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A. OVERVIEW

1. This outline of closing submissions is intended to be read together with the Respondent's Outline of Opening Submissions filed on 9 August 2024 (FDN82) (ROS) and adopts the defined terms therein. The ROS, in particular, address the documentary evidence and applicable principles.
2. In these proceedings, the Applicant principally seeks relief in respect of conduct between May and July 2023 which is said to have been oppressive or unreasonable within the meaning of s 61 of the *Associations Incorporation Act 1985 (Act)*.
3. The Respondent submits that the claim should be dismissed for the following reasons:
 - (a) The evidence establishes that the Board at all times acted bona fide and in good faith in its decisions to close the hospital and propose a transfer of the Respondent's assets to JBMT and its handling of the May and July SGMs.
 - (b) On any view, the Board's decision-making was a reasonable and considered exercise of the board-members' formidable combination of knowledge, skill and experience, both generally and specifically of the McLaren Vale & Districts War Memorial Hospital. On no basis can it be said the Board's decisions were so unreasonable that no reasonable board would have made:
 - (i) the decision to close the hospital and
 - (ii) then to propose a transfer of the Respondent's assets to JBMT.

The Applicant has not led any expert accounting or health management evidence to mount a genuine challenge to either decision or the Board's consideration of those decisions.
 - (c) Insofar as the Applicant challenges the correctness of the decision to close the hospital or says that there were (or are) other, better, proposals to deal with the Respondent's assets, those contentions in substance seek a merits review of the Respondent's decision-making, which is not the task the Court undertakes on a claim under s 61 of the Act.

- (d) The Board's communications with members fairly informed them of the Board's decision-making and rationale and the substance of the JBMT proposal, together with hypothetical alternatives. The reality was that there were no viable alternatives. The Pelligra proposal was a stalking horse created by Mr Baragwanath. The 'consultation' process sought by Mr Baragwanath was not formulated and can only be seen, in reality, as a means for him and his associates to block the JBMT proposal for long enough to enable them to take control of the Respondent. There is no evidence as to the viability of Mr Baragwanath's more recent proposal.
- (e) It may be accepted that the Respondent could have obtained further consultants' reports, undertaken a wider community consultation program, pursued a different opportunity with JBMT or undertaken some other process to deal with its assets following the decision to close the hospital. In theory, the possibilities for consultation and such a process are endless.
- (f) But the Board was responsible for the management of the Respondent Association, and the decision the Board reached was to put a single recommendation to members. There is no real suggestion, evidence or inference that decision to proceed in that way was anything but bona fide and in good faith. It came from a desire to provide certainty and leadership. It was made by a Board with many years of experience managing the hospital and in the wider health system, business and the law. The Board was not under an obligation to put any and every conceivable idea to the members or to insist on a consultation process before making a recommendation to members.
- (g) It is important in this regard that the resolution empowered the Board to transfer the Respondent's assets and undertakings to JBMT on such terms as it thought fit. As is apparent from the evidence, a consultation program to determine the future use of the site by JBMT is well advanced and no concluded agreement with JBMT has been reached. As a matter of substance, much of what the Applicant now seeks is already happening. The key issue in the proceeding is not consultation per se, but the identification of JBMT as an appropriate custodian for the assets (i.e. whether that decision was so unreasonable that no board acting reasonably could make it).

- (h) The proposal to transfer the Respondent's assets to JBMT is not contrary to its objects. There are a suite of powers in the Respondent's constitution to dispose of and deal with assets, whether as part of a winding up or otherwise. The assets will necessarily be used for the provision of health services by reason of JBMT's objects, which are enshrined in statute. Those objects are sufficiently similar to the objects of the Respondent. The Respondent's constitution and the authorities which consider the distribution of surplus assets of an incorporated association make clear that the objects of the recipient entity do not need to be identical, nor does the recipient necessarily need to be another incorporated association.

- (i) Once it is accepted that the JBMT proposal is not contrary to the Respondent's objects, the issues as to the acceptance of membership applications from persons who supported (and those who did not support) the proposal, and the Board's support for the proposal fall away. The Board was not required to undertake an inquiry into the voting intentions of new membership applicants or scrutinise the source of payments for memberships. The notion that the Board should somehow have been interviewing or vetting candidates for membership by making a subjective assessment as to their bona fides should be rejected. Unlike private clubs, there was no process of assessing, or refusing, membership applications.¹ No evidence has been led as to how some such process could or would have worked in practice. To accept that it was appropriate not to scrutinise and assess individual applications for membership, one need only imagine the controversy that would have been attended by, for example, a decision to refuse membership applications from persons who supported the Pelligra proposal or with links to the Freemasons due to a concern about their bona fides, or the fact that they had no connection with the Hospital or the McLaren Vale Community.

- (j) And the issue is not material:
 - (i) a small fraction of members were JBMT residents and a smaller fraction still had their memberships paid for by Wellbeing.

¹ Millar v Houghton Table Tennis and Sports Club Inc [2003] SASC 1 at [177] per Besanko J.

- (ii) only a subset of the members who are JBMT residents or who had their memberships paid for by Wellbeing actually voted (MFI R21).

- (k) The evidence does not bear out the Applicant's contentions as to Wellbeing and others stacking out the membership base. At the 5 May SGM (prior to any allegations of a recruitment drive by Wellbeing) there was very significant majority support for the JBMT proposal. Between the 5 May and 4 July SGMs, the level of support for the JBMT proposal increased from 74% to 86% and the membership base increased almost ten-fold. That is entirely consistent with increasing community awareness and engagement generally, leading to higher membership numbers. Unsurprisingly, not all new members voted the same way. As events transpired, by the 4 July SGM, the support within the membership for the JBMT proposal had increased somewhat. The increase does not suggest pollution of the membership base. Any such suggestion falls badly from those opposed to the resolutions and the Board decision, who were engaged in their own membership drive involving persons with no connection to McLaren Vale or the Hospital.

- (l) The notion that Mr Baragwanath and Mr Davis have been unfairly dealt with is untenable. They are not oppressed; they are the oppressors. They have waged, and continue to wage, a ruthless and strategic plan to oust the Board and take control of the Respondent's assets. They had every opportunity to, and did, put their case, to mobilise support for their cause and oppose the JBMT resolution. They continue to do so. Their real complaint must be that they lost the vote, and cannot accept the decision-making of the Board or its ratification by members with a real connection to the community. Having been unable, even now, to galvanise sufficient membership support for their side, they have instead sought to use this Court to achieve their ends.

- (m) Of course, it was and remains open to members to oppose the JBMT proposal. It may be accepted that some members may have a genuine and reasonable belief that some other proposal or process to deal with the Respondent's assets is preferable. But that is ultimately not to the point. As noted above, the Court does not engage in a merits review of the decision.

- (n) The Applicant's and Mr Baragwanath's seeming belief that they are better custodians of the Respondent's assets than JBMT may also be accepted, for the purposes of argument. However, their conduct, and that of their associates, does them no credit. Their conduct provides important context for the Board's conduct and necessarily informs the Court's assessment of the reasonableness or otherwise of the Board's conduct. This was a volunteer Board doing what they thought was best in the face of a campaign to defeat a proposal which the Board and, at every stage, a significant majority of the membership, have thought best.
- (o) The Court should have serious reservations about the motivations of the Applicant, Mr Baragwanath and their associates. They have commercial and political ambitions for the site. Their campaign has been characterised by a level of vindictiveness which weighs heavily against a grant of discretionary relief which would see them installed on some form of consultation process or otherwise re-open the issue vis-à-vis the membership by way of declaratory relief setting aside the resolution authorising the Board to proceed to negotiate the JBMT proposal.
- (p) Assuming, contrary to the Respondent's primary case, there is an argument that members were misled as at 4 July, or there was insufficient consultation at the time, there is no utility in granting relief as at August 2024. The members have had ample opportunity to further engage in, and reflect on, the debate and proposal. A selection of the discovered documents most favourable to the Applicant's case when taken out of context has been widely disseminated – well beyond the Respondent's membership base. A professional and extensive community consultation process conducted by Democracy Co is ongoing. The incumbent Board retains the overwhelming support of the members. The JBMT proposal has not been finalised and no agreement has been executed. Members could have, but have not, called a special general meeting to prevent the JBMT proposal from going ahead.

B. ISSUES FOR DETERMINATION

Matters no longer in issue

4. Much of the Applicant's pleaded case has fallen away.
5. The pleaded claim at SOC [13] as to various (unspecified) obligations relating to the Australian Charities and Not for Profits Commission (ACNC), Deductible Gift Registration (DGR) status and other taxation issues has been abandoned.
6. The Applicant's case was run on the basis that he would not call any evidence on those matters and the Court would not be asked to make any findings about those matters, save that the Applicant would give some brief evidence to explain some concerns he had with the management of the Respondent's affairs at an earlier point in time (Tr 69.31; 73.13, Applicant Opening (AO)).
7. Save to the extent that evidence might provide something of a narrative context to the way in which events unfolded, such evidence is not relevant and cannot form a foundation for any findings. It is obvious from both the way that those claims were pleaded and the way the case has ultimately been run that those complaints never had any substance. The Applicant's external advisors were right to abandon these issues – they conflated issues arising under the Act and the Respondent's constitution with entirely separate transactional tax issues.
8. The pleaded case as to alleged deficiencies in the giving of notice has fallen away (in the sense of physically providing notice, as distinct from the question of whether the materials which were provided were misleading). It was not opened on in writing and, while it was not entirely clear whether it was formally abandoned when the Applicant's case was opened orally, it was effectively conceded (Tr 71.7-72.5, AO). The claim is without basis.²
9. The claim that it was an "abuse of power" to convene the 4 July SGM (SOC [7B(d)]) is not advanced as a separate claim but rather has been "folded into" the oppression case (Tr 72.34, AO). That claim, in any event, may be shortly dealt with.

² Note ROS [68] and fn 99 as to the documents which demonstrate that proper notice was given and, otherwise, that any defect in the notice was not such as to warrant intervention by the Court.

There is no doubt that members had the power to requisition a special general meeting pursuant to cl 10.3(c) of the Respondent's constitution. That was as true for Mr Baragwanath as it was Dr Lawlor-Smith.

10. The Applicant's notional ultra vires claim (SOC [7B(e)]) is not advanced as a true ultra vires claim, but rather as a species of oppression insofar as it is alleged that the transaction was oppressive by reason of being contrary to the Respondent's objects (Tr 73.1, AO). It is plain that the Respondent has the necessary power to transfer its *surplus assets* to JBMT, subject to the restrictions of clause 17 of its constitution. The Respondent also has a suite of powers to dispose of assets and support other entities with similar objects without winding itself up, as set out in clause 5 of its constitution. The issue is, thus, not one of power but of process, i.e, a s 61 issue.
11. The pleaded claim at SOC [7A] as to collaboration with JBMT has effectively been replaced with a claim arising in respect of collaboration with Wellbeing (Tr 70.7, AO).

Issues for determination

12. What really remains of the Applicant's case is his claim under s 61 of the Act.
13. In that regard, the following issues arise for determination.
 - (a) Was it not reasonable for the Board, between January and March 2023, to seek to identify a proposal to deal with the Respondent's assets, rather than immediately go to members to announce the closure prior to having formulated any plan for the future, such that no reasonable board would have proceeded in that way.
 - (b) Did the Board fail to adequately consider alternatives to the JBMT proposal. If so, was that failure so unreasonable that no reasonable board would have considered the alternatives in that way.
 - (c) Did the Board fail to properly inform, or otherwise mislead, members as to the nature of the JBMT proposal or the availability of viable alternatives (or lack thereof), including in respect of proxy forms and how to vote flyers. If

so, was the omission or falsehood of a sufficient level of materiality, and of such magnitude and force that the Court may be comfortably satisfied that voters were more likely than not to have been misled or be comfortably satisfied that the Board was not acting in good faith.

- (d) Was the resolution passed at the 4 July SGM contrary to the objects of the Respondent, and, relatedly, is JBMT an entity which does not have similar objects to the Respondent.
- (e) Were persons who applied to become members of the Respondent who happened to support the JBMT proposal ineligible for membership. Relatedly, did the Board have the power, and if so, fail to properly exercise such power, to 'vet' applicants for membership by conducting an inquiry into whether the applicant supported the JBMT proposal, and rejecting the applications of any applicants who did.
- (f) Were persons who had their memberships paid for by others ineligible for membership and, to the extent this occurred, is it of any consequence.
- (g) Was the Board acting in bad faith in its dealings in respect of the requisitions of special general meetings by Mr Baragwanath and Dr Lawlor-Smith.

14. In the event that the Court finds, contrary to the Respondent's submissions, that the Board has engaged in oppressive or unreasonable conduct in respect of the above issues, it remains for the Court to consider whether to exercise its discretion to grant relief having regard to the significance of any conduct found to have been contrary to s 61 of the Act and the passage of time and events following any such conduct.

C. THE WITNESSES

Mr Baragwanath

15. Mr Baragwanath was a poor witness. His evidence was characterised by moments of candour but, on significant issues, an unwillingness to make appropriate concessions and a tendency to tailor his evidence to suit the Applicant's case.

16. On the whole, it might be accepted for the purposes of argument that Mr Baragwanath believes that he and his associates are best placed to manage, control, develop and/or lead some kind of community consultation process in respect of the Respondent's assets. He might also believe that the JBMT proposal is not the best proposal for the Respondent's assets and that there should be further consideration of what to do with the Respondent's assets – if only for the purpose of giving him further opportunity to persuade the membership of the merits of his proposal and/or to prevent the JBMT proposal from going ahead now that he has apparently settled on a preferred proposal for the assets.
17. His beliefs must, however, be qualified by his ulterior and collateral purposes, namely to advance a commercial proposal for the benefit of himself and/or his associates and to advance his and the Applicant's political interests. This stands in stark contrast to the position of the Board, who at no time can be said to have had any ulterior or other self-interested motives.
18. It is necessary to deal with Mr Baragwanath's evidence in some detail because the Applicant's claim that the Respondent has behaved in a manner oppressive or unreasonable for the purposes of s 61 of the Act must necessarily be assessed in light of the circumstances that existed at the time, including Mr Baragwanath's campaign to take control of the Respondent and defeat the JBMT proposal.
19. Mr Baragwanath's involvement in these proceedings is unusual.
 - (a) He is not the Applicant, despite being the "primary driver of this activity" (Ex R19, p 2).
 - (b) The Applicant's law firm has been the solicitors on record for the majority of the proceedings.
 - (c) Mr Baragwanath is employed as a consultant at the Applicant's firm for the purposes of this proceeding, despite not being a legal practitioner (Tr 156.2, XXN).
 - (d) Mr Baragwanath is funding these proceedings (Tr 156.26, XXN).

- (e) Despite the above, Mr Baragwanath was not asked by the Applicant to provide, and did not provide, documents for discovery generally (Tr 156.10, XXN) and did not consider that he needed to do so (Tr 156.20-22, XXN). Apart from his response to a subpoena, he seems to have only provided a small selection of documents, in circumstances which he was unable to recall.
20. Mr Baragwanath had no interest in the Respondent prior to 27 March 2023. That changed the moment it appeared that the Respondent's assets might be available.
21. Initially, Mr Baragwanath wrote to the Board to propose that he conduct a review of the situation (Ex A1, Tab 63).
22. It is not surprising that the Board did not readily invite him in. Mr Baragwanath had no prior involvement with the Respondent and no relevant experience (Tr 116.33, XXN). His email asserted, without foundation, that the Board had not properly considered the decision to close the hospital.
23. Mr Baragwanath's initial assessment of the situation – that the hospital was not only viable, but should be expanded – was demonstrably wrong (Ex A1, Tabs 11, 20).
24. Mr Baragwanath accepts that the Board's decision to close the hospital was not wrong (Tr 262.20, XXN).
25. Mr Baragwanath's proposal was to conduct a review with a view to making a "formal offer" to continue hospital services. His attempt to portray that as a proposal to explore other options (Tr 115-116, XXN) cannot be reconciled with the text of his email and should be rejected.
26. Mr Baragwanath's initial proposal to the Board was an attempt to position himself to control or drive a commercial opportunity. He attempted to avoid that proposition by asserting that it was "not how a board works" (Tr 123.30, XXN). The answer was non-responsive. His lengthy evidence on corporate governance in re-examination (Tr 293.24-294.10, RXN) similarly did not engage with the fundamental and obvious point that if he was conducting a review to provide a formal offer to continue services he was necessarily best placed to at least drive (if not control) that opportunity. That much is borne out by the "Dream Team" email he sent shortly after contacting the board and his community forum on 3 April (Ex

A1, Tabs 76, 65). It is consistent with his subsequent conduct of seeking to install himself and a number of his associates, including the Applicant and Mr Sparrow, onto the Board and his present plans (Ex R19).

27. His offer to conduct a review came with the first of many threats. Mr Baragwanath's attempt to characterise that as an attempt to help the "board see that the best way for the motion to pass is to engage in community consultation" (Tr 118.7, XXN) cannot be reconciled with his email. It also cannot be reconciled with his subsequent conduct – none of which was consistent with helping the Board facilitate the passage of its motion in favour of the JBMT proposal through a process of community consultation. Mr Baragwanath's plans never involved the JBMT proposal; his plans from the outset were for an alternative commercial proposal (Ex A1, Tabs 63, 76).
28. He then contacted the local school (Ex R17) and hosted a community event (Ex A1, Tab 65). Within days of having approached the Board, he was mobilising support against them and the JBMT proposal. His evidence to the contrary is another example of a failure to make appropriate concessions (Tr 120.31, 121.10, XXN). The same is true of his evidence that he was not seeking to promote a for-profit option against the JBMT proposal (Tr 122.20, XXN).
29. Mr Baragwanath's email to his "Dream Team" of 6 April 2023 is revealing (Ex A1, Tab 76). When asked about the members of the Dream Team in examination in chief, he did not mention their relevant commercial and political relationships (Tr 87.23, XN; cf Tr 124.23-126.7, XXN).
30. Mr Baragwanath then attempted to distance himself from point 3 of his "plan", which was to effect the removal of the Board. He sought to draw a distinction between "encouraging" the Board to resign and "forcing" them to resign (Tr 126.4-127.23, Day 2, XXN). This was an attempt to downplay the extent to which he has actively sought to take control of the Respondent, which is borne out by his prior and subsequent conduct.
31. In a moment of candour, and contrary to his earlier evidence, he accepted that the JBMT proposal was never part of his plan – he was pursuing a commercial opportunity (Tr 127.24-127.34, XXN). His attempt to disavow the possibility of

payment was evasive (Tr 127.35-128.20, XXN). He was at least willing to accept that his business associates could be paid (Tr 128.3, XXN). The Court also knows from very late discovery given during the trial that Mr Baragwanath proposes to use charitable proceeds generated from his plan to promote his political interests (Ex R19, p 2).

32. To make his campaign appear more credible, Mr Baragwanath created the Pelligra proposal (Ex R15). He and his associates promoted that proposal as “viable” and “real”. His evidence initially was that this was not part of his overarching plan to oppose the JBMT proposal (Tr 122.37, XXN). That evidence may be contrasted with his later acceptance of the Pelligra proposal being part of his plan (Tr 128.31-129.8, XXN).
33. Mr Baragwanath knew that he needed to have some form of proposal of sufficient substance to make people think that it was worth pursuing some alternative to the JBMT proposal (Tr 122.30, XXN; Tr 133.34; cf TR 123.4, XXN).
34. Mr Baragwanath did not tell the members that he wrote the proposal (Ex R15; Tr 133.38-139.7, XXN). He did not disclose that it was a “sub optimal” proposal (Tr 89.25, XN; Tr 134.15, XXN), although he maintains he thought it was the best proposal at the time (Tr 134.17, XXN). He accepted that the proposal would give Pelligra group a level of ownership with significant control over the site and the Respondent’s financial position, together with the possibility of the commercialisation of heritage aspects of the site (Tr 131.3-132.8, XXN). The Pelligra proposal came to nothing and has been abandoned.
35. That takes on real significance in the present case because the Pelligra proposal was the only alternative which was actually put forward for consideration beyond a few theoretical suggestions in email and social media traffic which amounted to no more than “half formed ideas”. The Pelligra proposal was thought by the key opponent of the JBMT transaction to be the best proposal at the time (Tr 134.17, XXN).
36. Mr Baragwanath again gave self-serving evidence when asked about the use he made of the Pelligra proposal and Norman Waterhouse’s letter to the Board. He agreed that he deployed these publicly, and prior to the Board having the opportunity to respond (even by his self-imposed deadline) (Tr 135.14, XXN). He

accepted that these documents were procured as part of his strategy to make members believe that there was an alternative plan and to undermine confidence in the board and impugn the governance of the association (Tr 128.31-129.5, XXN). His evidence that his threats to make the correspondence public and report the Board to regulatory agencies was not part of an attempt to cause their resignation or capitulation should be rejected (Tr 138.38-139.3, XXN). Notably, he filed an ACNC complaint against the Respondent shortly after these proceedings were commenced and another against JBMT shortly after it was joined as an interested party, accepting that its joinder was a “contributing factor” (Ex R14; Tr 246.4, XXN). His attempt to draw a distinction between him destroying the reputations of the Board and “facilitating” it is another example of an inability to make appropriate concessions (Tr 137.4-7, XXN).

37. Mr Baragwanath had a tendency to disassociate himself with the questionable conduct of those in his camp which nonetheless suited his ends. His evidence as to Ms Hirst’s proposal to Wellbeing (to which he was copied) proposing to subsidise their rent with charitable proceeds was evasive (Tr 138.30-139.30, XXN). Likewise his evidence as to the dissemination of discovered documents by Ms Tassie (Tr 164, 168.2, XXN; Ex R5, R6, R7). Notably, while he did not accept Ms Tassie to be in his “camp”, he did reveal that she is one of a small number of people who can post on his Save McLaren Vale Inc Facebook page (Tr 171.6, XXN). She is also one of the people whom he “holds up” as part of his campaign (Ex R19, p 2).
38. Mr Baragwanath was careful in choosing his audience. He rejected the proposition that he was seeking to downplay his opposition to the JBMT proposal publicly (Tr 129.36, XXN). His message in his “letter to his friends” was rather different (Tr 127.3, XXN). In a moment of candour, Mr Baragwanath conveyed his view that there was “no viability” in the JBMT proposal (Tr 127.26, XXN).
39. His privately held view is difficult to reconcile with his public statements and evidence portraying himself as open minded as to the outcome so long as there was sufficient consultation (see, e.g., Ex R4). Those public statements, in turn, do not sit comfortably with his continued campaigning despite having never achieved anything close to majority opposition to the JBMT proposal or for his or his associates’ campaigns for membership of the Board (Tr 152.32-153.28, XXN).

40. Mr Baragwanath also had a tendency to disassociate himself from his own conduct when it reflected poorly on him. Prior to being shown his email to members (Ex A1, Tab 101), Mr Baragwanath accepted that an email which had been sent on behalf of the Board “ccing” rather than “bccing” the members was plainly inadvertent and accidental (Tr 136.10, XXN). When confronted with his subsequent email attributing ill intent to the Board, he attempted to retreat from his earlier evidence and even denied the clear effect of his email (Tr 141.3-16, XXN). In any event, he did not think twice about exploiting the opportunity to email the membership having obtained their details (Tr 141.28, XXN).
41. No doubt realising how poorly his “letter to scumbags” (Ex R9) reflected on him, he sought to distance himself from it (Tr 175-6, XXN). In so doing, he denied the obvious – that the letter was a more frank expression of what he had been threatening publicly from as early as 3 April (Tr 176.38, XXN). Having not got his way, he intends to destroy those who have stood in his way.
42. In a similar vein, when shown his email to the Mawson State Electoral College, Mr Baragwanath sought to distinguish between using this issue for political purposes and using it to attract new members to the Liberal party (Ex A1, Tab 183; Tr 183.12-184.7, XXN). This passage of his evidence was particularly revealing. It was here that, in a moment of candour, he revealed his very considered approach to communications and that his plans and proposals would change depending on whatever he considered most effective (Tr 184.1-185.21, XXN). His evidence also cannot be reconciled with his more recent comments, which are unambiguous to his intentions to use this issue to grow Liberal party membership and related political gain (Ex R19, p 2).
43. A feature of the trial is how much the Applicant and Mr Baragwanath have sought to make of an asserted unwillingness on the part of the Respondent to mediate or pursue some process pursuant to cl 11 of the Respondent’s constitution.
44. The Court will necessarily treat such evidence with caution given that it cannot receive evidence of without prejudice conversations or counsel conferral. In any event, on the evidence that the Court has received, it is apparent that:

- (a) there is no evidence that the Applicant or Mr Baragwanath ever sought to engage cl 11 of the Respondent's constitution;
 - (b) the Court record shows that Applicant's conduct of his case was attended by very significant delays of the kind which necessarily hamper attempts to mediate;
 - (c) there has been many months of public debate and multiple general meetings of the Respondent at which the members have had every opportunity to address the matters the subject of this dispute;
 - (d) the campaigning against the Board has not been of the kind which can be said to have been conducive to mediating in good faith.
45. An important passage of Mr Baragwanath's evidence is where he addressed the some of the potential options for the use of the site (Tr 257.5-260.18, 263.28; 267.29, XXN). He eventually accepted that it was really a matter of opinion (subject to the question of whether the JBMT proposal is legally permissible). In particular, he accepted that his issue with JBMT was that (in his opinion) it had more limited uses for which it could put the site and that if JBMT paid for the site then the Respondent might be able to use the funds for different (but, he said, not better) purposes (Tr 257.13-259, XXN). That evidence highlights the extent to which the underlying complaint about the JBMT proposal in these proceedings is really seeking a merits review.
46. Mr Baragwanath went on to explain his latest proposal, the Save McLaren Vale Inc proposal. It appears to be some sort of magic pudding development proposal which does not require debt or equity or new management capacity or even much involvement from external consultants (Tr 261.2ff, XXN). While keen to talk about it in the witness box, no evidence was led as to what the proposal really was or how it was viable. Despite the passage of time, and community consultation process, whatever this proposal may be, it has not found sufficient favour to generate any move among the membership to revisit the issue. That weighs heavily against a grant of discretionary relief.

47. Remarkably, Mr Baragwanath said that this latest proposal was what he wanted all along (Tr 262.2, XXN), and went on to say that this option was an “obvious” option which was available to members as at 4 July (Tr 265.2-266.2, XXN), but at the same time that no one was aware of it because the Board had said it was not an option and Mr Baragwanath had not been campaigning extensively (Tr 266.19, XXN). That evidence was given in the face of all of his earlier communications with the Board and members and notwithstanding him having propounded the Pelligra proposal (and not his latest proposal) at the relevant times.
48. The very late discovery of Mr Baragwanath’s email of 18 June 2024 (Ex R19) puts into sharp relief Mr Baragwanath’s present thinking. Contrary to his own evidence and the case advanced in these proceedings by the Applicant, he has no issue with paying for memberships when he does it. Community consultation has disappeared from his plan. He is actively planning a special general meeting to remove the board and release further documents. His attempt to walk back from that email was a further example of evasive evidence when confronted with conduct which he knew did not reflect well upon him (Tr 276-278, XXN).
49. When confronted with the reality that the reason he was pursuing these proceedings is that he could not otherwise get the support of members, Mr Baragwanath made an extraordinary attempt to disavow having really been particularly engaged in this issue at all (Tr 280.4-281.38, XXN).
50. The reality is that Mr Baragwanath is not only keen to use this matter for political purposes but is actively touting his campaign against the Board as a way of promoting his political skill set. Further still, he wants to use the proceeds from the site for the purpose of “actively promoting the people who saved it”, i.e. him and his associates – or at least the Liberal party to the extent that he seeks to avoid credit for this himself (Tr 277.19-278.2). He accepted this was an “obvious connection” to the Applicant’s political campaign in the seat of Mayo (Tr 278.31).
51. It is respectfully submitted that the Court will see through Mr Baragwanath’s proposals. They never advance beyond an initial concept. They have been deployed and abandoned as it has suited his purposes. There is no evidence establishing their viability in even a theoretical sense. What ‘community consultation’ really means

for Mr Baragwanath is the opportunity to prevent the transfer of the Respondent's assets to JBMT so that he can control them and deploy them for his commercial and political purposes.

Mr Davis

52. Mr Davis was an unimpressive witness. As the Applicant, he has also had his firm as the solicitor on record, employed Mr Baragwanath and Mr Sparrow as consultants of his firm and accepted funding from Mr Baragwanath for the costs of the action. He also disseminated discovered documents without seeking the Respondent's or Interested Party's consent or notifying them until the matter was raised with him after the documents came to be widely disseminated (Ex R12; Tr 230.7-231.3).³
53. The Applicant's evidence is of very little assistance to the Court in these proceedings. The various unsubstantiated technical issues he has raised at times in relation to ACNC, DGR and tax matters have all been abandoned. He floated a recommencement of hospital operations or some suggestions for a restructuring of the Respondent (Tr 206, Day 3, XN), neither of which have any foundation as to viability in the evidence.
54. The Applicant seems to have become involved in this matter at Mr Baragwanath's behest, based on no more than a "vague interest" in Mr Baragwanath's plan for the hospital, which he may not even have read (Tr 211.16-20, XXN). He did not really engage with the community and apparently had other more pressing matters to attend to (Tr 213.19-37, XXN).
55. His seeming lack of interest in the hospital is consistent with his significant delays in progressing these proceedings, which are apparent from the Court record. When confronted with these delays, he gave evasive evidence (Tr 224-225, XXN).

³ In doing so, the Applicant acted contrary to well established principles e.g. *Legal Services Commissioner v Hurley* [2009] NSWADT 125 at [37].

56. It is not entirely clear why he is the Applicant in this proceeding. Insofar as he seeks to remain involved in the affairs of the Respondent as part of the relief sought, the Court can have no confidence that he will properly engage with the process.

Mr Bignell MP

57. Mr Bignell was subpoenaed to give evidence by the Applicant. Mr Bignell was an impressive witness. There was no challenge to his recollection of events or honesty. His evidence should be accepted.
58. He had been a member of the Respondent previously but had let his membership lapse given his role in Parliament, which involved lobbying for funding for the hospital (Tr 592.18, XXN). He has been the local member of State Parliament for 18 years (Tr 592.12, XXN). He was a regular attendee at the Respondent's AGMs and had dealings with successive boards of the Respondent (Tr 592, XXN). It is clear that Mr Bignell has had a long-standing interest in the Respondent and the community that he serves.
59. Mr Bignell spoke highly of the Board, and particularly highly of Mr Overland and his expertise within the public health system (Tr 592.33-593.8, XXN).
60. Mr Bignell was also asked about his involvement in the chain of correspondence between Mr Overland and Dr Lawlor-Smith on 6 May 2023, to which he was copied (Ex A1, Tabs 110, 111). He confirmed this was consistent with the discussions he was having at the time given his support for the Board's position (Tr 590, XN).
61. Mr Bignell was asked about the "strategy meeting" with some board members at Ms Forrester's home on 10 May 2023. His evidence about the meeting stands in stark contrast to the way in which the Applicant has sought to portray the meeting.
62. His evidence was that he spent most of the time at the meeting on the phone outside talking with Mr Baragwanath trying to diffuse the situation by explaining to him that the JBMT proposal had overwhelming community support (Tr 591.11, XN).
63. He recalled discussion about dates for what was ultimately the 4 July SGM. His evidence was that the discussion was largely about the desire to have him attend the meeting and his upcoming travel commitments (Tr 591.22, XN).

64. Mr Bignell candidly gave evidence that both sides of politics had wanted to avoid closure “on their watch” and had put pressure on each other to maintain funding. Ultimately, however, there was bi-partisan acceptance that the hospital was no longer viable by the time of early 2023 (Tr 593.16, XXN).
65. He had faith in the Board’s decision-making and had been speaking with Board members prior to the announcement of the decision to close (Tr 594.5, 595, XXN; 603, RXN). He accepted that the hospital’s life was limited and explained that his comments in his correspondence to Ms Tassie needed to be understood in the context of community hospitals across the State not being viable even with government funding, and that ongoing funding was uncertain (Tr 596-597.11, XXN).
66. He was not really able to say how funding would have continued or even whether it would continue. He accepted that he was not in the health department and was not really across the detail or decision-making (Tr 597, XXN). He agreed that the short-term nature of funding extensions made things difficult for the hospital (Tr 597.31, XXN).
67. As the local member, Mr Bignell was aware that new hospital beds were becoming available in the region and did not see the loss of the hospital as a major issue or oppose the decision – his concern was to ensure that GP clinics remained open and viable (Tr 598, XXN).
68. Mr Bignell spoke at both SGMs in support for the Board and the JBMT proposal. Mr Bignell spoke favourably of JBMT and was familiar with its work. He considered that the kind of work that JBMT proposed to do on the site to be very worthwhile and would address community needs; there was overwhelming community support for the JBMT proposal, in particular the concept of the transfer of the assets from one charity to another (Tr 598.38-560.2, 602.15, XXN).

Mr Overland

69. Mr Overland has had a long career in health, in particular in regional hospitals (Tr 308-309, XN). He has also had a long association with the McLaren Vale area (Tr 310). He chaired an experienced and skilled Board (Tr 325-326, XN).

70. Mr Overland has been retired for some time. He is in his 70s (Tr 455.11, XXN). He had a heart attack in 2020 (Tr 460.14, XXN). His terminally ill wife died during the events in question and he had full time carer responsibilities during that time (Tr 395.22, XN). He has been subjected to unpleasant treatment by opponents of the JBMT proposal (Tr 395.25, XN; Ex R6). He and his board have been the subject of a sustained public attack and campaign for their removal by the Baragwanath camp since April 2023, replete with threats of litigation and being reported to regulatory agencies.
71. Mr Overland was an honest and forthright witness. He answered the questions put directly, although at times he tended to give lengthy answers. He sought to distinguish between recollection and reconstruction, despite having some difficulties with his memory.
72. Mr Overland had a tendency to speak colloquially. At times it was suggested to him that his colloquialisms conveyed some significance (e.g., Tr 432.1, 446.27, XXN). Those suggestions amounted to no more than semantics (Tr 433.9, XXN).
73. Mr Overland was willing to make concessions. At times, particularly after extended periods of giving evidence, he had a tendency to be overly agreeable and make concessions which were clearly not correct on the face of documents (e.g. Tr 578-579, 586, XXN).
74. Mr Overland was defensive and frustrated at times. Be that as it may, it is clear that he was being honest and doing his best in very difficult personal circumstances.

Closure of the hospital

75. Mr Overland recounted the enormous challenges – financial and non-financial – that had faced the hospital throughout his time on the Board, and the Board’s efforts to overcome those challenges and have the hospital continue to operate as a hospital of some kind (Tr 313-315, 318-325, 327-345, 352, XN). All of this is borne out by the documents (ROS [20]-[38]). During that period, the Board had regard to external reports and considered options for the hospital in the lead up to the point at which the hospital would close due to its age and other developments in the health

care system. It is clear from his evidence that the Board was considering the future of the hospital on an ongoing basis.

76. The Board had been pressing for, and expecting, a three year extension (Tr 450.36, XXN). Ultimately, the short-term extension of government funding in January 2023 was the point at which the Board decided that the hospital could not go on (Tr 346, XN). The Board collectively decided it was not possible to go on after being advised of the short extension – it was not a decision driven by Mr Overland (Tr 478, XXN; Ex A1, Tab 44). Mr Overland’s disappointment with having to make that decision was palpable (Tr 348.2, XN). There is no substance to any suggestion that he or the rest of the Board was happy or keen for the hospital to close.
77. Given the long lead-in to the decision, it was not one which required a “board retreat” (Tr 480.34, XXN). It was also not a decision for the membership in the first instance (Tr 481.26, XXN). It was a quintessential management decision that was then conveyed to the members after the Board had formulated a plan for the future. The members had the opportunity to replace the Board or put forward other proposals had they disapproved of management’s decision.
78. Mr Overland was cross-examined about the financial position of the Respondent. When asked about the financial statements in cross-examination, he made appropriate concessions as to both the limits as to his accounting expertise and propositions put to him about the way in which the accounts appeared to have been prepared, albeit that he was not really in a position to say (Tr 425.25, 428.37, 429.14, XXN).
79. Mr Overland’s evidence was clear that he believed that the hospital was not profitable in an underlying sense, including having regard to advice of the Respondent’s treasurer, the late Mr Allert (Tr 429.5, XXN). The honesty or bona fides of his evidence and understanding was not challenged (albeit the correctness of his view was challenged). The Court would bear in mind that much of what was put to Mr Overland related to the treatment of complex government grant funding, the full terms and extent of which were not in evidence. There is no expert evidence as to the financial position or viability of the hospital.

80. So far as the Applicant places some significance on the notional profit in FY22, that must be considered and read together with Note 19 to the financials (Ex A1, Tab 34, p 275). That makes the parlous financial position of the Respondent abundantly clear.
81. Mr Overland was not challenged on his evidence that, even with a significant increase in funding, the hospital still faced financial challenges due to unforeseen circumstances and issues such as rising wages (Tr 464.37-465.2, XXN). It may be noted that the Respondent made a loss in January 2023, the month the decision to close was made (Ex A1, Tab 44).
82. Mr Overland was asked about the shortage of doctors facing the hospital. It was suggested to him that some sort of public appeal might have solved the problem. Mr Overland's evidence was that ongoing attempts to attract doctors by a public appeal was not useful in the real world of the medical profession (Tr 454, 492.22, XXN). SALHN's view was that if the shortage of doctors worsened they would just open more beds at Flinders Medical Centre rather than make staff available (Ex A1, Tab 42, p 377). That provides a useful indicator of the correctness of Mr Overland's view.
83. Mr Overland was not genuinely challenged on the numerous other factors and challenges facing the hospital which informed the decision to close the hospital.
84. Mr Overland was cross-examined at some length about his and SALHN's speculation about how the State government might deal with any potential closure at the conclusion of what was the then expected 3 year funding extension, which would have come at about the time of a State election. He accepted that it was plausible that there might be a political intervention at about that time to keep the hospital open (Tr 456-458, XXN). It may also have been possible that the State government was providing only a short-term extension because it planned for the hospital to close within three years, i.e. prior to the next election (Tr 479, XXN).
85. It is not apparent how the Board was meant to act on this speculation, to the extent that it is contended they should have. In the event, the State government only extended funding for 5 months. What is clear is that the State government conveyed

to him from the outset that it was comfortable with the decision to close the hospital (Tr 358.30-359; Ex A1, Tab 51).

86. Mr Overland candidly admitted that the Board did not think it appropriate to politicise the issue or simply keep pressing for more money (Tr 493-494, XXN). It may be noted that the Board had been pressing for more funding for some time, but this came with increased costs and obligations (Tr 494.5, XXN). It may also be noted that, having been lobbying for extended funding for some time, the Board only received a 5 month extension.
87. It was suggested to Mr Overland that he was more concerned about political sensitivities than the closure and had not tried hard to enough to keep the hospital open. While the Applicant may have preferred a more robust or public approach, Mr Overland clearly exercised his judgment, with the benefit of his significant experience within the public service, to write to the Minister in a careful way which would give the Minister a final opportunity to intervene before the closure became public (Tr 486, XXN). The Minister did not intervene.

Consideration of alternatives

88. Mr Overland was clear as to the Board's position in relation to the future of the hospital site – the Respondent did not have the financial or management capacity to redevelop the site and so another charitable or not-for-profit entity with similar objects would need to take it on (Tr 349.18, XN; 608.9, XXN).
89. It might be observed that much of this consideration was informal in the sense that there was not extensive documentation of the different options, but it is clear that the Board had an awareness of the kinds of options and had formed bona fide views about the best way forward (Tr 363.15, 374.16, XN). The Board was also clear that they did not want a for-profit venture and the future of the site needed to protect its heritage and existing tenants (Tr 350.1, XN). The Board was very aware of what it would take to transform the site into a new health facility (Tr 353.3, 363.24, 365.2 XN). Of the not-for-profit options, the Board was attracted to the logic of dealing with JBMT given the relationship and proximity and so the other theoretical options did not really feature (Tr 354.2, XN).

90. Mr Overland accepted that his view was that the Board should decide on what it would recommend to members and take a single proposal to members (Tr 582, XXN). That evidence was consistent with his contemporaneous communications (Ex A1, Tab 51). That approach was obviously taken bona fide in good faith.
91. While it might be accepted that the Board's consideration was not documented in detail, and that alternatives were not documented to the same extent as the JBMT proposal, that reflects that the Board had worked together for some time and was comprised of experienced people who were very familiar with the hospital, health system and local community. They brought that knowledge and experience to bear and the Court would not infer that lack of detailed documentation is indicative of a lack of consideration, especially considering that they are an unpaid volunteer board and necessarily held to a different standard than a board of, for example, a listed public company.
92. It was quite clear that the decision to close the hospital was made before any discussion with JBMT and the negotiations to transfer the site (Tr 357, XN).
93. The Board's recommendation to members was that JBMT was based on their experience and belief that it was the best option. The view was that there was no other better proposal that he had seen – as distinct from there being no other option at all (in theory) (Tr 608, XXN). The Board was not simply going to give the site away, it had already been negotiating, and would continue to negotiate, on the terms of the transfer if authorised to do so by members (Tr 368.18-373, XN).
94. It was put to Mr Overland that the Board could or should have pursued some other alternative approach with JBMT following the 5 May SGM by reference to cl 5.2 of the Term Sheet. His evidence was that the Board did not have the opportunity to engage with this because Dr Lawlor-Smith moved so quickly to re-enliven the original motion – which remained the Board's preferred approach (Tr 609.20, XXN). Events simply overtook the possibility of negotiating an alternative arrangement with JBMT, bearing in mind that possibility was no more than an aspirational line on a term sheet (Tr 610.33, XXN).

Response to Mr Baragwanath's initial approach to the Board

95. Mr Overland was asked about Mr Baragwanath's initial approach to the Board to offer his services (Ex A1, Tab 63).
96. Mr Overland discussed the approach with the Board (Tr 379.15, XN). Mr Overland candidly explained why he was not interested in Mr Baragwanath's initial approach – Mr Baragwanath was not known to Mr Overland, was not a member of the Respondent, and had no association with the Respondent or hospital system. His reasons for not derailing the process that the Board had determined to take after an extended period of consideration and years of struggling with the viability of the hospital, and with the benefit of two consultancy reports, are not unreasonable (Tr 433.12-434.3, XXN). It was not unreasonable not to want to undertake yet another review into the hospital based simply on an email from an unknown individual (Tr 435, XXN).
97. Mr Overland was also asked about his initial phone call with Mr Baragwanath. He was again candid in what he could recall and what he took from the call (e.g., Tr 380, XN; 437, XXN). It was clear from his evidence that he had very little if any recollection of the call but he did his best to answer the questions about what he thinks he would have said.

Engagement with Dr Lawlor-Smith following the 5 May SGM

98. Mr Overland candidly accepted that his intention when responding to Dr Lawlor-Smith was to ensure that Mr Baragwanath and his associates were unable to be elected to the Board (Tr 502, XXN). That reflected the Board's open public support for the JBMT proposal.
99. Mr Overland was asked about the "strategy meeting". As with much of the Board's impugned conduct in these proceedings, it did not amount to much. It was an informal discussion between some members of the Board and Mr Bignell to think about how they might proceed following the 5 May SGM (Tr 506-508, 512-519, XXN).
100. As submitted further below, there is nothing unreasonable or oppressive about this. The JBMT proposal had obtained very significant majority support at the 5 May

SGM. The Board remained of the view that it was the best proposal. The Board had been approached by a member seeking to re-visit the issue. The Board would not have put up the resolution again but for Dr Lawlor-Smith's approach (Tr 519.8, XXN) and would not have pursued the matter further if it failed following a second vote (Tr 520, XXN).

101. This was all happening in the face of Mr Baragwanath's campaign to remove the board and mobilisation of support for "corporate action" against the Board. It was happening in the face of growing membership and campaigning for both sides (Tr 522, XXN). Mr Overland had no idea what the views of the new members were, and nor could he; there was no inquiry being made into their views (and nor should there have been) (Tr 522, XXN).
102. It is also apparent that there was campaigning being undertaken by others within the community quite independently of the campaigns being run by Mr Baragwanath and Dr Lawlor-Smith. For example, it appears that there was a Dr Reid, who runs another medical clinic not on the Respondent's land, who appears to have paid for a much larger number of memberships than Wellbeing (Tr 552.30, XXN; 614.26, RXN) (assuming that his clinic paid rather than simply collecting funds from applicants and depositing them on their behalf to the Respondent).

Timing of 4 July SGM

103. Mr Overland was asked about the timing of the 4 July SGM. The questioning proceeded on the basis that this was designed to assist Dr Lawlor-Smith. Mr Overland was mindful of ensuring that the timing accorded with the constitutional requirements (Tr 526.31, XXN). He knew that he had about 60 days from a request call a meeting. As Mr Overland pointed out, it gave both sides time to campaign (Tr 526.26, XXN). Given the result of the 5 May SGM, it might be observed that Mr Baragwanath was starting from further behind than Dr Lawlor-Smith. If anything, he had more to gain from the additional time as he needed to convince / sign up more members.
104. Much was made of Mr Baragwanath's email of 11 May 2023 (Ex A1, Tab 115). In that email, Mr Baragwanath proposed appointing additional members to the Board. That passage of his email was used to found a suggestion that the Board was

somehow manipulating the process by continuing to assist him to call an SGM to require a spill of the Board (Tr 530.37, XXN).

105. The questioning proceeded on the basis that all Mr Baragwanath wanted was to fill the vacant board seat and that he did not want to spill the Board (Tr 527.36, 529.23, 530.6, XXN). That overlooked the fact that Mr Baragwanath's email was not just about filling a spare Board seat.
106. Mr Baragwanath's email expressly requested the Board do much more than appoint an additional director. Appointing an additional director was point 1 of a 6 point proposal to derail the JBMT proposal and, even then, he made no guarantees that the spill motion would be withdrawn if that proposal was acceded to (Ex A1, Tab 115, p 682).
107. The invitation to draw Mr Overland's attention to the balance of the email was not taken up (Tr 532). The questioning thus proceeded on an incorrect premise. Even with that incorrect premise and without having had an opportunity to review the full text of the email, Mr Overland recalled that his understanding was that Mr Baragwanath was still seeking a spill of the Board (Tr 533.11, XXN). When Mr Overland's memory of the full email was refreshed, it was clear that he never understood the email to be anything other than conveying the potential for a withdrawal of the spill motion if a number of other conditions were satisfied (Tr 614.13, RXN).
108. Indeed, when he did receive the proposed resolution to give effect to his call for a special general meeting, Mr Baragwanath seemingly gratefully received it – there was no suggestion that he would abandon his request if only one additional board member was appointed (Ex A1, Tab 118).
109. Mr Overland was cross-examined about his understanding of the need to call an SGM within 60 days of a request for members and it was pointed out that there was more than 60 days between Dr Lawlor-Smith's request for an SGM and the 4 July SGM date, suggesting that the 60 day period could not have motivated the timing for the meeting (Tr 538.38, Day 5, XXN).

110. However, the operative 60 day period was the 60 days from Mr Baragwanath's request for a special general meeting (Tr 540.30, XXN).⁴ It was suggested that this period was somehow not relevant because in his view the request for a meeting was invalid. That overlooks that he was plainly trying to facilitate the meeting that the Board had been asked to convene as a matter of fairness (Tr 390-391, XN; Tr 533.32, XXN), having understandably formed the view that it would not be productive to simply tell Mr Baragwanath that his request was invalid and deny him the opportunity to hold the meeting that he wished to hold (Tr 534.5, XXN). When he did suggest to Mr Baragwanath that the meeting request was invalid, Mr Baragwanath told him he was wrong (Ex A1, Tab 115, p 681) and that the request would only be withdrawn if a series of conditions were met (Ex A1, Tab 115, p 682). Understandably, and appropriately, Mr Overland and the Board tried to facilitate the spill motion rather than block it.
111. The Court may consider the counterfactual; what if the Board had convened an SGM to consider Dr Lawlor-Smith's motion (as it was bound to do upon receipt of her request) and simply refused to call Mr Baragwanath's meeting or put any board spill resolution on the basis that it considered the request invalid. Or what if the Board had ignored the 60 day period within which to convene a meeting in response to Mr Baragwanath's request on the basis that it was invalid so that it instead convened a meeting 60 days after Dr Lawlor-Smith's request so as to give her *more* time to campaign. One can only imagine the complaints that would have advanced in these proceedings and by Mr Baragwanath at the time.
112. It was suggested to Mr Overland that the timing of the notice was designed to prevent opponents of the JBMT proposal from signing up members. It was suggested that his failure to give advance notice of the 4 July SGM was designed to deprive the Baragwanath camp of their ability to sign up new members (Tr 559.31, XXN). As Mr Overland pointed out, the Baragwanath camp had been campaigning extensively (Tr 559.35, XXN). As noted above, Mr Baragwanath had already requested an SGM to spill the Board, having been canvassing support since April 2023.

⁴ Note that, while dated 1 May 2023, the request was not in fact sent to the Respondent until 3 May (Ex A1, Tab 103 and was not sent to the Chief Executive Officer.

113. As with many issues in the Applicant's case, the timing issue ultimately goes nowhere. Had there genuinely been an effective "ambush", there has been over 12 months for Mr Baragwanath's camp to recover. They tried running as candidates at the October 2023 AGM and failed. They have not mobilised sufficient support since.

Communications to members ahead of the 4 July SGM

114. The minutes of the 5 May SGM record that Mr Overland said that the Board would stay on to oversee the closure of the hospital (end of June 2023) and then resign to allow a new Board to take over (Ex A1, Tab 108). Dr Lawlor-Smith urged them to stay on. Mr Baragwanath had called for a meeting to spill the Board. Board positions were coming up for election at the October 2023 in any event.
115. In the circumstances, it is not clear what significance is placed on the Board staying on to the 4 July SGM at which point the spill motion was moved, or how it is even suggested that it was a departure from what the Board had said at the 5 May SGM (Tr 560.31, XXN). The sensible answer is that there is no significance. The support for the Board at the 4 July SGM was overwhelming, and remained so at the October 2023 when a conventional election was held as opposed to a spill motion.
116. If the real complaint is simply that the JBMT proposal was put to members again (Tr 560.38), it is difficult to see the foundation for that complaint; members are entitled to call SGMs and that is precisely what Dr Lawlor-Smith did. The Board made no secret of its support for her resolution, which was the same resolution the Board proposed in May and which the Board expressly described as such (e.g. Ex A1, Tabs 132, 134). It was no great community secret in the weeks following the 5 May SGM (Tr 561.3, XXN).
117. It was put to Mr Overland that he was setting up the Pelligra proposal as a 'straw man' (Tr 555, XXN). Mr Overland was clear that the Board had concerns about the proposal (Tr 383.1, XN) and had no interest in giving effective control of the assets to a private developer (Tr 556, XXN).
118. It is to be recalled that the Pelligra proposal had been circulated widely and promoted as being "real" and "viable" as an alternative to JBMT. There were no

other proposals. The Court now knows that the proposal had been created by Mr Baragwanath and even he believes it was a “sub optimal” option. The Board was clearly acting bona fide when communicating with members about the viability or otherwise of this or other options which were being canvassed on social media without any real foundation as to their viability (Tr 384-385, XN).

119. Mr Overland accepted that the Board ignored Mr Baragwanath’s “proposal” of 11 May 2024 (Ex A1, Tab 115; Tr 562). On its face it was not a proposal of any substance and was an attempt to buy time for his own campaign.
120. It was also put to Mr Overland that, in effect, he should have given informal notice of the 4 July SGM before formally giving notice of the meeting (Tr 557, XXN). Mr Overland rightly did not think that was sensible (Tr 557, XXN).
121. Mr Overland was asked about the importance of ongoing general practice services in the community and the extent to which that would be compromised if a private developer took over. His evidence was that he wanted to ensure that Wellbeing could continue to operate given the concerns that had been raised with him about private developer taking on the site (Tr 564.30, 565, XXN).
122. It is apparent that Mr Overland’s use of the term “merger” is genuine (Tr 572.22, XXN). That is apparent from his earliest internal communications (Ex A1, Tab 51). He accepts that he now understands that does not reflect the legal nature of the proposed transaction. It is plain, however, that in context the use of the term “merger” was not misleading in any material sense; it was abundantly clear that what was proposed was in the nature of a “transfer” or a “gift” (depending on which camp’s characterisation was adopted).⁵ From the outset, the campaign against the proposal fixed upon the issue of “gifting” (Ex A1, Tab 65). There was never any suggestion that members of the Respondent would be members of JBMT or retain control of the Respondent’s assets. That was the premise of having a nominee director of the Respondent on the JBMT board for a transition period (Tr 572.13, XXN).

⁵ See, e.g., ROS [62], [73]-[75] (and the document cited therein).

Mediation / dispute resolution

123. Mr Overland accepted that the Board had not engaged in a dispute resolution process or a mediation (Tr 606.26, XXN). As submitted above in relation to Mr Baragwanath's evidence, that evidence must be approached with caution given the nature of the issues discussed.

Dr Lawlor-Smith

124. Dr Lawlor-Smith has had an impressive career in clinical practice and public health administration (Tr 618, XN). She has worked in clinical practice for decades. She has served on the board of SALHN. She had treated patients at the Respondent's hospital for over 20 years (Tr 624:38, XN). Dr Lawlor-Smith has been a member of the Respondent intermittently for the last 30 or so years (Tr 628:06, XN).

125. Dr Lawlor-Smith was an honest witness. She made no secret of her concerns as to the motivations of the Applicant, Mr Baragwanath and their associates. The very unfair campaign against her in connection with these proceedings has clearly taken its toll, but she she did her best to answer questions directly and honestly, despite her own integrity being challenged in cross-examination.

126. Dr Lawlor-Smith and Dr Lovell established the Wellbeing clinic and paid to renovate the old obstetrics wing of the hospital for what is now the clinic (Tr 621.04, XN). The clinic employs a large number of medical and administrative staff. It services over 100 patients a day and has over 7,000 active patients. Its patient base comes from McLaren Vale and its surrounding suburbs (Tr 621:34, XN). Dr Lawlor-Smith is the managing director of the Wellbeing practice and, in recent years, has transitioned to a management role for the practice and no longer treats patients there (her clinical practice being elsewhere) (Tr 620:25, XN).

127. Wellbeing is one of two GP practices in McLaren Vale, the other being Dr Reid's McLaren Vale Family Practice, which is smaller (Tr 622:15, XN).

128. Dr Lawlor-Smith explained that, in recent times, Dr Lovell has been the primary treating doctor at the hospital prior to its closure. (Tr 623:20, XN). He has a particular specialisation in palliative care. Most of the patients who were referred

to the hospital were patients who did not need to be in a tertiary (major) hospital, for example patients recovering from surgery.

129. Dr Lawlor-Smith explained the critical shortage of GPs willing to care for patients at the hospital and her efforts to encourage them to do so and obtain better payment terms for those doctors, without success (Tr 626:06, XN). Her evidence is entirely consistent with the communications between the Board and SALHN as to their struggle to attract and retain doctors.
130. Dr Lawlor-Smith spoke highly of the Board and Mr Overland, having worked with a number of boards and chairs of the Respondent over the decades (Tr 628:10, 659:03, XN).
131. Dr Lawlor-Smith had no involvement in the decision to close the hospital and found out together with the general public (Tr 628:12, XN). She was not surprised by the decision given her long-standing involvement with the Respondent and the health system generally (Tr 628:37, XN).
132. Dr Lawlor-Smith readily understood that the hospital was not viable, drawing on her over 35 years in health management experience and knowledge of the demise of other similar hospitals (Tr 672:21, 673:09, XXN).
133. Dr Lawlor-Smith did not herself have any prior association with JBMT, but doctors at Wellbeing (in particular Dr Lovell and Dr Nielsen) treated patients from JBMT's aged care facility and retirement village (Tr 629:31, 630:10, XN). Dr Lawlor-Smith had formed the view that JBMT would be an excellent recipient of the Respondent's assets due to its excellent reputation in the region (Tr 639:04, XN).
134. Dr Lawlor-Smith gave evidence about the email to her and Dr Lovell from Ms Hirst (copied to Mr Baragwanath) promoting the Pelligra proposal (Ex A1, Tab 88). She recounted her concerns at a private developer taking ownership of the hospital site (Tr 631:14, XN).
135. Her concerns extended not just to the operation of the site, but what would happen to it in the event that the for-profit venture failed (Tr 673:09, XXN). In that regard, she had very significant reservations as to the viability of the various unsubstantiated proposals which had been circulating from time to time (Tr ,

673:26, XXN). It is clear that her assessment of these risks informed her concerns as to the level of ongoing protection for existing services on the site.

136. Prior to the 5 May SGM, Dr Lawlor-Smith encouraged staff and some friends to join the Respondent, but did not otherwise campaign actively (Tr 632:34, XN).
137. Dr Lawlor-Smith gave evidence at her disappointment with the outcome of the 5 May SGM. She was concerned for the Wellbeing lease, she supported the JBMT proposal, and she was alarmed by the “businessmen in suits” who had all of a sudden taken an interest in the Respondent’s assets (Tr 632:36 – 633:21, XN). This prompted her to become more actively involved to support the JBMT proposal. Dr Lawlor-Smith candidly accepted that she was very distressed in the aftermath of the 5 May SGM, and overcommitted with other work commitments (Tr 638:03, XN).
138. Dr Lawlor-Smith was asked about her email of 6 May 2023 (Ex A1, Tab 110), which she sent in the immediate aftermath of the 5 May SGM.
 - (a) She did not ultimately seek legal advice as foreshadowed in her email because Mr Overland suggested that the Respondent’s solicitors draft the motion instead (Tr 634:19, XN).
 - (b) She drafted a communication to patients but did not post or email it to patients; it was sent to staff (Ex A2, Tab 209) and displayed on the front counter (Ex A2, Tab 207) (Tr 635:34, XN).
 - (c) Her staff did not and could not, by virtue of the time pressure of their role, ask patients to become members but membership forms were left at the front counter in case patients wanted to sign up (Tr 636:07 – 637:02, XN).
 - (d) A little over 30 memberships were paid for by Wellbeing, mostly staff (Tr 637:02, XN). This represents a very small fraction of the membership base (MFI R21). It may be noted that only a subset of those members ultimately voted.
 - (e) Staff did not go and collect proxies from patients (Tr 637:07, XN). Dr Lawlor-Smith’s concern was to ensure that patients who were elderly and immobile had the opportunity to vote. It may be noted that Dr Lawlor-Smith held

relatively few proxies relative to Mr Baragwanath and his associates (MFI R21).

(f) A paid Facebook marketing campaign for the McLaren Vale area was undertaken (Tr 636:16, XN). No other paid marketing was undertaken.

139. It became apparent to Dr Lawlor-Smith within a week or so that the Facebook marketing campaign was successful, that community members were opposed to the Applicant and his associates taking over the hospital (Tr 638:20, XN). She did not therefore consider that she needed to (or had the time to) campaign further. That is not surprising given the significant support that the JBMT proposal had at the 5 May SGM. It is clear that the “campaign” undertaken by Dr Lawlor-Smith and Wellbeing was far less extensive than might first have been thought on the face of her email to Mr Overland on 6 May.
140. Dr Lawlor-Smith was asked about the timing of the meeting and how she knew about Mr Baragwanath’s motion to spill the Board. She could not recall how she knew this (Tr 665:08, XXN). It might well have been conveyed to her by a member of the Board or otherwise been a matter known publicly given the extent of the community debate on the issue. It was in fact in the public domain and had been conveyed directly to Dr Lawlor-Smith by Mr Baragwanath.⁶
141. When the 5 May SGM failed to pass the resolution in favour of the JBMT proposal, Dr Lawlor-Smith immediately made enquiries of a potential alternative site (Tr 668:19, XXN). She was trying to reassure her staff given the real risk to the practice which she perceived, even though this involved being untruthful in one of her communications with staff (Tr 675:38, XXN).
142. She remains concerned, in light of subsequent events, that Mr Baragwanath and his associates will challenge her lease (Tr 640:05, XXN). Those concerns are no doubt genuinely held given the campaign which has been waged against her publicly (Tr 640:14, 643:12 XN; 669:02, XXN).

⁶ The “letter[s] to request Board spill” (Ex A1, Tab 100) are dated 1, 2 or 3 May, and were served by email on 3 May (Ex A1, Tab 103). Mr Baragwanath’s bulk email to members (which included Dr Lawlor-Smith – glal@adam.com.au) was sent on 2 May, and includes a statement that it has been decided to call for the board to resign so that members can elect a [new] board (Ex A1, Tab 103, p. 625).

143. Dr Lawlor-Smith accepted that she now understands a registered lease provides the Wellbeing practice with a measure of protection, but at the time she held genuine concerns for how a private operator might put their lease at risk (Tr 640:05, XN; 645:30, XXN).
144. As noted above, Dr Lawlor-Smith's concerns extended beyond simply the strict legal protection afforded by her lease but the wider issues posed by a commercial development, particularly given her assessment (based on decades of experience) that such a development was likely to fail (Tr 646:19, XXN).
145. Dr Lawlor-Smith was cross-examined about the extent of inquiries she had made to obtain legal advice as to her lease and investigate the background of Mr Baragwanath and his associates (Tr 653:30, XXN). She did not seek legal advice because she did not consider it necessary and she did undertake her own research into the backgrounds of the key persons in the Baragwanath camp (Tr 670:12, XXN). She also made enquiries of Meals on Wheels, the manager of which expressed that there was no other option which guaranteed their ongoing operation but that JBMT had guaranteed it (Tr 650:34, XXN). It is not apparent what obligation she is asserted to have been under to make inquiries for the purposes of these proceedings. In any event, there is no doubt her concerns were genuinely held.
146. Dr Lawlor-Smith was cross-examined on the letter she drafted to patients (which was displayed at the reception rather than sent out) (Ex A2, Tab 202). The letter cannot be fairly criticised. It correctly notes JBMT's commitment to continue existing services. It correctly notes that businessmen from out of town (e.g. the Applicant and Mr Sparrow) had campaigned against the JBMT proposal from proceeding at the 5 May SGM. It correctly identified that they had proposed a for-profit development which would involve a developer taking over the hospital assets (i.e. the Pelligra proposal). It correctly identified that there was no commitment from the opponents of JBMT to maintain existing services which was equivalent to that given by JBMT. It also correctly identified that, if the venture fails, then having taken an interest in the land (as the Pelligra proposal entailed), the site would be at risk.

147. Dr Lawlor-Smith explained the succession plan that had been in place for the Wellbeing practice to her son and daughter-in-law. That succession plan has been put on hold due to the difficulties created by this litigation and the online campaign against her (Tr 641:27, XN).
148. Dr Lawlor-Smith's support for the JBMT proposal went well beyond her "private interest". She was concerned for the community interest and supportive of what JBMT would do (Tr 647:36, XXN). She saw the ongoing operation of the practice as vital for the community even though she was going to be transitioning it without payment (Tr 648:05, XXN). Given the extraordinary work that she and Dr Lovell have done for the community over the decades, there is no doubt that she feels a very genuine sense of responsibility to, and concern for, the community.
149. Dr Lawlor-Smith was questioned about her (and Wellbeing's) motives. Various suggestions were made to her about plans to expand the practice (Tr 660:04, XXN). It is respectfully submitted that these suggestions go nowhere in the proceedings.
- (a) It is plain from Dr Lawlor-Smith's evidence that there are no significant plans to develop the practice (Tr 660:18, XXN).
 - (b) Dr Lawlor-Smith was cross-examined about the Clinpath subtenancy. She explained that these arrangements are highly regulated by AHPRA and that the rent was set by Clinpath (Tr 665:25 – 658:19, XXN).
 - (c) It was suggested to Dr Lawlor-Smith that the relationship between Wellbeing and the Association was strained and only improved when the lease was renegotiated. Dr Lawlor-Smith accepted that there had been some historical issues with the sharing of space with day-surgery rooms but maintained that the relationship was on the whole good, particularly with the current Board (Tr 658:20, XXN).⁷
 - (d) The suggestion that Wellbeing was trying to fend off competition was emphatically rejected, and it is plain that the GP shortage means that competition is no issue (Tr 661:11, XXN).

⁷ Note Mr Overland's Retrospective Review at p.254 of Ex A1, Tab 33.

- (e) The Wellbeing tenancy does not require redevelopment as it has already been renovated to a high standard, and no offer has been made to redevelop it by JBMT (Tr 621:01, XN; 663:04, XXN).
- (f) Wellbeing is in no need of additional patients, and aged care patients are difficult patients to service – if anything, an increase in the number of aged care patients would be a hinderance rather than a help for the practice (Tr 674:21, XXN).
- (g) Dr Lawlor-Smith and Wellbeing made no secret of their desire to remain on the site and that their view was that the JBMT proposal would provide the best protection for them on the site – to the extent there was any “private interest”, it was publicly disclosed from the outset (e.g. Ex A2, Tab 222).
- (h) The Board itself is not imputed with any of the internal speculation or musings of the Wellbeing practice proprietors

150. Dr Lawlor-Smith has been subjected to unpleasant online treatment and also been the subject of complaints to AHPRA by members of the Save McLaren Vale group, the first complaints against her in what was otherwise an unblemished 42 year record (Tr 643:12, XN; Ex R24).

151. Those complaints were made on 16 May, 4 June and 11 June 2024. The Court may note that the Respondent provided discovery in these proceedings on 16 May (FDN 27) and 4 June 2024 (FDN 33).

Dr Lovell

152. Dr Lovell has been admitting and treating patients to the hospital for decades. He had served as a medical representative to the Board of the Respondent relatively recently (Tr 685:09, XN).

153. He had been a member of the Respondent at times but thought his membership might have lapsed in recent times, prior to him rejoining during the period in question (Tr 689:35, XN).

154. Dr Lovell was an impressive witness. His evidence should be accepted. His evidence was never seriously challenged. Notably, there was no suggestion put to him about ulterior motives or “private interests” motivating his support for the JBMT proposal, in contrast to what was put to Dr Lawlor-Smith.
155. Dr Lovell spoke to members at an information session held at the hospital following the announcement of the decision to close it (Tr 687:11, 690:14, XN). He was not involved in the decision to close the hospital or aware of it prior to it being announced publicly (Tr 687:14, XN).
156. Dr Lovell spoke to Ms Blunt shortly after the closure was announced. The conversation gave him comfort as to JBMT’s intentions for the site, in particular that it would support Wellbeing and the existing tenants (Tr 687:19, XN; 700:30, XXN). They spoke about the potential for redevelopment for the site at a high-level, but it was clear that JBMT was not in a position to make any promises or really formulate what it had in mind by way of works for the site (Tr 701:17, XXN).
157. Dr Lovell offered to speak to Mr Baragwanath and Mr Pelligra about their proposal as he considered that Mr Pelligra must have formulated his proposal on the basis of incorrect premise if he thought that the site could be viable as a private hospital development (Tr 691:25, XN; R25).
158. Mr Baragwanath did not take up Dr Lovell’s offer to speak. Dr Lovell approached Mr Baragwanath after the 5 May SGM and offered to speak again. Mr Baragwanath said he would, but never did (Tr 693:09, XN).
159. Dr Lovell spoke at the 5 May SGM. He told members that, based on his 40 years’ experience, he had not come across a more reliable not-for-profit organisation than JBMT and that he was not aware of any better organisation than JBMT to take over the Respondent’s assets (Tr 693:27, XN).
160. Dr Lovell was asked about Dr Lawlor-Smith’s email to Mr Overland of 6 May 2023 (Ex A1, Tab 110, Tr 694:12 XN). He had no real involvement in the “campaign”, such as it was (Tr 694:35, XN). He made a video for Wellbeing’s Facebook page (Tr 696:12, XN). He did not email patients and did not actively encourage anyone to join the Respondent (Tr 695:03, XN). He had some recollection of the letter from

Wellbeing (Ex A2, Tab 207) being displayed on the front desk at the clinic but did not believe that it was sent to patients (Tr 696:29, XN).

161. Dr Lovell is a member of the consultation group for the community consultation process being conducted by JBMT (Tr 697:11, XN).
162. Dr Lovell had seen first-hand the financial struggle that the Respondent was under to operate the hospital. Nurses had left to Noarlunga due to pay issues (Tr 698:05, XN), the local pharmacy had not been paid regularly (Tr 698:15, XN) and the Respondent was behind on payments to GPs (Tr 698:18, XN). His concerns were principally financial and related to the availability of GPs (Tr 702:19, RXN).
163. Dr Lovell spoke of the heavy and poorly remunerated workload that he took on for the hospital (Tr 699:12, XXN). He would have continued to perform that work if the hospital had remained open and continues to do broadly similar work for aged care patients (Tr 698:37, XXN).

Ms Blunt

164. JBMT is a statutory trust, presently incorporated under the *James Brown Memorial Trust Act 1990* (SA) (Ex A1, Tab 1), although it was founded much earlier. Schedule 1 to the Act sets out the purposes of JBMT. There are eight trustees on the board and an executive management team of six (Tr 711:08, XN). JBMT trades as “Kalyra”.
165. Ms Blunt, the CEO of JBMT, has had a long career in primary health care in Australia and overseas, as well as in executive management. She is an accomplished businessperson and leader who has also served in the military. Her experience in the health sector spans hospital management, regulation of nursing, regional healthcare management and aged care. She has served on a number of boards and peak industry bodies (Tr 705 – 708:05 XN).
166. JBMT was established in 1892 upon the death of Jessie Brown, who had inherited significant wealth from her husband. Ms Brown donated her wealth to create JBMT (Tr 708:10, XN). Since that time, JBMT has provided a range of health services to the community, including addressing polio, tuberculosis, returned servicemen and

women, housing for disadvantaged, hostel and community hospital type services (Tr 708:15, XN).

167. In 1988, JBMT identified ageing and affordable housing as a priority community concern and adapted its strategy to provide services. Since then, it has provided a range of aged care, retirement living and affordable housing, primarily in the hills and southern region (Tr 708:28, XN).
168. JBMT's present strategic plan focuses on community and belonging, particularly among older people, although it also provides services to young adults (Tr 710:01 – 711:07, XN).
169. JBMT has had a long-standing relationship with the Respondent and in the McLaren Vale. JBMT was engaged to operate the Respondent's aged care facility, which it partly funded, together with the Commonwealth government. JBMT subsequently acquired that facility. JBMT shares food services with the hospital kitchen. JBMT has acquired and operates a number of retirement villages in the McLaren Vale (Tr 711:18 – 712:18, XN).
170. JBMT's revenue is approximately \$50 million and its asset base is approximately \$170 million. It has the financial capacity to manage and develop the site and is experienced in managing heritage buildings with its experience in Belair (Tr 712:22 - 36, XN). The capacity of JBMT to manage the site, and its bona fides as a genuine custodian of the site, to use the site to provide health services for the benefit of the community and to protect the existing services on the site are manifest, and were never challenged.
171. In December 2022, JBMT was undertaking its strategic planning and meeting with key stakeholders, including Mr Bignell MP and Mr Overland. She met with Mr Overland on 7 February 2023. Her concern was primarily for the hospital kitchen; she knew that the hospital was under pressure and was considering the future of kitchen services. Her understanding from her meeting with Mr Overland was that the Respondent was under significant financial difficulties and might only have about a three-year lifespan. She was considering whether JBMT should build its own kitchen or a café and how these could help the key demographics of the elderly and disadvantaged youth (Tr 713:03 – 716:03, XN).

172. When Mr Overland raised the possibility of JBMT taking on the entire site, Ms Blunt considered that enhanced food services, respite, expanded GP services, affordable housing and housing to enable the transition to retirement living would be under consideration for the site (Tr 716:22, XN). She was concerned to support the GP services and volunteer op-shop as these had significant overlap with the residents at JBMT's facilities.
173. After this initial meeting and an exchange of correspondence with Mr Overland (Ex A1, Tab 47), Mr Overland called Ms Blunt to tell her that it was likely that the hospital would be closing (Tr 716: 04) and Ms Blunt conveyed that JBMT would be interested in the site, following which she obtained the imprimatur of the JBMT board to proceed to explore the issue further (Tr 716: 21, XN). By this time, her understanding was that the hospital was likely to close given the intimation from the Minister but she was mindful that events could change, such as additional funding being provided to avoid a closure (Tr 716, 38).
174. Ms Blunt then arranged for a heads of agreement to be prepared, but following discussion with Mr Overland, who expressed the view that it was too legalistic , instead provided a letter and term sheet (Ex A1, Tab 56, Tr 718 - 719).
175. When the closure of the hospital was announced (Tr 719:11), JBMT was not actively involved in driving the debate but was concerned to ensure that the public understood that JBMT would support the existing services on the site and also ensure that its residents were being provided with accurate information given concerns as to some of the public / social media debate (Tr 719:11 – 720:29, XN, 741:2 – 17, XXN). It was clear that the misinformation that JBMT was addressing was coming from opponents of the JBMT proposal, including the suggestion that JBMT residents were not permitted to become members of the Respondent (Tr 720:22, XN, 741:06 XXN).
176. Ms Blunt attended the 5 May SGM to be available to answer any questions that the members might have. She told the membership that JBMT was committed to a community engagement process and would do a detailed study of the McLaren Vale community demographic to ensure that JBMT addressed community needs (Tr 731:08, XN). She gave an undertaking that all of the current tenants on the site

would be respected and supported (Tr 722:37, XN). There were some concerns that JBMT would build a nursing home and she explained that was not part of the plan, since JBMT already had one in the area (Tr 723:12, XN).

177. Following the 5 May SGM vote, Ms Blunt and JBMT essentially took a wait and see approach (Tr 724:02 – 730:38, XN). JBMT had contingency plans in place for interruption of food services for the residential aged care facility (Tr 741:09, XXN). Ms Blunt was receiving a number of calls from residents at JBMT facilities, staff and other community members about the outcome of the meeting. These enquiries prompted Ms Blunt to send out further communications to JBMT residents, including to explain to residents that they, like any other member of the community, were free to become members of the Respondent and could vote (Tr 724:09-25, XN). In this regard, JBMT and its staff are experienced in facilitating its members participating in elections, including working with the Australian Electoral Commission (Tr 725:04, XN). JBMT otherwise put up some information from the Respondent which had been issued to its members on noticeboards and the like (Tr 727:05-14, XN). JBMT also helped create the ‘how to vote’ card in response to a request from one of the Respondent’s staff (Tr 727: 15 - 37, XN), but the card itself was not used at the JBMT facilities.
178. Ms Blunt also attended the 4 July SGM. She was asked a number of questions at the meeting. She spoke about the community engagement process and JBMT’s desire to respond to community needs (Tr 731:12, XN). She recalled that topics of discussion included JBMT not being membership based and the proposal to transfer the Respondent’s assets to JBMT did not involve payment for the assets (Tr 731:26, XN).
179. Since the 4 July SGM, JBMT has established a steering committee as part of its due diligence process, including addressing the tenancies, the need to restore the heritage aspects of the site, remediating asbestos and legionella from the site (Tr 732:08, XN).
180. There is not at present a final plan for the site beyond protecting the existing tenancies. A wide-spread community consultation process has been conducted throughout the community and a community advisory group has been established

(Tr 732:16, XN). No final agreement has been entered into with the Respondent to effect the transfer of the site.

181. Ms Blunt was asked about the formulation of JBMT's proposal to take on the site. While she cannot now recall the exact sequence, she had a clear recollection of the proposal following a discussion with Mr Overland and being designed by JBMT to respond to community need; while Mr Overland provided feedback on the tone of the proposal or the way it was presented, the substance of the proposal was JBMT's (Tr 734:38 – 737:34, XXN).
182. Ms Blunt was asked about Mr Baragwanath's email to her alleging some improper treatment of a resident at JBMT's aged care facility (Tr 725:30 – 726:13, XN). She accepted that the allegation made by Mr Baragwanath was serious, which is why she provided him with a serious response and emphasised the need for him to follow due process in advancing his concern, if he had wished to (Tr 726:11, XN). She might have made enquiries of staff at the facility prior to responding to Mr Baragwanath, but could not recall (Tr 738:17, XXN). No evidence was led in chief from Mr Baragwanath as to the matters referred to in his email and no weight can be attributed to them.
183. Ms Blunt was asked about the "vulnerability" of residents. She recognised the careful balance that needed to be struck between supporting residents who, for example, may have difficulty reading but respecting their rights to participate in ordinary life. In this regard, she explained that JBMT are experienced in facilitating elections and their staff are trained in this area (Tr 739, XXN).
184. As Ms Blunt explained, residents at retirement living facilities are independent, they manage their own affairs and food etc (Tr 739:38, XN).
185. It is important to note that there were no residents from the residential aged care facility who became members of the Respondent (MFI R21). Nor were there any residents of JBMT's facilities outside of the McLaren Vale who became members (MFI R21).
186. The cohort who did become members were a (relatively small) number of the residents of the retirement villages in the McLaren Vale (MFI RF21), and that

cohort comprised a small minority of the Respondent's members (and a smaller proportion still voted). These are persons who are independent members of the McLaren Vale community who are perfectly entitled to become members and vote like any other member of the community.

D. CONTENTIONS

Closure of the hospital and notification to members

187. The decision to close the hospital in January 2023 looms large over the proceedings, but is not really in issue.
188. The starting point is that the Respondent's constitution does not require it to run a hospital. Note that the Respondent as a corporate entity is defined as the "Hospital" (cl 1) and the "MVDWMH" is defined as the "business operation of the Hospital" (cl 3), i.e. the business operation of the Respondent. It does not specify that a hospital must be part of that business operation.
189. The minutes of the 2023 Board Meeting and Mr Overland's evidence as set out above make clear the decision was made in January 2023, not March 2023 (cf Statement of Claim – Rev 2 (SOC) [3A(a)]). That evidence also makes clear that the decision was made before discussions with JBMT had even started, not after a decision had already been made to transfer the assets (cf SOC [3A(c)]). The Board proceeded to implement the decision once the State government conveyed that the Minister was "relaxed" about the decision in February 2023 (Ex A1, Tab 51).
190. It may be accepted that there were seven board members of the Respondent at the time that decision was made (Ex A1, Tab 41). That notwithstanding, the decision was made by a quorate board. At least implicitly, the decision was ratified from 25 May 2023, when the Board composition increased to eight members (Ex A1, Tab 121, p 704). At no point thereafter was the decision reversed (or attempted to be reversed) and the closure proceeded.
191. The documentary evidence,⁸ and the evidence of Mr Overland, establishes that the hospital was in a precarious position for many years. Having sought a three-year

⁸ ROS [20]-[28] and the documents referred to therein.

funding extension with a view to seeing the hospital through its remaining useful life, the Respondent was offered only 5 months by the State government, with no assurance that further funding would be provided.

192. Against that background, given all of the staffing, financial and management pressures the hospital was facing and the lack of certainty as to future funding, it was not unreasonable to seek to implement a managed closure during the term of the extended funding agreement. As noted above, even Mr Baragwanath accepts as much.
193. The Applicant's complaint that the decision was made without consultation (AO [41]; SOC [3A(b)], [12(h)]) does not advance his case in these proceedings.
194. The continued trading of the hospital day-to-day in all the circumstances is a matter within management's purview. It was not unreasonable for the Board to defer the announcement of its decision for a short time while it formulated a plan for the Respondent's assets post-closure. In that regard:
 - (a) the decision to close was taken on 25 January 2023 (Ex A1, Tab 44);
 - (b) the State government's position was conveyed on 15 February 2023 (Ex A1, Tab 51);
 - (c) a term sheet with JBMT was negotiated by around mid-March 2023, after discussions in February 2023 (Ex A1, Tab 56);
 - (d) the decision was announced shortly after the March 2023 Board meeting (Ex A1, Tabs 57, 59, 60).
195. That short chronology demonstrates that the Board acted proactively to work through the necessary issues between being notified of the short funding extension and going to members.
196. It may well have been open to the Board to have taken a different approach and announce the decision to close prior to formulating a plan for the Respondent's assets post-closure. But that does not render the Board's approach unreasonable. At most, on the Applicant's case, the decision might have been announced a month

earlier (i.e. following the February 2023 Board meeting rather than the March 2023 Board meeting, once the State government had confirmed it would not be intervening to prevent the closure). That delay, such as it is, is of no moment in these proceedings.

197. Nor was it necessary for the Board to provide members with the Asia Australis or Destravis reports or other detailed financial information or business records; the communications from the Board explained to members in plain English terms why the Board had decided to close the hospital. It was not unreasonable for the Board to proceed in that way.
198. In any event, the calling of the 5 May SGM gave members an opportunity to address the issue, and members dissatisfied with the decision had the ability to requisition a special general meeting – which Mr Baragwanath had done on 3 May 2023, i.e. he had called for a spill of the board *prior* to the 5 May SGM (Ex A1, Tab 103).
199. Members of the community who disagreed with the decision, including Mr Baragwanath, took the opportunity to campaign against it. All of the Board members involved in the decision to close the hospital who stood for re-election in October 2023 were re-elected.
200. To the extent that the closure of the hospital remains in issue, it is submitted that the decision to close the hospital (and the handling of that decision) was not so unreasonable that no reasonable board could have made it. Even if a different view is taken, it is not a matter which can sound in relief; there is no proposal to re-open the hospital or evidence that this could be done.

Consideration of options following the decision to close the hospital

201. The context in which the Board came to consider options for the Respondent's assets following closure of the hospital must be appreciated; they had been expecting a three-year funding extension, during which they could consider options for the future. As events transpired, they did not have the luxury of time.
202. As Mr Overland's evidence referred to above demonstrates, the Board was also experienced and had worked together and been considering options for the hospital for some time – they were able to consider and work through the various options

and bring their knowledge to bear quickly and with a level of informality. Similarly, they were quickly able to assess the merits of the JBMT proposal. Mr Overland in his evidence set out above, and the contemporaneous documents,⁹ demonstrated that the Board had considered the options and their merits and conveyed this to members. Others such as Mr Baragwanath were free to, and did, put forward their own alternatives.

203. Insofar as it is contended that the Board should have undertaken a more formal documented consideration of alternatives or engaged further consultants or valuers to consider alternatives, it may be accepted that course was open to the Board. It cannot, however, be said that the Board's approach was so unreasonable that no reasonable Board would have proceeded in that way, particularly as a volunteer Board comprised of experienced members.

204. Even at the time of trial, let alone as at the 4 July SGM, no alternative of substance has been put forward.

- (a) The Pelligra proposal has been abandoned.
- (b) Mr Baragwanath's suggestion of consultation went no further than a few bullet points (Ex A1, Tab 115). No evidence has been led to substantiate any of the proposals as to the leasing of the site and consultation / review process that was suggested therein.
- (c) There is no community consultation plan advanced by the Applicant in these proceedings.
- (d) Mr Baragwanath does not really seek community consultation, having essentially formulated his own proposal (Ex R19). Mr Baragwanath's latest proposal is not in evidence.
- (e) No expert evidence has been led by the Applicant as to alternatives or options or their viability.

⁹ Ex A1, Tabs 67, 90, 96, 98, 108, 134, 184.

205. Mr Baragwanath has not presented a proposal so compelling that no reasonable board would have opposed it. Nor is he a person of such expertise and skill that no reasonable Board would have declined to bring him into the fold, particularly in light of the manner in which he has conducted himself. Despite obviously having campaigned extensively and drawn on his network, including the “Dream Team” and Mr Pelligra, he claims to have only done “very little work” and put in “very little effort” (Tr 282.1-30, XXN).
206. It is respectfully submitted that Mr Baragwanath and the Applicant cannot have it both ways.
- (a) If their position is that Mr Baragwanath has a viable proposal (even if just a proposal for consultation) then they should have substantiated it.
 - (b) If their position is that they have done “very little work”, then the Court would not act on that to set aside the members’ vote and send the Respondent back to the drawing board when there is no dispute that JBMT is a credible and capable organisation to take on the assets and use them to benefit the community.
207. In the event, neither the Board nor the membership were sufficiently attracted to the Pelligra proposal, or the prospect of a similar proposal, or the idea of consultation for consultation’s sake that they considered it worth pursuing in preference to getting on with the JBMT proposal. That was the position as at the 4 July SGM and has remained the position since, despite ongoing campaigning by Mr Baragwanath and his associates.
208. In reality, Mr Baragwanath’s campaign has been all tip and no iceberg. It has been characterised by vociferous opposition to the Board and JBMT but he has offered no alternative of substance. It is little wonder that the Board and the membership have chosen to get on with the JBMT proposal rather than put everything on hold for Mr Baragwanath. JBMT’s bona fides and capability were not and cannot seriously be questioned. There is no doubt on the evidence that JBMT will be an excellent custodian of the assets and will use them to meet community health needs.

209. So far as the Board is concerned, that position was not so unreasonable that no reasonable Board could have taken it. Nor was the Board's bona fides seriously challenged. Insofar as it is submitted that the Board should have proceeded differently, that is essentially a submission advanced seeking a merits review of the Board's process.
210. So far as the members are concerned, it was their prerogative to vote as they did.
211. Even if the Court finds, contrary to the Respondent's submission, that the consideration of alternatives was so inadequate that no reasonable Board would have considered the matter in that way, it is respectfully submitted that the finding would not sound in any relief. The passage of time, ongoing debate and campaigning and ongoing community consultation program (Tr 416, Overland XN; Ex A1, Tabs 171-172) mean that events have overtaken any initial failure to canvass alternatives and the membership has had ample opportunity to change course.

Communications to members

Characterisation of JBMT proposal

212. The starting point is the text of the resolution itself. It makes clear that what is proposed is a "transfer" of the Respondents' assets to JBMT (Ex A1, Tab 66, p 467; Tab 132).
213. The explanatory notes to the notice of meeting for the 5 May and 4 July SGM referred to the "disposal" of assets and that assets and real estate would be "transferred" to JBMT (Ex A1, Tab 66, p 468; Tab 132, p 755).
214. Information provided to members explained what was proposed and that while this involved "gifting" the assets to JBMT it also involved "gifting" liabilities and obligations (Ex A1, Tab 67, p 473). This was said to involve "a conditional process which the Board will negotiate and embed in a legally binding agreement before it finally agrees to the transfer of assets to [JBMT]" (Ex A1, Tab 67, p 474).
215. Members were told that voting yes "will transfer the site to [JBMT]" (Ex A1, Tab 134, p 760). Members were told that Dr Lawlor-Smith's motion "asks for the hospital and hospital site to be transferred to [JBMT]" (Ex A1, Tab 134, p 761).

There was an entire section of the materials devoted to the “transfer” of the site to JBMT (Ex A1, Tab 134, p 762).

216. The Applicant has placed undue weight upon the use of the term “merger”. In some instances, even when the term was used, it was used in the context of a “merger by transfer of assets” (Ex A1, Tab 96). While it may be accepted that on the proxy forms only the heading “merger” was used, and that the use of the term “merger”, while bona fide, was not correct in a technical legal sense, in all the circumstances the term cannot be said to have been of such magnitude and force that the Court may be comfortably satisfied that a hypothetical voting member was more likely than not to have been misled.
217. There is no evidence suggesting that the membership (and community more broadly) were or could have been misled. To the contrary, the evidence discloses extensive debate about “gifting” or “giving away” the Respondent’s assets (e.g. Ex A1, Tabs 65, 84).

Characterisation of alternatives

218. As to the alternatives, the Board dealt with these in communications to members from an early stage, explaining what those alternatives were and why it formed the view that these were less desirable options (Ex A1, Tab 67).
219. A key consideration for the Board was ensuring that existing services were protected. The Board formed the view, bona fide, that other potential proposals did not offer the same level of protection for the site and existing services (Ex A1, Tab 67).
220. Whatever might be made of the legal protection that some of the tenants on the Respondent’s land might have had as to their tenure by reason of their leases, it is plain from the evidence that the Board from the outset held very genuine concerns about ensuring that these services were protected. It is also clear that a feature of the discussions with JBMT from the outset was ensuring the continuity and protection of non-hospital services and heritage features of the site (Ex A1, Tab 49, p 407). The Board was right to say that the JBMT proposal offered a higher level of protection than the alternatives. There was no alternative which guaranteed the

existing tenants in the manner which JBMT had, in circumstances where the bona fides of the only notional competing proposal, the Pelligra proposal, and those who were campaigning against JBMT were being seriously questioned by the membership.

221. Whatever the strict legal protection might have been, one can readily appreciate that the existing tenants (and the Board and members who wanted those tenants to remain) did not want to have a hostile landlord or, at least, a landlord who they did not trust. Nor would they want a landlord pursuing a proposal that was likely to be a commercial failure, given the uncertainty and challenges that would pose.
222. It may be accepted that the Board's communication of 26 May 2023 (Ex A1, Tab 122) put the issue of protection of existing services in more absolute terms than the Board's other communications and was something of an outlier. The Board's further communication shortly thereafter with notice of the meeting was more measured (Ex A1, Tab 134, p 759, 762).
223. These communications must be assessed in their context and as a whole. As submitted above, there was, and remains, no alternative proposal of any substance for the site or for further consultation. That necessarily means those other proposals provide less certainty and security for the existing services and the use of the assets generally.
224. These were communications of a volunteer Board who had engaged a professional communications consultant, Ms Hockley. It is respectfully submitted that the Board communicated with members in a plain English and readily understandable way.
225. The circumstances did not require the Board in its communications with members to delve into very detailed or technical issues or provide members with voluminous reports or valuations. Nor was the Board required to refrain from expressing views. The essential issue for the membership was whether the JBMT proposal was conceptually one which they endorsed; it was then a matter for the Board to negotiate and implement the resolution. It is respectfully submitted that approach is entirely orthodox.

226. It is respectfully submitted that the Board's treatment of alternatives in its communications cannot fairly be criticised in all the circumstances, and does not reach the threshold for judicial intervention, particularly when regard is had to the passage of time since the resolution and members having had every opportunity to reconsider (or further consider) the matter.

The JBMT proposal does not defeat the objects of the Respondent

Ultra vires

227. As noted above, the Applicant's ultra vires case is not genuinely advanced as such, but rather incorporated within his oppression claim.

228. To the extent that the ultra vires claim is advanced as a true ultra vires, it must fail.

229. The pleaded ultra vires case is that the resolution was beyond power for the following reasons:

- (a) first, clause 15 of the Respondent's constitution prohibits the application of the Respondent's income and capital other than to the promotion of its objects, and it is said that the transfer of the Respondent's assets to the JBMT absent a resolution for winding up (and in any event) was and is contrary to the objects enumerated in cl 4 (SOC [7B(e)(i)]);
- (b) secondly, that a substantial proportion of members comprised at the time of the Second SGM residents of aged care facilities owned and operated by JBMT, which is claimed to be an "associate" of those members (presumably, within the meaning of cl 15) (SOC [7B(e)(ii)]).

230. Read in the context of the Respondent's constitution as a whole, it is clear that cl 15 does not assist the Applicant or have the effect for which he contends.

231. As submitted at ROS [92]-[94], the Respondent's constitution contains a series of provisions which empower a transaction of the kind contemplated by the JBMT proposal.

232. Clause 15 is headed "Prohibition against Securing Profits for Members". Its purpose and concern is to preserve the essential nature of an incorporated

association which, in fundamental contrast to a corporation under the *Corporations Act*, does not exist for the purposes of deriving profit for, or returning capital to, its members: see, in this regard, ss 18(5), 21(1), 43(1) of the Act.

233. Whilst cl 15 precludes the payment of income (akin to a dividend) or capital to members or their associates (save where it is a form of bona fide remuneration for services rendered or expenses incurred), it should not be understood as otherwise qualifying other powers set out in the constitution (cf SOC [7B(e)(i)]).
234. Clauses 5(b), (d), (f), (j) and (l) of the Respondent's constitution contemplate the disposal of assets or provision of financial support to other entities other than in the course of a winding up.
235. The power to dispose of assets in cl 5(b), in contrast to other powers in cl 5, is not expressed to be constrained by the objects of the Respondent. Instead, the constraint on the exercise of the power is the members, who are to be given the opportunity to call an SGM in respect of any proposed disposition of assets over a certain value.
236. In that regard, it might be observed that the Board set a threshold for the JBMT proposal that was too high at both the 5 May and 4 July SGMs. Clause 5(b) does not require a special majority in favour of a proposed disposition of assets; it permits the disposition to occur unless *opponents* of the proposed disposition to convene an SGM to move a motion against it.
237. The Respondent is also specifically empowered to fund, support and otherwise foster the objects of any institutions or trusts (not limited to incorporated associations), the functions of which are to support any of the objects of the Respondent (cl 5(j)). The constitution thus expressly contemplates that the Respondent would support or fund other entities even where those entities only support "any objects of the [Respondent]" – not all of them.
238. Further, once it is accepted, as it must be, that the Respondent can wind up (cl 16), it follows that the Respondent must be empowered to take steps anterior to a winding up for the purpose of effecting an orderly winding up.
239. It would be an absurd construction of the Respondent's constitution to require it to simply wind up the moment that it decided it would cease to continue as a going

concern and leave itself unable to make any proper arrangements as to its assets or affairs. Such a construction would necessarily deprive the Respondent of the opportunity to undertake the deregistration process contemplated by s 43A of the Act. For that reason alone, the Court would not construe the constitution in the manner contended for by the Applicant.

240. A further answer is that the members themselves have ratified the decision:
241. The contention that the JBMT proposal is ultra vires because JBMT is an “associate” of members who are residents of a village operated by JBMT (SOC [7B(e)(ii)]) is unsustainable. The constitution does not define “associate”, but likely it should be taken to adopt the statutory concept set out in s 3(6) of the Act. None of those categories of person or entity are engaged here.

Oppression

242. The Applicant’s real complaint is that advanced in connection with his oppression claim and is that the JBMT proposal defeats the objects of the Respondent.
243. The Respondent’s objects cannot be construed so as to require the Respondent itself to perform its objects in perpetuity – such a construction would defeat the winding up provisions of the constitution and the Act (and prevent the Respondent from seeking to effect and orderly wind down of its operations anterior to a winding up).
244. As noted above, even while trading as a going concern, the Respondent is empowered to support other entities and dispose of assets. It is not the case that the Respondent’s assets must be exclusively used for the Respondent itself performing its objects; they may be used to facilitate other entities pursuing similar objects. The Respondent also has the power to wind up and must necessarily have power to take steps anterior to a winding up to effect an orderly winding up or deregister under s 43A of the Act.
245. Considered in that light, it is clear that the JBMT proposal on no view ‘defeats’ the Respondent’s objects.
- (a) Clause 4(a) is intended to preserve the not-for-profit status of the Respondent. There is no dispute that JBMT is not membership based. There is also no

dispute that JBMT cannot distribute profits to its members and must use its profits to further its objectives (which it is submitted are similar to those of the Respondent). The powers in cl 5 expressly recognise that assets may be dealt with or disposed of to entities which are not membership based. Statutory not-for-profit entities may receive the assets of incorporated associations even though they are not themselves membership based.¹⁰ It is respectfully submitted that cl 4(a) is not ‘defeated’ by the JBMT proposal – although JBMT is not membership based, it retains the essential feature of being a not-for-profit which cannot distribute assets to members and is bound to use them to further its objects.

(b) Clauses 4(b), (c), (d) and (e) are in no way defeated by the JBMT proposal. Whatever might be said about the Board’s consideration of alternatives, it has plainly formed a bona fide view that JBMT would be an appropriate custodian of the Respondent’s assets to:

- (i) provide a viable and sustainable health care service to the community;
- (ii) develop and maintain a program for the maintenance and development of the (former) business operation of the Respondent and its environs;
- (iii) effectively and efficiently administer all facets of the health care service;
- (iv) provide an effective system of communication with regard to what will formerly have been the Respondent’s activities and facilities.

(c) There is no challenge to the proposition that JBMT can and will do the above in the event that it receives the assets.

246. The Applicant’s concern that the transfer is for “inadequate consideration” (SOC [7C]) belies a misunderstanding of the not-for-profit nature of the Respondent. The Board has formed a bona fide view that there is very real consideration for the

¹⁰ *In the matter of Nillumbik Community Church Inc (in liq)* [2011] VSC 590.

transfer insofar as JBMT will be preserving and using the assets to the benefit of the community in accordance with the Respondent's objects.

247. Even assuming that the transfer is purely a 'gift', the Court might consider the counterfactual.

- (a) Assume that the Respondent sold the assets to JBMT either as a step anterior to a winding up or in the course of a winding up if it had resolved to wind up in the first instance.
- (b) The Respondent would then have a fund which it would need to distribute on a winding up.
- (c) That fund would either be distributed back to JBMT (which would be an entirely circular transaction) or distributed to one or more other entities with similar objects, which is no more than a transfer of wealth from one charity to another.
- (d) Insofar as the Applicant complains that is not being done, the complaint is really seeking a merits review of the decision to benefit JBMT instead of some other not-for-profit.
- (e) In any event, the Applicant has not identified any other potential recipient of the Respondent's assets in these proceedings, notwithstanding he seeks relief for the distribution of the Respondent's assets on a winding up (SOC Part 4 [5]).

248. At the very least, the Board's assessment that the JBMT proposal would not defeat the objects of the Respondent was not so unreasonable that no reasonable board could have formed that view.

Similarity of objects between JBMT and the Respondent

249. As submitted at ROS [90], JBMT's objects do not need to be the same as the Respondent's to make it a permissible recipient and there can be no doubt having

regard to the authorities that the objects of JBMT are sufficiently similar for present purposes.¹¹

250. It does not matter if there are other incorporated associations or entities which have objects which are “closer” to those of the Respondent than JBMT,¹² noting, again, that no other recipients have been identified in any event.

251. Further, as submitted above, JBMT does not need to be membership based.¹³

Eligibility for membership

252. The Applicant’s claim that persons who became members for the purpose of supporting the JBMT proposal can necessarily rise no higher than his claim that the proposal defeats the objects of the Respondent. Necessarily, if the JBMT proposal is not found to defeat the objects of the Respondent, then it follows that someone joining for the purpose of supporting that proposal is not a person who did not support the objects of the Respondent and this issue falls away.

253. As submitted at ROS [89] (having regard to the authorities cited therein):

- (a) the power to accept or reject applications must be exercised in good faith having regard to the objects of the association;
- (b) where an association’s constitution contains a requirement that members support its objects but does not provide for an approval or vetting process, the committee does not have power to refuse to accept applications for membership by persons as against whom no suggestion has been made that they do not comply with the rules;

254. an allegation that membership applications have been wrongly accepted must be considered in light of the established practices for accepting membership applications. These authorities make clear that, even if the JBMT proposal is found

¹¹ See *Western Dessert Lands Aboriginal (Jamukurnu-Yapalikunu) RNTBC v Martu People Limited as trustee for the Martu Charitable Trust* [2014] WASC 417 at [10]-[11] per Le Mire J (referred to at ROS fn 135); *Application of Gregory Jay Parker (liquidator of Shellharbour Golf Club Ltd (in liq))* [2006] NSWSC 219 at [12]-[22]; *In the matter of Blacktown City Rugby League & Sports Club Ltd (in liq)* [2006] NSWSC 618 at [15].

¹² *QFL Limited v Worrell* [2000] QSC 381 at [20].

¹³ *In the matter of Nillumbik Community Church Inc (in liq)* [2011] VSC 590.

to defeat the objects of the Respondent, contrary to the Respondent's submission, it does not follow that the acceptance of memberships from persons who supported that proposal was oppressive or unreasonable, or that those memberships are invalid, in the circumstances of this case.

255. It follows that, even if it were necessary to consider this issue (i.e. if the Court found that the JBMT defeated the objects of the Respondent), the Applicant's claim as to the acceptance of membership applications must fail for the following reasons.

- (a) First, there is no doubt that the Board bona fide believed that the JBMT proposal was consistent with the Respondent's objects, such that the acceptance of membership applications from persons who supported the proposal cannot have been in bad faith.
- (b) Secondly, the Board followed the established practices for accepting membership applications without conducting an inquiry into candidates' bona fides.
- (c) Thirdly, the Board's acceptance of membership applications did not involve an assessment of whether the candidate was for or against the JBMT proposal, i.e. this is not a case where the Board was picking and choosing members.
- (d) Fourthly, the Board was in no position to know what the voting intentions of the new members were. Further, it is not possible to make any findings as to whether new applicants held a particular view on the JBMT proposal at the time of joining and, to the extent they did, whether they maintained or changed that view at some later time.
- (e) Fifthly, there is no challenge to the bona fides of the new membership applicants who supported the JBMT proposal. That is, although they might be found, implicitly, subjectively, to have misunderstood the objects of the Respondent in supporting the JBMT proposal, there is no suggestion that these persons did not have an honest belief as to the merits of the JBMT proposal or that it was consistent with the Respondent's objects. There is no suggestion that they were seeking to become members for an improper purpose or were anything other than genuine in their desire to participate in

what on any view is an issue of significance to the Respondent and the local community.

Dealings with Dr Lawlor-Smith and Mr Baragwanath in relation to the convening of the 4 July SGM

256. The Applicant's case on this issue is strained. Dr Lawlor-Smith and Mr Baragwanath were each entitled to requisition SGMs as members of the Respondent. The Board assisted each of them by providing the text of a resolution which gave effect to the purpose for which they were calling a meeting.
257. Insofar as the Board sought to schedule the two meetings simultaneously, that cannot be oppressive or unreasonable. The effect of that scheduling decision was to give Dr Lawlor-Smith less, rather than more time to campaign, because the 60-day period was running from Mr Baragwanath's request. Given the extent to which the two issues were interlinked, it was also not unreasonable for the Board to schedule both meetings for the same time, rather than have a situation in which two special general meetings were held shortly after each other.
258. It might be accepted *arguendo* that the Board had indicated to Dr Lawlor-Smith the amount of time that she had to conduct her campaign given the pending SGM to deal with Mr Baragwanath's resolution, but there is nothing oppressive or unreasonable about that. Mr Baragwanath had been campaigning for many months by this stage and had not stopped campaigning. There was no 'prejudice' to his campaign.
259. Nor is there anything unreasonable or oppressive about the Board putting up Dr Lawlor-Smith's resolution; adequate notice of the resolution was given and, as Mr Overland said, there was no great community secret about it. Indeed, the public campaign being conducted by Wellbeing made it very apparent that they were supportive of the JBMT proposal. Quite apart from there being no obligation to give Mr Baragwanath advanced notice of Dr Lawlor-Smith's motion, as a matter of fact it cannot seriously be contended that he was ambushed.

260. As to the suggestion that the Board made things more difficult for Mr Baragwanath by not resigning and, thereby, in effect, requiring a special resolution to effect the removal of the Board:

- (a) the Board was under no obligation to resign following the 5 May SGM having regard to what was said as recorded in the minutes or otherwise having regard to the very strong support for the JBMT proposal at that meeting;
- (b) insofar as the Board (or some members) had intended to resign or not seek re-election, it was not oppressive or unreasonable for them to do so when circumstances changed, namely the approach from Dr Lawlor-Smith;
- (c) there is nothing oppressive or unreasonable about the Board running (or promoting) a “unity ticket” in support of the JBMT proposal;
- (d) Mr Baragwanath’s resolution received so little support it obviously would have made no difference whether the Board resigned and stood for re-election or proceeded in the manner in which they did;
- (e) the result of the October AGM (where board positions were up for election on the ordinary course) demonstrates that the Board continues to retain the overwhelming support of members;
- (f) the Applicant cannot have it both ways; he cannot on the one hand allege that all Mr Baragwanath really wanted was for the Board to fill the vacant seat following the 5 May SGM but then complain that the entire Board did not resign following the meeting.

261. Further, all of the Board’s conduct in this regard must be understood in the context of it promoting what it believed, honestly and bona fide, to be the best (and only viable) proposal for the Respondent’s assets which enjoyed the overwhelming support of members. None of this conduct, viewed in context, was oppressive or unreasonable.

E. CONCLUSION

262. The Respondent respectfully seeks orders that the proceedings be dismissed with costs.

Date: **28 August 2024**

J White KC
Mitchell Chambers

LA Wicks
Bar Chambers

Counsel for the Respondent