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ASIC setback in \$245m Westpoint case

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The Australian Securities and Investments Commission has suffered a setback in a \$245 million legal action against directors of the failed Westpoint group, with the Federal Court ruling ASIC could not continue action instituted by Westpoint's liquidator.

In November 2007, the ASIC announced proceedings under section 50 of the ASIC Act against the directors (including Norman Carey) of Westpoint companies for compensation of breach of directors duties for an amount of \$245 million.

Rather than commence new proceedings, ASIC took over existing proceedings brought against the directors by the liquidators (PricewaterhouseCoopers). Mr Carey challenged whether or not ASIC could take over existing proceedings.

The Federal Court of Australia has today agreed with Mr Carey that ASIC does not have power to carry on existing proceedings commenced by the liquidator of Ann Street Mezzanine Pty Ltd and York Street Mezzanine Pty Ltd.

Justice Ray Finkelstein held that while ASIC did not have power to take over existing proceedings, ASIC could commence fresh proceedings.

Justice Finkelstein said: '...in the circumstances of this case, the answer is somewhat academic. The parties accept that if Mr Carey's view prevails ASIC can and will simply begin new proceedings in the name of each plaintiff. Moreover, I have pointed out to the parties that in such event, I would, most likely, make an order deeming each step taken in the existing proceedings to have been taken in the new proceedings...'

ASIC Chairman, Mr Tony D'Aloisio, said 'Today's decision clarifies a point of law and we will immediately institute fresh proceedings. Let me reassure Westpoint investors that the decision does not affect the substance of the cases which we are pursuing in which we are seeking compensation for them.'

ASIC will commence new proceedings on behalf of Ann Street Mezzanine and York Street Mezzanine and is in the process of commencing proceedings to be filed by 15 July 2008 in relation to a number of other mezzanine companies within the Westpoint group.

The present proceedings will return to Court for directions in relation to the other issues raised in Mr Carey's application and on the question of costs.

Background

On 8 November 2007, ASIC announced that it would commence legal action to recover damages from various directors and officers of certain companies in the Westpoint Group. It is alleged that the following directors and officers are responsible for the misapplication of funds raised by the mezzanine companies:

- Cedric Richard Palmer Beck;
- John Norman Dixon;
- Lynette Rochelle Schifftan;
- Graeme John Rundle - (who it is alleged was a director as defined by the Corporations Act); and
- Norman Carey - (who it is alleged was a director as defined by the Corporations Act).

ASIC also alleges that, in selling products with the risk and financial characteristics of Westpoint, the following five licensees did not comply with their obligations under the conditions of their Australian financial services licences and under the law:

- Bongiorno Financial Advisors Pty Ltd and Bongiorno Financial Advisors (Aust) Ltd
- Dukes Financial Services Pty Ltd and Dukes Financial Services Australia Pty Ltd (In Liquidation)
- Glenhurst Corporation Pty Ltd
- Masu Financial Management Pty Ltd
- Professional Investment Services Pty Ltd

On 20 December 2007, ASIC announced the second phase of its compensation action involving:

- Strategic Joint Partners Pty Ltd; and
- State Trustees Limited.

ASIC alleges that, in selling products with the risk and financial characteristics of Westpoint, Strategic Joint Partners did not comply with its obligations under the conditions of its Australian financial services licence and under the law. ASIC will allege that State Trustees, as the trustee of an unsecured mezzanine note issued by Market Street Mezzanine Ltd (in liquidation), breached its duty to the mezzanine note holders and

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