IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

SEC 2020 02284

B E T W E E N :

IN THE MATTER OF **IPO WEALTH HOLDINGS NO 2 PTY LTD (ACN 620 610 157) & Ors according to the attached Schedule**

BETWEEN:

VASCO TRUSTEES LIMITED (ACN 138 715 009) as trustee of the IPO Wealth Fund (ABN 71 456 233 724)

Plaintiff

- and -

IPO WEALTH HOLDINGS NO 2 PTY LTD (ACN 620 610 157) & Ors according to the attached Schedule First Defendant

OUTLINE OF SUBMISSIONS of the PLAINTIFF
for the APPOINTMENT OF PROVISIONAL LIQUIDATORS
23 June 2020

1. By an interlocutory process filed 29 May 2020, the plaintiff seeks –
   1) An order pursuant to rule 9.06 of the *Supreme Court (General Civil Procedure) Rules 2015* that IPO Wealth Holdings Pty Ltd (Receivers and Managers appointed) (**Borrower**) be joined to this proceeding as the seventeenth defendant, and
   2) An order pursuant to section 472 of the *Corporations Act 2001* (**Act**) that Hamish Alan MacKinnon and Nicholas Giasoumi of Dye & Co Pty Ltd be appointed as provisional liquidators of the Borrower.

   The defendants (**SPVs**) have also applied for the appointment of Mr MacKinnon and Mr Giasoumi as provisional liquidators of the SPVs.
2. It has come to our attention that yesterday, two days before the hearing of this application set for 24 June, and one business day after Mr James Mawhinney failed in his application to this Court on Friday 19 June 2020 to adjourn the hearing of this application, Mr Mawhinney as sole director placed the Borrower into voluntary administration.[1]
3. The Borrower has been insolvent since 3 June 2020 (see below). There was no move to place the Borrower into administration until after Friday's adjournment application failed. Mr Mawhinney had ample opportunity to take such a step earlier. He did not do so. It is

[1] These submissions have been completed at a time when no application has been filed by the new administrators nor Mr Mawhinney in light of the voluntary administration he brought about, and no affidavit material has been served in opposition to the appointment of provisional liquidators. The only material received from Mr Mawhinney to date has been his affidavit of 18/19 June 2020 in support of his adjournment application. These submissions have also been completed on the basis that the last report of the Receivers is that of 28 May 2020.

submitted that the Court should approach Mr Mawhinney's late conduct and any delaying effect he may argue it should have on the appointment of provisional liquidators with a healthy degree of scepticism. The Courts have often expressed their disinclination to defer winding up proceedings, or not to appoint provisional liquidators, where directors have left it to the last minute to place a company into administration.[2]

4. In addition to the orders sought in its interlocutory process as filed, the plaintiff seeks leave to amend its interlocutory process to seek –
    1) An order pursuant to section 532(2) of the Act that leave be granted for Mr MacKinnon and Mr Giasoumi to act as provisional liquidators or liquidators of IPO Wealth Holdings, and
    2) An order that the administration of IPO Wealth Holdings commenced on 22 June 2020 herewith ends, by operation of s 435C(3)(g) and/or by exercise of the Court's discretion under s 447A(1).
5. The plaintiff relies principally upon –
    - The affidavit of Lee Ray Monik of 29 May 2020 (**Monik Affidavit**), which exhibits as LRM-1 the Court-ordered Receivers report of 28 May 2020, and
    - The third affidavit of Craig Mathew Dunstan of 18 June 2020 (**Third Dunstan Affidavit**).
6. The plaintiff also relies upon –
    - The affidavit of Craig Mathew Dunstan of 22 May 2020 (**Dunstan Affidavit**), and
    - The second affidavit of Craig Mathew Dunstan of 28 May 2020 (**Second Dunstan Affidavit**).
7. By way of background to the IPO Wealth Fund, the events which lead to the issue of these proceedings and the bringing of this application, the plaintiff refers to its outline of submissions of 28 May 2020.

Principles

8. Generally, an applicant for the appointment of provisional liquidators must satisfy the Court as to two matters–
    1) There is a reasonable prospect that a winding up order will be made,[3] and
    2) There exist factors sufficient to require the exercise of the Court's discretion to appoint provisional liquidators prior to the hearing of the wind up application.[4]

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[2] See *In the matter of Plutus Payroll Australia Pty Ltd* [2017] NSWSC 1041 at [16] and the authorities there cited; see also *Treset Pty Ltd v South Pelagic Holdings Pty Ltd* [2020] FCA 187 at [61].
[3] *Tickle v Crest Insurance Co of Australia Ltd* (1984) 2 ACLC 493, 494; *ASC v Solomon* (1996) 19 ACSR 73, 80; *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* [2013] FCA 234; (2013) 93 ACSR 189 at [15].
[4] *ASIC v ActiveSuper (No 2)* per Gordon J at [25].

9. As to the first matter, the principles applying on an application to wind up on the just and equitable ground are well established –

    1) The classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case.[5]

    2) It has long been the case that a company may be wound up where there is "a justifiable lack of confidence in the conduct and management of the company's affairs" and thus a risk to the public interest that warrants protection.[6]

    3) A lack of confidence may arise where, "after examining the entire conduct of the affairs of the company" the Court cannot have confidence in "the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company".[7] There is thus a significant overlap between matters relevant to the just and equitable ground, and the matters which weigh in favour of the appointment of a provisional liquidator.[8]

    4) A risk to the public interest may take several forms. For example, a winding up order may be necessary to ensure investor protection, or where a company has not carried on its business candidly and in a straightforward manner with the public. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law. Again, there is an overlap between matters which would pose a risk to the public interest for the purpose of s 461(1)(k) and which are relevant to the appointment of a provisional liquidator.[9]

    5) "A stronger case might be required where the company was prosperous, or at least solvent".[10] Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act.[11]

10. As to the second matter, the principles as to the appointment of provisional liquidators are also well established –

    1) The Court may appoint a provisional liquidator on any ground.[12] The Court has a wide discretion whether or not to appoint a provisional liquidator.[13] The power is by

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[5] *ASIC v ActiveSuper (No 2)* at [19] and the authorities there cited.
[6] *ASIC v ActiveSuper (No 2)* at [20], citing *Loch v John Blackwood Ltd* [1924] AC 783, 788.
[7] *Galanopoulos v Moustafa* [2010] VSC 380 at [32]; see also *ASIC v ActiveSuper (No 2)* at [21] and the authorities there cited.
[8] *ASIC v ActiveSuper (No 2)* at [22].
[9] *ASIC v ActiveSuper (No 2)* at [23] and the authorities there cited.
[10] *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [96].
[11] *ASIC v ABC Fund Managers* [2001] VSC 383; (2001) 39 ACSR 443 at [124]-[130]; see also *ASIC v ActiveSuper (No 2)* at [24].
[12] *ASIC v CME Capital Australia Pty Ltd* [2015] FCA 1489 per Moshinsky J at [15].
[13] *Re Huntford Pty Ltd* (1993) 12 ACSR 274, 277.

no means limited, the grounds for an appointment are infinite, and all that really has to be shown is that there is a bona fide application constituting sufficient ground for the making of the order.[14]

2) The appointment of a provisional liquidator pending the determination of a winding up application will (usually) be a drastic intrusion into the affairs of the company and will not be done if other measures would be adequate to preserve the status quo.[15]

3) Therefore an applicant must show some good reason for intervention prior to the final hearing of the wind up application; for example, that the appointment is needed in the public interest or to preserve the status quo or to protect the company's assets or affairs.[16]

4) Tamberlin J's six principles listed in *ASC v Solomon*[17] are[18] –

   i. The court should only appoint where it is satisfied that there is a valid and duly authorised wind up application and a reasonable prospect that the order will be made;

   ii. The fact that the assets of the corporation may be at risk is a relevant consideration;

   iii. The provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all concerned and to enable the court to decide, after further examination, whether the company should be wound up;

   iv. The court should consider the degree of urgency, the need established by the applicant creditor, and the balance of convenience. The power is a broad one and circumstances will vary greatly. Commercial affairs are infinitely complex and various and it is inappropriate to limit the power by restricting its exercise to fixed categories or classes of circumstances or fact;

   v. It may be appropriate to appoint a provisional liquidator in the public interest where there is a need for an independent examination of the state of accounts of the corporation by someone other than the directors;

   vi. Where the affairs of the company have been carried on casually and without due regard to legal requirements, so as to leave the court with no confidence that the company's affairs would be properly conducted with due regard for

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[14] *Re New Cap Reinsurance Corporation Holdings Ltd* (1999) 32 ACSR 234 at [23]; see also *ASIC v ActiveSuper Pty Ltd (in liq) (No 2)* at [11]-[12].
[15] *Lubavitch Mazel Pty Ltd v Yeshiva Properties No 1 Pty Ltd* (2003) 47 ACSR 197 at [105]; see also *ASIC v ActiveSuper (No 2)* at [13] and the authorities there cited.
[16] *Allstate Exploration NL v Batepro Australia Pty Ltd* [2004] NSWSC 261 at [30]; *ASIC, in the matter of Bennett Street Developments Pty Ltd v Weerappah (No 2)* [2009] FCA 249 at [8]; *ASIC v ActiveSuper (No 2)* at [14].
[17] *ASIC v Solomon* (1996) 19 ACSR 73, 80.
[18] *ASIC v ActiveSuper (No 2)* at [16].

the interests of shareholders, it may be appropriate to appoint a provisional liquidator.

5) Where an application is made and an appearance is filed in opposition, the onus is not as heavy on the applicant. The court takes into account the opportunity the opponent has of putting before the court any relevant factors as to why a provisional liquidator ought not be appointed. Moreoever -

> If the plaintiff's affidavits raise matters to which a court would expect there to be some answer and there is no answer provided then that in itself raises a matter of suspicion that it may well be in the public interest to put in a provisional liquidator.[19]

Factors warranting the appointment of provisional liquidators to the Borrower

11. Here, the appointment of provisional liquidators would not effect an intrusion into the affairs of the company. Hence this factor, which is what tends to make the courts reluctant to appoint, can be put to one side. The Borrower is already under the control of the proposed appointees as receivers and managers.

12. The reasons to appoint here, in exercise of the Court's wide discretion, are –

1) The Receivers of the Borrower and the SPVs have formed the view that these companies ought be placed into liquidation. In those circumstances, it is appropriate that the Court appoint them provisional liquidators pending the hearing of the wind up application. This is particularly so where the appointment of the Receivers to the Borrower on 22 May 2020 was a private appointment. It is now clearly appropriate that the Court's supervisory jurisdiction be engaged over the Borrower also;
2) The companies are insolvent. The Borrower is unable to repay its $80 million debt to the Trustee.[20] The action of the director in placing the Borrower into voluntary administration of itself admits insolvency;
3) There is evidence of irregularities in the handling of assets of SPVs and funds of the Borrower.[21] There is evidence that some have been diverted to other companies related to James Mawhinney, without an equal and corresponding benefit to the SPVs and the Borrower, to protect the investments of the unitholders of the Fund; [22]
4) These irregularities were concealed from the Trustee;

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[19] *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* (1986) 10 ACLR 865, 866 per Young J; See also *ASIC v ActiveSuper (No 2)* at [18] and the authorities there cited; See also *ASIC v CME Capital Australia Pty Ltd* [2015] FCA 1489 at [20].

[20] Third Dunstan Affidavit at [4]-[6] and exhibits CMD-47 and CMD-48.

[21] Receivers Report of 28 May 2020.

[22] "Equal" does not mean simply of equal monetary value on an artificial accounting basis. It means of equal value in the context of insolvency. If a proprietary, beneficial interest in an asset on the verge of a significant increase in value is replaced with a book debt of fixed amount owed by a related entity, registered overseas, this is not equal, even assuming an ability to repay. Nor is it equal if it is replaced by a reduction of a debt allegedly owed to another related entity, in a fixed amount.

5) It is appropriate and in the public interest that independent official liquidators investigate the Borrower's affairs and report back to the Court;[23]

6) No adequate explanation has been provided by Mr Mawhinney in answer to the allegations raised by the Receivers a month ago in their report of 28 May 2020, or indeed to the multiple questions raised and pressed by the Trustees since March and April 2020. This in itself has been found to raise suspicion.[24] What explanation has been offered finally by Mr Mawhinney in his affidavit of 19 June 2020 is unsatisfactory because (a) it has come so late, with only an inadequate explanation as to why, (b) it was inconsistent with previous answers given to the Trustee and to the Receivers, and (c) it was not supported by financial and other documentary evidence which would either support or disprove the assertions made;

7) The Receivers are still lacking information and documents needed from Mr Mawhinney, a month after their appointment. The ROCAPs Mr Mawhinney provided were striking in their lack of content, and significant sections were left entirely blank.[25] On the application of Mr Mawhinney, an extended regime for the provision of further documents and information to the Receivers has been put in place on 19 June 2020, with the timetable extending out for a further 2 months, to late August. These matters and the delays they have caused also tell in favour of independent scrutiny;

8) In these circumstances there is substantial evidence justifying a lack of confidence in the controller of the Borrower and the SPVs, and the manner in which he has managed and dealt with the funds raised from investors in the Fund.

13. It can be seen that these factors also weigh heavily in favour of a winding up on the just and equitable ground, and show that there is at least a reasonable prospect that that order will be made.

14. These factors also demonstrate it is not in the interests of "creditors", nor indeed of unitholders, that the Borrower's newly-begun voluntary administration continue. The plaintiff is the only significant creditor of the Borrower, and is a priority secured creditor. The plaintiff understands that the only other creditors of the Borrower comprise related party creditors in which Mr Mawhinney is a director and/or shareholder. The plaintiff seeks the appointment of provisional liquidators not an administration. It is further noted –

1) Unitholders themselves have no rights or say in a voluntary administration process;

2) There is nothing to indicate any realistic probability of a DOCA being proposed or any benefit to creditors arising in that way. The newly-appointed administrators will

[23] See *ASIC v Tax Returns Australia Dot Com Pty Ltd* [2010] FCA 715 per Dodds-Streeton J at [86].
[24] See *ASIC v ActiveSuper (No 2)* at [48].
[25] See Third MacKinnon Affidavit of 18 June 2020.

not yet have had opportunity to explore this theoretical possibility, but having regard to the totality of what has gone before and what the Receivers have discovered to date, it is improbable in the extreme that a DOCA would be propounded, at least one which would involve sufficient benefit for creditors and for unitholders to deter the Court from proceeding to a winding up;[26]

3) Nor can the Court be satisfied that unitholders would be likely to benefit from any DOCA. Any proposed DOCA would be futile in any event, given that the SPVs are likely to remain in receivership/liquidation;
4) It is in the creditors' and unitholders' interests to know, sooner rather than later, the complete and true financial position of the IPO Wealth Group – the Borrower and the SPVs. This can and should be achieved by independent scrutiny, under the supervision of the Court;
5) The fact that well after the wind up and provisional liquidator applications were issued, and just 2 days before they were due to be heard on 24 June, Mr Mawhinney caused the Borrower to enter voluntary administration of itself admits insolvency, and shows there is a good case for the winding up order to be made[27] rather than the Borrower escaping the supervision of the Court, independent scrutiny and the ability for transactions to be clawed back and if warranted, directors and officers potentially brought to account;
6) The costs of two separate external administrations of the Borrower are against the interests of Unitholders and are not warranted;
7) The onus is on Mr Mawhinney to satisfy the Court that it is in the interests of creditors, and of unitholders, for the administration to continue. He would need to show a real, practical prospect, as opposed to mere optimistic speculation, that the creditors and unitholders will receive a better or quicker dividend if administration is permitted to continue, than they would eventually hope to receive if provisional liquidators are appointed.[28] This he cannot do, in light of the evidence and what the Receivers' investigations have revealed to date;
8) It is submitted Mr Mawhinney would also need to displace the conclusion that the public interest requires the appointment of independent, court-appointed experts to investigate what has occurred, and advise the Court as to whether liquidation ought be commenced so that steps could be taken to claw back transactions and if warranted potentially take action against individuals. This too he cannot do;

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[26] So reasoned Brereton J in similar terms, in *In the matter of Plutus Payroll Australia Pty Ltd* [2017] NSWSC 1041 at [19]-[20].
[27] As Brereton J concluded in *In the matter of Plutus Payroll Australia Pty Ltd* [2017] NSWSC 1041at [8].
[28] *Lubavitch Mazel Pty Ltd v Yeshiva Properties No 1 Pty Ltd* (2003) 47 ACSR 197 per Austin J at [78]; *ASIC v CME Capital Australia Pty Ltd* [2015] FCA 1489 at [32].

9) Even if provisional liquidators are not appointed to the Borrower, it will remain in receivership, hence the role of an administration would seem to be prosaic at best;

10) The appointment of provisional liquidators does not make salvage impossible, if on an independent assessment by the Court's appointees salvage is possible. If the provisional liquidators form the view that a realistic DOCA of benefit to creditors and unitholders may be achievable, they may if they see fit apply to the Court to be appointed administrators to a second administration, so that such a DOCA can be placed before creditors.[29]

15. It follows, the plaintiff submits, that s 440A(3) does not operate here as the Court cannot be satisfied it is in the interests of creditors for the Borrower to continue under administration rather than have provisional liquidators appointed. It also follows that the administration ought end, whether by operation of s 435C(3)(g) or by exercise of the Court's discretion under s 447A(1).

C G ROME-SIEVERS

Counsel for the Plaintiff

Lonsdale Chambers
23 June 2020

[29] So reasoned McKerracher J in *ASIC v Diploma Group Ltd (No 2)* [2017] FCA 593 at [16].