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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : HAMPTON HILL MINING NL -v- ASX LIMITED  
[2020] WASC 86

**CORAM** : HILL J

**HEARD** : 17 FEBRUARY 2020

**DELIVERED** : 17 FEBRUARY 2020

**PUBLISHED** : 13 MARCH 2020

**FILE NO/S** : CIV 1221 of 2020

**BETWEEN** : HAMPTON HILL MINING NL  
Plaintiff

AND

ASX LIMITED  
Defendant

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*Catchwords:*

Corporations - ASX - Listing Rules - Suspension of Quotation - Application for interlocutory injunction - Serious question to be tried - Balance of convenience - Urgent trial ordered - Application dismissed

*Legislation:*

*Supreme Court Act 1935 (WA), s 16, s 35*  
*Corporations Act 2001 (Cth)*  
ASX Listing Rules 12.1 and 17.2

*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Plaintiff : A J Papamatheos & C Spencer  
Defendant : A Sadler & K de Kerloy

*Solicitors:*

Plaintiff : Tottle Partners  
Defendant : Herbert Smith Freehills

**Case(s) referred to in decision(s):**

Chapmans Ltd v Australian Stock Exchange Limited (No 3) (1995) 17 ASCR  
524  
Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd [2003] NSWSC 33;  
(2003) 174 FLR 311

HILL J

**HILL J:**

(These reasons were delivered extemporaneously at the conclusion of the hearing. They have been edited from transcript to correct matters of grammar and so as to include complete references in the form of footnotes.)

**Introduction**

1           The plaintiff is and has been since 1994 listed on the Australian Securities Exchange under the ASX code 'HHM'. It currently has approximately 294 million shares on issue and 661 shareholders.<sup>1</sup>

2           By chamber summons dated 14 February 2020, the plaintiff seeks urgent orders restraining the ASX Limited (ASX) from taking any steps to suspend its securities from quotation. This matter came before me for an urgent hearing on 17 February 2020.

3           In support of its application, the plaintiff relied on two affidavits of Joshua Norman Pitt sworn 14 February 2020 and 17 February 2020. Mr Pitt is the executive chairman of the plaintiff and a geologist by occupation.

4           The application is opposed by the defendant. The defendant relied on affidavit of James Ronald Norman Rowe sworn 17 February 2020.

5           In considering this application, the court has been assisted by the statement of claim filed by the plaintiff with its writ of summons on 14 February 2020 and submissions filed by each of the parties on 17 February 2020.

**Legal Principles**

6           The applicant seeks an interlocutory injunction pursuant to s 16 and s 25 of the *Supreme Court Act 1935* (WA).

7           The principles on an application for an interlocutory injunction are well known. The plaintiff must show first, that there is a serious question to be tried as to whether there has been a breach of the requirements of reasonableness in *both* the process and substantive outcome of:

(a)       the view that HHM does not satisfy Listing Rule 12.1; and

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<sup>1</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020, par 5.

(b) the making of a decision under Listing Rule 17.3 to suspend HHM's securities from trading from the commencement of trade on Tuesday, 18 February 2020.

8 Second, the plaintiff must show that it is likely to suffer injury for which damages are not an adequate remedy. Third, the plaintiff must show that the balance of convenience favours the granting of the injunction.

**Serious question to be tried**

9 Under the agreement entered into between the ASX and HHM, HHM agreed that it would comply with the Listing Rules in force from time to time. The plaintiff submits that it was an implied term of this agreement that in exercising its powers under the Listing Rules, the ASX would act in good faith, honestly and fairly, and reasonably, would afford procedural fairness to the plaintiff and would do all that is necessary to enable HHM to have the benefit of the listing agreement.

10 It was not in dispute between the parties that the relationship between them is a contractual one, although the terms of that contract and whether these terms are to be implied as terms of the contract are in dispute.

11 The ASX first raised its concerns as to whether HHM was compliant with Listing Rule 12.1 on 7 February 2019.<sup>2</sup> The ASX referred to HHM's quarterly activities reports dated 27 April 2018, 31 July 2018, 31 October 2018 and 31 January 2019 and the appendix 5B cash flow reports that accompanied each of these reports. These reports indicated that from 1 January 2018 until 31 December 2018, HHM spent \$5,000 on exploration and evaluation and almost \$340,000 on administration and corporate costs. The letter gave HHM a period of six months from the date of the letter to demonstrate its compliance with Listing Rule 12.1 and warned HHM that if it did not do so, the ASX may suspend its securities from official quotation.

12 In its response to this letter dated 15 February 2019, HHM drew the attention of the ASX to the fact that its operations consisted of exploration and evaluation activity both in its own right and through joint ventures.<sup>3</sup> As such, HHM noted that its level of direct spend on exploration should not be relied upon as the sole measure of its level of operations. HHM noted that it was the minority partner in the

<sup>2</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP2'.

<sup>3</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP3'.

Millennium Zinc Project, that activity had been delayed while the majority partner was seeking third-party funding and that the majority party had now secured funding and further work was planned for the coming field season. The letter referred to the significant additional expenditure contributions of its joint venture partners to jointly held projects and the input of its directors (in particular Mr Pitt and Mr Tomkinson) who had not charged for their services. The directors of HHM requested that the ASX withdraw its threat of suspension and delisting.

13 On 18 March 2019, the ASX notified HHM that it would provide HHM with a further six months to demonstrate compliance with Listing Rule 12.1.<sup>4</sup> That is, HHM was required to demonstrate its compliance with Listing Rule 12.1 to the ASX by 7 February 2020.

14 On 10 January 2020, Daniel Nicholson of the ASX spoke with Peter Rutledge, the company secretary of HHM.<sup>5</sup> The ASX asked whether HHM intended to make any further written submissions to the ASX in respect of the matter. Mr Rutledge informed ASX that it relied on its submissions of 15 February 2019 and did not intend to make any further written submissions.

15 On 6 February 2020, the ASX notified HHM that it considered HHM had not demonstrated compliance with Listing Rule 12.1 and that it intended to suspend HHM's securities from official quotation as at the close of trading on 7 February 2020.<sup>6</sup> The parties subsequently agreed that the suspension would be delayed until close of trading on 11 February 2020 to enable further discussions to occur.<sup>7</sup>

16 On 7 February 2020, HHM provided a detailed response in relation to the proposed suspension.<sup>8</sup> The letter referred to the delays that had occurred in respect of the Millennium Zinc Project, as a consequence of decisions of the majority partner, and the work that HHM proposed to undertake in respect of the Glenview Base Metal Project, which is 100% owned by HHM. The letter requested a face-to-face meeting with the ASX before any further steps were taken.

17 On 10 February 2020, the ASX informed HHM that based on the information provided to it, the ASX considered that HHM did not

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<sup>4</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP4'.

<sup>5</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP5'.

<sup>6</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP5'.

<sup>7</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP8'.

<sup>8</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP6', p 62.

comply with Listing Rule 12.1 and was minded to suspend HHM as at the close of trade on Tuesday, 11 February 2020.<sup>9</sup> In reaching this decision, the ASX referred to HHM's mineral exploration expenditure for 2017, 2018, 2019 and its year-to-date expenditure, the failure by HHM to undertake any fieldwork since September 2017 or announce any exploration results since January 2017, and the extended time period which it had afforded to HHM to demonstrate compliance with Listing Rule 12.1.

18 On 12 February 2020, HHM's solicitors wrote to the ASX providing further information in support of its contention that it was in compliance with Listing Rule 12.1.<sup>10</sup> The correspondence referred to HHM's current projects namely the Glenview Base Metal Project, the Millennium Zinc Project, the Apollo Hill Project, the Northlander Gold Project and its discussions to earn into a new base metal project. It also referred to the plaintiff's holding in Peel Mining Ltd which had had significant exploration success at its tenements in the Cobar district of New South Wales. HHM contended that the comparison that had been undertaken by the ASX of its expenditure to administration costs was not a reasonable guide to the activities of HHM because both the executive chairman and Mr Tomkinson work on a no fee basis. As a consequence, the expenditure of the company did not reflect the potential cost of these activities, which it valued at in excess of \$300,000. Further, while HHM has interests in various projects, pursuant to arrangements with the companies operating these projects, HHM was not required to contribute to exploration expenditure in relation to these projects. HHM contended that this was typical of a junior joint venture partner and indicated a conservative and reasonable approach whereby HHM identifies prospective projects and then farms them out to other organisations who have greater capacity to develop and bring the projects to production.

19 In its correspondence, HHM emphasised that it had supportive shareholders who were aware of the directors' plans as explained to them at the recent annual general meeting and other public announcements. The plaintiff emphasised that if the ASX suspended HHM's shares, this would deprive shareholders of the value of an investment made in a company that has operated with the same approach for over 30 years.

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<sup>9</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP8'.

<sup>10</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP10'.

20 On 12 February 2020, the ASX notified HHM that its submission would be considered by the National Listings Committee on Friday, 14 February 2020 and that in the event it determined that the plaintiff did not satisfy Listing Rule 12.1, any suspension of trading would not be effective until commencement of trade on 18 February 2020.<sup>11</sup> The plaintiff's counsel drew my attention to the fact that in this correspondence, the ASX did not seek any further information from HHM nor provide any information as to the standards or policies of the ASX as to the level of operations of listed entities that was required.

21 On 14 February 2020, the National Listing Committee of the ASX determined that the plaintiff did not satisfy Listing Rule 12.1 and that its securities would be suspended from quotation from the commencement of trade on Tuesday, 18 February 2020. No reasons were given for this decision.<sup>12</sup>

### **Statutory regime**

22 The defendant operates the ASX market under a licence granted to it under ch 7 of the *Corporations Act 2001* (Cth) (Corporations Act). It was accepted by the plaintiff that the defendant's obligations included the creation of a fair, orderly and transparent market. The specific relationship between the defendant and the plaintiff is governed by a contractual relationship in which the ASX has substantial powers and discretion.

23 By Listing Rule 18.6, on admission to the official list, an entity must comply with the Listing Rules. This requirement applies even if quotation of the entity's securities is deferred, suspended or subject to a trading halt.

24 Listing Rule 19.1 states that the Listing Rules are based on the principles set out in the Introduction.

25 The Introduction to the Listing Rules contains the principles on which they are based. These relevantly include:

- (a) an entity should satisfy appropriate minimum standards of quality, size and operations and disclose sufficient information about itself before it is admitted to the official list;

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<sup>11</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP11'.

<sup>12</sup> Affidavit of Joshua Norman Pitt filed 14 February 2020 'JP14'.

- (b) sufficient investor interest in an entity's securities should be demonstrated before those securities are quoted; and
- (c) timely disclosure should be made of information which may have a material effect on the price or value of an entity's securities.

26 By Listing Rule 19.2, an entity is required to comply with the listing rules 'as interpreted in accordance with their spirit, intention and purpose, by looking beyond form to substance, and in a way that best promotes the principles on which the listing principles are based'.

27 Pursuant to Listing Rule 12.1, the level of an entity's operations must, in the ASX's opinion, be sufficient to warrant the continued quotation of the entity's securities and its continued listing.

28 I note that the ASX has not produced any guidance note in relation to Listing Rule 12.

29 Listing Rule 1 sets out the requirements for admission to the ASX. In my view, in considering whether the level of an entity's operations are sufficient to warrant the continued quotation of the entity's securities, Listing Rule 1 provides some useful guidance. That is, if an entity continues to meet the requirements for admission to the ASX, its operations are more likely to warrant the continued quotation of its securities.

30 Listing Rule 1.1 sets out 20 conditions that the ASX considers in determining whether to admit an entity to the Australian securities exchange. Condition 1 is that the entity's structure and operations must be appropriate for a listed entity. Paragraph 3.1 of Guidance Note 1 provides examples of where an applicant may not have a structure and operations appropriate for a listed entity.

31 Listing Rule 17.3 gives the ASX the power to suspend an entity's securities from quotation if, in the opinion of ASX, the entity is unable, unwilling to comply with, or breaks a Listing Rule or it is appropriate for some other reason. I note that the ASX has not produced any guidance note in relation to Listing Rule 17.

32 Courts have previously recognised that a term may be implied into a contract requiring an opinion to be formed or a discretion to be exercised under the contract to be formed or exercised in a manner that



is reasonable. This has previously been considered in the context of a contract between a listed entity and the ASX.

33 In *Chapmans Ltd v Australian Stock Exchange Ltd (No 3)*,<sup>13</sup> Beaumont J held that because a listed entity's proprietary interests may be adversely affected by a decision of the ASX, prima facie the ASX is required to accord procedural fairness. This will usually include an obligation to provide the listed entity with a proper opportunity to be heard. He also expressed the view that although there was no general duty to give reasons for a decision, such a duty may be imported in the particular circumstances of a case if fairness so requires. His honour also held that the ASX was required to act honestly and also fairly. In this regard, he drew a distinction between a decision which may be merely unreasonable and a decision that was entirely unreasonable in the sense that no reasonable person could possibly come to such a decision.

34 In *Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd*,<sup>14</sup> Campbell J noted that the law in New South Wales is that every commercial contract has implied as a matter of law the term requiring the exercise of good faith in the performance of that contract. He acknowledged there was room for argument about whether the contract between a listed entity and the ASX is a commercial contract. In that case, Campbell J considered that it was not necessary for him to decide the point as the Constitution of the ASX required it to act fairly.

35 In considering whether there was an unreasonable exercise of either the process or the power conferred by the Listing Rules, it is necessary to consider whether:

- (a) the process adopted by the ASX was unreasonable or irrational; and
- (b) whether it could reasonably be concluded on the information available to the defendant, having regard to the terms of the Listing Rules, that the operations of HHM were not sufficient to warrant continued quotation of its securities.

36 The plaintiff contends that first, the approach of the ASX demonstrated an unreasonable and irrational process for the purpose of Listing Rules 12.1 and 17.3, and second, no reasonable person in the

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<sup>13</sup> *Chapmans Ltd v Australian Stock Exchange Limited (No 3)* (1995) 17 ASCR 524.

<sup>14</sup> *Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd* [2003] NSWSC 33; (2003) 174 FLR 311 [88].

position of the ASX could have formed the opinion that HHM's activities were insufficient to justify the continued quotation of its securities. As such, the plaintiff contends that the opinion of the ASX that the level of HHM's operations were not sufficient to warrant the continued quotation of its securities was unreasonable, not a valid opinion and is of no force and effect.

37 As a consequence, the plaintiff submits that the decision of the ASX made on or about 14 February 2020 to suspend HHM's shares from quotation was unreasonable, not a valid decision and is of no force and effect.

38 The defendant submits that HHM is seeking to challenge a properly made decision of the ASX and that, in effect, its complaints about the decision seek to have this court reconsider the merits of its decision. Counsel for the defendant drew my attention to Listing Rules 2.9 and 18.5A which give the ASX absolute discretion.

39 The basis for the ASX's decision on 14 February 2020 and the matters that it took into account were not in evidence before this court. The plaintiff was not given any reasons for the decision but was simply notified of ASX's decision. In my view, it is arguable that in the particular circumstances of a decision to suspend a listed entity's shares from trading, there is a duty for the ASX to give reasons as a matter of fairness.

40 The proper construction of Listing Rules 12.1 and 17.3 and the matters that can be taken into account by the ASX have not previously been considered by a court. In my view, it is arguable that the matters referred to by HHM, particularly in the context of a junior mining exploration company, may support a conclusion that the ASX's process or decision was not fair. This, of course, cannot be determined on an interlocutory application, particularly when the ASX has not had an opportunity to put on evidence as to its decision making process or the reasons for its decision.

41 In my view, for these reasons, there is a serious question to be tried as to whether the ASX has acted fairly in reaching its decision on 14 February 2020.

42 However, without the ASX having given any reasons for its decision, I am unable at this stage to assess the strength of the plaintiff's case.

**Whether damages are an adequate remedy**

43 The plaintiff contended that if it was ultimately found that the ASX's decision was improperly made, the damage suffered by the plaintiff would be difficult to rectify by a monetary award. This was said to be because:

- (a) first, the impact of the suspension on the company would be difficult to prove and quantify; and
- (b) second, any suspension would damage the interests of both the company and its shareholders, who would have no remedy for their loss.

44 The defendant rejected this submission and contended that many of the matters relied upon by the plaintiff, such as any increase in the cost of capital or the requirement to issue a prospectus, could be rectified by a monetary award.

45 In my view, some but not all of the matters relied upon by the plaintiff can be rectified by an award of damages. In particular, I consider that any impact on the plaintiff's reputation and the impact on the plaintiff's shareholders may not be able to be remedied by monetary award.

**Balance of convenience**

46 The plaintiff submits that the balance of convenience favours the grant of the injunction. Specifically the plaintiff contends that if its shares are suspended from trading:

- (a) the plaintiff will incur potential costs and management distraction as a consequence of efforts to remove the suspension;
- (b) its shareholders will lose liquidity in their existing investment;
- (c) it will suffer reputational harm across its corporate activities;
- (d) it will be very difficult for the plaintiff to raise further capital while its shares are suspended to undertake the work foreshadowed by it;
- (e) if the plaintiff's shares are suspended for more than five days, the plaintiff will be unable to raise capital without a prospectus. As a consequence, it will incur additional expenses of having to

prepare a prospectus for any future capital raising. The evidence before me is that these additional costs are in the amount of between \$20,000 and \$30,000, excluding the time and effort of the directors in preparing the prospectus.

47 The evidence of the plaintiff also referred to the difficulty of the plaintiff in progressing farm-in discussions with third parties if trading is suspended.

48 The plaintiff submits that these matters outweigh any prejudice to the defendant in allowing the plaintiff to continue trading and paying listing fees to the defendant, pending any trial of these proceedings.

49 In response, the defendant submits that any harm that HHM will suffer is limited. The defendant notes that there is no evidence of any current capital raising or farm-in arrangements being undertaken that would be impacted by a short suspension of its shares from trading. The defendant submits that the plaintiff will be required to announce the ASX's decision and the existence and status of these proceedings. These announcements may cause shareholders to sell their shares if trading is reinstated, which could have a serious adverse effect on the share price of the plaintiff. On this basis, the defendant contends that granting the injunction will not maintain an orderly market in HHM shares.

50 The defendant also submits that granting an injunction will cause harm to the ASX by preventing it from operating the ASX market in accordance with its proper judgment and its statutory duties under the Corporations Act. In this regard, the defendant emphasised that its obligations extended not just to HHM and its current shareholders but people who may buy and sell HHM shares in the future, listed entities other than HHM, and persons who may trade in securities of other listed entities. Counsel for the ASX contended that the injunction might serve the interests of HHM but would occur at the expense of the reputation and integrity of the market as a whole, which would not promote a fair, orderly and transparent market.

51 On balance, I consider that the balance of convenience does not favour the grant of an injunction. In my view, most of the matters relied upon by the plaintiff can be addressed by a trial of the issues occurring at the earliest possible opportunity. There is no evidence before me that there is any current capital raising contemplated by the plaintiff or any arrangements that would be impacted by a short

HILL J

suspension of the plaintiff's shares. While I accept that the decision is likely to have an impact on the reputation of the plaintiff, given the obligation of the plaintiff to announce the decision of the ASX and the existence of these proceedings, I do not consider that there is any significant further impact on the reputation of the plaintiff that will be ameliorated by the granting of an injunction. I accept that the plaintiff will incur potential costs in seeking to remove the suspension, but do not consider that this factor alone is sufficient to support the grant of the injunction.

52 Counsel for the parties confirmed that this matter could be ready for trial within one month which timeframe could be accommodated by the court.

53 In my view, programming this matter to an urgent trial will address the matters referred to by the plaintiff.

**Disposition**

54 For these reasons, it is my view that the plaintiff's application for interlocutory relief should be dismissed and the matter should be programmed through to a trial at the earliest possible opportunity.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

MG

Research Orderly to the Honourable Justice Hill

13 MARCH 2020