provisions in s 259C…

Regulatory Guide 233 is for investment funds and similar entities, and controlled entities of listed companies engaged in arbitrage and client driven activities, however, the guide outlines the general regulatory risks that ASIC considers may arise from allowing indirect self-acquisition, as follows:

(a) *improper attempts to consolidate or exercise control* - there is a risk that the company's shares acquired by controlled entities may be inappropriately used to control the company;

(b) *increased possibility of corporate failure* - there is an increased risk of corporate failure where a company is investing its own funds in itself;

(c) *possible discrimination between shareholders* - there is a risk that self-investment may lead to a controlled entity being preferred over other shareholders in the company;

(d) *insider trading* - there is a heightened risk of insider trading where a controlled entity is trading in its holding company's shares;

(e) *market manipulation* - there is a risk that acquisitions by a controlled entity could be used to manipulate the market for the benefit of the corporate group; and

(f) *price opacity* - allowing indirect self-acquisition by a controlled entity, which uses its own funds rather than investors' funds, can create difficulties in valuing the consolidated group of companies. This is because part of the assets of the group includes shares in the controlling company. In addition and all things being equal, the greater the amount of indirect self-investment, the great the volatility in the controlling company's share price. This is

> because indirect self-investment tends to exaggerate the effect of good and bad news on the share price of the company.
>
> The presence of these legislative prohibitions evinces a legislative policy choice that arrangements such as the cross-shareholding are, as a matter of general corporate policy, considered undesirable. That is for good reason, as they permit individuals without the majority of capital invested in a company from exercising effective control.

76 Brickworks pointed out that Parliament chose to allow cross shareholdings that were in existence prior to the enactment of s 259D to continue in operation without temporal restriction. Accordingly, as Brickworks put it:

> The Explanatory Memorandum to the Company Law Review Bill 1997 provided:
>
> > "[12.73] The rules in section 259D of the Bill apply only to obtaining control, increasing control and other transactions occurring after commencement. For example, if A obtained control of B prior to commencement, A would not be required to end its control of B, nor B to dispose of its shares in A. However, if A were to increase its control in B after commencement, then within 12 months either A must end its control of B, or B must cease to hold the shares (Bill s 259D(1))."
>
> It follows that there is no policy against the Cross-Shareholding that is capable of being divined from the Corporations Act. On the contrary, Parliament was content for companies in the position of BKW and SOL to retain their cross-shareholdings for as long as they saw fit.
>
> For the same reasons, Perpetual's reliance on ASIC Regulatory Guide 233 is misplaced. That regulatory guide has no application to the Cross-Shareholding. Further, the guide is directed at entities other than BKW and SOL – namely, investment funds and similar entities engaged in arbitrage and client driven activities. Even if these matters are ignored, the Regulatory Guide rises no higher than recognising certain "risks" that may arise from an indirect self-acquisition and expressly contemplates that ASIC may grant relief permitting such acquisitions to take place.

77 Both the fact that the cross shareholding would not be permitted if sought to be created now and that the statutory regime excluded pre-existing arrangements from the prohibition are relevant. The former proposition demonstrates that arrangements such as the cross shareholding are undesirable as a matter of general corporate policy. The latter demonstrates that this general undesirability was not seen as sufficient by Parliament to force pre-existing arrangements to be undone by subjecting them to ss 259D and 259E. General undesirability as a matter of policy, of course, does not prove that any of the risks inherent in a structure have eventuated or, for that matter, that any unfairness has been caused. Ultimately, all that can be said is that the policy considerations mean that it would be prudent for the boards of both companies to be vigilant about the kind of issues that such a structure might involve. As

discussed below, the evidence establishes that neither board could be accused of a lack of vigilance or prudence about the potential effects of the cross shareholding.

4.4 The cross shareholding depresses share prices?

78 Perpetual submitted that:

> The cross-shareholding serves to depress and supress the market value of both Brickworks and Soul Pattinson. That has been repeatedly acknowledged in the companies' own advice from Gresham, Lion Capital, and Pitt Capital…
>
> The financial press coverage and perception of the cross-shareholding in the market is highly negative.

79 While Perpetual said it relied upon the evidence of Mr Duncan and Professor Frino to support these submissions, their evidence about value did not demonstrate that the cross shareholding in fact depressed share prices. The evidence, taken as a whole, permits only the following findings:

(1) Perpetual and experts advising Perpetual have consistently considered that the cross shareholding materially depresses the value of shares in the company compared to the market value of those shares but for the cross shareholding and all things otherwise being equal;

(2) some other market analysts share Perpetual's views;

(3) at various times and to various extents experts giving advice to the companies have reached similar conclusions to those of Perpetual;

(4) one difficulty that besets all of the evidence about the effect of the cross shareholding on share price is that the comparison is between the companies as they exist and the companies but for the cross shareholding or in a merged form and "all other things being equal" (which seems to mean that the assets of the companies and efficacy of the boards and management will be the same). However, if the cross shareholding is unwound the companies will be fundamentally different, as would be a merged entity, so the assumption of "all other things being equal" is elusive, and perhaps meaningless; and

(5) the substantial increases in share prices for both companies in more recent times tends to work against the conclusion that the cross shareholding materially depresses the value of shares in either company, a fact which advisors to the companies have recognised in their more recent reports to the companies.

80 Perpetual has not proved that the cross shareholding in fact depresses the market value of shares in either company.

81 Professor Frino's evidence was not a reliable foundation to reach any such conclusion. Given the way in which Perpetual put its case in closing submissions (that is, without any examination of the weight that should be given to Professor Frino's evidence) I do not consider it necessary to provide details of why his evidence does not provide an appropriate foundation for the conclusion that the cross shareholding depresses the market value of shares in either company. It is sufficient to say that his oral evidence established that:

(1) his methodology would not be found in any standard valuation texts;

(2) he had not subjected his analysis to any form of "reality check" to see if his results were sustainable;

(3) the posited increase in value would depend on decisions of the boards of the companies without the cross shareholding over the long term;

(4) his calculations of Tobin's Q (which measures the market value of the shares of a company relative to its book value) were based on an assumed 100% of the value of each company's investments (when, for example, Soul Pattinson is a shareholder but not 100% shareholder in various companies) and this could have distorted the analysis;

(5) this adjustment, for minority interests, should have been done and without it having been done the distorting effect could range from no effect to a very significant effect; and

(6) his samples, which were reasonably small, included outliers which were capable of skewing the results.

82 Mr Duncan's evidence also does not provide a sound foundation for a conclusion that the cross shareholding depresses the market value of shares in either company. Mr Duncan is not a valuer but a market analyst. He did not undertake a valuation exercise. He gave evidence of his perceptions of the effect of the cross shareholding on investors, particularly institutional investors. While he perceived the cross shareholding to be a deterrent to investment in the companies and believed it would be a similar deterrent to the weight of institutional investment money in the market, he accepted that views in the market were as diverse and multitudinous as the participants in the market. Mr Duncan also said that he was a "purist", by which he meant that in his view companies which offered an investor a "pure

play" in one particular market were preferable to those which were diversified. The structure of the companies offends against this purist approach to investment. It is not difficult to accept that some sophisticated institutional investors might share Mr Duncan's purist approach to investment. But it is not possible to infer that this is a view held by all or even the majority of institutional investors, and Mr Duncan accepted that he could conceive of reasons why retail investors in particular may prefer to invest in diversified companies.

83 Mr Duncan's evidence also did not permit a finding to be made that the cross shareholding is likely to materially depress the value of shares in each company because in common with the comparative value exercises mentioned above Mr Duncan's view to that effect assumed that but for the cross shareholding all other things would be equal, when no such assumption may be made. If the cross shareholding is unwound, things cannot be equal. However it is done each company, or a merged company, would be fundamentally different from the existing companies.

84 For the same reasons, Perpetual has not proved that if the cross shareholding does depress the market value of the shares in either or both companies, the dismantling of the cross shareholding will rectify that situation either immediately or over the longer term.

85 Otherwise nothing more can be found on the evidence, including that of Mr Duncan, than that some potential investors in the companies may not invest because of the cross shareholding, others may be unconcerned by the cross shareholding, and others again may see the cross shareholding as a positive attribute. In this regard Soul Pattinson noted in its submissions, and it is the fact, that:

(1) RBS Morgans has consistently identified the cross shareholding as providing Brickworks and Soul Pattinson with valuable diversity;

(2) CCZ Equities identified that there are a number of well publicised arguments for and against the view that the value of the whole of a company with an unrelated diversification model (which is the result of the cross shareholding) will be less than the sum of the parts, so that such a company will trade at a discount compared to its peers. While CCZ Equities preferred the view that the cross shareholding was a potential drag on Brickworks' share price and investors would be better off being able simply to invest in one or both companies without the cross shareholding, it also acknowledged that "the cross shareholding has to date allowed solid growth and

acquisitions cash inflow for the rest of BKW, providing it with a strong source of competitive advantage";

(3) Macquarie Equities identified Brickworks' shareholding in Soul Pattinson as having provided it with a strong earnings buffer;

(4) "Airlie Funds Management (through Mr Williams) presently regards an investment in Brickworks as a good investment based on an investment criteria which includes a strong balance sheet, durable business and management with a high degree of competence and integrity";

(5) RBS Morgans was unconvinced that restructuring would "unlock value" for Soul Pattinson, believing that such a restructure might lead to increased earnings volatility, risk and subsequent decreases in long-term value. RBS Morgans described the Brickworks' shareholding in Soul Pattinson as "its key differentiator"; and

(6) Citi analysed the cross shareholding in some detail in 2013 identifying pros and cons. The pros included takeover defence, forging stronger relationships, diversification, and allowing management to focus on the longer term. The cons included inflexibility, poor corporate governance, entrenching underperforming management, lower capital efficiency and returns, and hindering valuation.

86 In the present case, of course, it cannot be said that Perpetual's complaint is that the cross shareholding entrenches "underperforming management". Its complaint is that the cross shareholding entrenches management, even if in the present case it is common ground that (but for Perpetual's complaints about failure to unwind the cross shareholding) the companies have been well managed to date.

87 Further, I am unable to make a finding that the "financial press coverage and perception of the cross-shareholding in the market is highly negative". At best, I can find on the evidence that:

(1) there has been negative financial press coverage of the continuation of the cross shareholding but the proportion of this to financial press coverage generally remains unknown;

(2) there are elements of the market which perceive the cross shareholding to be highly negative;

(3) there are elements in the market which perceive Brickworks' investment in Soul Pattinson to be a positive for Brickworks;

(4) there are elements in the market which perceive Soul Pattinson's investment in Brickworks in to be a positive for Soul Pattinson; and

(5) there are elements in the market which consider the existence of the cross shareholding to be beneficial to both companies.

88 Ultimately, despite the pointed criticism of Mr Duncan's evidence for a view he expressed to the effect that Australian companies aim to invest well and diversification is a mere by-product of such a strategy rather than an aim in and of itself (a view which, at worst, attributes to company directors his own purist perspectives on investment), Mr Duncan's evidence in fact explained why attempting to identify "market perception" of the cross shareholding, as if that were a unitary concept, might prove elusive; the range of views in the market is as diverse as the range of participants.

89 Otherwise, it is also apparent that the share prices of both companies have rallied strongly in more recent times. According to the minutes of a meeting of Soul Pattinson's board on 12 April 2017, its shares were then trading at 8.8% above its after tax net asset value. It will be apparent from the discussion below that this change in share price (and relative share prices between the companies compared to their net asset value) was perceived by advisors to the companies as important to any assessment of the benefits of a restructure to their respective shareholders. This perception was reasonable in the circumstances.

90 For present purposes, the relevant point is that Perpetual attributed the fact that the shares of both companies were trading below their net asset value over a number of years to the cross shareholding, the essential argument being that unwinding of the cross shareholding would release this value (an argument on which Perpetual still relies but does not depend to make good its case). However, this argument makes no allowance for the substantial increase in the share prices of both companies in more recent years despite the fact that the cross shareholding remains in place. As Soul Pattinson put it (but the point applies equally to Brickworks), Perpetual has not explained how it is that the cross shareholding might be the cause of the shares trading at below net asset value when, in recent years, share prices have substantially increased despite the continuation of the cross shareholding.

91 To the extent, if at all, Perpetual's case relied on various papers by Hunter Green as evidence of market perception of value or as founding calculations of value, even if those documents

had been admitted for the purpose of proving the truth of the opinions contained in them, they could not have been relied upon for that purpose. As Soul Pattinson put it:

(1) there is no evidence of the qualifications of the author of the Hunter Green reports;

(2) the reasoning in those reports is opaque;

(3) there is no suggestion in the evidence that the author had the expertise to calculate a crucial integer in the calculations, namely the value of Brickworks' assets other than its Soul Pattinson shares (primarily a building products business, as well as development land and equity in trusts); and

(4) the reports do not take into account Soul Pattinson's substantial ($1.341 billion as at 31 July 2016) deferred tax liabilities on assets other than its shares in Brickworks. It is not that the merger would trigger this liability but that the merged entity will carry this liability, a fact which cannot simply be ignored.

4.5 Continued existence of the cross shareholding

92 Perpetual contends that:

> The cross-shareholding now only exists to protect the incumbent boards and management, which have since 1969, come to be dominated by members of the Millner family.
>
> …
>
> The cross-shareholding exists to vest control in the incumbent boards of Brickworks and Soul Pattinson, which are in turn, controlled by, or unduly influenced by, the Millner family. That control or influence is used to protect the cross-shareholding, and the incumbent boards and management.
>
> Recent historical events whereby efforts have been made to have the cross-shareholding unwound, or where there has been questioning of the providence of continuing the cross-shareholding, provide clear evidence of the exercise of such control or influence, to protect the cross-shareholding, and the incumbent boards and management. It shows that the so called independent directors either directly support the Millner view, or are at least prepared to go along with it. The only inference available is that such action has been supported and influenced by Mr Robert Millner, seeking to protect "the family business" and the family legacy. A clear example of this is the appointment of his son Mr Thomas Millner to the board of Soul Pattinson (dealt with below), and the prevention of the appointment of Mr Robert Fraser to the Soul Pattinson board, and the appointment of Ms Elizabeth Crouch to the Brickworks board.
>
> Brickworks has admitted that between 28 July 1997 to 27 November 2014, although on a limited number of occasions individual directors had abstained from voting on resolutions of the board on the basis of conflict, or had been absent from meetings of the board, "there has been no occasion on which the Board has passed a resolution in respect of which there was an objection or dissenting vote by any director on any topic".

93 I will deal with the various proposals separately. Insofar as the proposition that the cross shareholding now exists only to entrench control of the incumbent boards is concerned, it is not supported by the evidence.

94 I accept that the cross shareholding deters takeovers and facilitates retention of members of the boards over a longer term than might otherwise be the case.

95 But this does not mean that the cross shareholding now only exists to protect the incumbent boards and management and thus the control of the Millner family. Nor does the evidence support the proposition that independent directors "either directly support the Millner view, or are at least prepared to go along with it".

96 These submissions bring me back to the concept of the Millner family and its significance for Perpetual's case and what seems to me to be one of a number of fundamental difficulties with it. For the purpose of arguing the existence of oppression Perpetual's case ignores that:

(1) the companies have performed well in the past, apparently providing above average returns to investors for many years;

(2) no one, not Perpetual or otherwise, has suggested the directors and management of each company are other than competent and there appears to be a general consensus that the companies have been well managed to date; and

(3) no one, not Perpetual or otherwise, can know what the future might hold if the cross shareholding is dismantled.

97 Perpetual contends that propositions (1) and (2) do not matter because the oppression is not a result of the companies being poorly managed but of the cross shareholding entrenching the control of the boards and thus the Millner family and disenfranchising other shareholders from being able to influence membership of the boards of each company.

98 Perpetual contends that proposition (3) does not matter because there is no dispute, or should be no dispute, that there are ways in which the cross shareholding may be dismantled without unacceptable adverse impacts on members of either company, including by a nil premium merger.

99 I disagree. All three propositions matter. Propositions (1) and (2) matter because they undermine Perpetual's case that the Millner family controls the boards of each company either by acting in concert or by the existence of an agreement, arrangement or understanding

to that effect. Apart from Perpetual's complaint, there has never been a circumstance in which it is suggested that the cross shareholding has caused any circumstance adverse to the effective management of either company. Perpetual's case is left at the level of principle. It did not get who it wanted on the boards but it does not suggest that those appointed are other than competent. It has not achieved the dismantling of the cross shareholding but has not proved that the cross shareholding is responsible for periods in which the shares have been undervalued or that shareholders would be better off financially under any differently structured regime without the cross shareholding. It has not proved that the cross shareholding has caused any decision adverse to the performance of either company. There seems to be consensus that the boards of each company, apart from the complaint about the cross shareholding, have been competent and effective managers in the interests of their respective shareholders. As such, there is nothing which calls for any explanation as to why a 40 year old structure has not been dismantled. If the cross shareholding had resulted in any adverse consequence, such as retention of a poorly performing board or a poor decision affected by a conflict of interest or an improvident transaction, then there might be something to explain. An inference might then arise that the cross shareholding was being maintained for some reason other than that no alternative to date has offered demonstrable benefits over the longer-term.

100 Proposition (3) matters because reasonable directors would weigh the potential benefits of a restructure unwinding the cross shareholding recognising that the potential benefits are uncertain compared to the known performance of the companies to date.

101 It is convenient to deal now with Perpetual's approach to inferences it says should be drawn from the fact that no member of either board has given evidence. Some key principles are these:

(1) lack of evidence is not evidence. Lack of evidence may be relevant to inferences that are able to be and should be drawn from evidence;

(2) speculation and supposition, still less mere suspicion, are not inferences from evidence. Evidence must exist and must provide a rational foundation for the asserted fact before an inference may be drawn;

(3) Perpetual's invitation to the Court to be "bold" (citing *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 49 per Jacobs J) does not alter the fact that the boldness

which his Honour had in mind was the drawing of an inference open on the evidence. If the inference is not open on the evidence to be bold is just to be wrong;

(4) the *Jones v Dunkel* inference (*Jones v Dunkel* (1959) 101 CLR 298) that the evidence that a party could have called but did not would not have assisted it does not relieve a party of its burden of proof. It does not substitute for evidence which does not exist, but operates on the probability of the facts which may be inferred from the evidence that does exist; and

(5) circumstantial evidence is evidence from which inferences may be drawn. Lack of evidence may affect the probability that the facts asserted from the circumstantial evidence exist. No doubt circumstantial evidence may well be important to a case alleging an agreement, arrangement or understanding, but for a finding to be made that one exists there must be evidence, circumstantial or otherwise, which makes the finding open. Lack of contradicting or explanatory evidence may then affect the decision whether or not the inference open on the evidence should be drawn.

102 With these matters in mind, it is also relevant to note that a necessary element of an agreement, arrangement or understanding is mutuality. In *Trade Practices Commission v* ***Nicholas Enterprises*** *Pty Ltd (No 2)* (1979) 26 ALR 609 at 629 Fisher J referred to "the necessity for each of the parties to have communicated with the other, for each to have raised an expectation in the mind of the other, and for each to have accepted an obligation qua the other" as "the essential elements of the requisite meeting of minds" which an agreement, arrangement or understanding involve.

103 The cases on which Perpetual relies (*Nicholas Enterprises*, *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446, and *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410) involved agreements, arrangements or understandings which were necessarily unlawful at conception (to fix prices or for a purpose of substantially lessening competition). Perpetual does not allege that any director of the boards of either company breached any duty but there is a persistent theme in its case that the directors of both boards have unlawfully subordinated their duty to the relevant company to self-interest and an obligation to the Millner family arising from the asserted agreement, arrangement or understanding. But, as will be explained, the evidence of any kind of subordination is missing.

104 The fact that members of the Millner family and each board have customarily voted in the same way about any issue says nothing about an implied agreement, arrangement or understanding with the Millner family to maintain the cross shareholding. Perpetual cannot sustain that inference merely by reason of evidence that the boards of each company achieve consensus when it comes to voting and the absence of evidence from any board member or part of the management team of either company. No inference arises one way or another from the evidence of consensus decision making by the boards and thus absence of evidence from directors of the companies cannot assist Perpetual. As Soul Pattinson put it:

> Perpetual wants the Court to infer an arrangement or understanding from parallel conduct, not between competitors, but among directors of public companies. Unlike the case of competitors, there is nothing unusual in public company directors, upon being presented with a particular proposal, taking advice, engaging in discussion and ultimately reaching a consensus position. That a consensus has been reached is unremarkable. It does not suggest any antecedent understanding as to what is to occur.

105 Otherwise, the existence of an agreement, arrangement or understanding needs to be evaluated in the context of Perpetual's proposals and its continuing position that the cross shareholding, whether or not it depresses the value of shares in the companies or such value can be realised on the dismantling of the cross shareholding, is oppressive. This evaluation is carried out below by reference to the facts and circumstances upon which Perpetual relies. One difficulty in so doing, however, is that the submissions for Perpetual are not confined to the case as pleaded. The submissions contain numerous allegations of misconduct by the directors of both boards which are said to support the existence of the alleged agreement, arrangement or understanding, but these allegations were not pleaded or particularised. The submissions also allude to conflicts of interest without explaining how they advance the case of oppression. The submissions having been put, however, it is necessary to deal with them.

5. THE LEAD UP TO THE FIRST PROPOSAL

106 Matthew Williams was Perpetual's portfolio manager responsible for its shareholdings in Brickworks and Soul Pattinson until 2015. He gives evidence about questioning the cross shareholding and agitating for it to be dismantled from 2007 onwards. No one currently representing Perpetual has given evidence.

107 According to Mr Williams at the annual general meeting of Soul Pattinson in 2007 the following discussion occurred:

> Williams: "The cross shareholding hides value."

R. Millner: "No, there is nothing in it, forget it."

Another gentleman: "Why is our return on equity so low?"

Williams: "That gentleman had a very good question. It's because of the cross shareholding."

R. Millner: "Don't worry about that".

108 Thereafter, at a subsequent meeting which he attended with Robert Millner and Mr Partridge to discuss dismantling the cross shareholding by a simultaneous buy-back of the shares each company held in the other this exchange occurred:

Partridge: "Why should we change? The structure works perfectly fine".

Williams or Green: "Your business works fine, the assets are great, but the structure is holding back value for all minority shareholders".

Partridge: "Why should we change? Why?"

109 I do not see anything in this evidence which assists Perpetual. The fact that Robert Millner expressed a view that the cross shareholding did not depress the value of shares in the companies is immaterial. The fact that Mr Partridge said the structure "works perfectly fine" and queried why it should be changed is not surprising given that the structure had been in place since 1969. If Mr Williams perceived Mr Partridge to be aggressive and vehement in his opposition to what Perpetual was then proposing, the long-standing of the cross shareholding is an adequate explanation for this without any need to speculate about an agreement, arrangement or understanding that the cross shareholding must be maintained to protect the incumbent boards and thus entrench control by the Millner family. Nor does Mr Williams' perception that his reception was hostile take the matter further. I also note that the only answer Mr Partridge was given to his question as to why the cross shareholding should be dismantled was that the cross shareholding depressed the value of shares, not that it entrenched the incumbent boards and thus Millner family control or disenfranchised minority shareholders and was thereby inherently oppressive.

110 The newspaper articles that then began to appear reflect the theme of adverse impact on the share price by reason of the cross shareholding. It is not apparent why the fact that the companies were interested in press reports about them should support the existence of any agreement, arrangement or understanding between directors as alleged. It would be surprising if companies such as these did not monitor public comment about them. As I have said, however, the fact that the companies monitor publicity does not mean that all or any

directors must be taken to agree with anything that might appear in the press, even statements from the chairman, merely because those directors did not publicly correct any statement.

111 For its part Perpetual's focus continued to be the magnitude of the discount to share price that it and its advisors (**Hunter Green** International Broking) considered the cross shareholding imposed.

112 There is no reason to infer that the board of Soul Pattinson was being disingenuous when it promulgated a corporate governance statement around late 2010 stating that:

> The Board of Washington H. Soul Pattinson and Company Limited (the Company) is committed to ensuring its policies and practices reflect good corporate governance and recognises that for its success an appropriate culture needs to be nurtured and developed throughout all levels of the Company.

113 The statement that all directors are committed to bringing their independent views and judgment to the board and must inform the board of any conflict of interest so that the board's view was that Robert Millner and Michael Millner could be considered to be acting independently in the execution of their duties also cannot be seen as disingenuous. In that statement the board recognised that Robert Millner and Michael Millner did not qualify as independent directors under the ASX Corporate Governance Council (2014) **ASX Corporate Governance Principles and Recommendations** given their directorships of Brickworks, a substantial shareholder in Soul Pattinson, and other interests in the company. The point being made was that the board considered that Robert Millner and Michael Millner were capable of acting in the best interests of the company. The ASX Corporate Governance Principles and Recommendations do not go so far as to suggest any director who would not be considered independent under those principles is necessarily incapable of discharging his or her duty.

114 The appointment of Thomas Millner to the board of Soul Pattinson on 8 December 2010, five days after the annual general meeting of the company, was recorded in a minute in these terms:

> The existing composition of the Board was discussed and the benefits of increasing the number of Directors to seven were considered.
>
> The necessary and desirable skills, expertise and experience which would be required of an additional Director were discussed.
>
> It was RESOLVED to recommend to the Board that Mr T.C. Millner be appointed as an additional Director of the Company. Due to his family relationship with Mr T.C. Millner, Mr R.D. Millner abstained from voting.

115 In response to Perpetual's submissions about this event, I note that:

(1) the Constitution permits a director to be appointed by the directors or by ordinary resolution of the company shareholders;

(2) as such, there is no basis to infer a "deliberate strategy, to have Thomas Millner appointed as soon as possible after the AGM so that he could offer himself for re-election at the following year's AGM, having already served nearly a full year as a director, and present himself as an established incumbent". On Perpetual's case theory, he would have been elected at the meeting and had he been elected at the meeting he would have served the same period and be an incumbent director;

(3) even if, which cannot be known, Robert Millner did not abstain from his role as chairman and discussions about the appointment of Thomas Millner as a director, his conflict of interest as Thomas Millner's father was known to all;

(4) the fact that the recommendation must have been by Mr Westphal, a long-term associate of Robert Millner, and Mr Wills, Thomas Millner's uncle-in-law, does not prove Perpetual's case. There is nothing to suggest either did not believe that Thomas Millner had the necessary and desirable skills, expertise and experience to be appointed to the board; and

(5) this said, the events disclose the potential for the structure of the companies to give rise to actual or perceived conflicts of interest.

116 The appointment of Thomas Millner concerned Mr Williams who met with Robert Millner and Melinda Roderick, the then chief financial officer of Soul Pattinson (later appointed a director on 1 November 2014). Mr Williams repeated his views about the cross shareholding depressing value. Mr Williams, during the meeting, said to Robert Millner "[a]t least I am not trying to put my son on the board" which apparently made Robert Millner angry. Mr Williams reiterated that Perpetual wanted something done about the cross shareholding to which Robert Millner responded the "cross shareholding makes sense, there is nothing wrong with it". Given the context was the cross shareholding depressing value, this can mean only that Robert Millner disagreed with that proposition. Whether he was right or wrong about this, there is nothing to suggest that the view was not one genuinely held or was unreasonable in the circumstances (and subsequent events and advice demonstrate that the effect of the cross shareholding on value is probably more complex than Mr Williams' view at this time).

117 Perpetual submitted that:

> As can be seen in all the evidence, Mr Robert Millner's default position was always

> to come out in defence of the cross-shareholding. His sensitivity to anyone questioning his "succession planning" by putting his son on the board was also telling.

118 By this time, the only thing Perpetual had put against the cross shareholding was that it depressed share value, a view which Robert Millner apparently did not share. Further, the fact is the cross shareholding had been in place for 40 years and no one had identified an alternative structure which demonstrably provided shareholders with a better option.

119 Perpetual's anxiety about the continuation of the cross shareholding was unsurprising, however, given that it was being advised that both companies were trading at a substantial and increasing under value because of the cross shareholding. That depression of share prices was Perpetual's concern at this time is exposed by an article in the Australian Financial Review on 23 May 2011 which referred to Perpetual's view that the shares were trading at a 50 per cent discount to what the assets were worth. Robert Millner is recorded in the article in these terms:

> If you look at Brickworks' performance relative to peers in the industry over the past four or five years, it's been able to increase its dividend each half and most of that has come from its investment in W H Soul. On the other side, at W H Soul we think Brickworks is a good investment," said Mr Millner.
>
> He added that selling either major shareholding would result in a hefty capital gains tax liability. "It's been in place a long time and there is no reason to change it," he said.

120 In response to Perpetual's submissions about this:

(1) Robert Millner is (and was) the chairman of both companies so responding in both capacities is unexceptional. Perpetual would seem to have it that he should make one statement on behalf of Brickworks and another separately on behalf of Soul Pattinson;

(2) Robert Millner was not bound to address Perpetual's assertion of a 50% discount on the value of shares. Not mentioning it did not mean he agreed with it;

(3) he was also not bound to make any statement about his "considerable self-interest in preserving the cross-shareholding, and thereby continuing his control of both companies, which no doubt he intended to hand on one day to his newly appointed director son, Mr Thomas Millner";

(4) he was right to be concerned about tax liabilities. He was also right the cross shareholding had been in place a long time. He was entitled to the view that "there is no reason to change it" given that no one had suggested an alternative structure which

would demonstrably provide shareholders with a better option and no one had suggested at that time that, as Perpetual would have it, the cross shareholding was an instrument of oppression to entrench his control of the companies which he intended to pass on to his son;

(5) his references to the good performance of Brickworks because of its investment in Soul Pattinson and that Soul Pattinson saw the investment in Brickworks as a good one are inconsistent with the current assertion of Perpetual that the cross shareholding is nothing but an instrument of oppression retained only to enable the incumbent boards and thus Millner family control to continue; and

(6) there is independent evidence from market analysts which support Robert Millner's view that Brickworks' investment in Soul Pattinson enabled it to increase dividends despite a downturn in the building and construction industry. Nor is his view that Soul Pattinson's investment in Brickworks was a good one unfounded or idiosyncratic given the evidence of market perceptions.

121 Perpetual submitted that:

> There can be no doubt that from at least 3 June 2011 Mr Robert Millner, Mr Ian Bloodworth and Ms Melinda Roderick were all squarely aware of the allegation that the Millner family controlled the companies with the acquiescence of its "friends". There was no outraged response by any of Mr Millner, Mr Bloodworth or Ms Roderick, attempting to put the record straight, or disputing any such suggestion.

122 This appears to be a reference to the fact that in a 12 page Hunter Green report prepared for Perpetual, which was sent to Robert Millner, Mr Bloodworth and Ms Roderick there is this statement:

> The cross shareholding ensures that control of each company resides in the hands of a few individuals, the directors of each company, whose names appear below.
>
> …
>
> In short, almost absolute control of the two companies, and their combined asset base of about $4.1 billion, resides squarely in the Millner family (with the acquiescence of its friends) for an investment on their part of approximately $320m in the shares of the two head stocks.

123 These statements appear in the context of Hunter Green's primary thesis that the cross shareholding was causing a substantial depression of the value of shares in the companies. Robert Millner, Mr Bloodworth and Ms Roderick did not have to isolate these statements about control from the report and expressly refute them in order to be taken not to accept them. I accept, however, that by this time Robert Millner, Mr Bloodworth and Ms Roderick

were aware that Perpetual, supported by Hunter Green, considered that the cross shareholding caused the shares in each company to suffer from a substantial discount and was concerned by corporate governance issues given the appointment of Thomas Millner as a director of Soul Pattinson.

124 I do not see why I, like Mr Williams, should be sceptical of the message from Robert Millner to Perpetual in June 2011 that "they are doing a lot of work on a possible buyback of SOL shares and will report back soon". It seems from subsequent events that Brickworks was also gathering information to enable it to examine various options.

125 On 4 July 2011 the Australian Financial Review reported that:

> Washington H Soul Pattinson's non-executive chairman, Robert Millner, has hit back at calls to break up the cross-shareholding between the company and Brickworks, saying the arrangement has benefitted both companies over a long period of time. He acknowledged WHSP and Brickworks were trading at significant discounts to the sum of their parts but said the cross-shareholding was nothing new and had added significant value to both companies. "The majority of people that have bought the shares in that long period know the cross-shareholding and the lack of liquidity," he said. "In the last four or five years during the downturn, Brickworks has been one of the very few building materials companies that has been able to maintain or increase its dividend and its profits have actually risen".

126 Dealing with Perpetual's submissions in this regard:

(1) Robert Millner did acknowledge that both companies were trading at a significant discount to the sum of their parts value;

(2) it is implicit in his statement that he saw that this may in part be associated with the cross shareholding because of its impact on liquidity;

(3) he was right that the cross shareholding was long-standing;

(4) he must have been right that the majority of shareholders had bought with knowledge of the cross shareholding and its impact on liquidity;

(5) he explained how the Brickworks' shares in Soul Pattinson added value by assisting it to increase profits during a downturn in the building cycle; and

(6) he does have two capacities and cannot be expected not to speak in both capacities at the same time when dealing with the cross shareholding which, by its nature, involves each of the two companies. This does not suggest, as Perpetual would have it:

> The interchangeability of Mr Robert Millner's perspective of the shareholding demonstrates the reality, that he sees both companies as part and parcel of his family business.

127 Hunter Green and Perpetual, for their part, were entitled to disagree with these views (as they did), but that does not mean Robert Millner was being disingenuous in saying what he did on the basis, as Perpetual would have it, that his real but unstated desire was to maintain the cross shareholding to entrench his family's control of the companies. Equally, the fact that Hunter Green sent through its reports to the companies does not assist Perpetual's case. Hunter Green's "transparency" with the companies, to which Perpetual refers, is immaterial. Repeatedly sending reports to the companies did not impose an obligation on the companies to refute anything with which they disagreed. It also did not oblige them to provide to Perpetual information not otherwise generally available.

128 As I have said, I accept that the cross shareholding makes it more difficult for the companies to be taken over. If Brickworks is happy with the Soul Pattinson board the cross shareholding facilitates retention of that board over the longer term and if Soul Pattinson is happy with the Brickworks board the cross shareholding facilitates retention of that board over the longer term. The Millner family is represented on both boards and thus the cross shareholding facilitates their retention on both boards as it does the retention of all directors. There is also increased potential for perceived and actual conflicts of interest of various kinds as a result. I explore this effect of the cross shareholding in more detail below. But this is a long way from saying that the only reason the cross shareholding has been maintained is to entrench the incumbent boards and thus the control of the Millner family.

129 Mr Green of Hunter Green had a telephone call with Robert Millner and Ms Roderick on 20 July 2011 for about 40 minutes. Mr Green's subsequent email recorded:

> Rob said one reason they hadn't gone hard with buybacks previously is they had (at least informally) committed to ASIC/ASX that they would enter standstill arrangements under which BKW/SOL committed to not going up either register. I am paraphrasing slightly as he was not keen to be drawn in detail on this. But he just seemed to expose some nerves on this issue and made me think that there is room to push ASIC/ASX on the matter. The line of argument would be something like….
>
> ….have a look at the composition of each Board; there is no concept of one share one vote; all minority (non Millner) shareholders are potentially being prejudiced (and specifically, disenfranchised) by the cross shareholding; it's a gerrymander that would not be allowed today; it's regrettable corporate governance and yet you, the regulators, continue to endorse it by acquiescing in its existence. We require ASX/ASIC to make orders to dismantle the cross shareholding, to at least bring them back under 20%....
>
> It's definitely worth pursuing this angle; I just sensed Rob was very nervous not to upset the regulators on this issue (of creep).

130 The email continued:

> Rob tried to run the argument with me that BKW was its own entity with independent directors. He bristled at my response that control of the SOL board also gave him control of BKW. "You obviously don't know me very well Charlie".
>
> Further, he said that the companies were not "gold plated", not something "that I take to bed every night".
>
> Further, he said "we are keen to represent all shareholders"…."look at the Saraji sale".
>
> Further, he said that if someone made a bid for either company at 30% to 35% premium, then of course they would look at it. To which I said that would be too cheap. Obviously, he doesn't buy into the simultaneous equation (fantasy equity) method of valuation.

131 A further meeting was then arranged.

132 Around this time Brickworks retained **Gresham** Investment House to review its corporate structure. Perpetual puts a pejorative spin on an email from Craig Jensz of Gresham that "I have deliberately kept this [a work proposal] high level as the precise contents of what Lindsay [Partridge] wants for the Board meeting will be developed with him over the coming week" but this does not mean that Mr Partridge was dictating the opinions to be expressed, only that the client, Brickworks, wanted to ensure that the report it received addressed the issues it saw as relevant. The proposed role was as follows:

> Gresham will review Brickwork's current structure and set out options to enhance shareholder value in the short-to-medium term. Specifically, Gresham will:
>
> - Assess the quantum of the discount between Brickwork's [sic] share price and its inherent value;
> - Identify reasons why the discount exists;
> - Review internal actions undertaken by Brickworks since Gresham's reports in 2007;
> - Identify other feasible options to close the valuation gap, having regard to Brickwork's [sic] corporate objectives;
> - Identify any issues that flow from these recommendations.

133 The focus on "options to enhance shareholder value in the short-to-medium term", rather than corporate governance issues, is not unexpected. While corporate governance issues had been raised, it is fair to say that Perpetual's primary focus at the time was also share prices.

134 Subsequent dealings between Mr Partridge and Gresham confirm that Mr Partridge's role was limited to ensuring the Gresham report dealt with issues considered to be relevant and was based on accurate internal information. The emails which Mr Partridge sent on 5 and 6 August 2011 are also inconsistent with the notion that he felt bound by some agreement,

arrangement or understanding that the cross shareholding was to be maintained or that Millner control was relevant. To the contrary they suggest he was interested in knowing what the restructuring options were for Brickworks and if they would realise increased value for Brickworks' shareholders. Indeed, so unwedded was Mr Partridge to maintaining the cross shareholding he had his own preferred restructuring option which did not find favour with Gresham. It is also apparent from his emails that, as was appropriate given he was a director of Brickworks, Mr Partridge was interested in the outcomes for Brickworks. What is also apparent is that at this time the restructuring options were being assessed in the context of a possible sale of Soul Pattinson's shares in **New Hope** Corporation Ltd or **NHC**.

135 Gresham reported in August 2011. Perpetual submitted that:

> No written record has been produced of the meeting at 9am on Tuesday, 9 August 2011, but the Court would infer it occurred at that time and date in Soul Pattinson's boardroom, and was attended by Lindsay Partridge, Alex Payne, Robert Millner, Melinda Roderick, Craig Jensz and Paul Duske, as the executive assistants had arranged. The Court would also infer that the report referred to immediately below was presented at that meeting. It is significant that although Gresham had been retained by Brickworks, and given access to Brickworks own internal information and management, Soul Pattinson representatives were invited to, and the Court would infer, did attend the meeting.

136 Perpetual argues that much should be made of the fact that reports, including this report, to Brickworks have been discovered by Soul Pattinson and vice versa, when Perpetual itself was not privy to these reports. However, I do not see the same significance as Perpetual does in the information sharing which occurred between the companies given that the cross shareholding necessarily involves both companies.

137 The report of Gresham was entitled "Review of Corporate Structure Chairman Discussion Draft". Given that the companies have the same chairman and Gresham, while retained by Brickworks, was reporting on restructuring both companies (as the restructure of one necessarily involves the other in some way), I see nothing sinister in the title of the report.

138 Gresham's view was that Brickworks was substantially undervalued at the time, as was Soul Pattinson. Gresham did not identify the cross shareholding itself as the cause of the discount but did identify it as involving complexity (one reason for the share price discount) and partly responsible for a lack of trading liquidity (another identified reason for the share price discount). Gresham identified a suite of possible restructuring options and criteria for assessment. The criteria included value impact, no value transfer between the companies (i.e. equality of treatment of each company), maintaining Brickworks size/index representation,

gearing, and the "SOL shareholding" which was explained as "[e]nsures that BKW has a supportive long term shareholder that will prevent opportunistic takeover". The restructuring options included a merger and demerger option. Gresham's preliminary analysis was that a restructure would be required to ameliorate the discount to value and four options were worth further consideration.

139 Perpetual argues that everything said in this and other such reports of advisors to each company may be attributed to the boards which received them. I do not agree. The mere fact that a board receives advice does not mean it accepted the advice. If the board resolved to accept the advice or acted upon it then the position is different. But mere receipt and consideration without express demur is insufficient for attribution.

140 Perpetual argues that the reference to Soul Pattinson being "a supportive long term shareholder that will prevent opportunistic takeover" (and similar statements in numerous subsequent reports) is code for the boards of each company having an agreement, arrangement or understanding that the cross shareholding is to be maintained to entrench the incumbent boards and thus control of the Millner family. I disagree. Deterring takeovers was one of the reasons for the creation of the cross shareholding in 1969, but this does not mean that it is the only reason the cross shareholding has not been dismantled at Perpetual's urging from 2011 onwards. My view is that the statement about a "supportive long term shareholder that will prevent opportunistic takeover" means what it says. The companies have held shares in each other for 40 years. History has proved that neither is interested in a short-term investment in each other. History has proved that each has supported the other's strategy of long term growth over possible short term returns. These are sufficient explanations for the statement. There is no justification for going further and positing the existence of an agreement, arrangement or understanding that the cross shareholding is to be maintained in order to entrench the incumbent boards and thus control of the Millner family.

141 Brickworks had retained PWC for tax advice about the restructuring options Gresham identified. In advice of 26 August 2011 PWC said that it understood that of the options Gresham considered possible, the merger of the two companies followed by a demerger of the company owning solely the bricks and related property assets was preferred. PWC concluded that there were no significant taxation impediments standing in the way of the merger/demerger.

142 For its part Soul Pattinson decided to obtain advice from Pitt Capital Partners (**PCP**) which was majority owned by Soul Pattinson and the directors of which included Robert Millner and Peter Robinson. While this means that PCP could not be seen as giving independent advice, it had no reason to give advice other than in what it considered to be in Soul Pattinson's best interests. PCP shared Gresham's view that the companies had been undervalued for some time for a number of reasons including but not limited to the cross shareholding. PCP's report focused on Gresham's work and an alternative option, a selective buy-back of Soul Pattinson's own shares from Brickworks, because PCP considered Gresham's work to be weighted in Brickworks' favour. As PCP put it about any merger, Soul Pattinson "should only agree to a proposal which has a more balanced merger ratio". This approach is consistent with PCP, having been retained by Soul Pattinson, considering any restructure from the perspective of the best interests of Soul Pattinson (which is appropriate). PCP identified potential benefits from unwinding the cross shareholding including greater index representation and hence greater investment interest and analyst coverage, increasing the simplicity of the structure and corporate strategy, and potential tax advantages in resetting the tax cost base of investments.

143 The board of Soul Pattinson considered the PCP report, presented by Mr Barlow (who later was appointed a director of Soul Pattinson), on 29 August 2011.

144 Gresham prepared a further report on 12 September 2011 dealing with the possibility of mutual share buy-backs, probably because this option had been raised in the PCP report. Gresham considered that the key issue would be the buy-back price and that, while more complex, the merger/demerger could offer "better results" (which I infer to mean better value for Brickworks' shareholders).

145 In the meantime Hunter Green had been continuing its work for Perpetual and Perpetual decided to examine the corporate governance structures of each company, retaining CGI Glass Lewis for this purpose. Perpetual intended to present a report from CGI Glass Lewis to the boards of each company.

146 On 19 September 2011 the Australian Financial Review published an article saying:

> When it comes to advice, Mr Millner hasn't changed who he listens to. The group's investment bank, Pitt Capital Partners, one floor above the office, has direct access to him and non-executive director Peter Robinson. "Pitt Capital have their finger on the pulse," Mr Millner said. "But one of the beauties of someone in my position is I can go down to the guys on the floor of Brickworks and guys in mining and get a feel of

> what the average person thinks."
>
> …
>
> But it's the cross-shareholding "partnership" between WHSP and Brickworks that is expected to be questioned at this week's results meeting. WHSP has had a cross-shareholding arrangement with Brickworks for decades to ward off any potential takeover attempts and assist both businesses during economic cycles. WHSP and Brickworks' major shareholder, Perpetual, is pushing to have the conglomerate broken up to realise some of the underlying value, particularly as Brickworks' share price slumps. It's not the first time someone, or some group, has tried to unravel the cross-shareholding with Guiness Peak Group. Former chairman Ron Brierly attempted to do exactly that some years ago. Mr Millner said he understood the frustration of investors but highlighted the group's six month share price and long-term share price performance as reasons not to jump the gun. "That is one thing that has concerned us over the past six months – our share price maybe hasn't performed as well as it should have," he said. "When you've been around the game as long as I have you field calls from these guys and you can see where they're coming from. We've paid eight special dividends in 10 years."

147 It will be apparent that the article refers to warding off takeover attempts and assisting both businesses during economic cycles. The article does not suggest that the cross shareholding does not have this second effect and other evidence, such as market analyst reports, indicates that others share this view. This is inconsistent with Perpetual's case that the only reason the cross shareholding is now in existence is to entrench the incumbent boards and thus control of the Millner family.

148 Consistent with the apparent accessibility of Robert Millner to discuss issues with Hunter Green and Perpetual, Mr Green and Mr Millner spoke on 22 September 2011. Mr Green's subsequent email recorded that:

> I'm afraid there's not much joy in any of that [the merger/demerger question]. No commitment to timing and definitely resisted any concept of "coming together", as he rests on the 15 year track record, and the 40 to 50 year time horizon.

149 This accords with the views Robert Millner had expressed at other times, as referred to above.

150 Another article then appeared in the Australian Financial Review under the by-line "WHSP defends cross shareholding". The article continued:

> But Mr Millner defended the cross shareholding structure, saying it had served both companies well.
>
> "It's the board's responsibility to look at this but on behalf of WHSP we've had an outstanding track record of delivering performance to our shareholders," he said. "In the last 12 months we haven't outperformed the index but we were positive and there's a lot of companies in our portfolio that were negative.

151 Perpetual submitted that:

> The continued public defence of the cross-shareholding in light of the advice received from Gresham, Pitt Capital Partners and PWC was unjustifiable.

152 I disagree. If that were so no director would be able to disagree with a recommendation in professional advice. Directors would be redundant. Management could be left to employees obtaining advice as required. There is no basis, moreover, for any suggestion that Robert Millner did not believe that the cross shareholding served both companies well but, rather, believed it served only the Millner family well. Everything Robert Millner apparently did and said at this time indicates that he genuinely believed the cross shareholding had served both companies well to date. This view was not unreasonable. The Brickworks' shares in Soul Pattinson kept its performance up during a downturn in the building market. The Soul Pattinson shares in Brickworks were considered a good investment by it. The cross shareholding had facilitated stability in board membership and management of each company which was seen generally as having served the companies well over many years. But recognition that the cross shareholding facilitates greater stability in management of each company is not, as Perpetual would have it, code for an agreement, arrangement or understanding about entrenching the incumbent boards and thus control of the Millner family. Further, Perpetual's reading of the statement is incomplete. Robert Millner did not simply defend the cross shareholding. He said that it is the "the board's responsibility to look at this". He was right. And the boards of both companies were looking at the cross shareholding.

153 On 23 September 2011 Perpetual sent a letter to all board members of Soul Pattinson which said:

> The purpose of this letter is to express formally Perpetual's concern with the lack of action by SOL's Board of Directors on two central issues relating to the cross shareholding between SOL and BKW, in particular:
>
> • the discount to intrinsic value at which the shares in SOL trade; and
>
> • corporate governance matters.
>
> …
>
> The above concerns have been raised by Perpetual and other non-associated parties on numerous occasions. Continued inaction by the existing Board is not in the best interests of shareholders. These issues have now reached a point where it is inappropriate for shareholders to vote on the re-election of directors and the Board's remuneration without immediate clarification of the Board's stance.
>
> Perpetual will take steps to ensure that the Board acts in the best interests of all

> shareholders and requests your response to these matters without delay.

154 Perpetual then took steps to ascertain if Perpetual's chief operating officer, Cathy Doyle, and Robert Fraser would agree to be nominated as candidates for the boards of both companies. Perpetual also had another report from Hunter Green dated 23 September 2011 the headline of which was that the "cross shares conceal $1.5 billion". Hunter Green calculated the true value of shares in Soul Pattinson at 56% above their current price and shares in Brickworks at 72% above their current price. According to the Hunter Green report the companies could achieve "value liberation" by a number of methods which would dismantle the cross shareholding, with the available value uplift to the companies being $1.5 billion. Hunter Green found it "impossible to understand how any arguments in favour of the cross shareholding can come close to outweighing the financial benefits available in a restructure".

155 With this advice it is little wonder that Mr Williams' view, expressed in an email of 25 September 2011 to others within Perpetual, was that "the prize is massive and worth kicking up the biggest almighty fight over". Perpetual, as the second largest shareholder in both companies at the time, had no reason to be concerned about the relativities between each company in any restructure and believed it stood to make substantial gains in the value of its shareholdings. As such, its actions in vigorously pursuing the unwinding of the cross shareholding are understandable.

156 Perpetual also received the report from CGI Glass Lewis on 28 September 2011. The report said that of the board of Brickworks it considered 33% to be independent and of the board of Soul Pattinson considered none to be independent. The report continued:

> …according to CGI Glass Lewis' Guidelines, both boards fall short of proportionally representing public shareholders. Moreover and more importantly, the relationship between BKW and SOL is unusual in that the board structures have long been dominated by nominees of the Millner family, which is not listed as a current direct substantial shareholder (defined in the Corporations Act as holding not less than 5% of the total votes) in either entity.

157 The board of Soul Pattinson met on 29 September 2011. According to Perpetual, the redacted version of the minutes discovered by Brickworks compared to the version discovered by Soul Pattinson demonstrates the "sensitivity of the issue of the cross-shareholding". The redaction was to mask the statement:

> Messrs Craig Jensz (Gresham Investment House) and David Friedlander (Mallesons) joined the meeting and presented an update on Project Eternal in relation to various strategic, legal and tax matters.

158 Based on apparent redactions of other Brickworks' documents it seems the more likely explanation for the redaction is an over-generous approach to the concept of legal professional privilege on the part of whichever unfortunate paralegal or solicitor had the unenviable task of reviewing the discovered documents, 24,769 pages of which have ended up in evidence before me. The redactions in Brickworks' documents indicate a view that any mention of a lawyer, as opposed to legal advice, must be privileged. To attribute this to the sensitivity of the companies about the cross shareholding, given the discovery of all reports to the boards, is unpersuasive.

159 In any event, the minutes continued:

> It was noted that the Directors had individually received a letter from Perpetual Ltd concerning the cross shareholding.
>
> Extensive discussions took place surrounding the share price and shareholding structure.
>
> The board and management will keep a watching brief on this issue. No direct action will be taken on the cross shareholding at this time, however it will be reconsidered following the finalisation of any potential corporate action relating to the impending announcement by New Hope Coal Ltd.

160 It will be recalled that the options that the companies were considering internally had included a sale of Soul Pattinson's shares in New Hope. It is apparent that within the boards a view had emerged that the proposed sale of shares in New Hope should proceed before decisions about restructuring were made.

161 Dealing with Perpetual's submissions about this meeting:

(1) I do not accept that "in light of the Gresham report (and also the Pitt Capital Partners report of which of course, Mr Robert Millner was aware), and the tax advice received, the decision to do nothing, especially in light of Perpetual's letter, was quite extraordinary". For one thing, the decision was not to "do nothing". It was to monitor the issue and to reconsider it after the position in respect of New Hope had been finalised. Given the potential significance of the sale of shares in New Hope this decision was not "extraordinary". It was a decision reasonably open to be made in the best interests of Soul Pattinson;

(2) it is true that "the substantial holding in New Hope Coal was held by Soul Pattinson, not Brickworks" but the point is that unwinding the cross shareholding necessarily

affected both companies and the view taken to await the outcome of the proposed sale of the shares in New Hope was reasonable in the circumstances; and

(3) it is also true that "there is no indication in the minutes that Mr Robert Millner did not fully participate in the discussion and resolution of the issues, notwithstanding that he was the chairman of Soul Pattinson, as well as also being the chairman of New Hope Corporation Limited" but it is not apparent where this goes in Perpetual's case given the lack of any pleading about it or clarification of its relevance in any submission.

162 On 6 October 2011 an article in the Australian Financial Review entitled "Brickworks bond losing mortar" said:

> New Hope chairman Robert Millner, who is also chairman of Soul Patts and Brickworks, was yesterday holding open the possibility of the historic cross-shareholding being unwound.
>
> He says that unwinding has to be on the table if New Hope is sold. Otherwise the company would not be acting in the interests of shareholders.
>
> Brickworks owns about 42.85 per cent of Soul Patts, which, in turn, owns 44.6 per cent of Brickworks. This arrangement is so old that it pre-dates the creation of provisions in the Corporations Act prohibiting a company acquiring shares in itself.
>
> Millner admitted yesterday that the Corporations Act prevented the two companies from buying shares in each other.
>
> …
>
> Also, New Hope is being advised by in-house corporate advisory group Pitt Capital Partners.

163 Perpetual (understandably) places no weight on this article but, if such evidence be admissible at all, it cuts across Perpetual's case that the only reason for the maintenance of the cross shareholding is to entrench the incumbent boards and thus control of the Millner family. Robert Millner accepted that "unwinding has to be on the table if New Hope is sold" as "[o]therwise the company would not be acting in the interests of shareholders". From this it is apparent that Robert Millner did not believe the cross shareholding could or should be maintained if it was not in the best interests of shareholders of both companies.

6. THE FIRST PROPOSAL

164 Also on 6 October 2011 Mr Williams of Perpetual sent an email to Robert Millner which said:

> I recommend Rob Fraser to you as a truly independent director for the W.H. Soul Pattinson (SOL) board (see attached bio & transaction experience summary). Following our conversation this afternoon I will not propose him for the Brickworks

> board and hence will not be requiring the share register of that company at this time, nor will I require the SOL register if you agree to invite him onto that board.
>
> I've known Rob Fraser for over 15yrs and he is a person of the highest integrity. He is well known and respected around the mid- cap [sic] market, in particular, and I believe SOL will be perceived positively if he is appointed. He will not be a Perpetual appointment and I will make no public comment other than to say that such a move would be a welcome step by SOL.
>
> Rob's track record has demonstrated that as a board member he looks to achieve maximum shareholder return for all shareholders in a sensible professional manner.
>
> As a close reference I believe David Fairfull knows Malcolm Irving who can vouch for Rob.
>
> I look forward to hearing your views on this recommendation.

165 This is the commencement of the first proposal.

166 Soul Pattinson objected to the tender of Mr Fraser's biography as evidence of the truth of its contents, an objection which, while technically correct, seemed to pay little regard to the obligations in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth), given that I find it difficult to believe that Mr Fraser's experience and qualifications were truly doubted by Soul Pattinson and they re-appear in a Gresham report which has been admitted as to the truth of its contents. In any event, the fact that Mr Fraser may have been qualified to sit on the board does not mean that Soul Pattinson's board was bound to accept that he do so. No doubt numerous people were qualified to be on the board. It was for the board or an ordinary resolution of shareholders to decide on any director.

167 According to Mr Williams he then again met Robert Millner and suggested that "…let's have both. You put Tom on the board and appoint Robert Fraser to the board and we will go from there" and Robert Millner agreed to think about it.

168 Brickworks wrote to Perpetual on 6 October 2011. Perpetual's submission was that:

> Despite all the internal advice received from Gresham and PWC, the letter simply fobbed Mr Williams off.

169 This is not accurate. The letter in fact said that:

> The full Board of Brickworks have reviewed your requests and consider that, given the announcement by New Hope Corporation Limited on 5 October 2011, it is in the best interests of the shareholders of Brickworks not to take any direction at this time.
>
> The Board of Brickworks regularly does, and will continue to, consider all options that are in the best interests of all Brickworks' shareholders, particularly in the light of current volatile markets…
>
> In addition, I understand that our Chairman, Mr Robert Millner, has a meeting

> scheduled next week with the Chairman of your company to discuss this issue as it relates to Brickworks and WHSP. In a sign of good faith, we would appreciate you holding off any further public comment on this issue until after this meeting has taken place.

170 Perpetual also submitted that:

> Having spoken to Mr Williams that very day, Mr Robert Millner was now plainly looking to go above his head, in an attempt to end Perpetual's agitation regarding the cross-shareholding.

171 How going above Mr Williams' head can also constitute "fobbing off" Perpetual is not apparent. In any event, Robert Millner was entitled to communicate directly with Perpetual's chairman. It might be thought appropriate that he do so in the circumstances. Perpetual's suggestion that the communication was intended to "end Perpetual's agitation regarding the cross-shareholding" cannot be reconciled with the fact that Robert Millner had publicly said unwinding of the cross shareholding would have to be "on the table" if Soul Pattinson's shares in New Hope were sold.

172 Brickworks, consistent with its position that it was monitoring the situation pending resolution of any sale of New Hope shares by Soul Pattinson, received further advice from PWC which said that there should be no tax consequences from Soul Pattinson acquiring all shares in Brickworks in exchange for shares in Soul Pattinson.

173 The nomination committee of Soul Pattinson met on 12 October 2012 in respect of appointments to the board. The minutes record that the committee comprised Robert Millner and Mr Westphal and Mr Wills. David Fairfull, Michael Millner, Thomas Millner and Peter Robinson were also present. Perpetual submitted this:

> The stated reason why the committee declined to recommend his [Mr Fraser's] appoint was that "a sufficient number of directors and that the skills which Mr Fraser would bring to the Board were already possessed by the Board". It is noteworthy that that had not stopped the appointment of Mr Tom Millner less than a year before. The invitees then left the meeting. The committee – including Mr Robert Millner – then resolved to recommend to the board that Messrs Fairfull, Michael Millner and Thomas Millner stand for re-election.
>
> …
>
> There was then immediately a meeting of the full board of Soul Pattinson. The whole board then rubber stamped the "recommendation" of the nomination committee that Mr Fraser not be appointed. That nomination committee was of course only Messrs Robert Millner, Westphal and Wills. In effect the full board's decision was simply an acceptance of the prior decision of those three. To the extent that the board dealt with the election of Messrs Fairfull, Michael Millner and Thomas Millner, any such consideration has been redacted in the minutes produced.

174 In response, my observations are:

(1) Perpetual has not proved that Thomas Millner did not hold qualifications and experience which the board did not possess before his appointment;

(2) the fact that the full board agreed with the recommendation of the nomination committee does not mean it "rubber stamped" the decision. There is no evidence that board members did not bring to bear independent consideration of the issue of Mr Fraser's appointment to the board;

(3) Perpetual has not proved that the recommendation of the nomination committee and board decision was made for any reason other than that the skills which Mr Fraser would bring to the board were already possessed by the board; and

(4) Perpetual has omitted reference to the part of the minutes of the nomination committee which included this:

> It was agreed that should [WHSP's] holding in New Hope Corporation be sold and a substantial new investment or investments be made the Committee would consider the appointment of an additional Director or Directors with skills appropriate to those investments.

175 Perpetual was informed of the board's decision about Mr Fraser by letter dated 13 October 2011. Consistently with the board's resolution this letter said that if the sale of shares in New Hope proceeded Soul Pattinson would have cash to acquire other business and, at that time, it might need to appoint other directors with specific skills relating to those businesses.

176 On 19 October 2011, RBC (on behalf of Perpetual) made a formal nomination of Mr Fraser for election as a director of Soul Pattinson at the upcoming annual general meeting. Mr Williams, in an email to Mr Fraser, recorded as follows in respect of a conversation with Robert Millner:

> Spoke to Rob Millner (RM);
>
> I insisted I want to put Rob Fraser (RF) on the SOL Board so was pushing ahead.
>
> RM says does not want RF on board due to potential changes to board in event of a NHC transaction.
>
> I offered the compromise that RF would resign from SOL board upon completion of any transactions that satisfied our requirements.
>
> RM flagged that this might work so would contact board and be back to us by next week.
>
> I pointed out that we would continue to satisfy statutory requirements needed to put RF up for board as an independent candidate and thus expect documents from us today plus I would need release of share register.

> Conversation concluded with me pointing out that a lot of noise and distraction could be avoided if SOL just appointed RF to the board. Rob agreed with this but also pointed out poor performance of PPT which I stated as an unrelated issue.

177 Perpetual's submissions about this discussion are addressed as follows:

(1) this conversation does not show that the reason offered as to why Soul Pattinson did not want Mr Fraser on the board – namely the potential New Hope transaction – was a ruse. According to Perpetual, if that had been the real concern, the solution offered by Mr Williams more than addressed it. Given that the board had resolved that it already possessed Mr Fraser's skills it is not apparent to me that Mr Williams had offered a solution at all. Why the board might be attracted to Mr Fraser being elected then resigning is also not apparent;

(2) it is true that there is no evidence that this aspect of the proposal (Mr Fraser being elected then resigning) was taken up with the board and Perpetual did not receive a response to the proposal, but this proves nothing; and

(3) the submission that:

> …this conversation signals a shift in the attitude of Mr Millner, who, despite all efforts, had not been able to get rid of Mr Williams and his attempts to agitate for change. Even his attempt to go over Mr Williams' head had not produced results. Mr Millner was starting to attack Perpetual in an attempt to divert attention from the real issue – the cross-shareholding,

is unconvincing. Some might think that the course of events disclosed a continued willingness on the part of both companies, and Robert Millner in particular, to discuss the issue with Mr Williams.

178 Perpetual then submitted that:

> It can be readily seen that one of the real reasons that Mr Robert Millner was so desperate to resist the appointment of Mr Fraser to the board of Soul Pattinson was because if appointed to the board, Mr Fraser would have become aware of the advice received by Soul Pattinson from Pitt Capital Partners, as well as the advice received by Brickworks from Gresham. That would have been disastrous to Mr Robert Millner's continued public attempts to defend the cross-shareholding, and Mr Millner was desperate to avoid this outcome.

179 As Soul Pattinson said, this is unconvincing because:

> If Mr Fraser had become aware of PCP's advice he would have known that WHSP was faithfully reviewing the work of Gresham and considering the cross-shareholding and options to unwind with a particular focus on its strategic imperatives and timing given the upcoming New Hope transaction.

180 Further, and as noted, Robert Millner had made a public statement that if the New Hope transaction proceeded, unwinding of the cross shareholding would have to be "on the table" because it might no longer be in the interests of shareholders of both companies. This is irreconcilable with Perpetual's case of a "desperate" Robert Millner seeking to defend the cross shareholding at any cost.

181 The board of Soul Pattinson met on 20 October 2011. The minutes record receipt of RBC's nomination of Mr Fraser and continue:

> The Board considered Mr Fraser's curriculum vitae which had been received from RBC.
>
> Following discussion it was agreed that neither the formal nomination of Mr Fraser nor the information contained in his curriculum vitae had resulted in the Board reversing their decision not to appoint him as a Director of the Company at the Board meeting held on 12 October 2011.
>
> It was RESOLVED not to appoint Mr Robert Fraser as a Director of the Company and not to support his nomination at the AGM of the Company to be held on 2 December 2011.

182 Perpetual's submissions, and my observations in response, are:

(1) *The meeting started at 6.00pm and concluded at 6.05pm. Any consideration of the nomination must have been perfunctory at best*: the board already had a biography of Mr Fraser and had decided that his skill set was possessed by the board and no further directors were to be appointed pending the New Hope transaction;

(2) *The board appears to have had no difficulty in accepting Mr Fraser's curriculum vitae at face value. There was no complaint that it was unable to be accepted, or that the truth of the matters it contained was questionable*: I agree and have proceeded on the basis that Mr Fraser holds the qualifications and experience so identified; and

(3) *The decision to reject Mr Fraser was in substance that of Mr Robert Millner*: the submission is unfounded. The board as a whole decided not to accept the nomination. In any event, Perpetual did not accept the board's decision and put the issue to shareholders as a whole.

183 Perpetual said this:

> On 24 October 2011, Mr Robert Millner personally telephoned Mr Williams, and left a voicemail telling him that "the Board had once again declined to put Rob Fraser on the board". While literally true, that hardly conveyed a fulsome or accurate picture of how that resolution had come to pass in light of the history of the nomination committee's recommendation and the board's mere adoption of it.

184 What else, it might be wondered, was Robert Millner meant to do to communicate to Perpetual what had occurred?

185 Perpetual then made this point:

> It seems that by now Mr Robert Millner realised that Perpetual and Mr Williams were not simply going to go away, and in response, sent a letter to Soul Pattinson shareholders. In it he said: "With the exception of one WHSP Director, Mr Fraser is unknown to the WHSP Board". That was rather the point – he was to be an independent director. That comment betrayed Mr Robert Millner's perception as to how the Soul Pattinson board should be populated, by a group of like-minded people who were known to one another, and whom it should be inferred, would agree with his family based leadership style and view of the company. He urged shareholders to vote against Mr Fraser's election.

186 This too is unconvincing. Perpetual had in fact nominated Mr Fraser to the board for the proposed annual general meeting. Robert Millner's letter responded to this fact, not some supposedly belated realisation that Perpetual and Mr Williams were not "simply going to go away". The comment in the letter that Mr Fraser was unknown except to one board member did not convey a belief on the part of Robert Millner that the Soul Pattinson board should be populated by a group of like-minded people who were known to one another and whom it should be inferred would agree with his family based leadership style and view of the company. In many fields of expertise people in the field tend to know or know about each other. There is no reason to suppose that public company directors are any different. The point being made was only that Mr Fraser was not known to anyone bar one person on the board.

187 Perpetual said next:

> It must have been obvious that the 2011 Brickworks AGM was likely to be a contentious affair and confidential material in the form of "Q & A" was prepared for the Brickworks' board's internal use. The cross-shareholding received direct attention. It is plain from the proposed answers that the Brickworks strategy was to defend the cross-shareholding. There is no record of any director dissenting from that approach, even in light of the Gresham advice.

188 The Q & A document in fact said this, which was consistent with the decisions of the board of Brickworks and reasonable in the circumstances:

> 9. Are you considering unwinding the cross shareholding?
>
> The Board continuously review strategies to increase long term shareholder value, and will review again after the New Hope transaction
>
> …
>
> It is entirely appropriate to wait until the outcome of any transaction involving New

Hope Corporation.

189 On 28 October 2011, Soul Pattinson issued a notice for its annual general meeting to be held on 2 December 2011. In it the company notified that the chairman intended to vote all undirected proxies against the election of Mr Fraser and in favour of the election of Michael Millner, Mr Fairfull, and Thomas Millner.

190 Brickworks' documents for the Soul Pattinson annual general meeting included a letter stating:

> 3) A summary of details for the appointment of Robert D Fraser. This is provided to [sic] the basis that it appears that Mr Fraser has not contacted WHSP and not provided any further details as to his suitability to be a director of WHSP.
>
> …
>
> Mr Tom Millner will also be voted as a director for the first time at this meeting. It is noted that Tom has been CEO of BKI for 3 years and BKI was yesterday awarded Listed Investment Company of the Year by the Australian Fund Manager Foundation. Tom was also previously an Analyst with Souls Funds Management.

191 Brickworks' documents also included a Gresham report about Mr Fraser which sets out his qualifications and experience consistently with the material to which Soul Pattinson took objection. Gresham described Mr Fraser as "professional and personable", "reasonably intelligent", "pragmatic", with "relatively good corporate relationships, particularly with small cap to mid cap companies".

192 Perpetual described the contrast between the letter's commentary concerning Mr Fraser and the chairman's son, Thomas Millner, as "stark". However, this overlooks the fact that Brickworks' management had obtained and was providing information to its board favourable to Mr Fraser. The descriptions of Thomas Millner given to the Brickworks' board are also merely factual rather than, as Perpetual put it, "glowing".

193 The Brickworks' board met on 31 October 2011. Brickworks resolved to appoint Mr Partridge as its proxy for Soul Pattinson's annual general meeting, and to direct him to vote in favour of the election of Michael Millner, David Fairfull and Thomas Millner, but against Mr Fraser. Perpetual said this:

> Although Mr Robert Millner left the meeting for the vote, he had of course by this time made public his opposition to the appointment of Mr Fraser in the letter to shareholders that went out on 28 October 2011. Shareholders of course included Brickworks. Robert Millner had also presided over the nomination committee meeting at Soul Pattinson that rejected Robert Fraser. The members of the board remaining for the formal vote would have been in no doubt as to Mr Robert Millner's position on the vote, and they voted the way that he wanted them to vote, as they

always did.

194 I agree that members of Brickworks' board would have known Robert Millner's position but there is no evidence that they voted as they did because that is the way he wanted them to vote on this or any other occasion. It cannot be suggested that the decision the Brickworks' board made about Mr Fraser or Thomas Millner was unreasonable. Nor can it be suggested that no director could have fairly made such a decision.

195 Perpetual noted that around this time other shareholders made public statements endorsing Mr Fraser. This may be accepted. However, it is also the fact that yet other shareholders did not agree with Mr Fraser's appointment, particularly given a perception that he was associated with Perpetual.

196 Perpetual referred to an article in The Australian on 2 November 2011 which said:

> Mr Millner also returned fire at Perpetual, advising the company's 12 per cent shareholder to examine its own poor performance and "not throw stones at us".
>
> "The last thing we'll be doing is adding another director when we could soon end up with $2 billion-$3bn in cash" Mr Millner said.

197 Again, these statements are consistent with the decisions of the boards of each company. They do not add to Perpetual's case.

198 Perpetual said that on 16 November 2011 Mr Williams "spoke to Mr Brendan Crotty – one of the so-called independent directors – about supporting Robert Fraser's appointment". Mr Crotty had been appointed to the Brickworks' board on 10 June 2008 so his length of service did not suggest any possible lack of independence by 2011. Mr Crotty held no other position or interest in Brickworks or Soul Pattinson or any related company. Perpetual did not suggest he was related to the Millner family. Accordingly, he was not a "so-called" independent director. He was in fact an independent director.

199 Mr Williams' email records this:

> Spoke to Brendan Crotty to ascertain his view on Rob's nomination to SOL;
>
> - key takeaway is that he doesn't support Rob's nomination because (singing from the same song sheet) the sale of NHC will make all this superflous [sic].
>
> - knows of Rob Fraser because of sharing board with Bill Beerworth for 10 years and agrees would be a good director. I offered to have a meeting together with RF but he declined.
>
> - went through all the points re this is not about the sale of NHC etc
>
> - I put the acid on him re Rob Fraser v Tom Millner and how that was going to make

> him and the other independents look, but unmoved.
>
> - Overall very disappointing discussion.

200 On 16 November 2011 CGI Glass Lewis published a proxy paper which recommended against the election of Michael Millner, David Fairfull and Thomas Millner, and for the election of Mr Fraser.

201 Perpetual noted that on "17 November 2011, Mr Williams spoke with Mr David Gilham, another so-called independent director of Soul Pattinson [sic, Brickworks]". My observations above about Mr Crotty apply also to Mr Gilham, albeit that he had been on Brickworks' board since 2003 when length of service is a possible factor which has been identified by the ASX as relevant to independence and was the managing director of a company taken over by Brickworks. Mr Williams' email about this recorded that:

> Spoke to David Gilham;
>
> - David is well known to us from his time at Bristile.
>
> - Upshot is that he will call the other independent directors (Crotty, Webster) to suggest they have a call with Robert Fraser. Will come back to me tomorrow.
>
> - Doesn't believe it is appropriate to talk one-on-one with Rob Fraser.
>
> - Off the record he has a "good deal of sympathy for Perpetual's position" but is "part of a board that has to be unified."
>
> - Reading between the lines I think the BKW board has already voted their SOL shares already.
>
> - I pointed out the reputational damage to be seen voting for the son of the chairman vs a well credentialed candidate. He says he understands.
>
> - Until our letter arrived he was not aware of some of the family connections on the SOL board.

202 Perpetual highlighted the reference to Mr Gilham being "part of a board that has to be unified" in support of its case but I do not consider this means anything more than a view that it was in the best interests of Brickworks that its board be seen as unified rather than divided.

203 Mr Gilham got back to Mr Williams as promised. Mr Williams' subsequent email records as follows:

> - David Gilham called back as promised, after speaking to Crotty and Webster. They believe they know enough about Robert Fraser to make a decision without talking to him so will not be taking up our offer of a phone hook-up. I didn't ask him which way they would vote because I want to ask them in the public forum of the BKW AGM but it is certain that they have voted against.
>
> - Expressed the view that the public brawling is not helping things and I suggested

> that putting Robert Fraser on the board could have circumvented that. He agreed and said he had made the point to his chairman which is a bit at odds with then voting against Rob Fraser
>
> - Again expressed the view strongly that the possible sale of NHC will make SOL consider its options regarding BKW.

204 As to the parts of this email which Perpetual chose to highlight, I do not read the report of the conversation as suggesting that Mr Gilham believed Mr Fraser should be appointed to the board, only that the appointment would have avoided the dispute with Perpetual. One statement Perpetual has not highlighted is the last sentence about the sale of Soul Pattinson's shares in New Hope being the appropriate trigger for consideration of a restructure of the companies, which reflected the views of each board. There is no reason to doubt that Mr Gilham, as with Robert Millner and Mr Crotty, meant what they said when noting that any decision about restructuring should be made after resolution of the possible sale of Soul Pattinson's shares in New Hope.

205 Perpetual's next submission is this:

> On 21 November 2011, Mr Robert Millner as chairman of Soul Pattinson sent a further letter to shareholders. By this stage his strategy his evolved to one of openly attacking Perpetual, reflecting an increasing sense of desperation to stave off the attempt to put Mr Fraser on the board, and thereby potentially exposing the advice received as to the cross-shareholding. There is then an attempt to deflect from the issue, with tables highlighting Perpetual's corporate (as opposed to funds management) performance against Soul Pattinson's performance. In it, he said, in what was to become a common refrain in his defence of the cross-shareholding:
>
> > The Board believes that the issues raised by Perpetual are best answered by reviewing the performance of your Company. We believe that the true test of the management of a company is its performance and in particular the return the Company provides to its shareholders.
>
> In light of the advice received from Pitt Capital Partners and also Gresham, to which he and Soul Pattinson were privy, that was at best a disingenuous statement for a chairman to make to shareholders.

206 I disagree. Robert Millner was not defending the cross shareholding in the letter. He was explaining why he and the board did not agree with Mr Fraser being appointed to the board. Calling in aid the track record of Soul Pattinson compared with that of Perpetual does not involve deflection from the issue whether Mr Fraser should be appointed to the board. Robert Millner was entitled to identify that under the existing board of Soul Pattinson the company had performed well.

207 I also do not find anything sinister in the fact that Soul Pattinson was monitoring proxy reports for the meeting. A report of **ISS** Proxy Advisory Services Australia dated 17

November 2011 expressed the view that the composition of the Soul Pattinson board was "inconsistent with local market standards. All three sets of governance guidelines in Australia …recommend a majority independent board". ISS continued:

> Whilst there are concerns with the composition of the board at this time and the current cross-shareholding structure between SOL and Brickworks, which would normally prompt us to recommend a vote against a nominee who is affiliated with a substantial shareholder (that is, Michael Millner), we believe it is more productive for shareholders to vote in favor [sic] of all company nominees AND vote in favor [sic] of Robert Fraser, the shareholder nominee. As such, should Robert Fraser be elected to the board, there would potentially be less antagonism between him and the other directors, which would promote a better functioning of the board.

208 Perpetual makes something of a series of emails on 23 and 24 November 201 between the proxy advisor to Soul Pattinson and Brickworks which Perpetual believes shows that Brickworks had decided to vote for the appointment of Mr Fraser and then changed its position. According to Perpetual:

> There is no evidence from anyone from Brickworks about this change of position. It should be inferred that it was prompted by some intervention by Mr Robert Millner.

209 I am not persuaded that this inference should be drawn. First, the submissions make no allowance for any error or misunderstanding in the communications. Second, if anything, the text of the emails indicates the initial answer (suggesting Brickworks had voted for Mr Fraser's election) was simply a mistake. Third, on 31 October 2011 the board of Brickworks had directed that its proxies be voted against Mr Fraser's appointment so it is the fact the initial response was in error. Fourth, how Robert Millner enters this picture is not apparent. Fifth, it is unlikely that despite the meeting of the Brickworks' board on 31 October 2011 deciding to vote against Mr Fraser's appointment, it then (on a date unknown) decided to vote in favour of the appointment and yet between 5.34pm (the date of the first email) and 7.15am the next morning met and changed its mind again.

210 For its part Perpetual was trying to shore up support from other institutional shareholders in Soul Pattinson for the appointment of Mr Fraser to the board. As evidence of Robert Millner's alleged "increasing desperation" Perpetual focuses of an email he sent to Bruce Bagley, a former Soul Pattinson director and employee (and shareholder), who I am prepared to infer was a friend of Robert Millner. In short, Robert Millner asked Mr Bagley to speak at the meeting in favour of the existing directors of Soul Pattinson. Mr Bagley agreed to do so. Perpetual submitted as follows about the text of this email from Robert Millner:

(a) …

(b) "we" (query who the "we" is) "may need you to say a few words at the Souls AGM";

(c) "maybe the best time would be when Mr Fraser comes up for nomination" (i.e. we really want to shut that down);

(d) then he [Robert Millner] tells him what to say:

> "Could you talk about the Company's performance and quality of the people on the Soul's board.
>
> On Mr Fraser it would be handy if you make the point that if Souls was looking for a new director that the best way would be through one of the recruiting companies and search for the best candidate that is available.
>
> At this stage we feel that he has not got the numbers but I still think it will be a tough meeting regardless."

(e) obviously the irony of saying that the best way of recruiting new directors is through a recruiting company is lost on Mr Robert Millner who has put his son on the board;

(f) also, this is a particularly disgraceful and manipulative thing for the chairman of a publicly listed company to do – to connive the asking of questions by a former director and employee to give the appearance that they are unsolicited and coming from a disinterested shareholder when in fact he has put the words in their mouth to get him to where he wants to be in a "tough meeting"; and

(g) he encloses his own 21 November 2011 letter to shareholders.

211 There is no suggestion that Mr Bagley was being asked to say something he did not believe to be true. The suggestion was that Mr Bagley talk "about the Company's performance and quality of the people on the Soul's board", which left it to Mr Bagley to say what he pleased about both issues. Robert Millner thus did not put words in Mr Bagley's mouth. Further, Robert Millner did not put his son on the board, the board voted to appoint Thomas Millner. I do not accept the characterisation of the conduct as "disgraceful and manipulative".

212 Perpetual's next submission turned to Brickworks. The submission is this:

> Brickworks was plainly concerned about trying to manage the publicity concerning the vote. Ms Piercy was a director of Kreab Gavin Anderson. They are a PR company. Ms Piercy send an email on 28 November 2011, enclosing an AFR article on the upcoming vote and says:
>
> > "As discussed at our meeting, I have attached the Q&A we drafted for Rob for your information. We anticipate that there may be media attending the AGM tomorrow. Paul and I will be there to facilitate.
> >
> > We will also liaise with Mark regarding the media release."
>
> Some things to note. "Rob" was of course Mr Robert Millner. "Facilitate" was a PR term that should be taken to be a synonym for "control".

213 If this interpretation is accurate (and I am not sure why "facilitate" does not mean merely "facilitate"), it is not apparent how a public relations firm is meant to control a large meeting of shareholders or how this supports Perpetual's case.

214 As to the Q&A, Perpetual submitted:

> (a) the memorandum is addressed to "Robert Millner";
>
> (b) the subject is "Perpetual issue" – it is telling that the issue is Perpetual, not the underlying problems giving rise to the complaint about the cross-shareholding, which Mr Robert Millner and Brickworks know from the advice received is seriously supressing share prices;
>
> (c) the statement that: "Kreab Gaving Anderson recommends responding to media on a prepared reactive basis. This document outlines A Q&A to deal with media inquiries";
>
> (d) prepared reactive basis is an interesting concept – i.e. do not pre-empt media commentary, but be prepared to respond reactively; and
>
> (e) when one looks at the A in the Q&A, it is all the same pre-fabricated answers concerning performance, and is deflective and seeks to completely side-step the real issues - it is all just mere assertion.

215 For my part:

(1) Robert Millner is the chairman of Soul Pattinson so it makes sense that he is the addressee;

(2) the fact that the public relations firm chose to describe the subject matter as "Perpetual issue" cannot be attributed to Soul Pattinson. Even if it could, it is not telling. It cannot reasonably be suggested that the directors of Soul Pattinson were unaware of the advice received, and that advice was by no means as straightforward as that the cross shareholding was seriously suppressing the share prices and no more;

(3) the meaning of "prepared reactive basis" is unclear. If it is public relations speak for not pre-empting media commentary but being prepared to respond to it, I can see nothing sinister about such a policy; and

(4) characterising the suggested answers as "pre-fabricated" and "mere assertion" advances matters not at all. The suggested answers reflected the conclusions the boards had reached at that time.

216 Contrary to Perpetual's submissions, the ASX announcement by Soul Pattinson on 28 November 2011 about the return of proxy forms for its annual general meeting to be held on 2 December 2011 was also not a sign of "desperation". Insofar as events relating to this can

be relevant, the issue is not whether the announcement that proxy forms returned other than to the company were invalid was correct or incorrect, but whether there was any reasonable foundation for it. *Carson v Dynasty Metals Australia Ltd* [2011] FCA 621, on which Perpetual relies, was a decision about an interlocutory application the outcome of which turned on the balance of convenience. Section 250B of the Corporations Act, in terms, requires proxies to be "received by the company". As Soul Pattinson submitted, the "interception of proxy appointment forms by an intermediate party who is under no fiduciary duty or other apparent obligations in relation to their safeguarding, entails an inherent exposure to the possibility of filtering or other inappropriate handling: see *Portman Iron Ore Limited; Re Golden West Resources Limited* (2008) 170 FCR 409 at [34] and *Bisan v Cellante* (2002) 173 FLR 310 at [44]; [2002] VSC 430". Further, Mr Fraser's view that the announcement was wrong and "reprehensible" is immaterial, as is the media response. There was a reasonable basis for the views expressed. It has not been proved that Soul Pattinson did not genuinely hold those views.

217 Brickworks held its annual general meeting on 29 November 2011. Mr Williams attended and sent an email recording his account of events. The email said:

> AGM
>
> - Chairman and Deputy Chairman exempt themselves from any discussion regarding SOL and are not in the "room when the resolutions" are voted upon
>
> - So I asked the independents how did they vote? Initially Robert Webster said "We follow the guidelines from the SOL board"
>
> - So even though the Millners are "not in the room" I said they may as well be because they are issuing the SOL guidelines!! Webster then backtracked on this.
>
> - Crotty jumped into [sic] say there are 50 better qualified directors than Robert Fraser. I asked where were they and and [sic] that I looked forward to seeing them appointed but first we have to have the son of the chariman?
>
> - Then asked about the cross-shareholding and dismantling opportunities. Sale of NHC will result in this being looked at. What if NHC not sold? "We have taken advice and continue to do so"
>
> - There was only one other questioner who asked about clay supplies.
>
> - about 150 people in the room. More than half consisted of staff/fund managers/press/bankers, not a huge amount of shareholders.

218 I do not accept that this proves that the Millner family controls the board of Brickworks. It is not apparent to me what the "SOL guidelines" are or who was responsible for them. I do not accept that Mr Crotty demonstrated "himself to be completely aligned with the Millner camp

by his comments". The fact that Mr Crotty believed Mr Fraser would be a "good director" does not mean that he agreed that Mr Fraser should be appointed to the board of Soul Pattinson. Mr Crotty had already made it clear that he considered the issue should await the New Hope transaction. Nor does it mean that Mr Crotty did not consider that there were 50 other people better qualified than Mr Fraser to be a director of Soul Pattinson. The answers about the cross shareholding also accurately reflected the decision the directors had reached.

219 Perpetual then submitted this:

> Meanwhile Mr Alex Payne, Brickworks' CFO, and Mr Lindsay Partridge, Brickworks' CEO, were busy writing their own script for Mr Payne to use at the Soul Pattinson AGM to support Mr Thomas Millner's election. These documents and this action shows the degree to which both Messrs Payne and Partridge (the latter of whom is now a director of Brickworks) were supportive of the Millner family. Mr Payne's script is particularly instructive:
>
> > "I have been an employee and shareholder of Brickworks for 26 years and a Company Secretary for over 24 years. I attended the Board Meetings with the late JS Millner (as Chairman) and I watched as both BKW and SOL's continuously outperformed the market over the LONG TERM.
> >
> > These proven techniques weren't taught in University or necessarily found in textbooks but have proven very successful over the long term as many of you who have been shareholders longer than me can attest. This is clearly a superior model than one based on one-off knee jerk transactions for only limited short term gain. In fact, ladies and gentlemen, this performance has been going for over 100 years now. Since Mr Rob Millner took over from Jim Millner that has continued.
> >
> > I would like to think that we can ensure that this long term approach to maintain superior returns with lower RISK can continue well into the future. Tom Millner is well placed to achieve that. That already appears to be coming to fruition. As you may already know, Tom is CEO of BKI Investments Ltd which recently won the Inaugural Fund Manager of the Year award for an LIC.
> >
> > …
> >
> > Ladies and gentlemen, I will be voting "FOR" Tom Millner's appointment on its MERITS for superior Long Term returns with Lower RISK."
>
> It would be hard to imagine a clearer endorsement of the Millner family rule of Soul Pattinson, and the clear belief that Millner control was the bulwark against "one-off knee jerk transactions". In light of this neither of Messrs Payne nor Partridge can be considered independent of the Millners or their control or undue influence.

220 The submission depends on two unproven assumptions. First, that Mr Payne (and Mr Partridge) did not believe Thomas Millner to be an appropriate person for appointment as a director of Soul Pattinson. Second, that there exists "Millner family rule of Soul Pattinson". The email proves only that Mr Payne, and presumably Mr Partridge, genuinely believed that

Thomas Millner would be a good director of Soul Pattinson and thus his appointment was in the interests of Brickworks. Moreover, there is nothing wrong with both companies preferring a long-term approach to growth and returns to investors. The fact that this is known to be the view of Robert Millner does not mean he controls the boards. Nor need control by the Millner family be posited as the reason for the companies adopting such strategies. It cannot be said that the other directors could not reasonably hold this view and believe it to be in the best interests of the relevant companies.

221 Perpetual returned to Mr Bagley noting that:

> On 1 December 2011 Mr Robert Millner emailed Mr Bagley again, in respect of his carefully choreographed plan to have Mr Bagley make some seemingly unsolicited supportive comments at the Soul Pattinson AGM. Mr Millner said:
>
> > "If you need some spice on Mr Fraser Symex a company which Fraser is a director of raised money from shareholders in April at 42.5 . [sic] On Tuesday Symex came out with profit downgrade the shares yesterday were 24 cents.
> >
> > See you tomorrow."
>
> Mr Robert Millner was quite content to try to orchestrate personal attacks on Mr Fraser from the floor of the meeting, with a view to try to give the appearance that such comments were spontaneous, unsolicited and came from a disinterested shareholder. It was an entirely deceptive and misleading plan.

222 Again, I question the role of this submission in Perpetual's case.

223 Perpetual's submissions about the "the lengths that Soul Pattinson went to in order to choreograph their AGM in 2011" are of a similar character. Retaining a public relations firm before an annual general meeting which was to raise issues of serious dispute cannot be uncommon. Having that firm review the chairman's address can also hardly be novel. While some may agree that Soul Pattinson was, as Perpetual would have it, playing "the person not the ball" by drawing attention to Perpetual's share funds' performance I do not consider that it is reasonable to say this was an attempt to "smear Perpetual and to deflect attention from the real issue". Management and performance were not irrelevant to the issues that had to be decided. Characterising Soul Pattinson's advisors as "obsessed" with "getting photographers and cameras out before the Chairman's address" goes nowhere. No doubt all major annual general meetings are "carefully choreograph[ed]" and why Soul Pattinson should be criticised for doing so escapes me.

224 The fact that Mr Williams believed he was fobbed off at the Soul Pattinson annual general meeting on 2 December 2011 when he asked why Thomas Millner was a better candidate than Mr Fraser also does not prove anything of relevance.

225 Further, I do not find extraordinary Robert Millner's statement to the meeting that the three directors considered not be independent under the ASX Corporate Governance Principles and Recommendations, being himself, Michael Millner and Thomas Millner, "were members of the family which founded the Company 139 years ago and that their interests in preserving and generating the wealth of the Company are completely aligned with the interests of shareholders". Robert Millner was not saying the ASX Corporate Governance Principles and Recommendations were wrong. He was conveying that their long term involvement and family history meant that they believed that they had the long term best interests of the company at the forefront of their minds. It does not mean he was unaware of the potential conflicts of interest to which he was subject given his various interests and positions, and the need for any such conflicts to be appropriately managed. The reference to Thomas Millner being "appointed for succession planning and possesses relevant skills" does not prove that Robert Millner believes control of Soul Pattinson to be "his to gift to his son" or that "all the other then directors were entirely complicit in that plan". As Soul Pattinson said:

> …the emotive references in Perpetual's submissions to "succession" are overstated. There is nothing inherently wrong with WHSP having a suitably qualified Millner on the board even if partly for succession purposes. Long-term investors would no doubt obtain comfort in Millner continuity; it has certainly served shareholders well in the past. And obviously enough, as noted above, by 2015 Perpetual considered Mr Thomas Millner worthy of a place on the suggested board of a merged entity.

226 The annual general meeting voted against the election of Mr Fraser as a director and in favour of the election of Michael Millner, Thomas Millner and David Fairfull. The minutes record that the voting was done on a show of hands. As Soul Pattinson said "the proxies received in relation to the resolution are therefore not a record of the outcome of the voting on the resolution as they do not identify the number of shareholders voting and do not account for shareholders who attend the meeting in person and vote[d]". If the proxies are relevant, then Mr Fraser's election was defeated by 62.7% to 17.6% of the proxy vote. Excluding the votes of Brickworks and the Millner family and Millner entities, no doubt the proxy results would have been different, but as Soul Pattinson said if one also excludes the shares controlled by Perpetual (which was not a disinterested shareholder in relation to this proposal) then the percentages were around 13.16% against Mr Fraser's appointment and 5.31% in favour.

227 Otherwise I accept the following submissions on behalf of Soul Pattinson which are relevant to both the alleged oppression and, if it existed, the grant of any remedy by ordering Mr Fraser's appointment to the board of Soul Pattinson:

> If Perpetual's complaint is that Mr Fraser was kept out from the WHSP board because he was "truly independent" the following ought be recognised.
>
> a. Mr Fraser was acting as an advisor to Perpetual and / or acting on Perpetual's behalf, including by preparing letters to be sent on Perpetual's letterhead , attending meetings in respect of AGM strategy , and preparing FOI requests to ASIC ;
>
> b. Neither Mr Fraser nor Perpetual disclosed at the in the letters that were sent to shareholders that Mr Fraser had been advising Perpetual in the manner indicated. To the contrary he was presented as independent and non-aligned; and
>
> c. Mr Fraser's advice now seems to have extended to how Perpetual's increased stake (which would at the relevant time have been around 22%) in any merged entity could be addressed .
>
> If Perpetual's complaint is that he was kept out because he was not part of some Newington school network - the matter is hardly a matter for Federal Court litigation and in any event is objectively incorrect because there is no evidence that the vast majority of the board of Brickworks or WHSP have any connection to that school.

228 Perpetual submitted that:

> The 2011 Annual Report is in evidence. One can see that for substantial shareholders, Perpetual was then a 12.29% shareholder – yet despite that, it could not get a director it supported onto the board.

229 This is true. However, Perpetual must have known about the cross shareholding when it purchased shares in both companies in the 1980s. It had continued with its campaign to have Mr Fraser elected to the board of Soul Pattinson against the wishes of the incumbent board which had explained why it considered that the issue should be deferred until after completion of the New Hope proposal. The position of the incumbent board (and Brickworks in voting its shares) was not unreasonable. I do not accept that the defeat of Mr Fraser's election as a director involved oppression of Perpetual or other shareholders. Reasonable directors could well have reached the view that the directors of each of the companies reached.

230 It is also relevant that by 2 March 2012 it became apparent that the sale of Soul Pattinson's shares in New Hope would not proceed due to lack of buyer interest. Subsequently, two further independent directors were appointed to the Soul Pattinson board, Michael Hawker (appointed 10 October 2012) and Warwick Negus (appointed 1 November 2014). There is no

suggestion that either is other than an appropriate appointment. Nor could there be given that Mr Hawker is a company director of over 30 years' experience, has been the Chief Executive Officer and Managing Director of Insurance Australia Group, has held senior positions in Westpac and Citibank, and has been chairman of the Insurance Council of Australia and the Australian Financial Markets Association, as well as a member of the Australian Government's Financial Sector Advisory Committee. Mr Negus has over 20 years' experience in the banking and finance industry, has extensive experience in managing equity and property portfolios and is a director of a number of companies.

231 Further, company minutes of 15 May 2017 record this:

> Retirement of Mr. David Wills
>
> The Chairman advised that Mr. Wills would be retiring from the Board in the near future.
>
> It was agreed that the replacement Director should have an accounting background in order to provide a succession plan for the Chair of the Audit Committee.
>
> The Directors who were also members of the Nomination Committee RESOLVED to appoint a sub-committee comprising Mr. R. Millner, Mr. Westphal and Mr. Hawker to engage with Heidrick and Struggles to identify candidates.
>
> It was noted that the Board had only one female member and that the Board had undertaken to include both male and female candidates when selecting Directors.

232 In these circumstances the relief which Perpetual seeks, the appointment of Mr Fraser to the Soul Pattinson board, would not be granted even if the cross shareholding had resulted in oppression. As Soul Pattinson put it the "present case does not even begin to qualify" for such a remedy.

7. THE SECOND PROPOSAL

233 As part of the lead-up to its submissions about the second proposal Perpetual submitted this:

> It seems that on 27 February 2012 there was a meeting of the so called independent committee of the board of Brickworks. That committee was hardly independent of the Millners. It included Mr Partridge, had the attendance of Mr Payne, fresh from drafting a script to support Mr Tom Millner's Soul Pattinson election. Messrs Crotty and Gilham had betrayed their partisanship in their conversations with Mr Williams and by their behaviour in response to Mr Fraser's election. The Hon R.J. Webster had betrayed his partisanship at the Brickworks 2011 AGM. Worthy of note that the independent committee appointed Mallesons – the solicitors for Brickworks in this proceeding, as its legal adviser; Grant Samuel to prepare independent expert reports; and a "PR Consultant" for the committee. The fact that the committee felt necessary to appoint a PR consultant might be suggestive of the fact that it already anticipated it was going to have a public relations battle on its hands defending the cross-shareholding. Also it resolved that the terms of Craig Jensz, Greshham Investment

> House be reviewed prior to their engagement.

234 It will be apparent from the matters discussed above why I am unable to accept these characterisations. The independent committee is a committee of directors of Brickworks excluding Robert Millner and Michael Millner as directors and shareholders of Soul Pattinson. In particular, I do not accept that Mr Crotty , Mr Gilham or the Hon RJ Webster had "betrayed" anything, let alone what Perpetual must be alleging, that each had subordinated the best interests of Brickworks to an allegiance to the Millner family and self interest in continuing as board members. Nor do I understand why it would be "worthy of note" that the legal adviser to the committee is from the same firm as Brickworks' solicitors in this proceeding. The committee was not in any position of conflict of interest with the board of Brickworks. It was a mere sub-committee not involving Robert Millner or Michael Millner. Responsibility for decisions remained with the board, however. Nor does the fact that the committee intended to hire a public relations' consultant disclose anything of significance.

235 With the announcement by Soul Pattinson in March 2012 that the sale of its shares in New Hope had stalled for want of a buyer, Perpetual wrote to the board of Soul Pattinson on 30 March 2012 noting its continued concern that the share price did not reflect the true value of the underlying assets of the company and that dismantling the cross shareholding would "give much greater clarity around the true value of the assets". Perpetual was continuing to receive advice from Hunter Green that the shares in both companies were still trading at substantial discounts because of the cross shareholding. With Hunter Green's assistance Perpetual started to formulate a proposal for *in specie* distribution of Brickworks' shares in Soul Pattinson to Brickworks' shareholders which Perpetual thought would obviate the need for involvement of Soul Pattinson. Perpetual wrote to Mr Gilham on 26 April 2012 raising this proposal and attaching advice from Hunter Green. The Hon RJ Webster wrote back on 1 May 2012 confirming that the independent directors of Brickworks would consider the proposal, take advice if necessary, and make contact once they had done so.

236 Perpetual submitted that by an email of 1 May 2012 Mr Crotty betrayed his "pre-judgment" about the proposal. The part of the email on which Perpetual focuses says this:

> I agree with the comments made by Alex and David about brevity but I also think that we should be sending a signal to Perpetual that we are not going to allow BKW to be irretrievably damaged by the process, which the HG [Hunter Green] proposal seems to conveniently overlook. I understand that, at this stage, we do not want to start a dialogue which inadvertently results in an obligation to disclose info to the

> ASX. However, we are inevitably going to be forced to deal with Perpetual, as I don't think that the "mad men" will go away unless we burst the current "thought bubbles" with commercial reality.

237 The "commercial reality" which Mr Crotty had in mind is set out in six preceding paragraphs which explain why Mr Crotty considered Hunter Green's work appeared to reflect the thoughts of someone with "no experience in corporate finance and balance sheet management" including that:

- the ratio of the company's total assets to total liabilities would increase to such an extent it would breach most Australian banks' covenants;
- the company's balance sheet would become illiquid;
- the company would be liable for $45.5 million in capital gains tax and increase substantially its deferred tax liabilities which would have to be paid at some time;
- some shareholders may not want shares in Soul Pattinson;
- tax liabilities for some shareholders would crystallise; and
- the company's risk profile would substantially increase.

238 No one has suggested that Mr Crotty's views are incorrect, let alone outside the range of reasonable responses of a competent director to the second proposal. Mr Jensz (by then of Lion Capital not Gresham) subsequently agreed with Mr Crotty that the proposal was fundamentally flawed. As such, I reject Perpetual's submission that Mr Crotty "betrayed a complete lack of independence" by using the term "mad men". Mr Crotty in fact disclosed his commitment to act in the best interests of Brickworks by ensuring basic problems with Perpetual's proposal were made known. Similarly, that the Hon RJ Webster foreshadowed a reply to Perpetual which would be "short diplomatic but firm" before having received advice from Lion Capital does not disclose pre-judgment. In 2011 Gresham had already identified problems with a proposal of this kind. In any event, the directors were entitled to reach their own views about the proposal. Equally, they were entitled to seek advice as they did, and the advice reflected that provided in 2011.

239 Perpetual's next point is that Lion Capital was given an incentive to resist the unwinding of the cross shareholding. In fact, Lion Capital was offered an incentive of $4 million if a restructure which increased shareholder value was supported by Brickworks and of $1 million if Brickworks decided any restructure did not increase shareholder value and was

resisted. As such, if Lion Capital had an incentive, it was to identify a restructure which would increase shareholder value.

240 Perpetual then makes something of a supposed dispute about the external advisors based on an email from Mr Payne, Brickworks' Chief Financial Officer, and the independent committee. The email, of 3 May 2012, is to Mr Partridge and is in these terms:

> Hi Lindsay,
>
> Keeping you posted.
>
> Got a reasonably terse call from David re getting Craig to do the work when the Independent committee chose Gresham.
>
> I was polite and ate humble pie.
>
> But I thought we had made it clear at the last Board Meeting that Craig had left Gresham (even though we did not approve I guess.
>
> Also see attached email from Robert Webster, actually recommending we were going to Craig yesterday to assist with a response.
>
> Will keep battling on.

241 I accept that David must be Mr David Gilham. I do not accept Perpetual's submission that the independent committee was not that independent, nor that influential, because the company's management selected the advisor to appoint over the choice of the committee. As the email discloses, the head of the independent committee, the Hon RJ Webster, knew that Mr Jensz now of Lion Capital was doing the work and must be inferred to have been happy with that choice. Further, it is not clear that the members of the committee other than Mr Gilham disagreed with the work following Mr Jensz to Lion Capital. Indeed, it is not even clear Mr Gilham disagreed with Lion Capital doing the work, his point of concern being that the committee had appointed Gresham so that, despite it being apparent that Mr Jensz was now with Lion Capital, the committee should have formally voted on any shift to follow Mr Jensz. Finally, it is apparent that "management" thought it was clear from the committee that the work was to follow Mr Jensz. There is no basis to suggest that management was acting contrary to the committee's instructions.

242 Nor do I accept Perpetual's proposition that Mr Jensz was under the control of Robert Millner based on an email of 8 May 2012 which disclosed that he had spoken to Mr Barlow of PCP, who was advising Soul Pattinson. In particular:

(1) Mr Barlow called Mr Jensz. It was a matter for Mr Jensz to decide if he wished to discuss the most recent Perpetual proposal with Mr Barlow. Given that it involved a

sale of Brickworks' shares in Soul Pattinson it is no surprise he thought it appropriate to do so. The fact that he did so does not establish a lack of independence;

(2) the fact that Robert Millner had sought Mr Barlow's advice about the proposal, leading to the call, says nothing about Mr Jensz's independence;

(3) describing "the proposal [as] fundamentally flawed and easy to defend" does not suggest pre-judgment. It suggests that the proposal was impractical and would go nowhere as a result. This does not mean Mr Jensz was looking to defend the cross shareholding, although he might well have been looking for a method of unwinding it that delivered demonstrable shareholder value so he could claim the $4 million success fee;

(4) Perpetual has ignored the part where Mr Jensz said "I pushed back as/where appropriate, as you'd imagine". I infer that this is a reference to pushing in Brickworks' interests against those of Soul Pattinson, which was appropriate given his retainer by Brickworks;

(5) Mr Barlow's view that the full board of Brickworks should consider the proposal does not reflect anything about Mr Jensz. Even if Mr Barlow's view reflected that of Robert Millner, the view is reasonably open and it would be a matter for the board of Brickworks to determine how to deal with the potential conflicts of interest;

(6) the fact that Mr Barlow said he does not see an enormous upside to unwinding the cross shareholding may or may not be consistent with Robert Millner's then view. In any event, there is nothing to suggest it was not in fact Mr Barlow's view; and

(7) the observation that "he appreciates that it may not be appropriate to involve the Chairman in any face-to-face meeting on this" does not mean that Brickworks wanted to give a false appearance of things being done free from Robert Millner's influence. It means nothing more than what it says.

243 I accept that the draft report Mr Jensz prepared was provided to Robert Millner and management of Brickworks before the final version went to the independent committee. As to the former, Mr Jensz's email of 9 May 2012 indicates that the draft was provided for information purposes only and not to permit Robert Millner to require amendments. As to the latter, there is nothing to suggest that this was done other than to ensure the information on which the opinions were based was accurate.

244 Lion Capital's review of the second proposal was negative. As noted above, Gresham had already considered and rejected an *in specie* distribution for tax reasons, so the advice was consistent. Perpetual's main focus in respect of this report does not involve any suggestion that Lion Capital's advice about the second proposal was wrong. To the contrary, Perpetual appears to accept the second proposal involved fundamental problems. Perpetual's focus is the statement under the heading "Next Steps" in which Lion Capital asked "where to from here" and identified as a key issue "whether to explain that there are other structures that may lead to a better outcome" (being those the subject of the Gresham advice in 2011) which was answered:

> - Do not propose other structures
>
> - This may inflame the situation (i.e. Perpetual would ask why isn't BKW implementing any of these?)
>
> - [if so, proposed script/Q&A to be developed].

245 Perpetual submitted that:

> Mr Craig Jensz and Brickworks knew from the work that he did at Gresham that there were "other structures that may lead to a better outcome". The reason for non-disclosure was to avoid awkward questions from Perpetual and pressure to implement those other structures.
>
> Rather than seeking to constructively engage with Perpetual, Brickworks was intent on burying the issue…Mr Craig Jensz was at least complicit in those attempts.

246 I do not find the circumstance as sinister as Perpetual would have it. The Gresham advice identifying the merger/demerger option (which had emerged from Gresham's preliminary analysis of restructuring options as its most preferable option for further consideration) was from August 2011 and remained "preliminary" advice, given that the boards of each company had decided to await the outcome of the proposed sale of Soul Pattinson's shares in New Hope before progressing consideration of restructuring options. Further, PCP had advised Soul Pattinson that a buy back proposal might be better from its perspective. Either way, the boards of both companies cannot be taken to have assumed that if Perpetual's second proposal was rejected the issue of restructuring would be off the agenda, irrespective of any further action by Perpetual. Perpetual overlooks the fact that it is one thing for the board of Brickworks to consider for itself potential restructuring options which would unwind the cross shareholding and for it to satisfy itself that doing so would be in the best interests of its shareholders. It is another for it to convey information to Perpetual which might trigger disclosure obligations to the market or consume attention and resources which the board

might think better applied other than in dealing with Perpetual at that time. Given the reality that the companies could not simply ignore the issue in the face of their low share prices, declining to disclose to Perpetual (and thus necessarily to the market as a whole) the options which had been the subject of preliminary advice to the companies was not equivalent to "burying the issue".

247 The second proposal was referred to the full board of Brickworks on 29 May 2012. Robert Millner and Michael Millner attended the meeting. The minutes record that the independent directors noted the interest of Robert Millner and Michael Millner as directors of Soul Pattinson. The board resolved that a letter from the independent directors be sent to Perpetual and that the chairman send a copy of that letter to all shareholders, with all directors approving the chairman's covering letter to shareholders. Again, I do not see this as the independent directors being involved in a "charade". Perpetual chose to write to the independent directors and thus the response was from them. But no one was pretending that those directors alone would be making or had made a decision for Brickworks. The proposed letter to all shareholders from the chairman was not to be a secret.

248 Perpetual is critical of the way in which the draft letters were prepared and their content, describing the draft letter from the chairman as misleading. It is also critical of Mr Crotty for expressing the view that he was comfortable with the drafts. In fact, Mr Crotty might be seen as politely expressing his comfort with the drafts whilst also recommending changes which said that Brickworks had "made a number of steps over the years to ensure [it] has a very strong balance sheet which is underpinned by diverse sources of revenue and profit. It would be unconscionable for directors to do anything that might detrimentally change this situation". There is no basis to infer anything other than that Mr Crotty genuinely believed this to be the case and this view was reasonable in all of the circumstances. Indeed, for a director to express the view that it would be unconscionable to take action which would detrimentally affect a company's strong balance sheet indicates a proper appreciation of his obligations, not a subordination of them to control by the Millner family.

249 Perpetual's complaints about Robert Millner's letter to shareholders are not persuasive. The letter enclosed a copy of the letter sent to Perpetual about the second proposal (discussed below) which disclosed that that it was the full board of Brickworks which made the decision. While it is true that there is no record of a decision by the independent committee, there is no reason to doubt that the members of that committee had reached the view expressed in the

letter and conveyed the decision to the board. Given the terms of the letter to Perpetual, signed by each director on the independent committee, it is plain that they did make such a decision, even if it is not minuted. Robert Millner's letter does not suggest that there were no benefits to unwinding the cross shareholding. It refers to advantages of the cross shareholding for Brickworks (dividends from the shareholding and diversity offsetting building cycles) and the problems with the second proposal.

250 I do not accept the submission that "[s]uch was the antipathy towards Perpetual and Mr Williams, that on 1 June 2012 Mr Partridge did not even want to send Mr Williams the contemplated Chairman's letter, even though Perpetual was a shareholder". I read the email as querying why Mr Williams of Perpetual was to be emailed the chairman's letter in addition to the letter addressed personally to him from the independent committee rather than the chairman's letter being sent to Perpetual in the ordinary course along with all shareholders. This is why the email says the chairman's letter has nothing to do with "him" (that is, Mr Williams) which I read to mean nothing to do with Mr Williams' personally.

251 The letter to Perpetual signed by the directors on the independent committee identifies a series of problems with the second proposal and the overall position that it would materially reduce shareholder value in Brickworks. The problems are explained at some length in the letter including:

- significant resulting tax liabilities;
- higher debt for the company;
- more Soul Pattinson shares than Hunter Green had assumed would need to be sold to offset the tax and debt payments which raised discounting of the shares as an issue;
- Brickworks had insufficient franking credits to pay the distribution as fully franked dividend causing tax liabilities for shareholders;
- the business would be left smaller and severely weakened;
- Perpetual may need to reduce its holding in Soul Pattinson which would drive the share price of those shares down further diminishing the value to Brickworks' shareholders of the shares; and
- the proposal could not be implemented without approval of Brickworks' shareholders and regulatory approvals.

252 On its face, this analysis of the independent directors provides a compelling case against the second proposal. Moreover, Perpetual does not suggest that any of this analysis is incorrect.

253 It follows that I do not accept that the letter of Robert Millner to shareholders or of the independent committee of Brickworks to Perpetual were misleading. Perpetual has not established that the signatories to the letter from the independent committee did not reach the conclusions set out in the letter or that, in doing so, they were influenced by Robert Millner. I also note that, yet again, Mr Williams of Perpetual was invited to meet with the directors on the independent committee to discuss the reasons for this conclusion having been reached.

254 Contrary to the submissions for Perpetual the fact that, in the meantime, the public relations advisors to the independent committee were doing their job of trying to dampen down speculation about the issue is immaterial.

255 PCP provided further advice to Soul Pattinson in June 2012. Perpetual submitted that this report "signalled a significant change of tune to the earlier Pitt Capital Partners report of 29 August 2011", which should be inferred to reflect the attitudes of Robert Millner. The latter assertion is not supported by the evidence. The fact that Mr Barlow had discussed the issue with Robert Millner does not mean that the report of June 2012 reflected other than Mr Barlow's views. In any event, I do not see the "significant change of tune". The statement by PCP that there is "no tax effective way to unwind the cross-shareholding which either SOL or BKW can do unilaterally" is not suggested to be wrong. The acknowledgment that tax effective structures necessarily require an agreed approach between the two companies is also not said to be wrong. The report identified potential advantages and disadvantages from unwinding the cross shareholding. The fact that one possible disadvantage was "shareholder composition post unwinding (could result in a change of control or create an overhang)" and another was "loss of control and vulnerability to takeover" is not an admission of the Millner family controlling Soul Pattinson, but an acceptance of the fact of Brickworks' shareholding in Soul Pattinson and the potential changes if that shareholding ceased to exist, including a need for Perpetual to divest itself of some shares. In any event if as Perpetual would have it Robert Millner was dictating views to PCP it is difficult to understand why this was not also the case in respect of the earlier report which Perpetual seems to accept does reflect PCP's genuine opinions. It is also difficult to understand why the further PCP report was created at all given the desire Perpetual attributes to both companies to "bury the issue". It would be naïve to think that the companies would not have preferred it if they were not subject to

public attack by Perpetual, but this does not mean that they believed they could avoid the issue of dealing with structural issues in the face of the ongoing depression of their share prices compared to net asset value.

256 Mr Williams accepted the invitation to meet from the independent committee of the Brickworks' board. By this time it is apparent that Mr Williams had now reached the same view as Lion Capital and PCP that any proposal to unwind the cross-shareholding in a tax effective way would need to involve both Brickworks and Soul Pattinson. The fact that Mr Williams had ultimately reached the same view as the advisors to both companies at this time is relevant. It tends to undermine the submission that the advisors to both companies were doing nothing more than Robert Millner's bidding, just as it undermines the submission that the companies were intent on thwarting any further consideration of the cross shareholding. If the advisors were subject to Robert Millner's control, and Robert Milner was intent on maintaining the cross shareholding to entrench his control, why would the advisors have expressed the preliminary views they did that contemplated that the cross shareholding could be unwound without adverse tax consequences, with some advantages and disadvantages resulting, which the companies would have to further evaluate?

257 I do not see an email from Mr Payne of Brickworks to the board and others of 5 June 2012 about the meeting with Mr Williams as indicative of a company not "willing to listen to a major shareholder" or determined to "delay, obfuscate and fob him off", as Perpetual would have it. It is not irrelevant to the terms of the internal email that Mr Payne did not know that Mr Williams had effectively abandoned the second proposal in his own mind. While the letter from Mr Williams seeking to meet said that his purpose was to discuss the reasons for Brickworks having rejected the second proposal, this was not the case, at least by the time of the meeting. Further, Mr Williams' abandonment of the second proposal supports the inference that it suffered from all of the flaws which the independent committee of Brickworks had identified in its letter.

258 Contrary to Perpetual's submission I am unable to see any significance in the fact that Brickworks refused to release its tax advice as requested by another shareholder. That advice from PWC, which was received in final form on 7 June 2012, confirmed the adverse tax implications of the second proposal. It also referred to alternative options which required detailed consideration one of which was the merger/demerger Gresham had first identified in 2011. PWC said that subject to favourable consideration by the Australian Taxation Office

(the **ATO**) rollover relief should be available for the company and shareholders for a merger/demerger. Perpetual complains that this advice was given to Soul Pattinson but not the other shareholder who had requested it. However, the advice was specifically relevant to Soul Pattinson as the other party to the possible transactions (a proposition which applies to all of Perpetual's submissions about the companies being in possession of each other's documents).

259 Great weight is then placed by Perpetual on the request by Mr Payne of Brickworks on 13 June 2012 for a version of the advice dealing only with the second proposal and not the alternative options which had been the subject of internal consideration thus far, on the basis that Brickworks might disclose the advice about the second proposal to Perpetual. Perpetual submitted that Brickworks "deliberately wanted to keep Perpetual in the dark in that respect" and PWC was "entirely compliant". I do not accept Perpetual's characterisation of these events. As far as Brickworks knew, the sole purpose of the meeting was to discuss the company's reasons for rejecting the second proposal. Brickworks had already decided not to invite Perpetual into its internal considerations of other restructuring proposals. As I have said, this decision was not unreasonable if it is inferred, as I do, that Brickworks wanted to consider those issues for itself. In this context, removing reference to the company's internal consideration of other alternatives was not unreasonable.

260 Perpetual's criticisms of Brickworks' preparation for the meeting with Mr Williams scheduled for 19 June 2012 again overlooks the fact that, as far as Brickworks was concerned, the meeting was so Perpetual could be better informed about the reasons for the decision rejecting the second proposal. Perpetual's submission that the "message was therefore pre-determined to be a negative one, and the misleadingly cut-down tax advice was to be deployed" makes no sense. Perpetual had already been told the second proposal had been rejected so there was no pre-determination. The tax advice about the second proposal was not misleading if, as Mr Williams had informed Brickworks in writing, the purpose of the meeting was to discuss the reasons for rejection of the second proposal. Further, the draft script for discussions dated 15 June 2012 does not convey the message that the real purpose of the meeting was to "shut Perpetual up". No doubt Brickworks did want to see if it could convince Perpetual to not attack the company publicly but it is clear from the script that the real purpose was to ensure that Perpetual understood the reasons for Brickworks rejecting the second proposal. The statement that Brickworks could do nothing "by itself" without triggering tax liabilities was not misleading. It was consistent with the view Mr Williams had

by then reached and all of the advice available. Brickworks had no means of knowing that Mr Williams had reached the view himself that unilateral action by Brickworks was impractical for tax reasons and was by then considering mutual action by both companies.

261 Perpetual submitted that Mr Gilham's view that PWC should not attend because "this indicates some weakness on our part in having him attend to defend his advice to us and also leaves him vulnerable to questions regarding the advice he has given to us" were "hardly the actions of an independent director being objective about meeting with a major shareholder", but it seems to me that this comment is concerned with managing the meeting rather than the robustness of PWC's advice. Perpetual does not suggest the PWC advice was incorrect and Mr Williams seems to have come to the view that it was correct. In any event, others did not share this concern and the meeting occurred on 25 June 2012 attended by PWC, the Hon RJ Webster, Mr Crotty, Mr Gilham and Mr Payne, amongst others. As noted, however, Mr Williams' purpose was not to discuss the reasons why Brickworks had rejected the second proposal but to introduce the concept of a nil premium merger (that is, a merger in which neither company obtains a premium on share price for control over the other). This third proposal involved these steps, as described by Perpetual:

> (a) step 1 – Brickworks would make a scrip bid by way of a scheme of arrangement to the existing shareholders of Soul Pattinson, under which Soul Pattinson shareholders would be issued Brickworks shares in exchange for their Soul Pattinson shares. The number of Brickworks shares to be issued for each Soul Pattinson share would be calculated based on the ratio of their respective share prices. Assuming the scheme of arrangement were approved by Soul Pattinson shareholders, Brickworks would own 100% of the shares in Soul Pattinson; and
>
> (b) step 2 – Brickworks would cancel the Brickworks shares previously held by Soul Pattinson.

262 Mr William's recollections of the meeting as "defensive" with one director mentioning possible tax implications does not change the fact that the outcome of the meeting was that this third proposal would also be examined by Brickworks.

263 Consistently with this, the board of Brickworks resolved on 26 June 2012 to request management to examine the third or nil premium merger proposal.

264 Perpetual did not and does not seek to re-enliven the second proposal. It does not suggest in this proceeding that any order to the effect of the second proposal should be made. It does not suggest that any aspect of Brickworks' conclusions about the second proposal was incorrect. It says only that the manner in which the second proposal was dealt with

demonstrates the control of the Millner family by reason of the cross shareholding, a submission which I do not accept for the reasons given above.

8. THE THIRD PROPOSAL

265 Both companies sought and obtained advice about the third proposal, which is again inconsistent with the attribution to them by Perpetual of a desire to "bury the issue".

266 On 26 June 2012 Ernst & Young advised Soul Pattinson that Soul Pattinson should be able to buy the remaining shares in Brickworks in exchange for the issue of shares in Soul Pattinson without incurring a major tax liability, subject to obtaining a private ruling from the ATO.

267 Lion Capital provided a further report to Mr Payne of Brickworks on 4 July 2012. This report identified three restructuring options including the "merger of equals" (the merger without any premium payable by either company), a mutual buy back, and a combined mutual buy back and merger which "may add shareholder value through unwinding the cross shareholding". Lion Capital assessed the uplift in value from a merger of equals as in the order of 34% to 36%, but also that there may be subsequent downward pressure on the share price post transaction as Perpetual rebalanced its investment portfolio.

268 For its part Perpetual wrote to the Hon RJ Webster on 5 July 2012 requesting serious consideration be given to the nil premium merger proposal, noting Hunter Green's estimate of an immediate uplift in value of over 30%. This letter and Hunter Green's attached workings were distributed to the Brickworks' board and management, as well as to Soul Pattinson's management.

269 I do not read Mr Partridge's request to Lion Capital on 9 July 2012 asking how Hunter Green's numbers stacked up and to "pull it apart please" to mean anything other than that the numbers should be examined. The fact that Mr Partridge's initial view was that the uplift of 34% was correct means that he (or perhaps he, having spoken to Lion Capital) believed Hunter Green's calculations were correct. He also thought the merger/demerger remained a better option (described as the "newco" option in a number of the documents) whereas Mr Payne remained concerned about fairness to Brickworks on the basis that as "BKW often trades higher than SOL when the building industry is going OK" so that "as a concerned little shareholder we [Brickworks] get ripped off in the conversion ratio". Mr Partridge agreed but noted this would not be an issue in the "newco" arrangement. None of this suggests an

intention to "bury the issue" or other than a genuine grappling with the issue to ensure Brickwork's best interests were advanced.

270 Lion Capital prepared a draft report on the third proposal for Brickworks' management to review. Perpetual noted that this and later versions of the draft report said:

> Given the potential significant uplift in value and PPT's combative history, it now appears incumbent on BKW to explore the restructure opportunities further.

271 Robert Millner was also provided with this draft report. The next (and final) version of the report did not contain the above statement but said instead:

> Given the potential significant uplift in value and PPT's combative history, next steps by BKW need to be carefully considered.

272 I am not able to infer that this change resulted from a request by Robert Millner. It is possible that such a request was made either by Robert Millner or someone else. It is possible that Lion Capital decided that the language used in the draft was unnecessarily overbearing given the Brickworks' board was highly experienced. Whatever the source of the change, the advice was that further consideration had to be given to restructuring in the circumstances as they existed at that time. Another relevant aspect of this report was Lion Capital's advice that the timing of a merger was not favourable to Brickworks because the building products industry was at a low part of its cycle and New Hope at a higher point in its cycle, so a ratio based on current share prices would involve a transfer of value from Brickworks to Soul Pattinson. This was a material consideration from Brickworks' perspective.

273 Perpetual also makes much of the removal from a draft letter from Brickworks to Perpetual in response to the nil premium merger proposal of the statement in a draft that "[t]he Board recognises that there may be some potential increase in value" with the statement that "[t]he Board recognised that it may also not be the most appropriate time for a transaction while Brickworks share price reflects its trading at or near the bottom of the building and construction cycle". Perpetual said that this "shows a deliberate desire by the directors to ensure that no possible suggestion giving hope to Perpetual that there was any basis for unwinding the cross-shareholding would be made". I disagree. The letter, both in draft and as sent, identified some issues (as had been identified by Lion Capital) and asked how Perpetual saw those issues being resolved, after which a meeting could be arranged. Whether the information was deleted because of possible price sensitivity or otherwise, the letter did not ensure that Perpetual could have no hope of achieving an unwinding of the cross

shareholding. Nor do I consider it unreasonable for that part of the draft to have been deleted given the full spectrum of the advice Brickworks had received which may well have led a reasonable director to consider the statement to Perpetual in the draft undesirable at that time when the potential immediate (but according to the advice not necessarily longer term) uplift in share value was not the only relevant issue.

274 Mr Williams had a conversation with Mr Jensz of Lion Capital in which Mr Williams expressed his frustration and Mr Jensz apparently said "[y]ou are on the right track, they know this is the best way. Give it time, this will move". This hardly supports Perpetual's case that Mr Jensz was under the control of Robert Millner and doing his bidding in the advice given to Brickworks.

275 A meeting occurred on 30 August 2012 between Mr Williams and Mr Partridge and the Hon RJ Webster from which Mr Williams inferred that he did not "believe that they are serious in evaluating any proposal". I do not share Mr Williams' belief.

276 This may explain why, when Perpetual was approached by MH **Carnegie** & Co about the cross shareholding, Perpetual again changed tack.

277 Otherwise Perpetual made this submission:

> On 22 October 2012, Mr Jensz provided Mr Partridge with a strictly confidential Q&A document for the market update. In it, it proposed an answer:
>
> > "A restructure now is not expected to improve shareholder value."
>
> On what Brickworks knew at that time, as what Jensz knew, there was no basis for such answer.

278 I agree that this suggested answer does not reflect the effect of the advice from Mr Jensz of Lion Capital to Brickworks at that time, even allowing for a possible longer term downward pressure on share prices. I am not able to speculate on the reason for this and do not know what use was made of this document. The statement does not appear to have found its way into any publication by or on behalf of Brickworks.

279 Mr Williams gave a further presentation to the Brickworks' board on 21 November 2012.

280 Lion Capital provided Brickworks with a report about the third proposal dated 26 November 2012. This report said that while Brickworks' shares were fairly priced at this time (having increased over the previous months) the cancellation of the cross shareholding would increase the net tangible assets per share. Lion Capital also noted that Perpetual's proposal contained

major concessions from Perpetual that provided some interesting new options but the unresolved issue remained the determination of a fair merger ratio for Brickworks. As Brickworks had recently strengthened its share price the ratio it would yield of 0.86 for each Soul Pattinson share was still historically low.

281 On 27 November 2012 at Brickworks' annual general meeting Robert Millner and David Gilham retired and were re-elected as directors on a show of hands. Robert Millner, Mr Partridge and the Hon RJ Webster made presentations. The Hon RJ Webster said that there was "no realistic restructure within the control of Brickworks that will unequivocally improve shareholder value". This reflected the advice given. He also said that the existing structure had delivered strong shareholder returns. Insofar as this means Brickworks holding shares in Soul Pattinson had assisted in delivering returns to shareholders, this was also correct. He concluded that:

> Based on our findings thus far, the Independent Committee has recommended to the Board that Brickworks retains the current structure.

282 It is true that there is no document in evidence which records that recommendation but there is no reason to doubt that, as the time, the members of the independent committee had decided that thus far the current structure should be retained. As explained below, this does not mean that either company had ceased to consider restructuring options including the third proposal. However, the fourth or Carnegie proposal intervened.

283 According to Mr Williams he decided to work with Mr Carnegie to unwind the cross shareholding in 2012 because he had decided that "neither Brickworks nor Soul Pattinson was interested in taking steps towards dismantling the cross-shareholding". Perpetual entered into an agreement with Carnegie under which it sold some of its shares in each company to Carnegie affiliated entities to enable this to occur.

284 Mr Bloodworth, the Company Secretary of Soul Pattinson, prepared an internal question and answer draft and slides in anticipation of Soul Pattinson's annual general meeting. The document included the following:

> **"Isn't there a conflict of interest in having the Millners participate in the process? Why wasn't an independent committee established?**
>
> - The strategy of SOL and the organisational structure is a decision for the Board.
> - The board considers such issues having regard to the interests of all shareholders of the company

- SOL's two representatives of the BKW board did not participate in BKW's consideration of the matter and there was therefore no conflict in their participation in the consideration of the matter by the SOL board. We note that there is now only 1 common director, Mr Robert Millner, with Mr Michael Millner retiring from the Soul's Board in October 2012.

What outside advice have you received?

- The board engaged Ernst & Young for taxation advice, Lonergan Edwards for valuation advice [issue is the pressure that will come to release the findings of the valuation] and Pitt Capital Partners for corporate and finance advice."

285 This demonstrates, as would be expected, that the management and boards of both companies are aware of the potential conflicts of interest involved in the cross shareholding and the corporate governance dynamics to which it gives rise.

286 Perpetual submitted that PCP could not be said to be "outside" Soul Pattinson given the majority shareholding of Soul Pattinson in PCP. I agree but that conclusion is not material.

287 Perpetual pointed out as an indicator of market sentiment about the cross shareholding an article which appeared on a website, Crikey, in these terms:

> Since getting the call-up to the family fiefdom from uncle Jim (who got the call from his uncle Fred), the rugby fan has kept Washington H Soul Pattinson mostly in house, leading to all sorts of outrage over perceived conflicts – cousin Michael Millner, brother-in-law David Wills, cousin's husband Peter Robinson and (until October) son Thomas Millner all serve on the investment conglomerate's board.
>
> …
>
> The listed structure was a deliberate choice; to build his power Millner leveraged sharemarket liquidity to parlay profits into a hive of related investment funds and entities. It's those shrewd decisions that have built the wealth of the companies – and the family – with Soul Patts' revenue topping $1 billion. The family controls about 10%, or $300 million, but also marshals significant private shareholdings.
>
> ..
>
> The Carnegie option is contingent on a successful untangling and "unlocking" of foregone shareholder value, thought by many analysts to be well over $1 billion. It represents a small step in busting up the family clique's nexus.
>
> Aaron Bertinetti [of CGI Glass Lewis] agrees: "Part of the problem is this unprecedented power and the untapped market value in the stocks due to his cross ownership of companies and control of the boards."
>
> So far Millner's resisting, claiming each holding is a buffer against cyclical downturns. …

288 If this does disclose market sentiment to any meaningful extent then it must also be relevant that the same article said:

> Shareholders are sniggering all the way to the bank – they enjoy regular dividends…

289 On 12 December 2012, Mr Williams and Mr Carnegie attended a Soul Pattinson board meeting to present a proposal referred to as the TPG demerger proposal, which involved an *in specie* distribution of **TPG** Telecom Limited shares held by Soul Pattinson to Soul Pattinson shareholders. The Soul Pattinson board resolved to retain PCP to review this proposal (which did not remain on the table for long enough to become the fourth proposal, a subsequent proposal discussed below).

290 Mr Jensz's initial reaction to the new proposal was expressed in an email to Mr Partridge and Mr Payne of Brickworks on 13 December 2012 was that it "[s]ounds flawed and uninspiring". Perpetual was critical of the speed with which this response emerged but I do not consider that it reflects a pre-judgment on Mr Jensz's part. Rather, it may be inferred that it reflects a preliminary view which was not unreasonable in the circumstances that this proposal lacked apparent merit. Nor do I accept that the email discloses anything about the views of Mr Barlow of PCP who had discussed the proposal with Mr Jensz earlier in the day. In the same email Mr Jensz provided a further report addressing restructuring options including the nil premium merger. This report noted that significant regulatory approvals and oversight were anticipated for a merger including shareholder approval for a scheme of arrangement. This demonstrates that despite Perpetual's apparent change of tack, Brickworks was continuing to work on the third proposal and variants of it.

291 The Hon RJ Webster wrote to Mr Williams of Perpetual on 21 December 2012 noting that the extant proposals were inconsistent and seeking clarification of which proposal Perpetual was pursuing. On the same day Mr Williams responded to the effect that Perpetual wished to progress the unlocking of shareholder value by any and all methods.

292 The Brickworks' board met on 24 January 2013 where, for reasons not apparent, they resolved that there was no further action to take in relation to the proposals from Perpetual and Carnegie until further correspondence was received from Perpetual.

293 Despite this resolution, further consideration of the various proposals was continuing within each company. Mr Jensz of Lion Capital spoke to Mr Barlow of PCP. Mr Jensz's email reporting this discussion to Mr Partridge and Mr Payne of Brickworks said:

> SOL Board is meeting tomorrow. As part of this, they will consider what to do about PPT/Carnegie.
>
> Likely actions:

> 1. Value – Todd agrees that the value uplift is in the range we have determined (i.e. 10-12%) – so not enough in it to do it now.
>
> 2. Formal response to Carnegie – "no thanks" to the proposed in specie distribution of NHC and TPM shares.
>
> 3. AFR – apparently Michael Hobbs is writing an article for next Monday's AFR. He has asked for comment – so Todd want [sic] to get approval to engage and incorporate appropriate feedback.
>
> 4. Strategy – it's clear that PPT/Carnegie is not going away. So SOL needs to determine how to respond:
>
> a. Proactive – engage with PPT/Carnegie to educate them that the value uplift is not real.
>
> b. Go Public – point out the obvious errors in Hunter Green's fundamental analysis, which loses credibility.
>
> c. Do nothing – not preferred, as not having a response to the continued barrage of media makes SOL look defensive, hiding something – or not doing anything (all of which are untrue).
>
> d. Build – highlight the excellent performance of SOL over time (including participation for shareholders in TPM and NHC spin-outs).
>
> I will get an update after the meeting so we can be appropriately co-ordinated.

294 A letter from Soul Pattinson to Carnegie and Perpetual said that the board considered an *in specie* distribution of New Hope and TPG shares not to be in the interests of shareholders.

295 Lion Capital prepared a further report to the Brickworks' board dated 25 February 2013. This report indicated that the recent increase in share price (+27% for Brickworks and +5% for Soul Pattinson over the past five months) had removed all of the potential upside to the restructuring proposals so that, at that time, the potential value uplift was not material enough to warrant a restructure. The report concluded that Brickworks should not progress any restructure at that time but should continue to monitor the situation and revisit options depending on potential triggers including the valuations changing or Perpetual proposing firm measures to solve its overhang and control issues. The report also said that:

> From a public position, it would be appropriate to maintain a willingness to listen to any alternative proposals that provide the capacity to enhance returns above that offered by the current structure
>
> - Noting it requires SOL's participation in any restructure and BKW will not react to "knee-jerk" propositions and will continue to focus primarily on current operations and long term shareholder value.

296 This was not unreasonable advice in the circumstances. The fact that Brickworks share price had substantially increased while the cross shareholding remained in place did alter the

analysis and must have given rise to a question whether the cross shareholding was primarily responsible for the previous low share prices compared to net asset value.

297 The board of Brickworks met on 25 July 2013 and Mr Jensz presented the latest report from Lion Capital.

298 Perpetual noted that:

> On 12 March 2013, Mr Alex Payne sent an email to Mr Robert Millner, attaching draft materials for Brickworks' upcoming half yearly results, together with a draft presentation in relation to Brickworks' investment in Soul Pattinson (marked "Confidential") and a draft letter to be sent to shareholders by the Brickworks Chairman. Notwithstanding that the documents were described as being confidential to Brickworks, Mr Robert Millner forwarded Mr Alex Payne's email, and the attachments, to Mr Tom Millner, his son and a director of Soul Pattinson.

299 It is not apparent from the submission how this forms part of Perpetual's case as pleaded. If it is directed to the existence of conflicts of interest the point, insofar as it goes anywhere, is noted but is of no great moment, particularly given that the information was all bound for the public domain in any event.

300 Brickworks released information to the market on 21 March 2013 including by a letter to all shareholders which said:

> The findings of Brickworks independent review were clear – no corporate restructure within Brickworks' control would unequivocally improve value for shareholders.
>
> In recent months, media coverage of new external proposals relating to the Brickworks corporate structure has continued. As a result, Brickworks has reviewed each of these more recent restructuring proposals as well.
>
> These new external proposals do not change Brickworks' confidence in continuing with our investment in SOL and our existing corporate structure.
>
> …
>
> … The Board is writing to you now to advise that Brickworks will not continue to waste time, effort and resources on unsolicited short term restructuring proposals that may jeopardise the long-term performance of the company…
>
> As we look to the future, the Brickworks Board will continue to consider the full range of alternatives for our business. We will do this through our annual strategic planning process and periodic reviews that test the existing investments and corporate structure against a range of alternatives.

301 An associated presentation noted that Hunter Green's work failed to fully account for an estimated greater than $700 million capital gains tax liability on Soul Pattinson's investments in New Hope and TPG. The presentation said:

> …we will not be exploring any other restructure options – unless and until it can be

clearly proven that they are better than what we currently have.

302 Perpetual notes that before seeing this presentation "Mr Williams had never understood Brickworks to suggest that there might be a potential CGT liability of in excess of $700m arising from the implementation of the nil premium merger". It is not apparent to me that this relates to the nil premium merger as opposed to a sale of Soul Pattinson shares in New Hope and TPG.

303 Carnegie then requested the share registers of both companies. This may have prompted Brickworks to ask Lion Capital to review the arrangement between Perpetual and Carnegie which it did in a report dated 16 October 2013. Perpetual submitted that while this report was marked "Strictly Confidential", "consistent with his previous practice, Mr Robert Millner forwarded a copy of the paper to Mr Tom Millner (a director of Soul Pattinson) on 17 October 2013". Again, it is not clear how this submission advances Perpetual's case as pleaded other than as a possible example of the kinds of conflicts of interest that can arise given the cross shareholding (which I accept are relevant to the assessment of alleged oppression). Perpetual also said that the obtaining of a report from Lion Capital about Carnegie demonstrated how "unaccustomed" Brickworks was to any shareholder other than the Millner family seeking to exercise any sort of control over the company in which they held shares. This is speculation. The submission does not advance Perpetual's case of oppression by reason of the cross shareholding.

9. THE FOURTH PROPOSAL

304 Carnegie, by this time, had developed what has come to be known as the fourth proposal involving, as Perpetual described it:

> (a) the receipt by Brickworks of a distribution in specie of shares in TPG by Soul Pattinson to its shareholders ("**Proposed Demerger Distribution Transaction**");
>
> (b) the cancellation of all shares in Soul Pattinson held by Brickworks, and the receipt by Brickworks of related consideration from Soul Pattinson in return for the share cancellation ("**Proposed Cancellation of Shares Transaction**");
>
> (c) the appointment, pursuant to article 6.2(b) of the Brickworks Constitution, of Elizabeth Crouch as an additional director of Brickworks ("**Proposed Elizabeth Crouch Appointment**");
>
> (d) the passing of resolutions to enable Soul Pattinson to make an in specie distribution of all the shares in TPG held by Soul Pattinson to all members of Soul Pattinson to effect the Proposed Demerger Distribution Transaction ("**Proposed Demerger Distribution Resolutions**"); and

(e) the passing of resolutions to effect to the Proposed Cancellation of Shares Transaction ("**Proposed Cancellation of Shares Resolution**").

305 Integral to the fourth proposal was that it be put directly to shareholders. As such, the shareholding entities on behalf of Perpetual and Carnegie, on 23 October 2013, as Perpetual said:

(a) called a general meeting of shareholders of Brickworks pursuant to s 249F of the Corporations Act ("**Brickworks Shareholder Meeting**"); and

(b) requested that the directors of Soul Pattinson call and arrange to hold a general meeting of the shareholders of Soul Pattinson pursuant to s 249D of the Corporations Act ("**Soul Pattinson Shareholder Meeting**").

306 In the event, the fourth proposal was never put to shareholders because of an unfavourable ruling from the ATO. Despite this, Perpetual contends that the conduct of the companies in relation to the fourth proposal assists its case. As with the earlier proposals, Perpetual's submissions include a lengthy chronology of the steps taken by the companies about the fourth proposal but, ultimately, apart from a factual recitation, the matters of submission appeared to be as follows.

307 First, Perpetual submitted that the position of the companies was inconsistent. On 8 November 2013 Robert Millner, as chairman of Brickworks, informed Carnegie that the appointment of Elizabeth Crouch should be decided by shareholders and that "the board intends to remain neutral on the matter" yet on 11 November 2013 the Hon RJ Webster informed Carnegie that "[t]he Chairman of Soul Pattinson has advised me that Soul Pattinson currently intends to vote on this resolution. While this (and various other matters to which Perpetual has referred) discloses the potential for conflicts of interest to arise from the cross shareholding and a common director, the board of Brickworks was not implicated in any decision by the board of Soul Pattinson on the vote about Ms Crouch's appointment.

308 Second, the retainer of Lion Capital to advise on the fourth proposal noted that if Brickworks achieved increased shareholder value through a restructure, including by the fourth proposal, then Lion Capital would receive a $4 million success fee. Alternatively, if Brickworks decided that the fourth proposal did not increase shareholder value it would then be in Brickworks' interest to defend against the fourth proposal and, in the event of a successful defence, Lion Capital would be paid a $1 million success fee. Perpetual said:

> The provision of financial incentives to corporate advisors for resisting attempts to unwind the cross-shareholding is a further example of the way in which the cross-shareholding is used to exert control or undue influence to

> the detriment, and oppression, of PIML and other minority shareholders.

309 It is not apparent that this arrangement has anything to do with the cross shareholding as it is focused solely on increased value for Brickworks' shareholders. As already noted, the submission lacks force once it is recognised that the primary incentive was to identify any restructure which would increase shareholder value.

310 Third, various emails between Mr Partridge and Mr Jensz in the main about the appointment of Ms Crouch are said by Perpetual to reveal:

> …no substantive consideration of the question of whether an independent director was required on the board of Brickworks, and the sort of person who would be suited to such a position. The idea of appointing a new independent director was proposed by Mr Partridge merely as a strategy to "undermine" PIML and Carnegie & Co, two of Brickworks' company's shareholders and agreed to by Brickworks' supposed independent corporate advisor, Mr Jensz.

311 This submission is difficult to reconcile with the fact that Mr Partridge contemplated that Ms Crouch would be invited to apply for the position. It also does not take into account that the proposal to appoint Ms Crouch was but one of the proposed resolutions and it was reasonable for Mr Partridge to try to ensure that appointment of directors to the board was dealt with appropriately rather than swept up with the broader restructuring proposals. Nor does the exchange provide any support for the description of Mr Jensz as a "supposed" independent corporate advisor.

312 Fourth, Perpetual refers to another email from Mr Partridge to Mr Jensz on 20 November 2013 which said:

> This may be pessimistic view but it is how I read it currently.
>
> If Sol's can't vote we will lose the vote.
>
> The reason being the fundies and the general public find something complicated they abstain. We lose as P and C vote already passes 17 mill shares, tops there are 40 mill in play.
>
> …
>
> With an overwhelming vote of support it will be hard for the independents to say no.

313 I do not read this as suggesting that "the independent directors would be expected to say no to the Fourth Proposal even in the face of overwhelming support from shareholders other than Soul Pattinson". To the contrary, it suggests that the independent directors would accede to the proposal if it had an overwhelming vote in support. As such, Perpetual's next submission that "[t]he idea that the independent directors might vote in favour of a proposal which had

overwhelming support from shareholders other than Soul Pattinson is not even entertained by Mr Partridge" is unpersuasive. It seems to me that the email is contemplating the very opposite. It also follows from this that I do not accept that "the email implies that they [the independent directors] will need to find a way to explain their "no" vote in the face of such support."

314 Fifth, to the extent any criticism is implied, I see nothing wrong with the fact that PWC for Brickworks and Ernst & Young for Soul Pattinson were in communication with each other in respect of tax implications. Given the nature of the fourth proposal this seems only sensible.

315 Sixth, the resolution of the board of Brickworks on 25 November 2013 to appoint an additional independent non-executive director to the board, which Perpetual describes as part of Mr Partridge's intention to undermine the fourth proposal, may equally be seen as appropriately separating the issue of appointment from the restructuring proposals.

316 Seventh, the criticisms of Robert Millner and others about his letter to the ATO of 29 November 2013 overlook the fact that he had been sent letters by the ATO in two separate capacities, one as chairman of Soul Pattinson and another as chairman of Brickworks. It is apparent that the view taken was that Robert Millner should not deal with the request to him in his capacity as chairman of Brickworks but, rather, refer the letter to other directors of Brickworks who did not have an interest in Soul Pattinson. As such, while in theory the involvement of Mr Barlow (of PCP advising Soul Pattinson) in the preparation of the letter from Robert Millner as chairman of Brickworks to the ATO might be seen as "the blurring of the lines between the two companies", in fact, the terms of the letter make clear that Robert Millner would not be responding substantively on behalf of Brickworks because he was also the chairman of Soul Pattinson. While, again, this discloses the potential for conflicts of interest to arise which is a relevant factor in the overall assessment, it does not prove Millner family control as a result of the cross shareholding.

317 Eighth, the appointment of Deborah Page as an independent non-executive director of the board of Brickworks on 28 May 2014, which Perpetual also sees as part of Mr Partridge's plan to undermine the fourth proposal, is not the subject of criticism by Perpetual. The 2014 Brickworks' annual report records that Ms Page is or has been a director of numerous large corporations and has extensive financial expertise from her time as a partner at Touche Ross/KPMG peat Marwick and senior executive roles with Lend Lease Group, Allen Allen and Hemsley and the Commonwealth Bank. Ms Page was a manifestly suitable candidate for

appointment to the Brickworks' board. Mr Williams said that when he met Ms Page to inform her of the history of attempts to unwind the cross shareholding she said "I am a team player. I am not going in there to rock the boat" but that does not prove that Ms Page is anything other than an independent director intent on discharging her obligation to act in the best interests of Brickworks.

318 Ninth, an email from Lion Capital to Brickworks of 9 July 2014, after it became apparent the fourth proposal would founder on tax implications, saying that broader strategy issues in respect of Perpetual and Carnegie should be included in an agenda and they were "broadly looking at ideas to use their 'loss' & embarrassment here as leverage to get them to go away" does not prove that Lion Capital was not independent. It needs to be recalled that Lion Capital's view was that the time was not right for any restructure to be in the interests of Brickworks. It considered all of Perpetual's proposals but for the nil premium merger to be fundamentally flawed. It must have known that Brickworks had committed substantial time and expense to Perpetual's (and Carnegie's) proposals in circumstances where, ultimately, Lion Capital's concerns about each had proven well-founded. As a result, a strategy to get Perpetual to stop making proposals which were seen to be contrary to the best interests of the shareholders was not unreasonable, particularly given that Lion Capital had also expressed the view that Brickworks should monitor restructuring opportunities if they arose and presented demonstrable benefit to shareholders.

319 Tenth, the email from Thomas Millner to PCP and directors and various officers of Soul Pattinson on 19 July 2014 (the day after the ATO indicated that its private rulings would deny the demerger rollover relief required to give effect to the fourth proposal) may have been expressed in intemperate terms, but does not prove that the recipients agreed with his descriptions or, putting aside the language used, that Thomas Millner believed that the Millner family controlled the companies or that such control should be maintained. The email said, in response to a draft announcement about the foreshadowed ATO private rulings:

> I would go harder at them. They will want to come back, and we need to ensure they second guess themselves and don't; whilst also telling all our shareholders that they need to be extra mindful of any other future proposals from these two arrogant, publicity seeking, short term fee grabbing activists.

320 The fact that Perpetual and Carnegie owned shares in Soul Pattinson does not mean that they were above criticism in circumstances where the fourth proposal must have been an expensive and time consuming exercise which ultimately went nowhere.

321 Finally, the fact that Brickworks discovered a handwritten note by an unknown author on a draft letter to shareholders recommending against the fourth proposal which says, in part, "Round 2 [or 1] in a long war" also goes nowhere. Perpetual said that the "notion that the companies were at "war" with their shareholders typified their attitude to any attempt to unwind the cross-shareholding" but, if anything, the documentary record shows only that it was proposals by Perpetual that were considered to be manifestly adverse to the interests of all shareholders which drew the ire of some within the company. Given the time, effort and cost that responding to Perpetual's proposals must have involved, when Brickworks was plainly keen to ensure that any restructure would be in the best interests of its shareholders, none of this should be unexpected or assists Perpetual to prove its case.

322 The fourth proposal, excluding the nomination of Ms Crouch as a director, was effectively withdrawn after the adverse tax rulings.

323 Perpetual pleaded, but did not develop, a contention that the refusal by the companies to provide it with copies of all of the documents which had been submitted to the ATO in support of the application for private rulings on the fourth proposal was oppressive because it prevented Perpetual from formulating a proposal to dismantle the cross shareholding which is acceptable to the boards of both companies. It appears that time has overtaken this contention. Perpetual continued to present the nil premium merger to the companies after the withdrawal of the fourth proposal. As such, I do not address further this aspect of the case as pleaded.

10. MS CROUCH'S NOMINATION

324 Ms Crouch's election to the board of Brickworks was put before an annual general meeting of the company on 24 November 2015. The board did not support the appointment and Ms Crouch was not elected.

325 Perpetual points to a handwritten note discovered by Brickworks, the author of which is unknown which states:

> "- Director issue will be resolved.
>
> Some Honour. – (NOT ELIZABETH CROUCH)
>
> - HOW DO YOU MAKE THEM GO AWAY PERMANENTLY.

326 According to Perpetual this "typifies the attitude of the companies towards any attempt by shareholders to exercise their rights, and any attempts to put outsiders on the closed shop

boards". Apart from the fact that this cannot be attributed to the board of Brickworks, the references to "outsiders" and "closed shop" do not advance the case. They are conclusions without the benefit of evidence proving the underlying propositions. Presumably, "outsiders" means people not under Millner family control and "closed shop boards" means closed to directors not under Millner family control. In that event, why are the Hon RJ Webster, Mr Gilham, Mr Crotty and Ms Page not "outsiders"? The inference Perpetual seeks to the contrary is not open. How are the boards "closed shop(s)" when Mr Hawker and Mr Negus are not suggested to be other than independent directors of Soul Pattinson and Ms Page is not suggested to be other than an independent director of Brickworks, and all have been appointed to the bards within the last three years? Perpetual would have it that their appointments are a result of its agitation, which may be true, but if true it nevertheless demonstrates that the boards are not closed shops.

327 Perpetual submitted that:

> It appears proxy votes (other than Soul Pattinson's) were in favour of Ms Crouch's election. In other words, if not for the cross-shareholding, she would have been elected to the board of Brickworks. This was notwithstanding concerted efforts on the part of Brickworks to solicit shareholders to vote against Ms Crouch's appointment and to ensure that the proxy form and online voting system were designed in a way that emphasised the board was recommending against the appointment of Ms Crouch.

328 It is true that if not for Soul Pattinson holding a majority of shares in Brickworks proxy votes would have favoured Ms Crouch's election to the board of Brickworks. But this does not prove oppression. Ultimately, no more need be said about this aspect of the case than that, as was submitted:

> … there is no oppressive conduct in BKW's directors declining to support the election of an additional director to the board, with the consequential costs that such an election would entail, where an additional independent director (Ms Deborah Page) had only recently been appointed.

329 This is a preferable basis upon which to determine this issue than Brickworks' other contention that the issue of Ms Crouch's appointment was not pleaded as part of Perpetual's case.

11. SUBSEQUENT EVENTS

330 On 15 August 2014, Mr Williams wrote to Brickworks requesting copies all draft and final reports, letters and memoranda prepared by third parties in relation to the various proposals to unwind the cross-shareholding that had been made by it or Carnegie to Brickworks on the

basis that they wished to "explore all potential avenues for unwinding the cross-shareholding." The Hon RJ Webster responded on 22 August 2014 to the effect that "Brickworks does not regard it as appropriate to provide analysis to you of the various proposals identified in your letter, beyond that was previously provided to the market as a whole". A similar request was made to Soul Pattinson and similar response received. Perpetual noted that:

> Of course, as is noted above, some of the third party analyses that Mr Williams had requested had been provided by Brickworks to Soul Pattinson, despite not having been provided "to the market as a whole".

331 While this is true, the proposals involved both companies one way or another, and thus they were in a unique position compared to other shareholders.

332 In February 2015 Perpetual proposed consideration by the companies of the nil premium merger, with further information about such a restructure in support being provided by Hunter Green.

333 The companies continued to obtain advice about restructuring issues, including Perpetual's updated nil premium merger proposal.

334 For example, in June 2015 the board of Brickworks considered a report by Lion Capital dated 28 May 2015 which identified a likely share price increase of 10% if a merger/demerger was pursued but, if pursued, the restructuring could not be undone. Compared to other options, including other mergers and acquisitions which offered greater value, Lion Capital recommended that a merger/demerger should not be pursued at that time, and that mergers and acquisitions appeared to be a better alternative. On 31 July 2015 Lion Capital reported to the board about further work carried out by Hunter Green for Perpetual. Lion Capital concluded that the uncertainty about any value uplift and the associated risks did not support the proposal being pursued. On 5 August 2015 the board of Brickworks resolved in accordance with this advice but also to continue further assessment of alternatives which appeared to be superior (I infer a reference to the Lion Capital advice about possible mergers and acquisitions).

335 In August 2015 PCP reported to the board of Soul Pattinson. Perpetual focused on the statement in this report in these terms under a column dealing with disadvantages of the nil premium merger (compared to advantages):

> Impact on investing culture at SOL

- the current structure allows SOL to make investments for the long term without threat of knee jerk reactions from outside influences.

336 Perpetual submitted that this (which reflects Lion Capital's description in reports to Brickworks of Soul Pattinson as a "supportive major shareholder") was:

> … consistent only with an expectation that the cross-shareholding structure can be relied on to prevent anyone other than each of the boards of the two companies obtaining control, and a recognition that each of the boards has a desire to maintain the same board management and philosophy in each company. That is a management under the influence of Mr Robert Millner. It may be inferred that those statements are informed directly or indirectly by board member views. That inference is reinforced by the absence of evidence any demur to such statements by any board member recorded in any board minute or in any email correspondence.

337 The August 2015 report from PCP contained other information. It reported that Soul Pattinson continued to trade at a 23.6% discount to net asset value. It reported that given the recent strong share price of Brickworks the merger ratio was unattractive for Soul Pattinson and an approach based on net asset value would be better for Soul Pattinson but unlikely to attract Brickworks (an approach Perpetual described as flawed because it failed to look through the cross shareholding). PCP also reported that its preliminary advice was that there would be no tax leakage for the companies or for shareholders due to the availability of rollover relief. The board of Soul Pattinson decided to retain another advisor, Lonergan Edwards, to review PCP's conclusions. There is and can be no suggestion that Lonergan Edwards was not independent from Soul Pattinson. Lonergan Edwards advised in October 2015 and confirmed that the nil premium merger would be disadvantageous to Soul Pattinson's shareholders if the merger ratio were to be based on share price.

338 For its part, Perpetual received tax advice from Greenwoods & Herbert Smith Freehills on 10 September 2015 that there would be no tax consequences from this proposal. This is consistent with the advice each company received about tax issues if the nil premium merger proposal was to be implemented.

339 Perpetual wrote to the companies again on 23 December 2015 in pursuit of the nil premium merger proposal.

340 PCP prepared a report to the board of Soul Pattinson dated 10 February 2016 which, amongst other things, said that the report updated PCP's advice given in August 2015. The update included that a strong increase in the company's share price (+21.3% since August 2015) and the strong share price of Brickworks meant that the main reason Perpetual had put forward to support the nil premium merger had been removed (that is, to remove the discounted share

prices compared to net asset value said to result from the cross shareholding). As such, a merger was unattractive because any increase to the net asset value would be from the elimination of deferred tax liabilities and the shares held by each company in the other. The board noted the advice including that the proposal "could impact on WHSP's investment style which has outperformed the market over a long period". Perpetual submitted that this may be inferred to be an adoption of the PCP statement in the August 2015 report that "the current structure allows SOL to make investments for the long term without threat of knee jerk reactions from outside influences". Perpetual continued:

> In other words, the Soul Pattinson board wants to keep the cross-shareholding because it protects it, and by extension the Brickworks board, from "outside influences". The Soul Pattinson board could only believe that the cross-shareholding protects against "outside influences" if it has a belief based on reasonable grounds, or by inference knowledge, that the Brickworks board will protect Soul Pattinson from a takeover and, in its turn, the Soul Pattinson board will protect Brickworks from a takeover. They are ad idem in retaining each other's management.

341 Lion Capital prepared a report for the independent board committee of Brickworks in March 2016. This report identified as "Benefits of the current structure – The current BKW + SOL structure provides certain advantages" "5. Long-term decisions – Supportive major shareholder provides capacity for the BKW board to plan long term investments (consistent with investment horizons for new brick plants) 6. Ownership stability – Less concerns about short-term performance volatility leading to opportunistic takeover". Perpetual also noted that in this report:

> Under the heading "Strategy of the NPM" it was stated: "A NPM raises numerous issues for BKW at the corporate/strategy level" "2. We consider that PPT's approach may lead to pressure building from shareholders to sell assets … - This may lead to a shorter-term approach to investment management than currently undertaken at SOL and BKW – The culture that has generated long-term outperformance at BKW and SOL would then be threatened". It may be inferred that those statements are informed directly or indirectly by board member views. That inference is reinforced by the absence of evidence of any demur to such statements by any board member.

342 Grant Samuel, which also provided advice to the independent board committee of Brickworks said:

(1) they agreed with Lion Capital that the pursuit of the nil premium merger was not financially or strategically compelling and it should not be pursued now;

(2) while not certain it is unlikely that there would be a material permanent uplift sufficient to justify the transaction;

(3) while this was so, it could provide such an uplift in the future depending on future movements in relative values and share prices and the proposal should be kept under review;

(4) there are a number of hurdles to implement the proposal but these are no greater than for any similar corporate transaction; and

(5) "i]n general terms, we do not believe there are any material downsides to a nil premium merger. While we do not believe a nil premium merger would be likely to create a significant uplift in market price that would justify the transaction at the present time, it could do so at some future date…".

343 Perpetual criticised Grant Samuel's analysis to the effect that the share price of the merged Brickworks may not track the very substantial increase in net asset value per share on the basis that the reasons in support are not persuasive. Perpetual preferred to focus on the simple calculation that as the merged entity would have the same assets but fewer shareholders it necessarily followed that the net asset value per share increased. As Perpetual described this simple calculation:

> Grant Samuel calculated an underlying net asset value per share in the Brickworks merged entity of $22.29 compared to a Brickworks share price at the time of $14.60 and a Soul Pattinson share price at the time of $16.00. As Lion Capital observe (and there are numerous other instances of a similar observation by other advisers): "With the same earnings/assets in the NPM as with BKW/SOL currently – but with a lower number of shares – the resultant value per share for all external shareholders increases"

344 At its March 2016 meeting, the independent board committee of Brickworks noted that earnings diversity and stability are a by-product of the cross shareholding and not a justification for it and that as Soul Pattinson had historically traded at a discount to net asset value there is a risk that a nil premium merged entity would trade at a net tangible asset value less than Brickworks. This discloses an active engagement by that committee with the financial and corporate governance implications of the cross shareholding. It is inconsistent with Perpetual's case of maintenance of the cross shareholding to entrench control in the incumbent boards and thus the Millner family.

345 Perpetual noted that thereafter:

> At the Brickworks board meeting on 23 May 2016, Mr Webster "updated the Board on … the IBC's assessment of Perpetual's nil premium merger proposal as outlined in the board papers". The update included a written "Board Update" which referred to the Lion Capital report and a Grant Samuel independent review, and recorded Lion

> Capital's advice that "the nil premium merger is not financially or strategically compelling and it should not be pursued now". The strategic considerations included the loss of control referred to above in that paper, and it may be inferred that the Brickworks board took that into account.

12. OPPRESSIVE NOT TO UNWIND THE CROSS SHAREHOLDING?

12.1 Perpetual's further submissions

346 Perpetual remains of the view that unwinding the cross shareholding will release value to shareholders but its case does not depend on proving that as a fact (and, as noted, it is my view that it has not proved this). As Perpetual put it:

> Regardless of how well or badly the board and management are performing the carriage of a company's business, there is inherent oppression in the use of a corporate structure to entrench the board and management in their incumbent positions, and to prevent them being exposed to the risk of shareholder sanction, and if thought desirable, removal. A structure which enables the board and management, and only the board and management to the effective exclusion of shareholders, to determine their own fate, is oppressive to shareholders.

347 Perpetual referred to the principle that a director may not use a power, such as the power to issue shares, to defeat the voting rights of existing shareholders or to maintain their own control of the company (relying on *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289, *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614 at 640, *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 439 – 440, *HNA Irish Nominee Ltd v Kinghorn (No 2)* [2012] FCA 228; (2012) 290 ALR 372 at [639], and *Corbett v Corbett Court Pty Ltd* [2015] FCA 1176; (2015) 109 ACSR 296). By analogy to this principle Perpetual said:

> So too with respect to the creation and maintenance of a corporate structure, like the cross-shareholding, which serves to immunise the incumbent board and management from shareholder control. That is precisely the effect of the cross-shareholding.

348 Perpetual referred to the fact that in 2000 Guiness Peat Group lodged a takeover bid for Brickworks, which was defeated only by reason of the exercise by Soul Pattinson of its voting rights attached to its shares in Brickworks. Given that a majority of shareholders other than Soul Pattinson wished to accept the takeover offer, Perpetual said it is apparent that the cross shareholding is an anti-takeover (and thus entrenchment of control in the existing boards) mechanism.

349 Perpetual said that:

> The response of each board and in particular Mr Robert Millner, to Perpetual's attempts to unlock the cross-shareholding, provides further evidence of their determination to keep the control mechanism in place, because of the control it affords. By way of example, both boards were well aware by at least 2011 that a

> practical means of achieving an unlocking of the cross-shareholding was a merger, whether by use of Brickworks as the merger vehicle or a Newco. Yet both companies deliberately chose not to inform Perpetual of that possibility. Their approach has been consistently one of reaction.

350 Perpetual submitted that:

> Neither Brickworks nor Soul Pattinson have ever appropriately responded to the nil premium merger. At a minimum it would see the same asset base spread over 40% less shares in the combined entity. That fact alone would lead to an increase in minority shareholder value.
>
> …
>
> There has never been a properly articulated response as to why the nil premium merger is not a practically workable and effective mechanism that permits the unwinding of the cross-shareholding without adverse consequence to either company. To the contrary, the evidence suggests that such an unwinding would unlock significant value for shareholders in both companies through the creation of a new combined entity within Brickworks.

351 Perpetual also submitted that it was apparent that the focus of both companies when considering dismantling the cross shareholding had been increased share value, not corporate governance and the inherently oppressive effect of maintaining a structure which entrenched the control of the current directors each of which had been appointed at the instigation or with the approval of Robert Millner or, before him, his uncle James Millner. By analogy to the reasoning in ***Equiticorp*** *Finance Ltd (In liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 148 the directors of each company, when considering the maintenance of the cross shareholding, had effectively overlooked the inherently oppressive effect of the cross shareholding.

352 As to the arguments based on performance of the companies under the existing structure, Perpetual submitted that these:

> … suggest a causative relationship between performance and the cross shareholding. These statements only have substance if they mean that the cross shareholding has kept management, and in particular Millner family management, in control and that management has served the shareholders well. So understood, such statements are further confirmation of the only purpose and function of the cross-shareholding.

353 Also, according to Perpetual:

> The argument as to smoothing out fluctuations in business cycles cannot depend on the cross shareholding. It is simply diversification. That would exist equally under a merged entity with the same asset base. It does not justify the cross-shareholding.

354 As Perpetual put it:

- The issue in these proceedings is a fundamental one. A corporate entity

> obviously has an existence independently of the identity of its board members from time to time. What the company has is ownership of assets. Board members are simply stewards for the management of those assets. It is the shareholders who have an indirect interest in the assets. A structure designed to entrench particular individuals on a board is antithetical to the interests of the shareholders other than the Millners. The retention of the structure, where available means exist to dismantle it, is oppressive.

…

- There can be no doubt that given the reason for its creation and the exercise of the power conferred by the cross-shareholding to defend the incumbent directors and management, its maintenance would be regarded as objectively unfair in the eyes of a commercial bystander.

355 Perpetual said it had been demonstrated that the oppression caused by the maintenance of the cross shareholding could be remedied. In its words:

> The nil premium merger proposal, or any other variant of a merger, represents an available practical means of unlocking the cross-shareholding, re-enfranchising shareholders and removing other difficulties associated with the cross-shareholding. At worst, the cross-shareholding has no negative financial impact on either company. In fact, on the evidence, the likelihood is that it would provide a significant financial benefit to shareholders.

356 Perpetual said that it is apparent from the advice given to each company that:

(1) the nil premium merger proposal can be achieved without adverse tax or other financial consequences (and, on Perpetual's case, with a substantial increase in shareholder value);

(2) issues such as the merger ratio between the companies are a matter for ordinary commercial negotiation and do not present a material barrier to the implementation of the proposal;

(3) the obtaining of regulatory and other approvals are also matters routinely dealt with in the ordinary course of any corporate restructuring and, given the size of the companies, could not be said to involve any material impact or burden on them; and

(4) the nil premium merger, if implemented, would have other benefits including the simplification of the corporate structure and effecting greater transparency to the market about value.

357 By contrast, maintenance of the cross shareholding, apart from its inherently oppressive effect, and as recognised at various times by the advisors to the companies:

(1) limits the capacity of the companies to raise capital by the issue of shares (Lion Capital referred to this in a report of 24 March 2015 as share issues would dilute the

holdings of each company in the other and thus, as Perpetual put it, detrimentally affect [the cross shareholding's] control purpose);

(2) makes it difficult for the market to recognise the true value of the shares in each company on a "look through" basis by use of simultaneous equations to solve the otherwise endless valuation circle (as Grant Samuels noted in advice to Brickworks while these equations could be done to allow for the circularity of value created by the cross shareholding, they are "rarely done" by market participants for reasons which are not apparent);

(3) results in complexity of corporate structure which deters investors including institutional investors;

(4) deters "potential takeover investors, investors seeking to take advantage of another entities takeover bid, investors who do not regard the control by one family via a cross-shareholding as attractive and seek to have some influence in a general meeting, by way of example, dampens competition for shares in each company which is plainly price depressive"; and

(5) "creates significant liquidity issues to the detriment of volume of trades and, as the internal reports recognise, is a deterrent for investors, particularly institutional investors that desire the capacity to divest readily".

358 Rather than ordering the implementation of the nil premium merger, however, Perpetual submitted that it would be appropriate to order that each company, within 12 months, take such steps as required to bring about the termination or unwinding of the cross shareholding, thereby leaving it to the companies in the first instance to negotiate the best way in which to do so (failing which a share sale would be required reducing the holdings of each in the other to less than 10%). Perpetual also sought further or alternative orders in the interim preventing each company from voting on elections to the board of the other company and any proposals to terminate or unwind the cross shareholding. Finally, Perpetual pressed its initial claims for relief in the form of the appointment of Mr Fraser to the board of Soul Pattinson and Ms Crouch to the board of Brickworks.

12.2 The agreement, arrangement or understanding contentions

359 It should be apparent from the discussion of the evidence above that I am satisfied that Perpetual's case of the existence of an agreement, understanding or arrangement to maintain the cross shareholding in order to keep the incumbent boards and thus Millner family in

control of the companies has not been proved. Consistency of votes as recorded in company minutes proves nothing. The evidence, such as it is, that Robert Millner allegedly assumes that the Millner family control the companies, in reality, prove no such thing. The attempt to attribute acceptance of this alleged assumption to other directors based on apparent lack of public response to things Robert Millner has said prove nothing. No inference of an agreement, understanding or arrangement is able to be drawn from anything any director has been proved to have said or done. This aspect of Perpetual's case never rose above mere suspicion, speculation and innuendo. As such, no inference of the kind explained in *Jones v Dunkel* is available to assist Perpetual.

360 Apart from these considerations I accept the submissions of each company about these allegations.

361 Accordingly, I agree that, this aspect of Perpetual's case:

> … is elliptical. Perpetual does not say whose purpose or function it is referring to – nor how any such purpose is effectuated by the boards. Perpetual refers throughout its submission to "a management under the influence of Robert Millner" (PS [6]) or "board influence" (PS [52]) or Robert Millner's "influence over the boards" (PS [65]) or "undue influence" (PS [152], [155], [342]) along with other such vague notions such as there being a "control mechanism in place" (PS [18]) or Millner Family "control" (PS [20]) or the cross-shareholders being "like-minded" (PS [52]) or the companies being "family companies or businesses" (PS [56], [94]ff, [151], [153]) or there being "complicity of other directors" (PS [106]). Such allegations fall short of alleging an arrangement or understanding and are at such a level of vagueness and generality so as to be meaningless – they also prove the bankruptcy of the pleaded case advanced by Perpetual.

362 This submission reflects my observations above that an agreement, arrangement or understanding to maintain the cross shareholding, in and of itself, makes no sense in Perpetual's case theory. It has to be such an agreement, arrangement or understanding in order to entrench the incumbent boards and thus control of the Millner family to make sense. But when that is articulated, the lack of proof is manifest. There is substantial evidence from which it would be inferred that each director of each company has discharged in good faith their obligation to make decisions in the best interests of shareholders.

363 The evidence includes the constitution of the boards.

364 The board of Brickworks (seven members) includes two members of the Millner family, the managing director (Mr Partridge) and four others, including most recently Ms Page. Why any of the four independent directors might have been willing to enter into any such agreement, arrangement or understanding contrary to their obligations remains unexplained.

They are all highly experienced in the corporate sphere. They must be taken to know their obligations. Yet Perpetual's case is that at least two of the independent directors are party to an agreement, arrangement or understanding which would involve them in a serious (yet unpleaded) dereliction of their duties. No such inference would be lightly drawn.

365 The board of Soul Pattinson has eight members, four of whom are alleged by Perpetual to be party to the agreement, arrangement or understanding. Of those four one, Mr Westphal, is not a member of the Millner family. He is a chartered accountant and a former partner of Ernst & Young. Again, why he might have involved himself in such a serious dereliction of duty remains unexplained.

366 The evidence includes the recent appointments to each board of independent directors of unimpeachable qualifications (Ms Page to the board of Brickworks and Mr Hawker and Mr Negus to the board of Soul Pattinson) and the proposed further appointment of another independent board member to Soul Pattinson to replace Mr Wills. It is difficult to reconcile the appointment of these people to each board with the existence of a cabal of directors on each board joined in a common purpose of ensuring the cross shareholding remains in order to entrench their position and thus the Millner family's control of the companies.

367 The evidence includes the reams of documents disclosing that, far from a "kneejerk" rejection against any proposal to restructure the companies including by unwinding the cross shareholding, each company has devoted what must be substantial time and money to not only assessing each of Perpetual's proposals as they emerged, but also developing other options. The evidence also indicates that each board is well aware of the need to continue to consider the structure of the companies, including the continuation of the cross shareholding, to ensure that their obligations as directors are discharged. As Soul Pattinson submitted:

> The documentary evidence shows that the boards monitor their respective businesses and structures and made business judgment decisions accordingly. It cannot seriously be suggested that all this material was generated (including the retention of third external advisors) as a ruse such that there was never any proper bona fide consideration by the directors of the merits or otherwise of the cross-shareholding. The emotive language employed to suggest that the advisers were controlled and choreographed has no basis in evidence…It is again an allegation of serious dishonesty. No such allegation is pleaded. And there is no evidential foundation for it.

368 The evidence includes the fact that both boards decided to obtain expert advice from a range of advisors (corporate and tax) about every proposal of Perpetual and other possible restructuring opportunities. Perpetual was critical of aspects of that advice, and submitted

that both PCP and Lion Capital changed their advice over time so as to reflect the views of the Millner family. While I accept that PCP could not be seen as independent of Soul Pattinson (given Soul Pattinson is the majority shareholder in PCP), I do not accept that there is a proper foundation to infer that PCP or Lion Capital were doing other than providing the companies with their genuine opinions in all of the circumstances as they existed at the time their advice was given. As the advice given discloses, the reason that aspects of the advice were different over time reflected the changing market circumstances, particularly the change in relative share prices of the two companies. Further, neither company limited the advice obtained to PCP (for Soul Pattinson) or Gresham and then Lion Capital (for Brickworks). At various times both companies sought review of this advice by other advisors (Lonergan Edwards for Soul Pattinson and Grant Samuel for Brickworks), as well as tax advice. Moreover, if as Perpetual alleges the primary advisors were truly under the sway of Robert Millner, and Robert Millner was determined to maintain the cross shareholding as a means of maintaining control, why would those advisors have bothered identifying other methods by which the cross shareholding could be unwound which offered better potential outcomes than those formulated by Perpetual? The fact that the advisors consistently identified the existence of other methods by which the cross shareholding could be unwound, and then provided advice about the advantages and disadvantages of each method having regard to the prevailing circumstances at the time each advice was given (including changes in the relative share prices of both companies), is inconsistent with Perpetual's allegations that the advice was tailored to suit the desires of Robert Millner.

369 Perpetual's repeated criticisms of those parts of the expert advice which the companies received which do not suit Perpetual's case also do not advance its case. The reports were prepared over a period of years under different market circumstances and thus changes in conclusions are to be expected. None of the authors of the reports have given evidence. They have not had notice of or the opportunity to respond to Perpetual's criticisms. The experts who have given evidence do not provide opinions supportive of Perpetual's criticisms. I am not in a position to second-guess the advice various experts gave to the companies over a period of years merely on the basis of alleged errors which are not themselves the subject of evidence. To attempt do so would be to engage in an entirely unsatisfactory process which could not yield any reliable conclusions.

370 The evidence includes the willingness of both boards to hear presentations by Mr Williams of Perpetual and for members of those boards, including Robert Millner, to meet with Mr

Williams on numerous occasions. While Mr Williams felt that he was being stonewalled in these meetings, his perceptions do not alter the fact that he was repeatedly given opportunities to present Perpetual's views to members of the board of each company.

371 The evidence includes the resolutions of the boards as and when they considered each proposal. The boards repeatedly considered information and advice as it became available. Perpetual's case, when analysed, is that presumably with knowledge or at least acquiescence of the boards of both companies, every one of meetings which have dealt with the restructuring since 2011 has involved a form of sham because, by reason of the alleged agreement, arrangement or understanding, there was never going to be any genuine consideration of the advantages and disadvantages of any restructuring which might affect the cross shareholding. As Soul Pattinson put it, the:

> objective evidence hardly suggests that the board was not faithfully considering the cross-shareholding and whether its unwinding is in the interests of shareholders. The objective evidence and factual history is also completely contrary to Perpetual's alleged purpose to entrench management.

372 The evidence includes that Perpetual itself, when proposing the nil premium merger again in 2015, suggested that the board of the merged entity could be comprised of Robert Millner Thomas Millner, Michael Millner, the Hon RJ Webster, Robert Westphal, Michael Hawker, Warwick Negus, Deborah Page and Brendan Crotty. Perpetual said that this involved no inconsistency with its case which was concerned with unwinding of the cross shareholding as a means of entrenching control in the Millner family and returning voting power to shareholders. This, however, overlooks that part of Perpetual's case which alleges that the majority of these suggested board members are alleged to be party to or have acquiesced in a secret arrangement for an unlawful purpose. Why would Perpetual suggest that the board of the merged entity be comprised of people it believed were party to or acquiesced in an ongoing serious breach of their obligations as directors?

12.3 Consideration of the effect of the cross shareholding

373 I have discussed above the reasons why Perpetual has not proved its case that the cross shareholding materially depresses the value of the shares in each company. To the extent that Perpetual ultimately rested this part of its case on the proposition that a merged entity would have the same assets and a smaller number of shareholders, necessarily resulting in a greater net asset value per share than is currently the case, I adopt the submissions of Soul Pattinson. First, if calculating net asset value per share were as simple as this, it is surprising that

Professor Frino did not adopt this method. Second, it is apparent, as Soul Pattinson submitted, that Perpetual's proposition assumes that the shares each company holds in the other have no value. This may be because Perpetual has held shares in both companies at all material times. This may also explain Perpetual's indifference to the merger ratio between the two companies (an issue which would not be immaterial to a person owning shares in only one or other of the companies). In any event, if shareholders other than the companies own about 57% of the shares of the total shares on issue in both companies, then the companies must own the balance and, to each company, those holdings must have value. Soul Pattinson put it this way, and I agree:

> Accordingly, the statement made in opening that a nil premium merger would mean that outside shareholders go from owning 57% of combined assets of $4,251.5 million to owning 100% of such assets is wrong. The true position is (ignoring deferred tax liabilities of WHSP…) that outside shareholders would go from owning 57% of combined assets of $7,485 million (being $2,820m + $4,665m) to owning 100% of $4,251.5 (which is the same, subject to rounding error).

374 Soul Pattinson also challenged calculations made in submissions by Perpetual (not in any valuation evidence) to the effect that cancellation of the cross shareholding would result in a 12% increase in share price for each company. But as Soul Pattinson pointed out, the comparison being conducted in those calculations is between the actual share price of shares in each company as at 21 April 2017 and the posited net asset value of the merged entity to former shareholders in the former companies. That is, Perpetual's calculations assume "that the merged entity will trade at a share price precisely reflecting NAV". This may be a result of Perpetual's contention that the only reason that shares in the companies have traded below their net asset value in the past is the cross shareholding. But this contention has not been proved. As discussed, the increases in share prices over recent years, while the cross shareholding remains in place, do not conform to this hypothesis. There is also evidence of a range of opinions about the effect of the cross shareholding on share price. For present purpose it is sufficient to say that Perpetual has not proved that the or even a material reason that the shares in each company have traded below net asset value at times in the past is the cross shareholding. On the evidence, I cannot find that the cross shareholding in fact depressed or depresses the prices of shares in either company. All I can say is that the cross shareholding, at times, may have contributed to the price of shares in each company being below net asset value.

375 Perpetual has also not proved that if the cross shareholding were to be unwound then the shares in the merged entity would necessarily trade at net asset value. There is a reasonably

available view that the share prices may see an immediate uplift as a result of unwinding the cross shareholding, but that view has not been proved as more likely than not to be the fact. There is also a reasonably available view that even if there was an immediate uplift it may be short lived and the shares in the merged entity itself may trade at below net asset value given that it also will be a form of conglomerate (a fact which itself is thought by some in the market, including but not limited to Mr Duncan, to causes shares to trade at a discount to net asset value).

376 Accordingly, the assessment whether a commercial bystander would consider maintenance of the cross shareholding to be objectively unfair cannot proceed on the basis that it has been proved that maintenance of the cross shareholding has depressed the value of shares in the companies in the past or will continue to do so in the future. On the basis of the information currently available, a reasonable director would consider that the maintenance of the cross shareholding may have contributed to the shares in the companies trading below net asset value at times in the past and may do so in the future. Nor can the assessment proceed on the basis that the unwinding of the cross shareholding would necessarily lead to a material increase in share price. A reasonable director would consider that, depending on the share prices at the time the unwinding is implemented, the unwinding of the cross shareholding may lead to an immediate increase in share price but that there was a real risk that any such increase would be temporary. A reasonable director would also consider that, given its structure, there is a possibility that shares in a merged entity would themselves trade in the future at a discount to net asset value.

377 In contrast to Perpetual, a reasonable director would be concerned about the merger ratio for the company in any merger in order to ensure that their shareholders received fair value for their existing shares in a merged entity. Perpetual's answers to this issue are twofold. First, the merger ratio can be worked out as part of ordinary commercial negotiations. Second, the most straightforward approach would be for the merger ratio to reflect the underlying value of assets each company is contributing to the merged entity. I accept that it would be possible for the companies to negotiate a merger ratio that, ultimately, each thought was fair to their shareholders if they decided that the cross shareholding should be unwound by way of a merger. I also accept that the time and expense that would necessarily be incurred in that negotiation together with the obtaining of all necessary approvals (shareholder and regulatory) would not be out of the ordinary for a transaction of the kind Perpetual envisages. But that is not to say these considerations, of time and expense, are immaterial. Reasonable

directors would not engage in a major corporate restructure merely because the sale would remove a factor which might have caused shares in the company to trade at a discount in the past and which might cause an increase in share price which might only be temporary. They would take into account whether the time and expense in effecting the restructure was justified by reason of the potential benefits. They would not simply dismiss the time, expense and, for that matter, potential disruption to company performance in the interim, as immaterial.

378 That said, I accept that reasonable directors would take into account a number of the other factors which Perpetual identified in determining whether maintenance of the cross shareholding is unfair. Accordingly, reasonable directors would recognise:

(1) the effect of the cross shareholding on value is unclear and makes it more difficult for the market to assess the true value of each company which is undesirable;

(2) the effect of the cross shareholding on corporate governance does involve complexity and a heightened risk of conflicts of interest which are undesirable and may also adversely affect the perceptions of the companies;

(3) the cross shareholding, for so long as it is maintained, necessarily decreases liquidity of each company (but whether or not it affects capacity to raise capital is unproved as, leaving aside the possibility of share issues, there are other methods to raise capital); and

(4) for so long as it is maintained, the cross shareholding does deter takeover offers and thus decreases the likelihood of such offers for shareholders.

379 It is for these reasons that, as I have said, the cross shareholding may contribute to the share prices of each company having traded below net asset value in the past but, as the directors would also know, the relationship between the cross shareholding and share price is by no means certain given that share prices substantially increased over recent years.

380 Further, reasonable directors would also be aware that:

(1) the cross shareholding has been in place for more than 40 years;

(2) there are approximately 7,689 shareholders in Brickworks and 15,617 shareholders in Soul Pattinson, but it is not apparent that any apart from Perpetual favour the relief sought in this proceeding. The position of other shareholders about the relief sought is unknown;

(3) given that the cross shareholding has been in place since 1969 Perpetual acquired its shares knowing of the existence of the cross shareholding and it would be reasonable to assume that most current shareholders acquired shares aware of the existence of the cross shareholding;

(4) Perpetual has been selling down its holdings in both companies. RBC on Perpetual's behalf owns 3.06% of Brickworks' shares and 1.46% of Soul Pattinson's shares. Perpetual has adduced evidence, to which objection is taken, that in total it holds 6.3% of Brickworks' shares and 3.6% of Soul Pattinson's shares but the relevant point is that it has materially decreased its shareholding since this proceeding commenced (via RBC Perpetual previously held 8.95% of Brickworks' shares and 6.49% of Soul Pattinson's shares). The fact that Perpetual has done so exposes the obvious fact that any shareholder who has become dissatisfied with the cross shareholding is not locked in and can sell their shares as the companies are publicly listed on the ASX;

(5) on the evidence, as Soul Pattinson put it, there is not a single example of "any transfer of value to the so-called Millner Family or any other improvident transaction" by either company in the entirety of that period;

(6) the cross shareholding facilitates stability over the longer term in board membership of both companies which has contributed to the capacity of the boards to make decisions with a view to longer term outcomes;

(7) there is abundant evidence that both companies are generally considered to have been well managed at all times;

(8) for Brickworks' directors the shares in Soul Pattinson have provided it with a useful buffer during low periods during the building and construction cycle and could reasonably be anticipated to continue to do so in the future;

(9) for Soul Pattinson's directors, the shares in Brickworks have been seen in the past to be a good investment and no circumstance has apparently arisen that would presently suggest to the contrary;

(10) by the same token, the cross shareholding has the potential to facilitate retention of boards of the companies even if they were under-performing;

(11) advice on restructuring proposals has been received by the companies over a number of years, the most recent advice being that there is insufficient justification for such a

restructure at this time, and for the directors of Brickworks at least other value adding options have been recommended for further consideration;

(12) the merger proposal, if implemented, could not be readily undone and the cross shareholding could not be recreated under the Corporations Act; and

(13) no-one can know whether the merged entity would perform as well as the companies in terms of either dividend payments or share price.

381 All of these factors would be taken into consideration and weighed by reasonable directors. On the evidence, I would infer that all of these factors have been taken into consideration and weighed by the directors of each board having regard to the interests of their company as they appear at the time. In this regard, it is apparent that as circumstances have changed (eg the possible sale of Soul Pattinson's shares in New Hope and the changes in share price of each of the companies), the advice which the directors have received has also changed. The evidence overwhelmingly favours the inference that the directors of each board have carefully considered restructuring options on the basis of professional advice which has taken into account the circumstances at the time. They have reached the view that no restructuring option has presented itself which presents demonstrable benefits compared to the existing structure which has existed for 40 years. In so doing, moreover, I infer that they have taken into consideration other factors which would be apparent to people in their position and with their expertise. For example, it is apparent from his emails that Mr Crotty assessed the possible advantages and disadvantages of any restructuring with a detailed understanding of relevant matters which a judge could not appreciate based on a hearing of two weeks and a review, in the context of litigation, of selected aspects of the management of the companies.

382 The fact that Mr Crotty was able to identify these matters in a short email and on only a brief review of the material presumably reflects his particular experience and expertise. He has extensive property industry experience, was the managing director of Australand for 17 years, and holds other directorships in the property sector. Similar observations could be made about the experience and expertise of the other directors of the companies. Despite Perpetual's contentions to the contrary, there cannot be any doubt that each director reached their conclusions in good faith and with the best interests of the relevant company in mind, based on a wealth of experience, expertise and knowledge which, in reality, could not be available to a court. Moreover, there is no reason to infer that the directors will not continue to consider restructuring options if any circumstance presented itself suggesting that it might

be in the best interests of the company for such options to be pursued. While these matters are not a reason to shy away from a finding of oppression if oppression is proved, they are relevant to the posited consideration of the commercial bystander and are of the utmost importance when assessing remedy.

383 Perpetual's submission that the references to the benefits of diversification are misconceived because there is no part of the cross shareholding which is necessary to achieve this aim overlooks the fact that it is diversification from the perspective of each company which is being called in aid. For a shareholder in Brickworks, the shares in Soul Pattinson provide a buffer against the cyclical nature of the building and construction industry. For the shareholder in Soul Pattinson, the shares in Brickworks provide exposure to the building and construction industry. Not every shareholder would, like Perpetual, have shares in both companies. Not every shareholder, moreover, can be assumed to be as willing as Perpetual is to hold shares in a merged entity, a point to which I return below in the context of relief.

384 Perpetual's complaint that neither board has considered the oppression caused by the mere maintenance of the cross shareholding is without substance. Whether or not the label of oppression has been invoked in the past (and it has not in Perpetual's communications with the companies other than in the context of this proceeding), the submission assumes that neither board is aware of the effect of the cross shareholding. This assumption would not be made. Both boards must be taken to be aware of the effect of the cross shareholding on corporate governance, including the risks of conflicts of interest. Given their qualifications, expertise and experience the notion that they do not know and have not taken into account the potential effects of the cross shareholding on the corporate governance of the company of which they are a director is unpersuasive.

385 The boards did not need to refer expressly to the issue of corporate governance in their resolutions in order to found an inference that those potential effects were taken into account. Further, the submission is directly at odds with Perpetual's case that board members are party to or have acquiesced in an agreement, arrangement or understanding to maintain the cross shareholding for a particular corporate governance objective – the control of the companies by the incumbent boards and thus Millner family. The fact this case has failed does not make it reasonable to infer that these boards are proceeding in ignorance of the potential impacts of the cross shareholding on corporate governance. Finally, there is direct evidence to the contrary. Corporate governance issues were raised in a number of the reports to each board.

The independent committee of the Brickworks' board expressly noted in its March 2016 meeting that earnings diversity and stability are a by-product of the cross shareholding and not a justification for it. This view was open to the members of that committee, but it does not mean that a reasonable director would not consider possible loss or reduction of earnings diversity and stability as relevant to the assessment of whether a restructuring was warranted. In any event, the point is that insofar as corporate governance issues are part and parcel of any consideration of the best interest of the company I am satisfied that each board member must be well aware of those issues and must be taken to have considered them when evaluating the options for restructuring. Moreover, there is no reason to assume board members will not continue to do so in the future.

386 What then is left? There are two companies which own shares in each other and have done so for many years. The cross shareholding could be unwound by a number of methods without adverse tax consequences but the timing and details of any such restructuring would require substantial time, effort and cost to resolve. The restructuring would have some advantages as identified above but, on the material available in this case, those advantages would not necessarily include any mid to longer term increase in share price. In particular, there is no proper foundation for concluding that there is any material financial advantage to shareholders for such a restructuring to be pursued at this time. The restructuring also would have some disadvantages as identified above. In addition, in contrast to decades of apparently successful corporate performance by each company in pursuing their different corporate objectives, the future of a restructured entity is unknown. Given this, a commercial bystander would consider that not only is there no compelling financial reason to pursue a restructure at this time, but also that there is no demonstrable financial benefit to doing so.

387 Despite Perpetual's primary focus for years being the consequences of the cross shareholding being the allegedly adverse impact on share price, its case is that there is a more fundamental issue at stake – that directors are servants, not masters, but the effect of the cross shareholding is to enable the board of each company, rather than "external" shareholders (that is, shareholders other than the companies and the Millner family) to determine the constitution of each board. This raises two issues. Does the cross shareholding have this effect? Would a commercial bystander consider this effect to be objectively unfair in all of the circumstances identified above including the length of time for which the cross shareholding has been in place, that it may reasonably be inferred that most shareholders, and

certainly Perpetual, purchased their shares knowing about the cross shareholding, and that, as Perpetual has been doing, shares in the companies are able to be sold?

388 First, the effect issue. I have accepted above that the cross shareholding facilitates stability of board membership and thus also facilitates the boards making decisions which they consider would benefit the companies over the longer term. Perpetual would submit that this is simply another way of saying that the cross shareholding entrenches Millner family control of the companies. I disagree. Control or any form of improper influence by the Millner family, as I have said, has not been proved. That said, I have accepted that the cross shareholding could facilitate entrenchment of under-performing boards because it does facilitate stability in board membership.

389 One then must ask, what does "entrenchment" mean in this context? Soul Pattinson is a major shareholder in Brickworks and Brickworks is a major shareholder in Soul Pattinson. As substantial shareholders, their votes carry corresponding substantial weight in any meeting of shareholders. Accordingly, if the issue is membership of the board, the votes of each company in the other carry weight commensurate with their shareholdings. On one level, any consequential potential entrenchment of board membership is no different from the position of any company with a substantial shareholder. On another level, the "cross" part of the cross shareholding has a compounding effect. The board of company A has an interest in the board of company B discharging its obligations in a manner considered appropriate by the board of company A and the board of company B has an interest in the board of company A discharging its obligations in a manner considered appropriate by the board of company B. It is not difficult to hypothesise that a resulting tendency would be a shared view that it is best if the boards of each company are like or at least similar minded about their consideration of the best interests of the company. But a hypothesis is one thing and an inference from evidence another. In the present case, if it could be inferred that this has occurred, what is also apparent is that apart from Perpetual in the present case, there is no suggestion, let alone evidence, that this had any impact detrimental on any shareholder. To the contrary, it would not be unreasonable to again hypothesise that any tendency towards like or similar mindedness about management, to date at least, has facilitated positive financial outcomes for shareholders over many years.

390 Perpetual makes the point that if members of each board continue to be effective then, acting rationally, shareholders will retain the directors. The cross shareholding, however, deprives

shareholders of that capacity. This, Perpetual says, is why Brickworks' submission that Perpetual may simply call a meeting of shareholders and put its nil premium merger proposal to a vote is meaningless; with the cross shareholding in place, the votes of shareholders who wish to unwind the cross shareholding can never be sufficient. It is here, however, where Perpetual's theory of unfairness and thus oppression breaks down. The theory breaks down because it assumes that the determining factor for each company in exercising voting rights as a shareholder in the other company is the continuation of control of each company by the incumbent boards and thus the Millner family, an aspect of the case which has failed. Once that is put aside, there is no reason to assume anything other than that the board of company A wants company B to perform well and the board of company B wants company A to perform well. If the cross shareholding, at any time, is inimical to that objective, there is no reason to infer that both companies would do anything other than vote in accordance with their perceived corporate self-interest. There is no reason to infer that the voting rights of either company in the other will be exercised for any purpose ulterior to the best interests of the company as a shareholder. Such an exercise of voting rights may or may not align with the interests of minority shareholders, but that fact alone does not involve any unfairness. It is nothing more than the consequence of a substantial shareholding. As Brickworks submitted, the fact that the exercise of majority voting power may defeat the wishes of the minority, of itself, does not indicate oppression of the minority. As such, I do not accept that the cross shareholding deprives "external" shareholders of their vote. All shareholders have a vote commensurate with their shareholding. Insofar as voting rights are concerned, the effect of the cross shareholding on any shareholder in one or other of the companies is the same as any substantial shareholding.

391 This again brings me back to the point made earlier that performance matters. Because the cross shareholding facilitates stability in board membership it could be used to facilitate the continuation of poorly performing boards. If there were any evidence of that in the present case (which there is not) then Perpetual might have been able to identify conduct related to maintenance of the cross shareholding which would be considered unfair. But that is not the present case. I can see no reason why a commercial bystander would see any unfairness in the fact that, on the material available to them at the time they made the decisions and to date, the boards of each company decided against a restructure that would unwind the cross shareholding on the basis that each company would continue to monitor opportunities for increased shareholder value including by restructuring if seen as appropriate in the future.

While increased shareholder value is not the only relevant issue, I do not accept Perpetual's contention that the boards made decisions without regard to the full suite of considerations, particularly those concerning corporate governance. It was for the boards to evaluate the complex and, in a number of respects, competing financial, structural, and governance considerations to which the cross shareholding gives rise, and it remains a matter for them to continue to do so. Given this complexity, a conclusion of objective unfairness would not be reached lightly. The directors of each company were and would be entitled to substantial latitude in weighing up the best interests of the company in the circumstances as they appear to them at the time. The principal matters to which Perpetual has pointed, the possible depression of share value, the difficulty in ascertaining value, the anti-takeover effect, the liquidity issues, the facilitation of retention of board membership (or, as Perpetual would have, it, the entrenchment of the boards), and the potential for actual and perceived conflicts of interest, do not lead to a conclusion of objective unfairness in all of the circumstances. These matters cannot be considered in isolation from the numerous other issues of relevance discussed in these reasons for judgment, all of which I am satisfied the directors have taken into account.

392 The conclusions of each board, I note, are also supported by the evidence that since departing from Perpetual Mr Williams, in his capacity as industrial portfolio manager for Airlie Funds Management, has caused that fund to almost double its shares in Brickworks since June 2016. Brickworks submitted the following which I accept:

> … [The] fund [managed by Mr Williams for Airlie Funds Management] contains approximately 25 stocks and a "highly selective process" is used to determine which stocks to include in the fund.
>
> Mr Williams accepted that three key criteria were used when determining which stocks to invest in. Those criteria included: (a) outperformance of the ASX; (b) a strong balance sheet; (c) a durable business; and (d) management with a high degree of competence and integrity.
>
> Mr Williams confirmed that all of the investments that Airlie Funds Management has made in the industrial share fund satisfy these criteria. Mr Williams also accepted that BKW was one of the stocks included in the Airlie Funds Management industrial share fund and that Airlie had almost doubled its investment in BKW in the period October 2016 – March 2017. Mr Williams confirmed that it was his decision to double the investment in BKW and that he applied the criteria set out above in making that decision.
>
> It follows that the main proponent of the current litigation considers that BKW is likely to outperform the ASX, has a strong balance sheet, runs a durable business and has a management with a high degree of competence and integrity. These views are inapt to describe a company that is being run oppressively.

393 Mr Williams, the architect of Perpetual's campaign to unwind the cross shareholding and the only person to give evidence of Perpetual's issues of concern (albeit that he no longer works for Perpetual and has not done so since 2015), doubled the investment of the fund he now manages in Brickworks. Now this is telling evidence. Mr Williams doubled the industrial share fund of Airlie Management in Brickworks based on its existing structure. It is difficult to accept that he would have done so if he believed that the existing structure was so unfair that reasonable directors could not have thought it fair in all of the circumstances. It should also be inferred that Mr Williams believed the investments in Brickworks satisfied the applicable investment criteria which included "management with a high degree of competence and integrity". This is inconsistent with the allegations of an agreement, arrangement and understanding to maintain the cross shareholding and the hypothesis that the companies have and will exercise voting rights to maintain the cross shareholding in order to entrench control by the incumbent boards and thus the Millner family.

394 For these reasons I do not accept Perpetual's case of oppression by reason of the maintenance of the cross shareholding. A commercial by-stander would not see maintenance of the cross shareholding to date unfair in all of the circumstances identified.

12.4 Other relevant matters

395 As the companies submitted, there are other problems with Perpetual's case. I have no idea about the position of other shareholders, employees of the companies, or third party interests that might be affected by the relief sought. Leaving it to the companies to deal with everything under mandate that the cross shareholding must be unwound within 12 months or shares in each other sold to reduce the cross shareholding to no more than 10% within a further 6 months is not a substitute for consideration of these interests.

396 Nor is a court an appropriate forum to weigh these interests. The companies relied on observations in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 at [201] to [214] where Spigelman CJ explained why a "feasible" split of company assets was nevertheless inappropriate because, amongst other things, a number of the steps would involve commercial judgment which, absent agreement, a court would not usually make (at [207]). His Honour continued:

> [208] No doubt, the parties could, acting in a co-operative manner, resolve many commercial issues leaving a limited number of appropriate issues for judicial determination on the basis of, inter alia, expert evidence. Nothing in the course of these proceedings suggests that such co-operation is likely.

> [209] No authority in the long history of oppression suits or, the relevantly analogous history of partnership dissolution suits, in which a court has undertaken the task of dividing the assets of an ongoing business, was cited to the Court. My research has not discovered any such precedent.
>
> …
>
> [212] In my opinion, this Court should not embark on the course of attempting to divide the assets in this case. Indeed, save in a situation of a limited range of assets with little interconnection between them, I doubt if it would ever be appropriate for a court to attempt such a task. The Court should not be placed in a position where:
>
> (i) it may have to make commercial judgments;
>
> (ii) it runs the risk of being dependent on commercial or political negotiations;
>
> (iii) it may have to make contingent or alternative orders, subject to the outcome of commercial or political negotiations.

397 I accept that the present case raises similar issues. I have not been taken to any authority in which orders requiring the restructuring of two publicly listed companies have been made in an oppression suit. The orders are dependent on commercial negotiations and, no doubt, the position of shareholders and regulatory authorities (which are presently unknown but for the parties). I am being requested to make contingent or alternative orders (the sale of shares if the restructure cannot be agreed).

398 In respect of the lack of authority, Young J in *Maine v Chelia* [2005] NSWSC 860 at [46] said:

> It is true that, so far as everyone's researches are concerned, no case where a demerger order has been made in an oppression suit has been found. The fact that this is so does not necessarily mean that such an order cannot be made, it is just that it makes one pause when one can see that the present case may very well not [sic] be unique.

399 In *Falkingham v Peninsula Kingswood Country Golf Club* [2014] VSC 437 Robson J found oppression (at [97]-[100]) in conduct by which a merger was effected but refused relief on the grounds of delay (at [111]). His Honour continued:

> [113] If I am wrong as to the application of laches and acquiescence or delay to the statutory oppression claim, then in any event, in my discretion under s 233 of the Act, I would not make orders undoing the merger as sought by the plaintiff. I have to balance the harm done to the members of the company as it now stands with the plaintiff's entitlement to relief. There is no doubt that laches applies as a defence to the equitable claim to invalidate the decision of the company to admit new members from the Peninsula Golf Club.
>
> [114] In the circumstances where the clubs have been merged for almost a year, I consider the relief sought by the plaintiff to be unwarranted, bearing in mind the inconvenience and prejudice that would be caused to the members of the Peninsula Kingswood Club today.

> [115] Another factor that I take into account is that the group supporting Mr Falkingham appears to be only a handful of members out of some now two thousand plus members of Peninsula Kingswood. I expect that if the admission of the new members was set aside, that the board would probably be able to affect the merger again.

400 On the available evidence it is not possible to ascertain the inconvenience and prejudice to other shareholders if the orders Perpetual seeks are made. It is possible, however, to infer that there will be a real potential for such inconvenience and prejudice. The companies are quite different. Shareholders in one but not the other might not be of the same mind as Perpetual, which owns shares in both companies, about owning shares in a merged entity. The likelihood of all shareholders being persuaded of the fairness of a merger ratio is dubious. The impact of the ongoing negotiations and uncertainty inherent in the orders (a dismantling of the cross shareholding or a sell down of the cross shareholding shares to no more than 10%) on the share price and dividend policies of the companies is unknown.

401 Otherwise it is sufficient for me to adopt parts of the submissions of each company which expose the difficulty of making orders such as Perpetual seeks. Soul Pattinson thus submitted:

> a. the interests of shareholders were found to be relevant to the Court's decision to decline to order the transfer of ordinary shares and removal of directors in *HNA Irish Nominee Ltd and Another v Kinghorn and Others (No 2)* (2012) 88 ACSR 427. Emmet J held that he would "require that the other shareholders be notified, and given an opportunity to be heard, prior to the making of any such orders" (at [736]);
>
> b. the possibility that a company and "its other shareholders' position" could be "detrimentally affected" by a Court order requiring reinstatement of a director was relevant to the Court's decision to ultimately decline to grant such an order - *Re Courtesy Real Estate (NSW) Pty Ltd* (2013) 96 ACSR 593; [2013] NSWSC 1666 at [22] per Black J;
>
> c. in striking out an Amended Statement of Claim seeking, inter alia, orders that various directors be restrained from holding office, the Court gave weight to the interests of other shareholders, noting that it would be reluctant to "interfere with the election preferences of members" of a widely held public company "which has over two million members" - *Shelton v National Roads and Motorists' Association Ltd and Others* (2004) 51 ACSR 278 at [17] per Tamberlin J;
>
> d. the likely voting intentions of other shareholders were relevant to the Court's determination as to whether declarations could be made deeming a distribution in specie by way of dividend to be contrary to ASX listing rules. In that decision, Anderson J declined to grant the declaratory relief on the basis it was "quite clear" that if the entity "had held a meeting of its members to approve the distribution in specie by way of dividend of the CRL shares, the members would have approved it by an overwhelming majority" - *Quancorp Pty Ltd And Another V Macdonald And Others* (1998) 28 ACSR

520 at 525 per Anderson J;

e. the "disruption" to various third party interests weighed in favour of the Court declining to grant an injunction restraining a company from proceeding with a rights issue until a general meeting had been convened to vote - *Chimaera Capital Ltd v Pharmaust Ltd And Others* (2007) 64 ACSR 332; [2007] FCA 1539. French J noted at [102] that "if the allotment of shares pursuant to the rights issue is effectively blocked pending the EGM, there will be effects on third parties and a delay in raising the necessary funding for the company"; and

f. the fact a company was able to operate effectively on a day to day basis, including the fact it had a number of employees, militated against the Court granting an order that the company be wound up - *Australian Institute of Fitness Pty Ltd v Australian Institute of Fitness (Vic/Tas) Pty Ltd No 3* (2015) 109 ACSR 369; [2015] NSWSC 1639 at [709]-[711] per Sackar J.

402 Brickworks submitted:

> … the orders ignore a whole range of practical issues that would face the boards of BKW and SOL in attempting to unwind the Cross-Shareholding.
>
> …
>
> …Perpetual fails to have regard to:
>
> …
>
> (a) the effect of ASX Listing Rules. Those rules are binding on BKW and SOL and enforceable by the Court (Corporations Act, ss 793C and 1101B). A number of Listing Rules are potentially relevant in the present context, including Listing Rule 10.1 (which requires the approval of members, by ordinary resolution, to the disposal of a substantial asset to a substantial holder of the entity), and Listing Rule 11.2 (which requires the approval of members, by ordinary resolution, to certain significant changes in the nature and scale of activities of a listed entity). It is not for this Court to make decisions, in advance and in the absence of a specified transaction, that cut across the operation and/or scope of the Listing Rules;
>
> (b) the need for schemes of arrangement. While the revised orders refer in passing to the possibility of a scheme, it is likely that two schemes would be required. The terms of the schemes would need to be drafted, orders for the convening of meetings would need to be obtained, shareholder votes would need to be passed by the requisite majorities and a court would need to approve the schemes. These matters are not merely mechanical but instead raise a wide range of substantive considerations that would need to be considered at the appropriate time. The orders sought by Perpetual make no allowance for these matters. In particular, there is no conceivable basis on which BKW and SOL should be required to sell down their shareholdings in each other even if schemes of arrangement are voted down by shareholders or not approved by the Court. Yet, Perpetual's orders require just this outcome;
>
> (c) the need for ATO rulings. While the tax advice received by BKW suggests that a nil premium merger is unlikely to trigger a material CGT liability, the advice has consistently recommended that private rulings be obtained in order to confirm the position. Again, Perpetual's orders make no allowance for the possibility that such rulings may ultimately be unfavourable;

(d) the need for consideration to be given, at the appropriate time and by the appropriate decision-maker, to the ability of BKW and SOL to vote their shares in each other in relation to any shareholder resolutions. For example, it is not appropriate for the Court now to make orders prohibiting BKW and SOL from voting in any schemes of arrangement given that matter is quintessentially one for the judge responsible for convening the scheme meetings. For the same reasons, this Court would not trample on the authority of the ASX to reach concluded views about such matters under the Listing Rules.

403 For these reasons, if Perpetual had proved oppression, then I would have refused relief in the exercise of discretion, particularly given the evidence that both companies accept that their structure, which is unique in Australia insofar as I am aware and has corporate governance implications as discussed above, should be subject to ongoing periodic review.

12.5 Mr Fraser and Ms Crouch's appointment as directors

404 Having failed in its case of oppression, the relief Perpetual seeks by way of the appointment of Mr Fraser to the board of Soul Pattinson and Ms Crouch to the board of Brickworks need not be considered. Nevertheless it is worthwhile to note that, again, if Perpetual had succeeded in proving oppression, I would have declined this relief in the exercise of discretion.

405 As to Mr Fraser, Perpetual's case does not take into account the appointments of Mr Hawker and Mr Negus, independent directors of unimpeachable qualifications and experience. These facts alone would be sufficient reason not to exercise any discretion in favour of the order Perpetual seeks. Apart from this, there is a concern on the evidence that Mr Fraser has been involved in advising Perpetual which would call into question not his actual independence, but at least the perception of his independence. No such concerns attach to Mr Hawker or Mr Negus.

406 As to Ms Crouch, Perpetual's case does not take into account the appointment of Ms Page and, as Brickworks said, "Perpetual has not sought to explain why a still further independent director must be appointed to the board of the company, let alone why that person should be appointed by the Court instead of submitting themselves to the normal election processes provided for under the company's constitution".

407 Otherwise I do not accept Perpetual's submission that it should be inferred that the decisions to appoint these new directors were made as a result only of Perpetual's case and not because the boards considered the appointments to be in the best interests of each relevant company. Even if Mr Partridge considered that the appointment of another independent director to the

board of Brickworks would "undermine" that part of Perpetual's proposal, it cannot be inferred that other directors shared this view or that they did not consider it in the best interests of the company for Ms Page to be appointed or, indeed, that Mr Partridge did not consider it to be best interests of the company for Ms Page to be appointed.

13. CONCLUSIONS

408 Perpetual has not proved oppression. Accordingly, the second cross-claim must be dismissed, with costs.

I certify that the preceding four hundred and eight (408) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 10 July 2017