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Details of Filing

Document Lodged:	Submissions
File Number:	NSD747/2021
File Title:	IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED ACN 151 964 626 (ADMINISTRATORS APPOINTED) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 2/09/2021 10:22:10 PM AEST

Registrar

Important Information

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In the matter of The Forum Group of Companies Pty Ltd ACN 151 964 626 (Administrators
Appointed)
Federal Court of Australia
NSD747/2021

APPLICANTS' OUTLINE OF SUBMISSIONS

Introduction

- 1 By Interlocutory Application filed 26 August 2021, the applicants, Jason Preston and Jason Ireland in their capacity as joint and several liquidators of the First to Twenty-Fifth Plaintiffs, and provisional liquidators of the Twenty-Sixth to Twenty-Eighth Plaintiffs (**Liquidators**), seek orders pursuant to s 477(2B) of the *Corporations Act 2001* (Cth) (**Act**) that approval be granted for the Liquidators to enter into a funding agreement with Westpac Banking Corporation (**Westpac**). The Liquidators also seek directions pursuant to s 90-15 of the Insolvency Practice Schedule (Corporations) 2016 (**IPSC**) that they would be justified in entering into that agreement and are authorised to carry out its terms to effect.
- 2 The Liquidators rely upon the affidavit of Jason Preston affirmed 19 August 2021 (**Preston Affidavit**), and Exhibit JP-1, on the application.

Funding Agreement

- 3 The proposed funding agreement is at Exhibit JP-1 at CB395 to CB406 (**Proposed Funding Agreement**). The purpose of the Proposed Funding Agreement is to provide interim funding to the Liquidators in respect of their remuneration and expenses incurred in connection with the external administrations of the Plaintiffs, including but not limited to their initial investigations of the Plaintiffs and the identification of possible future sources of asset recoveries.¹
- 4 The funding occurs by way of the provision of a facility which may be called upon by the Liquidators from time to time (**Facility**). Under the terms of the agreement, Westpac agrees to provide a loan to the Liquidators for remuneration and expenses incurred in the period between 1 July 2021 to 30 September 2021 or other such longer

¹ Proposed Funding Agreement cl 3.2(b).

period as agreed in writing between the Funder and the Liquidators from time to time (**Invoice Period**) in connection with their investigations.² The Liquidators may from time to time submit invoices to Westpac for approval, and once approval is granted the Liquidators can draw down on the Facility in a sum equal to the approved invoice.³ Interest is payable on the funding which has been drawn down at the rate of BBSY Bid plus 3%.⁴ There is a limit on the facility of \$4.5m excluding GST, or such other amount as agreed in writing between Westpac and the Liquidators (**Facility Limit**).⁵

- 5 As to repayment of the funding that has been advanced, the amounts drawn down are to be repaid once and to the extent that there are sufficient funds in any of the Plaintiffs, and the Liquidators acting reasonably form the view that those funds are not required for the purpose of that liquidation or provisional liquidation.⁶ That is, no amounts are repayable to Westpac if there are not sufficient assets available in the applicable Plaintiff to do so,⁷ and Westpac agrees that the liability of the Liquidators accrued under the Proposed Funding Agreement is accrued on a limited recourse basis, limited to the assets available in the liquidation of the relevant Plaintiff.⁸ In that respect, the Liquidators are not personally liable for any deficiency in the repayment of funding advanced by Westpac, and Westpac releases them from any claim in that respect.⁹
- 6 Clause 3.5(b) of the Proposed Funding Agreement provides that the Liquidators are jointly and severally liable for the repayment of all amounts drawn down and any interest accrued under the Facility (regardless of whether the funding was used in the liquidation or provisional liquidation of any particular Plaintiff).¹⁰

Employees

- 7 Despite the general repayment obligations referred to above, to the extent that there are any employee entitlements in a Plaintiff which have a statutory priority under ss 556 and 560 of the Act, any recoveries obtained by the Liquidators are first to be applied to pay those entitlements before repayment of funding to Westpac is to be made.¹¹

² Preston Affidavit at [9(a)].

³ Proposed Funding Agreement cl 3.3.

⁴ Proposed Funding Agreement cl 3.4.

⁵ Proposed Funding Agreement cl 1.1 (definition of 'facility limit').

⁶ Proposed Funding Agreement cl 3.5(a).

⁷ Proposed Funding Agreement cl 3.5(c).

⁸ Proposed Funding Agreement cl 3.7(a).

⁹ Proposed Funding Agreement cl 3.7(b).

¹⁰ Proposed Funding Agreement cl 3.5(b).

¹¹ Proposed Funding Agreement cl 3.6(a).

lugis Investments

- 8 Mr Preston gives evidence that lugis Investments Pty Ltd (in liquidation), the Seventeenth Plaintiff in these proceedings (**lugis Investments**), acquired shares in, and an existing shareholder loan to, Autonomous Energy Pty Ltd (**AE**) in February 2021.¹² AE was placed into administration on 8 July 2021 by resolution of the directors of AE.¹³ On 12 August 2021, AE's creditors resolved to pass a deed of company arrangement under which the shares in AE held by lugis Investments were to be transferred to an entity controlled by AE's management team in exchange for monies paid into a Creditors' Trust from which distributions would be made for the benefit of creditors of AE.¹⁴ As such, lugis Investments remains a creditor of AE and is entitled to receive benefits under the AE Creditors' Trust. For that reason, the Proposed Funding Agreement carves out any monies paid to lugis Investment in its capacity as a creditor of AE, unless each creditor of lugis Investments has been paid in full.¹⁵

SMBC accession

- 9 The Proposed Funding Agreement contains a mechanism at clause 7 that would permit either SMBC or SocGen, with the agreement of Westpac and the Liquidators, to become a party to the Proposed Funding Agreement by signing an accession deed. That would result in the incoming funder providing an agreed share of the funding contemplated by the Proposed Funding Agreement.
- 10 As at the date of this application, the Liquidators anticipate that a form of accession deed will be agreed with SMBC and Westpac which would result in SMBC providing part of the funding contemplated by the Proposed Funding Agreement on a pro rata basis. The approval sought in the form of orders provided to the Court would permit the Liquidators to execute any accession deed to the Proposed Funding Agreement,

¹² Preston Affidavit at [13].

¹³ Preston Affidavit at [6(a)].

¹⁴ Preston Affidavit at [14].

¹⁵ Proposed Funding Agreement at 3.6(b).

Relevant principles

Approval of agreements

- 11 The Proposed Funding Agreement may end more than 3 months after it is entered into. Section 477(2B) of the Act relevantly provides that:

Except with the approval of the Court ... a liquidator of a company must not enter into an agreement on the company's behalf ... if:

- a) without limiting paragraph (b), the term of the agreement may end; or
- b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

- 12 When an application brought under that provision, the Court must consider the purpose for which the powers of a liquidator exist, and those purposes include the recovery of funds for the benefit of creditors.¹⁶ As Gleeson J held in *Robinson, Re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 at [34]:

The standard imposed under s 477(2B) concerns an assessment by the Court that entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator, rather than involving the exercise of commercial judgment (footnotes omitted).

- 13 At [36], her Honour held further that the Court's task is to satisfy itself that there is no error of law, or grounds for suspecting bad faith, or any other good reason to intervene, having regard to the liquidator's commercial judgment.
- 14 The Court is not however to simply rubber stamp any agreement put forward by the liquidator, and as such the Court will not approve an agreement that is unclear.¹⁷ The role of the Court is to grant or deny the liquidator's proposal and not develop some alternative proposal which might seem preferable.¹⁸ In that sense, whilst an approval hearing is not a hearing *de novo* of the considerations weighed up by the liquidator, it is nonetheless important to judge, in cases concerning the approval of funding agreements, whether the entity providing the funding is given a benefit

¹⁶ *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89; *Robinson, Re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 at [33]-[36] (Gleeson J).

¹⁷ *Re United Medical Protection (No 4)* (2002) 42 ACSR 218.

¹⁸ *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at [26] (Gordon J).

disproportionate to the risk being undertaken by the liquidator in light of the funding that is promised (or that the funder is making a grossly excessive profit).¹⁹

Directions under s 90-15 of the IPSC

15 The Court's power under s 90-15(1) Insolvency Practice Schedule (Corporations) (IPSC) includes a power to give directions about a matter arising in connection with the performance or exercise of a liquidator's functions or powers.²⁰ It is common for directions under s 90-15 to be sought alongside orders under s 477(2B) of the Act, however as Connock J held in *Re Minken Pty Ltd (in liq)* [2019] VSC 288 at [23]-[24], the two applications are distinguishable; the application under s 90-15 results in the exoneration of the liquidator's personal liability, and means a closer examination of the decision is required.

Reasons for granting approval under s 477(2B) of the Act

16 *First*, Mr Preston has deposed to his investigations revealing matters requiring detailed investigations in order to identify assets that may be able to be recovered for the benefit of the Plaintiffs' creditors.²¹ As is made plain by Mr Preston's evidence, particularly at paragraph 20(d), the Plaintiffs do not have available assets to fund those necessary investigations and recovery actions of their own motion.

17 *Second*, there is no reason to doubt the *bona fides* and prudence of the Liquidators in entering into the Proposed Funding Agreement. That proposition is fortified having regard to the following aspects of the Proposed Funding Agreement:

- (a) employees of the Plaintiffs are carved out specifically to ensure that they retain their statutory priority under ss 556 and 560 of the Act; and
- (b) Mr Preston's evidence is that he has not identified any potential prejudice or oppression to creditors of the Plaintiffs that would arise by reason of entering into the Proposed Funding Agreement.²² That evidence should be accepted in

¹⁹ *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at [26] (Gordon J), citing *Anstella Nominees Pty Ltd v St George Motor Finance Ltd* (2003) 21 ACLC 1,347 at [11] and *Re ACN 076 673 875 Ltd* (2002) 20 ACLC 1,551 at [28].

²⁰ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 at [166] (Gordon J).

²¹ Preston Affidavit at [20(a)].

²² Preston Affidavit at [20(e)].

light of Mr Preston's considerable experience in formal insolvency administrations.²³

- 18 *Third*, Westpac does not receive a benefit disproportionate to the Liquidators' risk of entering into the Proposed Funding Agreement. Indeed, the evidence establishes that the terms of the Proposed Funding Agreement are likely to be more favourable than those that would be available from a commercial litigation funder (for the reasons explained by Mr Preston in his affidavit at [21]). The agreement provides for the payment of interest on the drawn down amounts, and a mechanism for Westpac (itself or on reasonable request of the Liquidators) to seek priority under s 564 of the Act in respect of recoveries made by the relevant Plaintiff if funded. However, Westpac does not by those provisions alone receive such priority in the absence of a successful Court application.
- 19 *Fourth*, in a similar respect, the Liquidators' remuneration itself, despite the Proposed Funding Agreement, is nonetheless subject to the remuneration approval provisions of the Act (specifically, for example, s 60-10 of the IPSC in relation to the Liquidators' appointment as liquidators of the plaintiffs in liquidation, and s 60-16 of the IPSC in relation to the Liquidator's appointment as provisional liquidators of the plaintiffs in provisional liquidation). Accordingly, any questions as to the quantum of the Liquidators' fees is not a material consideration to the current question before the Court (because the time for the Court's supervision in that respect arises at the time of a remuneration approval application).
- 20 *Fifth*, in relation to clause 3.5(b) of the Proposed Funding Agreement referred to above – being that the Liquidators are jointly and severally liable for all repayment amounts drawn down and any interest accrued under the Facility regardless of whether the funding was used in the liquidation or provisional liquidation of a particular entity – Mr Preston gives evidence as to why such a provision is, in his view, in the interests of the Plaintiffs as a whole.²⁴ Most particularly, Mr Preston deposes that although claims are yet to be adjudicated, each of the Plaintiffs faces the same claim in respect of funds loaned by Westpac and other financiers to Forum Finance Pty Ltd (receivers appointed) (in liquidation) (Westpac lodging proofs of debt at the first meeting of creditors of each of the Plaintiffs).²⁵ As such Mr Preston says that any recoveries by

²³ Preston Affidavit at [2].

²⁴ Preston Affidavit at [19].

²⁵ Preston Affidavit at [19(a)].

one Forum entity would therefore reduce the amount claimed by all other Forum entities.

- 21 *Sixth*, the Liquidators submit that their evidence is sufficient to display to the Court the process of reasoning and decision making in relation to the Proposed Funding Agreement, such that in addition to orders under s 477(2B) of the Act a direction that the Liquidators are justified in entering into the Proposed Funding Agreement can be given by the Court in the present circumstances.

Conclusion

- 22 For the above reasons the Liquidators seek the orders in the short minutes of order enclosed with these submissions.

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Counsel for the Applicants

2 September 2021

Short Minutes of Order

No. NSD747/2021

Federal Court of Australia
District Registry: Sydney
Division: General

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED ACN 151 964 626
(IN LIQUIDATION)
(ACN 151 964 626)**

**Jason Preston and Jason Ireland in their capacity as joint and several liquidators of the
First to Twenty-Fifth Plaintiffs**

First Applicant

**Jason Preston and Jason Ireland in their capacity as joint and several provisional
liquidators of the Twenty-Sixth to Twenty-Eighth Plaintiffs**

Second Applicant

Judge: JUSTICE LEE

Date of order: 3 September 2021

Where made: Sydney

THE COURT ORDERS THAT:

1. Pursuant to section 477(2B) of the Corporations Act 2001 (Cth) (**Act**), approval be granted
for the First and Second Applicants (**Liquidators**) to enter into, on behalf of the First to

Filed on behalf of: 14 James Street Pty Ltd ACN 638 449 206 (In Liquidation) and others, the
Applicants

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KBPS 516150955v2 121031672

Twenty-Eighth Plaintiffs, a funding agreement between the Liquidators and Westpac Banking Corporation (***Funding Agreement***) substantially in the form at pages 16 to 27 of Exhibit JP-1 of the affidavit of Jason Preston affirmed 19 August 2021 and any Accession Deed as contemplated in clause 7 of the Funding Agreement.

2. Pursuant to section 90-15 of Schedule 2 of the Corporations Act 2001 (Cth), direct that the Liquidators are justified in entering into the Funding Agreement and any Accession Deed as contemplated in clause 7 of the Funding Agreement and are authorised to carry its terms to effect.
3. The costs of and incidental to this Interlocutory Application be costs and expenses in the liquidation of and paid out of the assets of the First to Twenty-Eighth Plaintiffs.

Schedule

No. NSD 747 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED (IN LIQUIDATION)
(ACN 151 964 626)**

Plaintiffs

- First Plaintiff: The Forum Group of Companies Pty Limited ACN 151 964 626 (In Liquidation)
- Second Plaintiff: 14 James Street Pty Ltd ACN 638 449 206 (In Liquidation)
- Third Plaintiff: 26 Edmonstone Road Pty Ltd ACN 622 944 129 (In Liquidation)
- Fourth Plaintiff: 5 Bulkara Street Pty Ltd ACN 630 982 160 (In Liquidation)
- Fifth Plaintiff: 6 Bulkara Street Pty Ltd ACN 639 734 473 (In Liquidation)
- Sixth Plaintiff: Aramia Holdings Pty Ltd ACN 114 958 717 (In Liquidation)
- Seventh Plaintiff: Eros Management Pty Ltd ACN 622 298 346 (In Liquidation)
- Eighth Plaintiff: Forum Direct Pty Ltd ACN 054 890 710 (In Liquidation)
- Ninth Plaintiff: Forum Fleet Pty Limited ACN 155 440 994 (In Liquidation)
- Tenth Plaintiff: Forum Group Pty Ltd ACN 153 336 997 (Receivers Appointed) (In Liquidation)
- Eleventh Plaintiff: Forum Group (QLD) Pty Ltd ACN 103 609 678 (In Liquidation)
- Twelfth Plaintiff: Forum Group (VIC) Pty Ltd ACN 153 062 018 (In Liquidation)
- Thirteenth Plaintiff: Imagetec Financial Services Pty Ltd ACN 111 978 182 (In Liquidation)
- Fourteenth Plaintiff: Imagetec Solutions Australia Pty Ltd ACN 074 715 718 (In Liquidation)
- Fifteenth Plaintiff: Intrashield Investment Group Pty Ltd ACN 645 578 829 (In Liquidation)

Sixteenth Plaintiff: Intrashield Pty Ltd ACN 133 426 534 (In Liquidation)

Seventeenth Plaintiff: Iugis Investments Pty Ltd ACN 647 627 745 (In Liquidation)

Eighteenth Plaintiff: Iugis Pty Ltd ACN 632 882 243 (In Liquidation)

Nineteenth Plaintiff: Iugis Waste Solutions Pty Ltd ACN 647 212 299 (In Liquidation)

Twentieth Plaintiff: Onesource Australia Holdings Pty Limited ACN 120 463 (In Liquidation)

Twenty-First Plaintiff: Orca Enviro Solutions Pty Ltd ACN 626 552 645 (In Liquidation)

Twenty-Second Plaintiff: Orca Enviro Systems Pty Ltd ACN 627 597 782 (In Liquidation)

Twenty-Third Plaintiff: Smartprint Fleet Management Pty Ltd ACN 132 807 080 (Receivers Appointed) (In Liquidation)

Twenty-Fourth Plaintiff: Spartan Consulting Group Pty Ltd ACN 168 989 544 (In Liquidation)

Twenty-Fifth Plaintiff: Forum Finance Pty Ltd ACN 153 301 172 (In Liquidation)

Twenty-Sixth Plaintiff: Forum Group Financial Services Pty Ltd ACN 623 033 705 (Provisional Liquidators Appointed)

Twenty-Seventh Plaintiff: Forum Enviro Pty Ltd ACN 168 709 840 (Provisional Liquidators Appointed)

Twenty-Eighth Plaintiff: Forum Enviro (Aust) Pty Ltd ACN 607 484 364 (Provisional Liquidators Appointed)

3 September 2021