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28 August 2024

To be inserted by Court 93 Case Number: Date Filed: FDN:
Hearing Date and Time: **Hearing Location:**

Applicant's Closing Address

SUPREME COURT OF SOUTH AUSTRALIA
CIVIL JURISDICTION

Please specify the Full Name including capacity (e.g. Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable) for each party. Each party should include a party number if more than one party of the same type.

ROBERT LLOYD HENRY DAVIS
Applicant

MCLAREN VALE & DISTRICTS WAR MEMORIAL HOSPITAL INCORPORATED
Respondent

JAMES BROWN MEMORIAL TRUST
Interested Party

Lodging Party	Robert Lloyd Henry Davis **Full Name (including Also Known as, capacity (e.g. Administrator, Liquidator, Trustee) and Litigation Guardian Name (if applicable))**	
Name of law firm / solicitor **If any**	Belperio Connell **Law Firm**	Brendan Connell **Solicitor**

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Introduction

1. The Applicant's case comes down to a number of propositions.

    1.1. first, the decision taken by the Board on 25 January 2023 to bring the hospital undertaking to an end miscarried in such a way that it was, or would be, contrary to the interests of the Members as a whole;

    1.2. second, the decision taken by the Board on 23 March 2023 to adopt a plan to divest the surplus assets of the Association to the James Brown Memorial Trust (**Kalyra**) was, or would be, contrary to the best interests of the Members of the Association;

    1.3. third, thereafter, in the period between the 23 March 2023 Board meeting and the 5 May 2023 special general meeting, the affairs of the Association were conducted by the Board, in its determination to pass resolutions to authorise the divestment to Kalyra, in a manner that was, or would be, contrary to the best interests of the Members of the Association;

    1.4. fourth, following the 5 May 2023 special general meeting, the affairs of the Association were conducted by the Board, in its determination to pass resolutions to authorise the divestment to Kalyra, in a manner that was, or would be, contrary to the best interests of the Members of the Association;

    1.5. fifth, whether on its own or as the culmination of propositions one to four, the special resolution of 4 July 2023 is conduct of the affairs of the Association that was, or would be, contrary to the best interests of the Members of the Association; and

    1.6. sixth, the determination of the Board to implement the 4 July 2023 resolution and disinterest in attempting to resolve the dispute with the Applicant by mediation is conduct of the affairs of the Association that was, or would be, contrary to the best interests of the Members of the Association.

2. By contrast, the Association's case comes down to three propositions:

    2.1. first, that the decision by the Board without reference to the Members was within the authority of the Board and so should not be "reviewed" by this Court;

    2.2. second, that the plan to divest surplus assets of the Association to Kalyra was subjectively in the broader "community interest" and so should not be "reviewed" by this Court; and

    2.3. third, somehow, whether or not the affairs of the Association have been conducted in a manner that is contrary to the best interests of the Members is affected by personal criticisms of the Applicant or Mr Baragwanath or their wider interests.

    The first and second of these propositions reflect the Board's misunderstanding of, or perhaps intentional effort to distract from, the interest of the Members that the Objects of the Association continue to be pursued.

    The third proposition reflects the Board's intent to distract from the real issue – which is whether, on the facts, the affairs of the Association were conducted in the manner as alleged by the Applicant. Such an attack by the Board on a Member or Members is regrettable.

3. The attitude of the Board to the Members and their interests as Members is summed up in one passage of the evidence of Mr Overland:

> "Q: That's correct isn't it. You'd run out of ideas.
>
> A: Yes, we had.
>
> Q: And no one thought "Let's go with the members for ideas."
>
> A: No, no, we didn't.
>
> Q: And no one thought "Let's see if the members can try and do something that we can't."
>
> A: How could the members who had no knowledge or experience in running hospitals – let's be frank here, they didn't know anything about it – how could they suggest to us how we could finesse or change the operations of the hospital? … The membership of the day, 57 members –
>
> Q: Not worth consulting is that right.
>
> A: - the likelihood that they were going to come forth with a cunning plan to rescue the situation that we couldn't think of was nil.
>
> Q: So it was not worth asking them.
>
> A: We didn't even think about it."
>
> Overland XXN 481.19 – 482.16

Whilst this passage was specifically about the making of the decision to close the hospital undertaking, it reflects the attitude of Mr Overland and the Board that they and only they knew what was best for the Members and that implementing their plan was paramount.

Associations Incorporation Act 1985, s61

4. Section 23 of the *Associations Incorporation Act 1985* ("the **Act**") provides that the rules of the Association (in this case the Constitution, Exhibit A1, Doc 3, Volume 1.page 45) bind the association and all members.

5. The provision needs no explanation or elaboration.

6. The oppression remedy is provided for in s61, which relevantly provides

> *"(1) A member or former member of an incorporated association may apply to the Supreme Court or the Magistrates Court for an order under this section on the ground that the association has engaged, or proposes to engage, in conduct that is oppressive or unreasonable.*
>
> *…*
>
> *(4) The Court hearing a proceeding under this section may, if satisfied that the association has engaged, or proposes to engage, in conduct that is oppressive or unreasonable, make one or more of the following orders:*
>
> *(a) an order for regulating the conduct of the association's affairs in the future;*

(b) an order directing the association to institute, prosecute, defend or discontinue specified proceedings, or authorising a member of the association to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the association;

(c) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;

(d) an order requiring a person to do a specified act or thing;

(e) an order for the alteration of the rules of the association;

(f) an order that a former member be reinstated as a member of the association;

(g) any other order that is, in the opinion of the Court, necessary to remedy any default, or to resolve any dispute.

(5) The Supreme Court may, in a proceeding under this section, if it considers it appropriate to do so, make an order that the association be wound up or an order appointing a receiver or a receiver and manager of the property of the association.

…

(9) The Supreme Court may not make an order under this section that an association be wound up if it is of the opinion that the winding up of the association would unfairly prejudice members affected by conduct of the association that is oppressive or unreasonable.

…

(15) For the purposes of this section –

(a) an association has engaged, or proposes to engage, in conduct that is oppressive or unreasonable if –

(i) …

(ii) it has engaged, or proposes to engage, in conduct that was, or would be, oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or was, or would be, contrary to the interests of the members as a whole; or

(iii) …

(b) a reference to engaging in conduct includes a reference to refusing or failing to take action."

7. The Applicant's case is that conduct of the affairs of the Association in a manner that is intended to defeat the Objects of the Association, binding because they are contained in the Constitution, and contrary to an express prohibition in the Constitution, is necessarily conduct that is *contrary to the interests of the members as a whole*.

8. Nicholson J set out the approach to be taken to s61 in *Ridgway v Sporting Shooters' Association of Australia Hunting & Conservation Branch (SA) Inc* [2015] SASC 7 at

[149]-[154], having regard to the decisions in *Popovic v Tanasijevic (No 5)* [2000] SASC 87; *Millar v Houghton Table Tennis & Sports Club Inc* [2003] SASC 1; *and Pettit v South Australian Harness Racing Club Inc* (2006) 95 SASR 543

9. His Honour said:

> [150] In *Popovic v Tanasijevic (No 5)* Olsson J made the following general remarks about the meaning of "oppression" as that term was used in an earlier version of s 61.
>
> > According to its normal meaning the word "oppression" connotes the exercise of authority or power in a burdensome or unjust manner. Section 61 of the Act does not exclusively define its statutory meaning, other than by the inclusive provisions of s 61(7). As appears from authorities such as *Re Enterprise Gold Mines NL*(1990-1991) 3 ACSR 531 at 538 et seq and *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd*(1991-1992) 6 ACSR 63 ("John Starr") at 65 et seq, the concept is not susceptible of precise, all embracing definition. At best, decided cases are illustrative of conclusions in specific fact situations.
> >
> > However, it may at least be said that the section focuses on the effect of particular transactions sought to be impugned or management procedures adopted by those who are in de facto or de jure control. What is in contemplation is a notion of unfairness, according to ordinary standards of reasonableness and fair dealing.
> >
> > *Conduct complained of must be unjustly detrimental to either individual members specifically or, alternatively, members as a whole.* It is not necessary to prove lack of bona fides, but conduct beyond power or in breach of statutory, legal or financial duty may well amount to oppression …
>
> [151] The content and application of s 61 in its present form was considered in *Millar v Houghton Table Tennis & Sports Club Inc*. In *Millar*, the committee of the defendant club was found to have breached s 61 when it made a single decision to refuse, in bulk, applications for membership by residents of the Houghton area. The residents were opposed to the committee's decision to sell a hall owned by the club and wished to become members in order to prevent the sale from going ahead. By making a single decision about the applications considered as a bundle, rather than considering each individually and on its merits, the club was found to have acted in a manner contrary to the interests of its members as a whole and therefore in breach of s 61. In applying s 61, Besanko J adopted the following approach:
>
> > *In my opinion, it is appropriate to approach the application of s 61 of the Act to the facts of this case with a number of principles in mind. First, it is not necessary in order to bring conduct within the terms of the section to establish any actual irregularity or invasion of legal rights or a lack of probity or want of good faith. Secondly, in relation to the phrase "contrary to the interests of the members as a whole" it is appropriate to apply a similar test to that applied in the case of the common law requirement that a majority of members must act bona fide for the benefit of the company as a whole. Thirdly, while it is appropriate to approach the application of the section with the underlying theme of unfairness in mind, it is still necessary to consider each of the elements referred to in the section (i.e.., oppressive, unfairly prejudicial, unfairly discriminatory, or contrary to the interests of the members as a whole) in turn.* Fourthly, to the extent that the underlying theme is one of the prevention of unfairness, there is an

> issue as to how the concept of unfairness is applied in the case of a small non-profitmaking sporting organisation.
>
> A member has no commercial interest in the Club, and therefore any test of commercial unfairness is inappropriate. I suppose that in broad terms, a member has, subject to the provisions of the Constitution, an interest in sharing in the facilities and activities of the Club, and in not being unfairly excluded therefrom. Again, subject to the provisions of the Constitution, a member is entitled to participate in the management of the Club and other decision-making bodies, and not to be unfairly excluded therefrom. *In addition, a member has an interest in the longer term aspects of the Club's operations, and by this I mean that a member has an interest in ensuring that the Club carries on its operations in accordance with its Constitution, and in particular, the objects and powers stated therein.*

[152] Underlying the approaches of Olsson J in *Popovich* and Besanko J in *Millar* is the notion of unfairness as being a central consideration in determining what conduct will constitute oppressive or unreasonable conduct for the purpose of s 61. In the context of an expulsion, the question of whether it is unfair, in the circumstances, to deny a person membership arises. This is to be considered in the context of consideration of the extent to which, if at all, a person can have an entitlement to be a member of such an association in the first place. *Where, as in this case, the membership is of a non-profit making club, a person's interest in being a member will extend to participating in the club's facilities and activities, including its management, and in ensuring that the club acts in accordance with the terms of its constitution.*

[153] In *Pettit v South Australian Harness Racing Club Inc*, White J listed the following propositions concerning the application of s61 with which, in general, I agree.

1. *The constitution of an association binds the association and all of its members. This means that the Committee was bound to apply the relevant provisions of the Club's Constitution in its consideration of the membership applications.*

3. Other than in the limited circumstances of the kind outlined in the majority judgment in *Wayde*, the courts are not concerned in applications of the present kind with reviewing the underlying merits of the management committee's decision. The courts do not substitute their discretion for the discretion exercised in good faith by an association's committee.

   There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

6. *In order to succeed, it is not necessary for an applicant to show that any decision of the association was invalid.*

8. The power to accept or reject membership applications must be exercised in good faith.

9. The power to accept or reject membership applications must be exercised having regard to the objects of the association.

10. A refusal of applications for membership without regard to the association's objects may well be a decision which no reasonable committee could reach.

12. An association may have many reasons for rejecting membership applications. It may determine that the aims and aspirations of an applicant are not consistent with the objects of the association … .

[154] The considerations identified in 3, 8, 9 and 12 are particularly pertinent in this case. Further, as his Honour's remarks in *Pettit* indicate, in determining whether the conduct of an incorporated association is oppressive or unreasonable, *it is important to reflect on whether the association has acted in accordance with the terms of its constitution. As a statement of the objects and rules by which it is bound, an association's constitution serves as a guide to any assessment of its conduct. However, the court's role is not to quarrel with the merits underlying any managerial decisions, provided they have been made in good faith and within constitutional constraints.*"

[Emphasis added]

10. The statement of principles by White J in *Pettit* at [26], set out in part in *Ridgway*, included the following additional principles:

4 *Conduct by a committee of an association will be contrary to the interests of the members as a whole if no committee, acting reasonably, could have engaged in that conduct.*

5. *Conduct may be contrary to the interests of the members as a whole even though a committee does not act in bad faith.* In *Wayde*, Brennan J said:

> '[I]f 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 …'

…

7. However, proof of invalidity or non-compliance with an association's rules may indicate that a decision is contrary to the interests of the members as a whole. This is because of the importance which the law attaches to adherence to the provisions of an association's constitution. So much is apparent in the following passage in the judgment of Olsson J in Popovic v Tanasijevic (No 5):

> *'Conduct complained of must be unjustly detrimental to either individual members specifically or, alternatively, members as a whole.* It is not necessary to prove lack of bona fides, but conduct beyond power or in breach of statutory, legal or financial duty may well amount to oppression. *The very provisions of s 61(7) reveal the importance which the legislature attaches to the proper adherence to the provisions of the constitution and rules of an incorporated association. This is because a failure to observe such provisions has the effect of depriving members of their right, as members, to have the affairs of the entity conducted in accordance with its constitution and rules.'*

[*Emphasis Added]*

11. Whilst often these principles are applied in the context of decisions in respect of the admission or expulsion of members, they are of general application.

12. The Applicant contends that an Association's affairs must be administered in a manner consistent with the pursuit of its Objects, and the pursuit of the Objects by the

Members, acting as a whole, can only come to an end upon the winding up of the Association.

13. The Members in this case have not resolved to wind up the Association. They rejected winding up at the 5 May 2023 special general meeting. Therefore the pursuit of the Objects and the conduct of the affairs remained binding on the Association and the Members acting as a whole.

14. Equally, conduct the effect of which was to eviscerate the Association and leave it an empty shell unable to pursue its Objects was contrary to the best interests of the Members.

15. The Applicant relies on paragraphs [11] to [20] of his written opening, FDN 77, as to the Objects without repeating those paragraphs here.

The decision taken by the Board on 25 January 2023 to bring the hospital undertaking to an end

16. The Applicant contends that the decision to bring the hospital undertaking to an end was contrary to the interests of the Members as a whole in that it defeated the pursuit of the Objects of the Association, relevantly, clauses 4(b), (c) and (d) of the Constitution without the authority of the Members in general meeting.

17. In addition, the manner in which the decision was taken, leading to closure within months, on 30 June 2023, deprived the Members of a meaningful period in which to consider alternative uses of the assets of the Association in the pursuit of its Objects.

18. Whilst the Association could pursue its Objects other than by conducting a hospital, for example if the Association decided that it could not continue to conduct a hospital, it was for the Members to make that decision and not the Board.

19. The Applicant accepts that the Court cannot grant a remedy that will have the effect of rescinding the Board's decision and requiring the Association to resume conducting a hospital. However, the decision and the way it was a made is part of the events which make up and led to the 4 July 2023 resolution, in respect of which the Applicant does seek a remedy.

20. The circumstances in which and the manner in which the decision was made miscarried so severely that the Court should find that "no committee, acting reasonably, could have engaged in that conduct".

21. The decision of the Board miscarried in two ways, over and above the fundamental problem of the failure to put the decision to the Members:

    21.1. The decision was substantially motivated by an erroneous assumption that Dr Lovell would retire in June 2023 with the effect that the Association would then be unable to deliver upon its contractual obligations to SALHN.

    21.2. The decision to close was substantially motivated by the political consideration that closure should occur in 2023, so as not to occur in the run up to the next State election due in March 2026.

22. The decision made by the Board at its 25 January 2023 meeting (Ex A1, Doc 44, 1.381) needs to be considered in the context of events leading up to it.

    Report from the Chair – 2021/22

23. Ex A1, Doc 33, 1.279 is Mr Overland's Chairman's Report for the 2022 annual general meeting. In it he relevantly notes:

23.1. The Association was on a sustainable financial footing for the first time in some years and would report a profit for FY2022 (this view, of course, is in contrast to his later comments and evidence in chief about profit). (p279)

23.2. The Association had successfully increased its daily average bed occupancy rate to around 15 patients per day. (p279)

23.3. The long term future of the hospital was probably 3 to 5 years, having regard to when new Flinders Medical Centre capacity would come on stream. (p279)

23.4. Redevelopment by the Association was not a realistic option both from a cost and architectural standpoint. (p279)

23.5. One plausible option for the future would be to convert the hospital into a health hub which offers a range of both public and private health and related services to the wider southern vales community. The Board would welcome suggestions from the community about what could or should be done. (p280)

24. The minutes of the AGM, held on 26 October 2022, (Ex A, Doc 38, 1.289) record Mr Overland as having delivered an oral report in line with his written report. At p291, he told the meeting that options after the future closure of the hospital undertaking were that the site could "be a focus for community health services or private health services, it can be turned into consulting rooms, or, in a worst case scenario, it can be bought for housing". By necessary inference, at the AGM, Mr Overland was canvassing a future which would see the Association continue even after a decision to close the hospital undertaking. See also Overland XXN 444.18-445.21.

25. He was also canvassing that there would be a period of time in which the Members could consider and make their decision about alternative ways forward – they had the luxury of a certain amount of time. (p291) They were ultimately deprived of that by the way in which closure was handled by the Board.

26. On 22 November 2022, Mr Overland wrote to the local member of Parliament, the Hon Mr Bignell MP (Ex A, Doc 40, 1.363). The Court's attention is drawn to the following:

26.1. It is recognised that "the most logical use" of the site after closure would be as a "health hub" where "various types of health and health related services were delivered by both private and public providers". (p366).

26.2. The Board recognised that:

> "…a decision to close the hospital will potentially create political difficulties for the government but believes that a cooperative approach to the process will allow this to be done without undue public controversy. The timing will be one key issue where an agreed approach will be necessary."

The Court should infer from this that political considerations, in the sense of taking care not to embarrass the Government, were a relevant consideration for the Board and Mr Overland.

26.3. The Board saw closure as inevitable in 3 to 5 years. (p366)

27. On 7 December 2022, Mr Overland met with representatives of SALHN. His email to the Board of that day is a reliable guide to what occurred: Ex A, Doc 42, 1.377. The Court's attention is drawn to the following matters:

27.1. Finance: SALHN displayed a positive attitude to renewing funding for a three year period, rather than the series of short term funding extensions granted in the past.

27.2. Doctors: There was a discussion about the vulnerability of the Association to the retirement of Dr Lovell in mid-2023. Mr Overland "made it clear" that in the absence of a viable panel of GPs (i.e. upon Dr Lovell's retirement), the Association could not continue to operate as a hospital and that the Board would have to look at closure. Mr Overland assessed the risk of this occurring as "very real indeed".

On this topic:

(i) The effect of the discussion at the meeting, and Mr Overland's comments in his email, is that the pending "retirement" of Dr Lovell would put the Association in the position of inevitable closure.

(ii) In XXN, Mr Overland said that the retirement of Dr Lovell was "being mooted": T451.25. He accepted that his view was that the retirement of Dr Lovell would be "mission critical" in the sense that it was Mr Overland's view that when Dr Lovell retired, the Association would not be able to continue to operate as a hospital: T451.27-453.3.

27.3. Governance: There was a discussion about the limited ability of the Board members to remain in office due to their age structure. Overland XXN T 455.3-.25.

27.4. The Future: There was a discussion about "managing the politics of an prospective closure" at the end of a 3 year period and how it would "be tricky". The timing of any decision to close would be important because "the government will not countenance such a decision in the run up to an election". (p378)

On this topic:

(i) The Court should infer that, as at December 2022, closure in about 3 years, i.e. in 2025, was recognised as being "tricky" politically.

(ii) The Court should infer that closure in 2025 would be seen to be in the "run up to an election", due in March 2026, so the government "would not countenance" leaving closure to the end of the 3 year period being discussed. It necessarily follows that Mr Overland came away from the discussion with the understanding that, politically, it was the Government's preference for closure to occur before 2025.

(iii) Mr Overland was cross examined on this topic at T455.36-459.31. The Court should not accept Mr Overland's denials.

28. On 17 January 2023 (Overland XXN 461.4-462.28) Mr Overland sent an email to the Board: Ex A, Doc 43 1.379. The tenor of the email is less optimistic than his email of 7 December 2023 (Overland XXN 462.5-462.15). The Court's attention is drawn to the following matters:

28.1. Finances: Mr Overland reports that the finances are now "on a stable if not a necessarily a strong footing". Again, this is to be contrasted with his later statements on this topic.

28.2. Governance: Mr Overland notes the burden he was under personally. Overland XXN 465.10-.27.

28.3. Doctors: Mr Overland proceeds on the assumed basis that Dr Lovell would be retiring, that it was "highly likely that there will be no replacement" and in that

event, the Association "will be unable to fulfill its contractual obligations to SALHN".

On this topic:

(i) The Court should note the singular importance in Mr Overland's mind of the pending "retirement" of Dr Lovell, as it would render the hospital unable to continue to operate.

(ii) Mr Overland was cross examined on this topic at T466.13-467.25.

29. The Court should find that on a date between 17 January 2023 and the Board meeting of 25 January 2023, Mr Overland met with representatives of SALHN again. The report of this meeting, contained within the 25 January 2023 Board minutes, Ex A, Doc 44, 1.381, serves as a report made in relative proximity to the meeting. It is not, however, a *record* of the meeting. As a result, some caution is called for in using it as evidence of the meeting because Mr Overland may well have "curated" how he reported on the meeting to his Board.

29.1. The Court should find that the meeting with SALHN proceeded on the express basis that Dr Lovell, the most active GP, was retiring in June 2023. Overland XXN 476.22-477.21.

29.2. The Court should find that SALHN representatives said to Mr Overland that there was no possibility of SALHN providing medical support to replace Dr Lovell.

29.3. The Court should infer that, necessarily, the conversation must then have turned to closure, because Mr Overland was clearly of the view that Dr Lovell's retirement without replacement would mean inevitable closure.

29.4. A finding that the discussion turned to closure (despite Mr Overland's denial at T477.30-.32) is supported by the reference in the 30 January 2023 letter to the Minister, Ex A, Doc 46, 1.395, to having had "preliminary advice" from SALHN executives that many hospital employees were likely to be taken over by SALHN. (p398) The Court should infer that the "preliminary advice" had been given to Mr Overland at the subject meeting with SALHN (Overland XXN 494.32-496.27) and that must have been in the context of a discussion about closure of the hospital.

30. The Court should find that following this meeting with SALHN representatives, and before the 25 January 2023 meeting, Mr Overland had decided that, in view of Dr Lovell's retirement in June 2023, in circumstances where funding had only been agreed for the period up to 30 June 2023, the Board should decide to close the hospital. The Court should not accept his denial of this: Overland XXN 479.1-.11. In this regard, see also Overland XXN 482.22-483.1.

31. The Board meeting of 25 January 2023 then occurred, the minutes for which are at Ex A1, Doc 44, 1.281.

31.1. The meeting commenced at 4.30pm. There were many items of business to address. The Court should find that the Board did not reach a discussion of the topic of closure of the hospital until after 5.30pm and likely close to 6pm. The meeting ended at 6.15pm. The Court should find that the discussion which resulted in the "consensus" that the hospital should close was short and occurred towards the end of a long meeting. Overland XXN 473.8-475.22. The Court should reject Mr Overland's suggestion that the discussion on closure occurred any earlier than 5.30pm.

31.2. The Court should find that the Board read into the extension of funding for the short period up to 30 June 2023 a view held by SALHN that the government wanted the hospital to close sooner rather than later, so as to avoid the lead up to the next State election. Mr Overland was cross examined on this topic at T479.20-480.20.

31.3. The Court should find that the Board was motivated by this and in seeking to address the Government's political sensitivities by writing to the Minister in terms "suitable for inclusion in Hansard". (p386) Mr Overland was cross examined on this topic at T484.3-33.

31.4. The Court should find that:

(i) The decision was taken on the assumption that Dr Lovell would be retiring in June 2023 and there was no discussion about the ways in which Dr Lovell might be replaced. Overland XXN 480.22-26.

(ii) The decision was very significant, but no one considered holding a special Board meeting giving the Board members to reflect on the decision. Overland XXN 480.27-481.10.

(iii) The decision was taken because the Board had simply "run out of ideas". Overland XXN 481.12-481.20.

(iv) The decision was taken without regard to asking the Members. Overland XXN 481.21-482.16.

(v) The Board did not consider going to the public to try to find new Members who might have new ideas. Overland XXN 483.2-19.

32. The fact of the matter was that Dr Lovell had no intention to retire in June 2023 or at any other time in 2023. It is abundantly clear from Dr Lovell's answer on the question of his intention to continue providing services after 30 June 2023 that he did not have any intention to retire as at the start of 2023 or any other time: Dr Lovell XXN 698.37-699.19. The Board acted upon an assumption that it did not care to check.

33. The Court should note that, apart from Mr Overland, no other Board member has been called by the Association to give evidence at trial. The Court should infer that no Board member could give evidence to support the Association's case that there was any proper consideration of relevant issues at the Board meeting. The Court should not rely on Mr Overland's speeches in evidence, such as at XN 349.18-350.38, as they are wholly unreliable and self-serving.

34. Further, the decision of the Board was void because the Board was not properly constituted and so could not act.

34.1. Clause 8 provides that the Board comprises 8 Board Members, plus ex-officio executive members who attend meetings.

34.2. A person can become a Board member in one of two ways. Either:

(i) election by the Members, under cl 8.3(a); or

(ii) appointment by the Board to fill a casual vacancy, under cl 8.4.

34.3. As at 25 January 2023, the Board comprised Mr Overland, Ms Forrester, Mr Allert, Dr Kremmidiotis, Mr Bright, Ms Hudson and Mr Henessey, that this is so is clear from the minutes of the 2022 AGM, from which it is clear that no election to replace Ms Rosenberg who had resigned on 29 September 2022 occurred: Ex

A1, Doc 34, 1.257 at 259 and A1, Doc 38, 1.289. (Senior Counsel for the Association, by a leading question, obtained oral evidence from Mr Overland that at the start of 2023 Ms Rosenberg was a member of the Board: Overland XN 326.2-.6. This is plainly not the fact.)

34.4. Pursuant to cl 8.2 of the Constitution, a Board member's term of office is two years and four Board members retire annually.

34.5. At the 2022 AGM:

(i) Of the seven members in office (Ms Rosenberg having retired in the previous month), only two members are noted to have retired and renominated (Mr Bright and Ms Kremmidiotis): Item 5 of the minutes.

(ii) The consequence was that a Board was purportedly created of at most 7 members. This was not a Board constituted under the Constitution.

(iii) In fact, the Board was only of 6 members because 4 were to have retired at the AGM and elections held to replace 4. Instead, only 3 (counting Ms Rosenberg) retired, and two were elected in their place. The Association has not established who is other the person on the Board whose term of office ended at the 2022 AGM and who was not re-elected.

34.6. Therefore, at the conclusion of the 2022 AGM there was not a properly constituted Board.

34.7. The Constitution does not make provision for the Board to have power to act if it is not properly constituted.

34.8. The legal position is:

(i) Where a Board is properly constituted, with sufficient numbers to comply with the corporate entity's constitution, but then falls below the minimum number, the Board can act insofar as it is authorised by the constitution. In this case, that authority only extends to a power to fill casual vacancies: cl 8.4.

(ii) However, if the Board is not properly constituted to start with, it cannot then act.

(iii) The principle is established in *Re Sly, Spink & Co* [1911] 2 Ch 430 at 436-437 and discussed at length in *Ngarluma Aboriginal Corp RNTBC v Ramirez* (2018) 364 ALR 94 at [94]-[106].

35. The Applicant contends that having regard to how central the conduct of the hospital was to the pursuit of the Objects of the Association, *"no committee, acting reasonably, could have"*:

35.1. purported to make the decision without having a fully constituted Board;

35.2. made the decision to close the hospital in the space of minutes at the end of a long meeting;

35.3. made the decision to close the hospital without first taking time to reflect on the decision and hold a special meeting of the Board to discuss the matter further;

35.4. made the decision to close the hospital without actually asking Dr Lovell whether in fact it was his intention to retire in June 2023;

35.5. made the decision to close the hospital without consulting the Associations accountants to obtain up to date management accounts and projections;

35.6. given priority to the political considerations of the Government over the interests of the Members to be the body making a decision about closure; or

35.7. made the decision to close the hospital without first seeking the approval of the Members in general meeting.

36. Even Dr Lawlor Smith trusted that the Board had done their "due diligence" before deciding to close the hospital (Dr Lawlor Smith XN 629.17) when in truth they had not, even in the most basic way of asking Dr Lovell whether the rumours that he was retiring were true.

37. Then, as agreed at the Board meeting, a letter was sent to the Minister on 30 January 2023: Ex A1, Doc 46, 1.395.

37.1. The Court should find that this letter was drawn with two objectives:

(i) First, to make it inevitable that the Minister not stand in the way of closure of the hospital.

(ii) Second, to ensure that the Minister had political cover in respect of the closure of the hospital.

37.2. The Court should so find having regard to the following aspects of the letter:

(i) The letter opens by reference to the hospital having for many years had to manage a "deteriorating financial position". The true position was that in his 2022 Chairman's report, Mr Overland reported that FY2022 had been "a good one" and that the hospital was on a "sustainable financial footing": Ex A1, Doc 35, 1.279. In his 17 January 2023 letter to the Board, Mr Overland considered the financial position to be "on a stable if not necessarily strong footing": Ex A1, Doc 43, 1.379.

(ii) The letter states that the Board had "discussed the options for the future" and had "concluded that there is no feasible and realistic way in which it can hope to continue to offer inpatient services for much longer". This statement is, in terms, there is no way in which continuation of hospital services is possible. This is plainly a statement to the effect that closure is out of the Minister's hands, the Board has determined continuation to be impossible. It is observed that the 25 January 2023 minutes do not record any discussion of particular options.

(iii) Financial situation: The Board would not be asking for any more funding, simply to allow the hospital to struggle on. It was not a "viable outcome" for the Board to receive only a short extension of funding. However, short extensions had been the norm in previous periods, see Ex A1, Doc 45, 1.389 at Recitals D to G.

(iv) Medical staff: The letter states as a fact that its most active GP (i.e. Dr Lovell) would be retiring in June and that, based on current advice, at that time the hospital would become unable to fulfill its contractual obligations to SALHN.

(v) Board members: The letter expresses a view that it was unlikely retiring Board members could be replaced.

(vi) Summary: The letter states that there was “no feasible way” in which the issues facing the hospital could be satisfactorily resolved in either the short or the long term. (p397) The letter states that “all realistic options to ensure the ongoing viability and sustainability of the hospital as a going concern have been exhausted”. (p398) The letter states that “the most sensible course of action is to now undertake the managed closure of the hospital”. (p398)

38. The Applicant contends that having regard to how central the conduct of the hospital was to the pursuit of the Objects of the Association, *“no committee, acting reasonably, could have”*:

38.1. sent a letter to the Minister in the terms of the 30 January 2023 letter which would inevitably lead to the Minister not standing in the way of closure;

38.2. communicated a decision to close the hospital to the Minister without first obtaining the approval of the Members in general meeting; or

38.3. communicated a decision to close the hospital to the Minister without making a final appeal for assistance.

39. Mr Overland and SALHN met on 15 February 2023, at which time the closure date of 30 June 2023 was determined. Ex A1, Doc 51, 1.411.

The decision taken by the Board on 23 March 2023 to adopt a plan to divest the surplus assets of the Association to Kalyra

40. The Applicant contends that the Board then engaged in the conduct of the affairs of the Association in a manner contrary to the interests of the Members when, still not properly constituted and therefore without authority under the Constitution, it decided on 23 March 2023 to pursue a plan to divest the entirety of the net assets of the Association to Kalyra. Further, it did so without having given any substantive consideration to other alternatives for pursuit of the Objects of the Association following closure of the hospital undertaking.

41. Mr Overland and Ms Blunt, of Kalyra, discussed the idea of Kalyra taking over the hospital site over lunch on 7 February 2023. Ex A1, Doc 47, 1.299 and XN Blunt 714.14-715.27.

42. On 8 February 2023, Mr Bright commented to Mr Overland, by email, in a positive way in respect to the Kalyra possibility, but noted that the Board needed to “make sure we canvas all logical options”. Mr Overland’s response to state his view to be that it would be “easier to ‘sell’ a relationship with or the sale of property to” Kalyra. Ex A1, Doc 48, 1.401. The Court should find that Mr Overland was proceeding on the basis that the potential of transaction with Kalyra was an excellent idea that he would pursue to the exclusion of other possibilities. Overland XXN 576.17-577.22.

43. Mr Overland appears to then have engaged with Ms Blunt in an effort to have a proposal formulated by Kalyra and ready for the Board meeting on 23 February 2023. The proposal was not ready in time for that meeting. Ex A20, Doc 2, p3.

44. On 15 February 2023, Mr Overland wrote to the Board: Ex A1, Doc 51, 1.411. By this time, he is already contemplating the possibility of a “merger” with Kalyra – meaning Kalyra taking over the assets. He recognises the need for “community engagement” (noting he does not speak in terms of Member approval) but expresses a “very strong preference” that community engagement only occurs when an agreed path forward has been agreed. The necessary inference is that Mr Overland was not proposing a

process of the Members of the Association being consulted as a means to determine the options going following closure of the site or for the Members to consider alternatives. He intends the Board to have decided upon the way forward and then seek "community engagement" in effect to approve that path forward.

45. A further observation is that in the email Mr Overland does not mention taking the decision to close the hospital to the Members in general meeting. The Court should infer that it simply was not on his mind that the Members ought be asked whether they authorised the closure of the hospital. In fact, the Board never took the closure decision to the Members.

46. The approach of Mr Overland, and by extension, the Board, is fundamentally misguided.

47. The broader "community" is not the relevant body to decide the future of the Association or its assets. It is the Members and the Members alone who have the right, under the Constitution, to decide how the Association shall pursue its Objects.

48. The fact that those Objects involve a community benefit does not mean that it is "the community" that determines the future of the Association. That is solely in the power of the Members, acting in a manner in furtherance of the Objects of the Association, or resolving, if those Objects can no longer be pursued, to wind up the Association.

49. Between 6 March 2023 and 10 March 2023, Ms Blunt formulated a proposal document to be sent by Kalyra to Mr Overland. Mr Overland was engaged in the process, providing comments to Ms Blunt on drafts as they developed. The documents were only finalised when Mr Overland concluded that the proposed covering letter was "terrific". Ex A20, Doc 3, p5 – Ex A20, Doc 10, p17. See p18 for his observation that the letter is "terrific".

50. For a reason which is not explained in the evidence, the March meeting was to occur on 30 March 2023 (see Ex A1, Doc 53 at p422, Item 11) but was brought forward to 23 March 2023 (Ex A1, Doc 57 1.432), with a special Board meeting to occur on 30 March 2023 (see p437, Item 11). The Association has not put before the Court minutes of the special Board meeting which was to have been held on 30 March 2023.

51. The position remained that the Board was not properly constituted.

52. The minutes of the 23 March 2023 meeting address "proposed negotiations" with Kalyra at Item 9.2.

    52.1. It is observed that there is no record of a resolution (even assuming the Board had power to act) to pursue the divestment of assets to Kalyra and the winding up of the Association.

    52.2. Instead, the minutes proceed upon an assumption that such a decision has been taken and the only matter worthy of recording in the minutes is a "communications strategy", which was discussed at length, for the forthcoming special general meeting.

    52.3. The Court should find that the Board considered the strategy it would adopt to "sell" the proposed divestment of the net assets to Kalyra as worthy of greater consideration than the very issue of *whether it was in the interests of the Members of the Association as a whole* to divest the net assets of the Association to Kalyra leaving the Association an empty shell unable to pursue its Objects.

52.4. At this meeting:

(i) The Board had before it the Kalyra "Term Sheet" (Ex A1, Doc 56, 1.427 at p430).

(ii) The Term Sheet identifies two alternative possible transactions with Kalyra at Item 5.

(iii) The first, Item 5.1 – is a transaction involving a dissolution of the Association and the transfer of all surplus assets to Kalyra.

(iv) The second, Item 5.2 – is a transaction on commercial terms.

(v) The Court should find that the Board adopted the Item 5.1 proposal and effectively ignored the Item 5.2 proposal for a transaction on commercial terms.

53. No members of the Board, other than Mr Overland, have been called to give evidence in respect of this meeting. The Court should infer that none of them could have given evidence in support of a contention that the Association properly considered relevant issues at this meeting.

54. The Court should find that the Board did not, whether at its February or March 2023 meeting:

54.1. consider the viability of the Association leasing out the hospital site after the closure of the hospital undertaking;

(i) Item 9.2 of the January Board minutes record that Mr Hennessey was to look into and advise on whether the hospital facilities were viable for leasing. Ex A1, Doc 44 at p387.

(ii) Mr Hennessey did not ever report to the Board on the topic: Overland XXN 487.16-21.

54.2. go back to and consider the recommendations of the Asia Australis report (Ex A1, Doc 11, 1.97) that the Board investigate the potential use of the site as a Health Hub (p108 of the report); Overland XXN 583.18-585.31 or

54.3. consider going to the Members to ask them about ideas for what should be done with the hospital site or the future of the Association after closure of the hospital. Overland XXN 487.22-37.

55. The Board well knew that its proposed way forward would result in the transfer of real property valued between $5 million and $6 million to Kalyra: Overland XXN 487.34-488.10.

56. The Applicant contends that the Board engaged in the conduct of the affairs of the Association contrary to the best interests of the Members by:

56.1. deciding to proceed with the Kalyra transaction involving the divestment of the Association's assets to Kalyra and winding up of the Association;

56.2. failing to give consideration to a transaction with Kalyra on commercial terms which would enable the Association to continue to pursue its Objects and not be faced with inevitable winding up;

56.3. deciding upon a transaction that was prohibited by clause 15 of the Constitution. That clause requires the capital of the Association to be applied exclusively to the promotion of the Objects of the Association. Divesting the entirety of the

assets to another entity with the effect that the Association is unable to pursue its Objects is the direct opposite of this.

56.4. As Mr Overland accepted in cross examination (T 443.6-16) Members had the right to expect that the Board will have researched and investigated options before making decision.

The conduct of the affairs of the Association in the period between the 23 March 2023 Board meeting and the 5 May 2023 special general meeting

57. Having decided upon the proposal to dispose of the assets of the Association to Kalyra, the Board then set about creating an environment in which it had the best possible prospect of obtaining the required 75% majority upon a resolution to authorise that course at a special general meeting of the Members.

58. The Board made its decisions public on 27 March 2023. On that day it:

58.1. issued a letter to the Members: Ex A1, Doc 59, 1.441;

58.2. issue a media release: Ex A1, Doc 60, 1.443; and

58.3. issued a letter to staff: Ex A1, Doc 61, 2.445.

59. The letter to the Members:

59.1. states that the Board is negotiating a "merger" and that the Members will be asked to vote on a resolution in line with a "merger" with Kalyra;

59.2. states that the Board had "considered every possible way of keeping the hospital open, but it has become clear that this is not possible". The Applicant contends that this is misleading because:

(i) One critical factor in the Board's decision to close was the assumption that Dr Lovell was retiring with the consequence that the Association would then not be able to meet its contractual obligations. The Board did not make an enquiry of Dr Lovell to ascertain whether the assumption was true.

(ii) The other factor was the political considerations which drove the decision to close the hospital. The Members are not told about those.

59.3. states that the position of nursing staff was uncertain pending negotiations with SALHN and Kalyra. This statement of was misleading because the Board had already been informed, on 15 February 2023, that SALHN would offer employment to all nursing staff and that their service at the hospital would be recognised so as to preserve their seniority: Ex A1, Doc 51, 1.411. The letter unnecessarily creates uncertainty in the minds of nursing staff, which is a factor which tends to cause nursing staff to support the proposed divestment to Kalyra as a way to preserve their employment;

59.4. states that the Members will be asked to vote on a resolution "in line with" the Board's decision to close the hospital, whereas the truth was that the Board having made its decision, closure on 30 June 2023 was by this time inevitable and a *fait accompli*.

60. The media release:

60.1. states that the Board had given "much deliberation" to the question of closure and had "explored all other options". The truth of the matter is that it had not.

60.2. characterises the divestment to Kalyra as a "merger";

60.3. states that the hospital will close on 30 June 2023, and an expectation that Kalyra would take over from that date. In other words, closure was certain and approval of a transfer to Kalyra was a mere formality;

60.4. the position of nursing staff was expressed in a way suggesting uncertainty, when in fact, offer of employment with SALHN with seniority preserved was assured.

61. The letter to staff makes statements to the same effect.

62. The Court should find that the characterisation of the proposed divestment to Kalyra as a "merger" was misleading. The natural meaning of "merger" is the two entities coming together as one, with the membership of both continuing in the new merged entity. This was not what was going to happen.

63. Mr Baragwanath, a member of the local community, then sends an email to the Board. He describes his experience and he makes an offer to assist the Board to investigate alternatives to closure of the Hospital. Ex A1, Doc 63, 2.455.

64. There is no evidence that Mr Baragwanath's email was ever considered by the Board at a meeting of the Board or by members of the Board, other than Mr Overland. The Court should reject Mr Overland's evidence that members of the Board spoke about it "informally": Overland XXN 434.4-31.

65. The Association received Mr Baragwanath's email almost a week before issuing a notice calling a special general meeting on 5 May 2023. Had it wished to properly consider alternative courses of action, it could have done so. Mr Baragwanath had put forward a cogent basis upon which the Board might reconsider whether there are options available other than closing the hospital: Overland XXN 430.21-38.

66. Instead, Mr Overland told the Court he dismissed Mr Baragwanath's email as the "equivalent of cold calling": Overland XXN 431.1-433.20. Mr Overland dismissed the approach from Mr Baragwanath, one can say, with disdain. He was not going to let anything derail the plan to take the proposal of divestment to Kalyra to a special general meeting. Overland 433.12-434.3, 434.32-435.30.

67. Mr Baragwanath was putting forward an opportunity for the Board to do the very thing that had been recommended be done by Asia Australis: Overland XXN 586.9-24.

68. Mr Baragwanath called Mr Overland on 5 April 2023. Mr Baragwanath's evidence of the telephone call is at Baragwanath XN 82.19-84.20, 85.29-86.16. Of particular note:

68.1. Mr Overland had no reason to doubt Mr Baragwanath's experience in financial matters and in the management of charitable organisations: Overland XXN 436.6-437.6.

68.2. Mr Baragwanath expressed that he was sympathetic to the position the Board found itself in: Overland XXN 437.11.

68.3. They had a discussion about the fact that Mr Overland had informally obtained the views of an architect about the condition of the building: Overland XXN 439.35-443.5, 446.10-32.

68.4. Mr Overland conveyed that the Board had exhausted all sensible efforts it could make to keep the hospital open: Overland XXN 447.8-17.

A matter worthy of comment at this stage relates to the issue of the assumption as to Dr Lovell's retirement.

The Court can infer that by the time of his cross examination, Mr Overland was aware that the assumption was mistaken: Overland XXN 477.9-14 - it is noted that he did not make this clear in his examination in chief.

By 5 April 2023, Dr Lovell had participated at a meeting of staff in the old Obstetrics suite (Dr Lovell XN 687.11, 691.2-291.22) on 29 March 2023. The Court should find that Mr Overland was present, because of the importance of the meeting. There is no oral evidence confirming that he was present. In the ordinary course of things, one would expect Mr Overland to have asked Dr Lovell the crucial question about his pending retirement and would have learned that Dr Lovell was not in fact retiring.

If the Court finds that this is what most likely occurred, then this adds weight to the contention that the refusal of the Board to consider and investigate alternatives to closure on 30 June 2023 was contrary to the interests of the Members.

69. Mr Overland dismissed Mr Baragwanath's views as simply the views of a citizen that did not correspond with the views of the Board, and therefore easily dismissed: Overland XXN 439.20-34.

70. Mr Baragwanath had become a Member on 30 March 2023: Ex A1, Doc 189, 3.1041 at 1076, receipt number 1733. He was a Member at the time of his conversation with Mr Overland.

71. The Board proceeded to issue a notice of special general meeting to take place on 5 May 2023: A1, Doc 70, 2.481.

71.1. The document mis-characterises the transaction with Kalyra as a "merger".

72. The explanatory notes which accompanied the notice of special general meeting, Ex A1, Doc 70 at p482, state that the Board had determined that the ongoing operation of the hospital beyond 30 June 2023 was "not viable".

73. The evidence of Dr Lovell, who can be accepted as a sophisticated recipient of the Board's communications strategy, was that he understood the position to be that the Association was in a "dire" financial position, meaning that it had been incurring losses from its operations, so it was unsurprising that the Board should have decided to close the hospital: Dr Lovell XXN 697.38-36, 698.25-36. Dr Lovell spoke at the information session for staff based on his assumption about the hospital's lack of financial viability: XN 691.17. When he refers to the concept of "lack of viability" he means not financially viable: XXN 697.33-37. Neither Mr Overland nor any other member of the Board ever dispels the impression held by Dr Lovell or anyone else that the Association was in a dire financial position and had been incurring losses.

74. The Court should find that this is precisely the message that the Board was intending to convey.

75. It is also the message that Mr Overland sought to convey in his evidence in chief: Overland XN 336.16-338.22. His evidence was that the FY2022 financial statements did not accurately record the true position as to profit because they treated as revenue grant funding that had not yet been earned.

76. However the truth was otherwise.

77. The true position, as properly recorded in the FY2022 financial statements, Ex A1, Doc 34, 1.257, was that:

77.1. The financial statements were signed off by the Board (p259) and the auditor (p260).

77.2. The policy adopted in the preparation of the financial statements was that grant funding was brought to account as revenue only to the extent that it was earned in the sense that work done to earn it had been completed, and to the extent that it is not yet earned, it is recognised as a liability: Note 1(e). (p266)

77.3. In FY2022, $2,937,683 had been received in Government grants. (p264)

77.4. Of this sum, the amount of $2,494,831 was earned and recorded as revenue: Note 2. (p271) This means that unearned grant receipts were not treated as revenue.

77.5. The difference, i.e. unearned grant receipts ($2,937,683 less $2,494,831), being $442,852 was added to Other Liabilities – Unearned Grant Funding: Note 11. (p273). The FY2023 balance of $625,000 is the total of the FY2022 balance plus $442,852.

77.6. Accordingly, it is false to say that the reported profit of $516,080 (p261) was inflated by the effect of treating unearned grant funding as revenue. It is an accurate profit figure. By parity of reasoning, the FY2021 profit figure of $560,362 is also a true representation of profit. In other words, the Association had earned profits of half a million dollars in each of the two financial years prior to the Board's decision to close the hospital.

77.7. It is also false to say that the profitable operations of the hospital did not contribute to the Associations cash balance of $2,140,771 as at 30 June 2023. (p262)

77.8. That cash balance is explained by the Statement of Cash Flows (p264), and is the total of the FY2021 balance of $1,269,760 together with the net inflow of cash in FY2022 of $871,011. The FY2022 net inflow of cash includes the full amount of Government grant receipts, i.e. both the earned and unearned grants, net of operating expenses paid.

78. On 4 April 2023, in its letter to the Members sent with the notice of general meeting, Ex A1, Doc 66, 2.465, the Board:

78.1. stated that the Association had struggled for many years to remain viable. The truth was that in January 2023 the financial position was "stable": Ex A1, Doc 43, 1.379.

78.2. stated that it had "deliberated for a long time and considered every option" before coming to the decision to close the hospital and negotiate with Kalyra: as has been addressed above, there was not a long consideration nor was there a consideration of "every option".

79. Also in April, the Board sent out a document entitled "Options considered for the future use of the hospital": Ex A1, Doc 67, 2.471. The document is misleading.

79.1. It suggests that the Board actively investigated and considered the possibility of redevelopment of the hospital to meet modern standards. There is no record of such an investigations or consideration.

79.2. It suggests that the Board actively investigated and considered the possibility of sale of the hospital to a private operator. There is no record of such an investigations or consideration.

79.3. It suggests that the Board actively investigated and considered the redevelopment of the hospital as a health hub. There is no record of such an investigations or consideration. Indeed, the opposite is the case. Asia Australis had recommended that this be investigated but the Board did not undertake any investigation or go back to the Asia Australis report.

79.4. It identifies the possibility of the sale of the site. Attention is drawn to two aspects of the comments made on this topic.

(i) First, it conveys that it is "not clear" that the interests of existing users such as Wellbeing Clinic and SA Ambulance Service "could be protected". This is plainly false as each of Wellbeing Clinic and SA Ambulance Service had secure interests under their respective leases. The Court should find that the Board actively sought to create the impression that unless the divestment to Kalyra proceeded, there was a real prospect of the Wellbeing Clinic and the SA Ambulance station, and other users, being required to close.

(ii) Second, quite extraordinarily, it conveys that a sale of the site with the result that the Association would then receive the proceeds of sale would be a "problem". The "problem" would be "what to do with the money". It could hardly be a "problem" for the Association to have a fund with which to pursue its Objects.

79.5. The document mis-characterises the proposed divestment to Kalyra as a "merger".

79.6. The document attempts to misconstrue the proposed divestment to Kalyra as not being a "gift" in the ordinary sense of the word. This is misleading because, on any view, the divestment to Kalyra would be a gift, albeit subject to obligations. The document seeks to convey that Kalyra would not, in truth, benefit from the transaction. The real position was that Kalyra would receive net assets (i.e. assets net of liabilities) in the order of $5 or $6 million, and an income rental stream from the Wellbeing lease.

79.7. The document states that the Board "considered several options for the future use of the hospital". In truth, the only option it considered, and adopted, was Item 5.1 in the Kalyra Term Sheet.

80. The further document issued by the Board, entitled "Frequently Asked Questions", Ex A1, Doc 68, 2.475, is replete with similar misstatements.

81. On 22 April 2023, Mr Baragwanath wrote to the Board again: Ex A1, Doc 86, 2.521. On this occasion he forwarded the proposal he had worked up with Pelligra Group to illustrate how readily interest could be generated in the future of the site. Baragwanath XN 88.3-27. The Pellligra letter is Ex A1, Doc 85, 2.519.

82. Again, rather than open its mind to alternatives different to the course it had adopted, the Board, and Mr Overland doubled down on their position, sending further letters to Members: Ex A1, Doc 90, 2.539 and Ex A1, Doc 96, 2.559. The second letter, in particular, asserts that the Board considered and rejected the "Pelligra proposal". There is no evidence of such consideration by the Board having occurred – there was no discussion on the topic recorded in the minutes of the 27 April 2023 Board meeting: Ex A1, Doc 92, 2.547.

83. A further aspect of the second letter is the assertion that the Association "cannot continue to operate the hospital beyond 30 June 2023 *because its main source of funding ceases from that time*".

    83.1. The true position was that, whilst in January 2023 SALHN had approved an extension of funding to 30 June 2023, it had not conveyed that there would not be a further round of extension after that.

    83.2. In fact, further funding was available: Ex A1, Doc 64, 2.457 and Doc 82, 2.511.

    83.3. SALHN had brought funding to an end on 30 June 2023 as a consequence of the decision to close the hospital, and not the other way around.

84. A special general meeting was held and the Members rejected a resolution to divest the assets of the Association to Kalyra and rejected a resolution to wind up the Association.

The conduct of the affairs of the Association in the period between the 5 May 2023 special general meeting and the 4 July 2023 special general meeting

85. The Members having, on 5 May 2023, rejected a resolution to wind up the Association, the mandate of the Board was, and remained, to continue to pursue the Objects of the Association.

86. Instead, Mr Overland and the Board, acted in concert with Dr Lawlor Smith, to subvert the outcome of the 5 May 2023 special general meeting.

87. The Applicant contends that the Court should treat the evidence of Dr Lawlor Smith with extreme caution. The Court should find that she was not candid with the Court and, in some instances, was not a witness of truth. On her own testimony, she is willing to lie if it is advantageous to her.

    87.1. The Court should reject her evidence to the effect that as a result of the outcome of the 5 May 2023 meeting she had a genuine concern as to the future tenure of the Wellbeing Clinic.

        (i) Dr Lawlor Smith had, for many years, been responsible for the management of the Wellbeing Clinic, over her career she has held responsible positions on boards and in management: XN 619.29.

        (ii) The Wellbeing Clinic had held leases from the Association from about 2007, and the Court has before it evidence that it had entered into a lease with the Association on 31 October 2022 for a five year term with a right of renewal: Ex A1, Doc 39, 1.295.

        (iii) The Court has evidence that as at 2020, there were conflicts between the Wellbeing Clinic (by necessary inference, Dr Lawlor Smith ought be found to have been advancing the cause of the Wellbeing Clinic) and the Association, Ex A1, Doc 11, 1.97 at p157. The Court has evidence that those conflicts were resolved in 2022: Ex A1, Doc 33, 1.251 at p254. The Court should infer that she is a capable executive able to defend the interests of her business.

        (iv) The Court should find that Dr Lawlor Smith well knew and understood that the tenure of the Wellbeing Clinic was secure under its lease, irrespective of the outcome of the 5 May 2023 special general meeting.

        (v) The Court should find that if Dr Lawlor Smith did genuinely have any such concern, she would have obtained legal advice – which she did not seek.

Dr Lawlor Smith XXN 645.16-647.30, 669.12-20. She did not obtain legal advice notwithstanding her "alarm" and after, as she told the Court, discussing the risk to the lease with her "management team". Despite her evidence of "alarm", she "did not think it was necessary to get legal advice" about the lease: Dr Lawlor Smith XXN 653.30-654.2.

87.2. When Dr Lawlor Smith's attention was drawn, in cross examination, to Ex A2, Doc 208, p2155, and the fact that she had assured Ms Trudgeon, on 8 May 2023, that the jobs of Wellbeing Clinic staff were safe, her evidence was that she lied to her staff about their jobs being safe. XXN 675.38-676.28.

(i) The Court should find that her evidence on this topic was itself untruthful.

(ii) The Court should find that Dr Lawlor Smith assured Ms Trudgeon that the jobs of Wellbeing Clinic staff were safe because, on 8 May 2023, Ms Trudgeon had seen Dr Lawlor Smith's draft letter to patients which conveyed that it was necessary to support the "merger" with Kalyra in order to enable the Wellbeing Clinic to continue to provide services.

(iii) The Court should find that Dr Lawlor Smith gave an assurance to Ms Trudgeon because she knew that what was being conveyed in the letter to patients, and what she was planning to convey in her advertising campaign, was false. XXN 676.29-677.14.

(iv) It is a matter not to Dr Lawlor Smith's credit that she "communalised" the alleged lie to the staff. She says in her evidence "a decision was made to lie to the staff, because *we* were concerned…" and "…the reason *we* didn't convey that to the staff was that *we*…". XXN 676.1-2 and 676.11-14. The Court should treat this as an attempt to bolster her untrue evidence about her having lied to the staff.

88. The Court should find that Dr Lawlor Smith was driven, in her campaign and co-operation with the Board, after the 5 May 2023 special general meeting, by her and the Wellbeing Clinic's financial self-interest.

88.1. The rejection of the Kalyra transaction by the 5 May 2023 special general meeting did not entail that some other alternative proposal had been accepted. There was no other proposal before the Members. In other words, it did not follow from the rejection of the Kalyra proposal that the site would be sold to a property developer, as Dr Lawlor Smith asserts that she opposed.

88.2. The only, and obvious, natural outcome of the 5 May 2023 special general meeting was that alternative options would need to be investigated and ultimately one or more put to the Members.

88.3. Instead, Dr Lawlor Smith's reaction was to embark upon a concerted effort to cause the Kalyra proposal to be re-put and succeed.

88.4. Wellbeing Clinic had a very real financial interest in such an outcome:

(i) Ms Blunt had conveyed to Dr Lovell that Kalyra would look at redevelopment of the site, including the Wellbeing Clinic tenancy. In other words, if Kalyra became the lessor, Wellbeing Clinic would have the prospect of capital improvements to its tenancy or even a new building. Dr Lovell XXN 701.31-702.12. The Wellbeing Clinic premises had been gutted and refurbished by Dr Lawlor Smith and Dr Lawlor a long time ago – 17 years ago (Dr Lawlor Smith XN 621.1-11) The Court should find that Dr Lovell likely told Dr

Lawlor Smith about what Ms Blunt had said about this specifically: Dr Lawlor Smith XN 638.37-639.4. The Court should reject Dr Lawlor Smith's evidence on the topic: XXN 663.4-10.

(ii) The introduction of aged care residents into the hospital would introduce additional potential patients for the Wellbeing Clinic in close proximity. Dr Lawlor Smith's animated and extended answer rejecting this as a benefit to the Wellbeing Clinic ought be rejected, the manner in which she gave her response is telling: XXN 674.5-27.

(iii) On 23 April 2023, Dr Lawlor Smith had received an email from Ms Hirst, providing to her a copy of the Pelligra letter and expressly referring to the development of the site as a "health precinct": Ex A1, Doc 88, 2.533. Dr Lawlor Smith's reaction to the email was to convey to Ms Ross, on the same day, that she and Dr Lovell "really look forward to dealing with Kalyra". The Court should infer that, in a business sense, they looked forward to dealing with Kalyra as their landlord.

(iv) A health precinct would introduce additional GPs and allied and medical care practitioners into the precinct which would, or could potentially, directly compete with the Wellbeing Clinic. Dr Lawlor Smith's rejection of the suggestion that she was "concerned about the competition" as "just ridiculous" should not be accepted: XXN 661.26-662.12. In 2020 they had expressed to Asia Australis "their potential interest in expanding further in the South Western wing of the Hospital and in expanding services to a range of specialists and allied health professionals": Ex A1, Doc 11, 1.97, at 157. The Wellbeing Clinic is a large corporate medical practice (noting its sophisticated management structure, Dr Lawlor Smith XN 621.22-31) offering GP services, a consulting orthopaedic surgeon, and allied health practitioners such as a sports consultant, and a dietician (Dr Lawlor Smith XN 621.15-622.2), and its premises included pathology services through its subtenant Clinpath (Dr Lawlor Smith XXN 655.25-33). The Applicant contends that it was in Wellbeing Clinic's interest that only it have the ability to expand on the site and develop its practice.

(v) In 2022, Dr Lawlor Smith and Dr Lovell had agreed in principle the transfer of their interest in the Wellbeing Clinic business to their son and daughter in law: Dr Lawlor Smith XN 641.1-3, XXN 649.14-22. Patently, they had a financial interest in the business having Kalyra as a lessor, and on Dr Lawlor Smith's own evidence, a financial interest in the outcome of this very litigation: XN 641.30-36. It was the passing of the resolution authorising the divestment to Kalyra that triggered a public announcement of the handing over the practice to her son and daughter in law: Dr Lawlor Smith XXN 653.22-29.

(vi) Dr Lawlor Smith's evidence that her private financial interest "did not come into it" as a motivator for her actions ought be rejected as untruthful: Dr Lawlor Smith XXN 648.5-16.

88.5. If the Court accepts the evidence of Dr Lawlor Smith to the effect that she genuinely felt that her practice was being threatened (for example, XN 638.4, 633.2-5, 638.4), then this is the very essence of being motivated by a financial interest.

89. In its general assessment of whether any part of Dr Lawlor Smith's evidence is reliable, the Court should have regard to her propensity to gloss over matters to present them in what she considered to be a favourable light or make assertions without foundation which she considered might support her evidence. For example:

    89.1. In her evidence in chief, she said that the October 2022 lease was merely to formalise a tenancy over a couple of isolation rooms that had been used as a result of the Covid 19 pandemic: XN 622.22-32.

    89.2. In cross examination, she acknowledged that in fact the October 2022 lease resulted in the Wellbeing Clinic tenancy taking over the space used by Clinpath to offer pathology services, and that Clinpath became a subtenant: XXN 655.12-656.4.

    89.3. It is not to her credit that she refused to acknowledge that the arrangement was Clinpath was part of the resolution of a longstanding tension between Wellbeing Clinic and Clinpath in connection with the provision of pathology services: XXN 656.5-656.1, 658.20-659.36, Ex A1, Doc 33, 1.251 at 254.

    89.4. Another example is that she considered the Pelligra proposal a major risk for the Association because Pelligra would become a co-owner of the site (XN 631.18-23), but apparently had no difficulty with the idea of the Association giving away the entirety of its assets and then being wound up. Self-evidently, giving away the assets and winding up the Association is, to put it mildly, "a major risk for the Association".

    89.5. Another example is that she felt the rejection by the Members at the 5 May 2023 special general meeting of the Kalyra proposal and winding up was "an attempt to take over the Association" by businessmen from outside the area: XN 633.9-21, 644.26-33. If that concern was genuinely held, it was irrational because there was nothing at all about the rejection of the resolutions that entails a takeover of the Association by ill-intentioned outsiders. The Pelligra letter itself, even accepting it was not a proposal put to the Members, expressly states that Pelligra would only be interested in a joint venture if it had "broad community support": Ex A1, Doc 85, 2.519. Dr Lawlor Smith might be said to be driven by prejudice against anyone she deems to be a "private developer" if that is a useful way she can attack them in order to achieve her own objectives. (It is observed that Dr Lawlor Smith seems to have no difficulty in private development ideas when she herself is the private developer: Dr Lawlor Smith XXN 662.34-663.3.) Dr Lawlor Smith intentionally referred to "business people from outside the community" in her campaign messaging in order to trigger a sense of outside money coming in to interfere with the local community: XXN 670.36-671.4, 671.32-672.1.

    89.6. Another example is the assertion, without any foundation in evidence, that "right from the get go" Mr Baragwanath and Mr Davis "have made it pretty clear" that their "intention is to challenge our lease": XN 640.8. This evidence was put forward as motivating her approach to the Board on 6 May 2023. There is nothing in Mr Baragwanath's efforts to encourage the Board to investigate alternatives to closure prior or to the Kalyra proposal which could remotely be said to convey an intention to challenge Dr Lawlor Smith's lease.

90. On 6 May 2023, at 11:11am, Dr Lawlor Smith wrote to the Board laying out her plan: Ex A1, Doc 110, 2.665. The email speaks for itself. The plan is to recruit new

members for the specific purpose of passing a resolution to authorise the divestment of the assets of the Association to Kalyra.

91. Mr Overland responded positively within hours, at 1:40pm: Ex A1, Doc 111, 2.667. He approved of a "loose coalition of people willing and able to support a large scale membership drive with specific objectives in mind". Overland XXN 497.5-503.19

92. The specific objective was to overturn the will of the Members as expressed at the meeting of 5 May 2023: Overland XXN 498.19-22.

93. The Applicant contends that it does not make any difference whether or not each and every element of the plan outlined by Dr Lawlor Smith was implemented. On the evidence it is clear that the plan was put into action and efforts were made to achieve its objectives. It is also clear on the evidence that there was co-operation between the Board and Dr Lawlor Smith in that effort. As Dr Lawlor Smith confirmed, she went ahead with the objective of her plan, being to recruit new members to vote in favour of the approval of a transfer of the assets for no money to Kalyra: XXN 664.20-29.

94. There are some aspects of the matter which are worthy of particular note.

95. In his email of 1:40pm, Mr Overland outlines his tentative view of the way forward. It involves:

    95.1. The Board remaining in place (contrary to what was said to the special general meeting, that the Board would stand down: Exhibit A1, Doc 108, 2.647 at Item 5, p650).

    95.2. A general meeting would be convened at which the Board resigns to "create" a spill, for which a pre-arranged ticket of nominees would be ready to "ambush" the Baragwanath faction. The objective would be to ensure a "friendly" Board to resurrect the Kalyra resolution.

    95.3. The new Board would then re-put the Kalyra resolution to the Members, which by that time would be "much enlarged" in number.

    95.4. So, whilst Mr Overland welcomed and encouraged Dr Lawlor Smith's plan, his alternative did not require 20 Members to requisition a meeting, as Dr Lawlor Smith had proposed.

96. On 8 May 2023, Dr Lawlor Smith sprang into action on her recruitment drive: Exhibit A2, Docs 201 to 208.

97. On 8 May 2023, Dr Lawlor Smith sought from her staff member, Ms Trudgeon, the telephone number for Ms Forrester and then called her: Dr Lawlor Smith XXN 668.2-15. Ms Forrester had a deep involvement in relevant events. She was involved in this telephone conversation, she was present at the strategy meeting, she reported on the outcome of the strategy meeting and she was present at all Board meetings and participated in Board decisions in issue in these proceedings. Yet, she was not called by the Association to give evidence. This is striking. The Court should proceed on the basis that Ms Forrester could not have given any evidence to support the case of the Association, whether as to the diligence of the decision making by the Board, the matters it considered at the time of its various decisions. The Court should proceed on the basis that Ms Forrester could not have given evidence that would stand in the way of an inference, which inference is available from the documentary record, that the Board's co-operation with Dr Lawlor Smith's campaign was embracing and enthusiastic. *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [63].

98. On 8 May 2023, in his email of 3:09pm, Mr Overland advised that a "group of concerned people will be meeting" on Wednesday 10 May 2023, and that this "group" would "doubtless wish to co-ordinate its activities" with Dr Lawlor Smith's: Ex A2, Doc 203, p2143.

99. The "group of concerned people" did meet on 10 May 2023.

100. The Applicant observes that the Association did not discover a record of the 10 May 2023 meeting until after the completion of Mr Overland's cross examination. That record has now been received into evidence as Exhibit A26. The Court might rightly wonder how it can be that the record of that meeting was distributed by email by Ms Forrester to each of the other six Board members, twice, and is plainly directly relevant to the issues in dispute in this proceeding, yet for some reason it could not be disclosed until such a late stage in the action.

101. The Court should draw an adverse inference against the Association by reason of these circumstances. That adverse inference should be that the Association deliberately tried to suppress evidence of the meeting until it could no longer once the Applicant referred to the meeting in its oral opening (T 55.19 and 56.19-22) and Mr Overland was cross examined on the topic: Overland XXN 512.22-513.33, 514.35-516.34, 517.34-527.17.

102. The Court will note that Mr Overland did not address the meeting in his evidence in chief in any detail. See his oblique reference to there being "two clear sets of reactions": Overland XN 383.34-384.15. See limited evidence as to the strategy meeting at Overland XN 398.26-399.9 – just a coffee and biscuits affair.

103. From the record of the "strategy meeting", Ex A26, the Court can infer that:

    103.1. All members of the Board, save for Dr Kremmidiotis, together with the Hon Mr Bignell MP were present.

    103.2. Those present (but effectively, the Board) were proceeding on the basis that the request received from Mr Baragwanath and others for a special general meeting to be held to resolve to sack the Board was ineffective.

    103.3. Those present agreed it was permissible for the Board to put the Kalyra resolution and the winding up resolution again.

    103.4. They agreed an eighth Board member would be recruited.

    103.5. The Hon Mr Bignell MP would undertake certain tasks in support of the Kalyra transaction.

    103.6. They agreed that the Board would issue a "communication piece".

    103.7. They agreed to a two special general meeting process. The first, to put the Kalyra resolution. The second to put the winding up resolution.

    The Court should infer the reason for this was an appreciation that the Members would be less likely to support the Kalyra resolution if coupled with a winding up resolution, as had occurred at the 5 May 2023 meeting. Whereas, if dealt with separately, the Kalyra resolution would pass and then the winding up resolution would be inevitable.

    103.8. It was agreed that the Kalyra resolution would be put at a special general meeting to be held on 4 July 2023, and they worked back to determine the last date by which new Members had to be signed up if they were to have a right to vote.

103.9. It was agreed that the notice of special general meeting would be sent out on 2 June 2023. The Court should infer that the date was determined with a view to maximising the time for new Members recruited by Dr Lawlor Smith's efforts to join and to minimise the time for opponents of the Kalyra resolution to mobilise to recruit new Members.

103.10. There was a detailed and specific discussion of Dr Lawlor Smith's plan, including finalising the date by which her proposed 20 Member requisition of a special general meeting was to be received.

103.11. It was agreed that Mr Overland would draw a resolution for Dr Lawlor Smith to put.

103.12. It was agreed that Ms Forrester would communicate with Dr Lawlor Smith.

104. In every sense, the meeting was a step in a co-ordinated effort by the Board to work with Dr Lawlor Smith to recruit members in support of the Kalyra proposal, in the plan she had described.

105. From Mr Overland's evidence, the following further finding should be made:

105.1. Those present (in effect the Board) went away "determined to support Dr Lawlor Smith and the proposal" she had put: Overland XXN 516.7-9.

105.2. No one present stood in the way of the plan for the Board to work together with Dr Lawlor Smith: Overland XXN 516.14.

105.3. Mr Overland informed the meeting of the explosion in Memberships that had occurred since the 5 May 2023 special general meeting: Overland XXN 517.34-518.4.

105.4. There was a specific discussion about Dr Lawlor Smith's plan: Overland XXN 518.9-519.16.

105.5. There was a decision that they did not need to hold separate special general meetings to deal with the Board membership issue and the Kalyra resolution: Overland XXN 520.1-520.8.

105.6. Despite Mr Overland's denial, there was a discussion about his preparing a draft letter for Dr Lawlor Smith to send to him: Overland XXN 523.4-523.25, 525.11-25.

106. The Court should take particular note that in evidence Mr Overland expressed the view that it would not have been appropriate for the persons present at the "strategy meeting" to decide matters" such as the date for the next special general meeting, that being a matter for the Board: Overland XXN 524.1-524.24. The record of the meeting, Ex A26 records that this is precisely what occurred, decisions were made about dates.

107. The Court should draw an inference that none of the Board members present, apart from Mr Overland, could give evidence to counter any inferences adverse to the Association in respect of the meeting. If they could, they would have been called to give evidence by the Association.

108. A matter significance in support of a finding that the affairs of the Association were being conducted in a manner contrary to the interests of the Members as a whole is that the Board members embarked on the strategy agreed at the strategy meeting rather than:

108.1. listen to the will of the Members, as expressed by the rejection of the resolutions in favour of the Kalyra divestment proposal and the winding up of the Association;

108.2. accept that the Members did not wish the Association to be wound up;

108.3. return to the Kalyra Term Sheet (Ex A1, Doc 56, 1.427, at 431) and go back to Kalyra with a view to negotiating commercial terms under Objective 5.2 with a view to putting to the Members the best terms that could be negotiated.

109. If the Board had even done this, the Members would have had before them for consideration a way forward that would ensure its survival and an ability to continue to pursue its Objects. When Members have rejected winding up, it is the duty of the Board, entrusted with the management of the Association, to strive to enable the Association to pursue its Objects.

110. On 10 May 2023, Mr Overland issued a "Notice to All Staff": Ex A1, Doc 113, 2.677. The statement in that document that the Board has no knowledge of a plan to hold a meeting to reconsider the Kalyra proposal was false. In view of the date of the document, there can be no inference but that it was knowingly false. The Court should reject Mr Overland's attempt in evidence to limit the effect of the statement to a "public meeting" and not a special general meeting. Mr Overland confirmed that the notice was sent out: Overland XXN 566.5-12, 567.4-570.10.

111. The Applicant relies on the course of the communications between Mr Overland and Dr Lawlor Smith as evidenced in Exhibit A2.

112. The plan had immediate effects, with:

112.1. Memberships driving up quickly.

112.2. Wellbeing Clinic funding some memberships: Ex A2, Docs 210, 215 and 217.

113. The Facebook marketing campaign embarked upon by Wellbeing Clinic was "really successful": Dr Lawlor Smith XN 638.26. After the 4 July 2023 special general meeting, the Wellbeing Clinic celebrated its success: Dr Lawlor Smith XXN 645.15.

114. Though not specifically discussed by Mr Overland and Dr Lawlor Smith, even another local doctor funded multiple memberships: Ex A1, Doc 189, 3.1041 at p1151.

115. Dr Lawlor Smith and the Wellbeing Clinic issued a circular letter and Facebook misinformation, carefully calibrated to convey that unless the Kalyra proposal was adopted, the very existence of the Wellbeing Clinic was at risk: Ex A2, Doc 207, p2153, Ex A2, Doc 209, p2157, Ex A2, Doc 221, p2191 and the SA Ambulance facility was at risk: Dr Lawlor Smith XXN 650.25-33. It is hardly surprising that the Wellbeing Clinic celebrated its successful campaign on 5 July 2023: Ex A1, Doc 163, 3.901.

116. In the middle of May, Mr Overland engaged in communications with Mr Baragwanath, seemingly to assist him, and his supporters.

116.1. On 8 May 2023, Mr Baragwanath wrote offering his assistance again, proposing the best way forward would be a new Board with the required 8 members, and committees to grow membership, investigate alternatives and raise money: Ex A1, Doc 112, 2.669. Mr Baragwanath is plainly conveying that he is proactive, with the best interests of the future of the Association in mind.

116.2. On 11 May 2023, Mr Baragwanath wrote, confirming that he did not necessarily wish to see the entire Board resign and really intended the addition of a member to reach the required 8 Board members. He sets out his

suggestion. The suggestion speaks for itself, and is plainly one which seeks to accommodate the interest shown by Kalyra but also ensure an investigation and consultation period for alternatives to be explored: Ex A1, Doc 115, 2.681.

116.3. On 16 May 2023, Mr Overland writes, and steers Mr Baragwanath back to a resolution to remove the Board: Ex A1, Doc 118, 2.691. The Court should find that this was, in truth, Mr Overland ensuring that Mr Baragwanath did not abandon the Board spill, which was part of Mr Overland's plan. The Court should reject Mr Overland's suggestion that he merely provided a draft resolution to Mr Baragwanath out of a sense of "natural justice": Overland XXN 533.5-535.24.

117. On 16 May 2023, Mr Overland provided to Dr Lawlor Smith a draft of the letter she would send to him: Ex A2, Doc 213, p2169. She sent it to him on 26 May 2023, together with a requisition signed by 20 Members: Ex A2, Doc 216, p2175. Of those 20 Members, 14 had joined after the commencement of Dr Lawlor Smith's campaign. Indeed a number are staff of the Wellbeing Clinic itself.

118. The Board met on 25 May 2023: Ex A1, Doc 121, 2.704.

118.1. The Court should find that it went through the charade of accepting the requisition sent in by Dr Lawlor Smith and fixing a date for a special general meeting to be held on 4 July 2023.

118.2. The Board appointed a new member, Mr Botha, in order to ensure that it was properly constituted. Mr Overland moved that he be appointed even though he had never met Mr Botha. Overland XXN 547.12-548.14.

118.3. Mr Botha became a Member of the Association on that very day, probably at the meeting itself: Overland XXN 549.17-550.25.

118.4. In doing so, the Board had no interest in appointing Mr Baragwanath to the Board, precisely because he held a different view to them: Overland XXN 548.15-549.16.

119. On 26 May 2023, the day after its Board meeting, the Board issued an update to Members: Ex A1, Doc 122, 2.705.

119.1. The Court should find that this is the "short communication piece" that had been agreed at the strategy meeting on 10 May 2023 would be sent out: Ex A26.

119.2. The document endeavours to create an atmosphere of there being two camps. Those who support the Kalyra proposal support the protection of the site. Anyone who opposes the Kalyra proposal must necessarily be supporting a private developer, with no guarantee of community services and no protection for current services. This is patently misleading.

119.3. The document conveys that only the Kalyra "merger" will protect the continuation of Wellbeing Clinic and SA Ambulance at the site. Whereas if the site fell into the hands of a private developer "current services and heritage will be lost". The Board must be taken to have known this to be false at the very least because of existing long term leases to Wellbeing Clinic and SA Ambulance.

119.4. The document is further misleading in stating that the Board "is considering the next steps for the hospital facility", when in truth, the Board's strategy had

been determined at the strategy meeting of 10 May 2023, and implemented in multiple steps after that date.

120. On 2 June 2023, Mr Overland then caused to be issued a notice for a special general meeting to be held on 4 July 2023: Ex A1, Doc 132, 2.753, following the course agreed at the strategy meeting of 10 May 2023: A26.

121. The Applicant contends that these events constitute the conduct of the affairs of the Association contrary to the interests of the Members because:

121.1. Mr Overland and the Board engaged in conduct, in concert with Dr Lawlor Smith, for the express purposes of:

(i) overturning the outcome of the 5 May 2023 special general meeting;

(ii) achieving that outcome by a campaign to recruit new members (even if paid for by Wellbeing Clinic or others) who would support a resolution to divest the assets of the Association to Kalyra.

121.2. Mr Overland misled staff about the involvement of the Board in a plan to put the Kalyra proposal back before the member for re-consideration.

121.3. The Board allowed Dr Lawlor Smith's private financial interest in the success of the Kalyra proposal to drive the conduct of the affairs of the Association.

121.4. The effect of the campaign, led by Dr Lawlor Smith was the recruitment of Members who were not qualified for membership – namely they did not support the Objects of the Association, as required by cl 6.1 of the Constitution. Indeed, the express objective was to recruit members who would support a resolution that would render the Association unable to pursue its Objects and lead inevitably to winding up.

121.5. The Board recruited the unknown Mr Botha as a member because he would support them, and overlooked the keen and qualified Mr Baragwanath precisely because he did not agree with them.

The 4 July 2023 resolution as conduct contrary to the contrary to the interests of the Members as a whole

122. The Applicant contends that the second resolution, which passed with a majority of about 86% of the vote was, and was the result of, the conduct of the affairs of the Association contrary to the interests of the Members as a whole.

123. First, and foremost, it was the product of the conduct addressed above, in particular that which occurred following the 5 May 2023 special general meeting.

124. The resolution was passed with 542 votes in favour: Ex A1, Doc 162, 3.897.

124.1. Of the votes in favour, 294 of the votes in favour were by proxy on behalf of Members who had joined following the 5 May 2023 special general meeting.

124.2. There is a strong inference that these 294 Members joined with the intention of voting in favour of the divestment of the assets of the Association to Kalyra.

124.3. There is a strong inference that these 294 Members joined, at least in part, motivated by the efforts of the Wellbeing Clinic to recruit members to vote in favour of the divestment of the assets of the Association to Kalyra.

124.4. Accordingly, there is a strong inference that these 294 Members joined without the intent, required by cl 6.1 of the Constitution, to support the Objects of

the Association. Rather, their intent (whether knowingly or not) was to authorise a transaction that would defeat the Objects of the Association.

124.5. Those 294 Members are, by cl 6.2(c) of the Constitution, bound by the Constitution, including the Objects and the cl 15 requirement that the capital of the Association be applied exclusively by the Applicant in the promotion of its Objects.

124.6. Of the 183 Members who voted in person in support of the second resolution at the special general meeting, it is not possible to say how many of them became members following the 5 May 2023 special general meeting, however, there is a strong inference that at least a significant number did so.

125. It can be said with certainty, that the outcome on the second resolution is sufficiently tainted by the mis-information propagated by the Board and by the Wellbeing Clinic, and the recruitment of Members for the very purpose of supporting a resolution that would result in the Association becoming an empty shell, that the Court should conclude that the resolution itself is conduct contrary to the interests of the Members as a whole.

126. Further matters that support such a finding are that:

126.1. The proxy form, on which proxy votes were cast, did not describe the second resolution in terms but rather invited a Member to vote for or against “Merger”: Ex A1, Doc 133, 2.756.

126.2. The Court should find that this conveyed to a Member exercising a proxy vote that a vote in favour would support the two organisations coming together as one, with the continued participation of the Members of the Association in the new entity.

126.3. The Court should find that the proxy vote in favour of the second resolution is unsafe because it is tainted by the misleading nature of the proxy form.

126.4. The second resolution authorises a transaction in contravention of the prohibition in cl 15 of the Association.

127. The Applicant voted against the second resolution.

128. Mr Baragwanath voted against the second resolution.

129. A total of 89 Members voted against the second resolution.

130. In circumstances where the Members rejected a winding up, on 5 May 2023, and accordingly the Association is to continue in existence (no further winding up resolution having been put and passed in general meeting), each of the 89 Members are entitled to expect that the Association will continue to pursue its Objects, and its affairs conducted accordingly.

131. The Applicant goes further to submit that in this proceeding, the Court must proceed on the basis that all of the Members who did not vote at all, whether they were entitled to vote or not because of the cl 6.3 four week rule, are entitled to expect that the Association will continue to pursue its Objects, and its affairs conducted accordingly.

The failure of the Board to try to resolve its dispute with the Applicant, Mr Baragwanath and other members who opposed the divestment to Kalyra

132. Clause 11 of the Constitution applies to this dispute between the Applicant and the Association.

133. The Court has heard of the efforts made by the Applicant to try to mediate the dispute.

134. The Court has heard of the rejection of those efforts by the Association, and of the determination of the Association to implement a transaction by which it divests all of the Association's assets to Kalyra.

135. The determination of the Board to resist every effort to resolve this dispute, particularly in circumstances where it has particular knowledge of its co-operation with Dr Lawlor Smith to subvert the outcome of the 5 May 2023 resolution, ought itself to be found to be conduct contrary to the interests of the Members.

Remedies

136. If the Applicant is successful in its claim, he invites the Court to hear further from the parties as to the appropriate remedies.

137. In part, the appropriate remedies will be informed by the findings made.

138. Pursuant to s61(4) of the Act, the Court has wide ranging powers. The Court's power includes making:

    138.1. orders for regulating the conduct of the Association's affairs in the future: s61(4)(a);

    138.2. orders restraining a person from engaging in specified conduct or from doing a specified act or thing: s61(4)(c);

    138.3. orders requiring a person to do a specified act or thing: s61(4)(d);

    138.4. any other order that is, in the opinion of the Court, necessary to remedy any default, or to resolve any dispute: s61(4)(g).

139. Pursuant to s61(5), the Court may order the winding up of the Association. The Applicant contends that this should be the remedy of last resort. The Applicant's contention is that a suite of orders can be formulated to protect the interest of the Members as a whole, with a view to the preservation of the Association.

140. The remedies sought by the Applicant are, subject to refinement:

    140.1. An order the effect of which is that the second resolution passed at the 4 July 2023 special general meeting be of no effect and discharged.

    140.2. An order restraining the Board and Kalyra from entering into any transaction the substantial effect of which is the divestment of the assets of the Association to Kalyra.

    140.3. An order directing the Board to appoint a committee, comprising the Applicant, Michael Baragwanath and two nominees of the Board to investigate and report to the Members as to the alternatives available to the Members by which the assets of the Association may be employed to achieve the Objects of the Association.

A Dal Cin

Counsel for the Applicant

Service

The party filing this document is required to serve it on all other parties in accordance with the Rules of Court.

Accompanying Documents

Accompanying this Document is a:
If applicable identify document(s)