

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

**IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944**

First Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Second Applicant: **BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN  
IN THEIR CAPACITY AS LIQUIDATORS OF  
EQUITITRUST LIMITED (IN LIQUIDATION) (RECEIVERS  
AND MANAGERS APPOINTED) (RECEIVER APPOINTED)  
ACN 061 383 944**

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND  
ARSN 089 079 854 AND THE MEMBERS OF THE  
EQUITITRUST PRIORITY CLASS INCOME FUND ARSN  
089 079 729**

**CERTIFICATE OF EXHIBIT**

Exhibit PJH-4 to the affidavit of Peter Justin Hegarty affirmed: 4 February 2022

Deponent



Name: Simone Bryant

Qualification: Solicitor



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**CERTIFICATE OF EXHIBIT AND  
INDEX**

Filed on behalf of the first and second  
applicants  
Form 47, Version 2  
Uniform Civil Procedure Rules 1999  
Rule 435

**HEGARTY LEGAL**

Suite 3.02, Level 3, 99 Elizabeth Street,  
Sydney NSW 2000  
Phone No: 02 9056 1746  
Fax No: 02 9056 1735  
Email: [stuartb@hegartylegal.com.au](mailto:stuartb@hegartylegal.com.au)

## Stuart Bailey

---

**From:** Tahlia O'Connor <Tahlia.OConnor@gadens.com>  
**Sent:** Wednesday, 27 October 2021 10:11 AM  
**To:** Stuart Bailey  
**Cc:** Scott Couper; Peter Hegarty  
**Subject:** In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings No. BS10478/2011 [GQ-BD.FID525428]  
**Attachments:** Letter to Hegarty Legal dated 27 October 2021.pdf

Dear Colleagues,

Please see the **attached** correspondence.

Yours faithfully,

**Tahlia O'Connor** | Senior Associate | **gadens**  
[tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com) | T +61 7 3231 1625 | F +61 7 3229 5850  
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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Our Reference      Tahlia O'Connor 201110996  
Direct Line        +61 7 3231 1625  
Email                [tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com)  
Partner responsible   Scott Couper

**gadens**

ABN 30 326 150 968

27 October 2021

Hegarty Legal  
Suite 1303  
Level 13, 383 Kent Street  
SYDNEY NSW 2000

ONE ONE ONE  
111 Eagle Street  
Brisbane QLD 4000  
Australia

GPO Box 129  
Brisbane QLD 4001

Attention:      **Peter Hegarty and Stuart Bailey**

T +61 7 3231 1666  
F +61 7 3229 5850

By email: [peterh@hegartylegal.com.au](mailto:peterh@hegartylegal.com.au) ; [stuartb@hegartylegal.com.au](mailto:stuartb@hegartylegal.com.au)

[gadens.com](http://gadens.com)

Dear Colleagues

**In the Matter of Equititrust Limited ACN 061 383 944 (EL)**

**Your clients: Blair Pleash and Richard Albarran as liquidators of EL (*the Liquidators*)**

**Our client: David Whyte, the court appointed receiver of the Equititrust Income Fund (*the EIF*)  
and the Equititrust Priority Class Income Fund (*the EPCIF*)**

We refer to your email dated 22 October 2021 by which you served (part of) your clients' Points of Claim. As you know, by the order dated 1 October 2021 your clients were required to file and serve your clients' Points of Claim by 15 October 2021.

We further refer to our email dated 22 October 2021 by which:

1. We noted that several paragraphs of your clients' Points of Claim refer to "Particulars to the Points of Claim" (which appears to include at least 5 schedules);
2. We had not been served with the Particulars to the Points of Claim and the schedules 1 to 5; and
3. We requested that you provide us with copies of those Particulars to the Points of Claim and the schedules 1 to 5 immediately by return.

As at the date of this letter, we have still not been served with the Particulars to the Points of Claim or the schedules 1 to 5.

It is not possible for our client to reasonably and properly prepare the Points of Defence in response to your clients' Points of Claim without the Particulars to the Points of Claim and the schedules. The reasons for this include, but are not limited to, for example, the following:

1. By paragraph 41(a) of the Points of Claim, your clients claim an indemnity from the EIF for "*EIF Administration Expenses*". This is defined in paragraph 29(b) as "*The Administration Expenses ... attributable to EIF in the amount stated under the heading 'Total claim' in Schedule 3 of the Applicant's Particulars to Points of Claim, that will be provided separately*". This paragraph in turn relies on the definition of "Administration Expenses" contained in paragraph 28(a), being "\$203,388.99 in relation to the Administration of the Company" and is particularised as being set out under the heading "Amount" in Schedule 3 to the Particulars to the Points of Claim. It therefore seems your clients are claiming an amount for "EIF Administration Expenses" to be indemnified from the EIF without actually stating the precise amount of your clients' claim from the EIF for 'expenses' or identifying how those particular expenses were incurred by EL in its capacity as responsible entity for the EIF (or were otherwise for the benefit of members of the EIF).
2. By paragraph 41(d) of the Points of Claim, your clients claim an indemnity from the EIF for the "Order Remuneration" which we understand to be for the "Order Work" in undertaking the proof of debt process in accordance with the Order made by Justice Boddice dated 2 April 2019 which is apparently particularised in schedule 2 of the Particulars to the Points of Claim. It may be that, upon review of your clients' remuneration in undertaking the proof of debt process as set out in schedule 2, our client may have little or no objection to the remuneration claimed for the proof of debt process and paragraph 26 of the Points of Claim can be admitted. However without the

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Particulars to the Points of Claim and the schedules, our client is simply unable to properly respond to this allegation.

In light of the above and given that the matter is listed for a hearing on 4 November 2021, we repeat our request for you to urgently provide us with the Particulars to the Points of Claim and the schedules referred to in the Points of Claim in order to enable our client to prepare the Points of Defence.

We look forward to hearing from you by return.

Yours faithfully



**Tahlla O'Connor**  
Senior Associate

## Stuart Bailey

---

**From:** Tahlia O'Connor <Tahlia.OConnor@gadens.com>  
**Sent:** Tuesday, 2 November 2021 10:47 AM  
**To:** Stuart Bailey  
**Cc:** Scott Couper; Peter Hegarty  
**Subject:** FW: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings No. BS10478/2011 [GQ-BD.FID525428]  
**Attachments:** Draft orders (01\_11\_2021).DOCX

Dear Colleagues,

We refer to our email dated 22 October 2021 and to our letter dated 27 October 2021 to which we have not received a response.

As at the date of this email, we have not been served with the Particulars to the Points of Claim or the schedules 1 to 5 referred to in your clients' Points of Claim. As explained in our letter dated 27 October 2021, it is not possible for our client to reasonably and properly prepare the Points of Defence without the Particulars to the Points of Claim and the Schedules.

In those circumstances, we are instructed to provide you with the **attached** proposed orders which our client intends to seek at the hearing on Thursday, for your clients' consideration.

Please confirm your clients' position in respect of the proposed orders as soon as possible, and in any event by no later than midday on Wednesday, 3 November 2021.

Separately, as previously raised it appears to our client that all members of the EIF and the EPCIF (being the respondents in this proceeding) are potentially affected parties (as is ASIC). Accordingly, whilst a matter for your clients, our client considers that your clients ought to either demonstrate service on all the members of the EIF and the EPCIF, or apply for substituted service orders of the kind previously sought by our client.

We otherwise look forward to service of the sealed order made by Justice Boddice on 1 October 2021.

Should you wish to discuss this matter, please contact the writer or Scott Couper on (07) 3231 1651.

Yours faithfully,

**Tahlia O'Connor** | Senior Associate | **gadens**  
[tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com) | T +61 7 3231 1625 | F +61 7 3229 5850  
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**From:** Tahlia O'Connor

**Sent:** Wednesday, 27 October 2021 9:11 AM

**To:** Stuart Bailey <stuartb@hegartylegal.com.au>

**Cc:** Scott Couper <Scott.Couper@gadens.com>; Peter Hegarty <peterh@hegartylegal.com.au>

**Subject:** In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings No. BS10478/2011 [GQ-BD.FID525428]

Dear Colleagues,

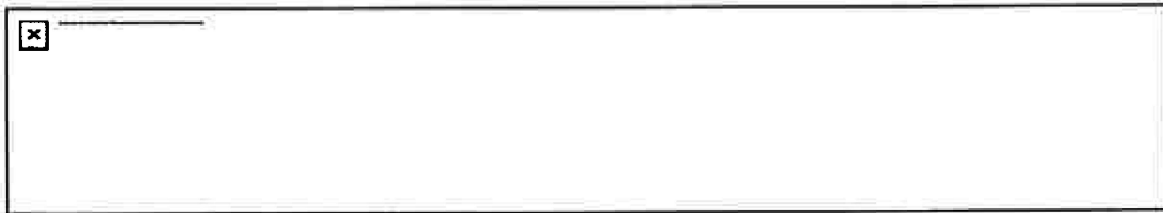
Please see the **attached** correspondence.

Yours faithfully,

**Tahlia O'Connor | Senior Associate | gadens**  
[tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com) | T +61 7 3231 1625 | F +61 7 3229 5850  
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**SUPREME COURT OF QUEENSLAND**

**REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011**

**IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944**

**Applicant: EQUITITRUST LIMITED ACN 061 383 944**

**AND**

**Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729**

**ORDER**

**Before: Justice**

**Date: 4 November 2021**

**Initiating documents: Application filed 13 August 2021 (Court document 228)  
(the **Winding Up Application**)**

**Application filed 28 September 2021 (Court document 238) (the **Indemnity Application**)**

**THE COURT DIRECTS THAT:**

- 1. Paragraph 4 of the order of Justice Boddice dated 1 October 2021 be vacated.**
- 2. By 5 November 2021 the applicants file and serve the Particulars to the Points of Claim.**
- 3. By 26 November 2021 David Whyte in his role as court appointed Receiver of the Equititrust Income Fund file and serve a points of defence setting out, at least, each ground relied upon to oppose the grant of the relief sought at paragraphs 3, 4, 5 and 8 of the Indemnity Application.**
- 4. The balance of the Indemnity Application, and the Winding Up Application are adjourned to (x) December 2021 for directions.**
- 5. Liberty to apply on three days' notice in writing to each other.**
- 6. Costs of both applications be reserved.**

**Signed:**

---

**ORDER**  
**Filed on behalf of the court appointed receiver**  
**Form 58 Rule 661**

**GADENS LAWYERS**  
**Level 11, 111 Eagle Street**  
**BRISBANE QLD 4000**  
**Tel No.: 07 3231 1666**  
**Fax No: 07 3229 5850**  
**SZC:201110996**

**BNEDOCs Draft orders (01\_11\_2021).DOCX**

## Stuart Bailey

---

**From:** Stuart Bailey  
**Sent:** Wednesday, 3 November 2021 11:39 AM  
**To:** Mr Scott Couper (Other side's solicitor); Tahlia O'Connor  
**Cc:** Peter Hegarty  
**Subject:** In the matter of Equititrust Limited (in Liquidation) - Supreme Court of Queensland Proceedings No. BS 10478/11  
**Attachments:** Letter to Gadens - 3 November 2021; Applicants proposed orders - 4 November 2021

Dear Colleagues,

Please see our letter **attached**.

Kind regards,



**STUART BAILEY SENIOR ASSOCIATE**  
D 02 9056 1746 | P 02 9056 1735 | M +61 448 417 029  
A Suite 3.02, Level 3, 99 Elizabeth Street, Sydney NSW 2000  
E [stuartb@hegartylegal.com.au](mailto:stuartb@hegartylegal.com.au) | W [www.hegartylegal.com.au](http://www.hegartylegal.com.au)

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Our Ref: PJH:SEB:1404  
Your Ref: Scott Couper 201110996

3 November 2021

Gadens  
11 Eagle Street  
BRISBANE CITY QLD 4000

By email: [scott.couper@gadens.com](mailto:scott.couper@gadens.com); [tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com)

Dear Colleagues

**In the matter of Equititrust Limited (in Liquidation) ACN 061 383 944**  
**Supreme Court of Queensland Proceedings No. BS 10478/11**

We refer to your recent correspondence requesting certain particulars foreshadowed in our points of claim.

#### **Particulars**

The particulars sought fall into two categories. *First*, those found in any usual WIP report or itemised bill – date, time entry, author, charge, brief description of work and an expense report (date, amount, payee and description). Reports of this kind have previously been provided to you.

*Second*, the allocation of the charge for each item of work in the WIP report and each expenses in the expense report between the company, EIF and the other funds and the basis for it.

Our clients estimated that it will take them approximately 6 weeks at a cost of approximately \$50,000 to undertake the work required to provide the second category of particulars. That is unsurprising given that an analysis of seven years of time entries and expenses is required.

Our clients are unfunded and those costs will have to be met by our Liquidator clients i.e. in addition to the >\$1 million they have already incurred.

The particulars you have sought concern the issue of the quantification of our clients' remuneration and expenses, not their entitlement to be paid for any part of same from the assets of EIF. If our clients are found to have no such entitlement, that \$50,000 will be effectively thrown away.

This is a further reason why, as you already know, our clients propose that the Court separately and prior to trial determines the issue of our clients' entitlement to be paid from the assets of EIF.

Once that issue is determined, and if favourable to our clients, our clients will then provide the second category of particulars (and the first category again, if that is what your client's require).

Your client does not require the particulars sought to prepare its points of defence in response to the points of claim.

#### **Proposed orders**

We have not yet received your client's points of defence.

The matter is listed for directions tomorrow. Please see enclosed a draft order setting out orders that our client proposes be made by the Court.

26750

**HEGARTY LEGAL**

Suite 2, Level 3, 99 Elizabeth Street, Sydney NSW 2000 | 02 9056 1735 | [info@hegartylegal.com.au](mailto:info@hegartylegal.com.au) | [www.hegartylegal.com.au](http://www.hegartylegal.com.au)

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You will note that the proposed orders contemplate our client filing an application for the separate determination of questions prior to trial and the issue of service in respect of the members of the funds.

Would you please let us know by return correspondence whether your client consents to the orders we have proposed being made. If so, we intend to write to his Honour's associate this afternoon and request that the orders be made without an appearance by the parties.

If your client will not so consent, please inform us of the orders that you will propose be made tomorrow.

Yours faithfully  
**HEGARTY LEGAL**

A handwritten signature in black ink, appearing to read 'Peter Hegarty', with a long horizontal stroke extending to the right.

**PETER HEGARTY**

PRINCIPAL

D 02 9056 1736

E [peterh@hegartylegal.com.au](mailto:peterh@hegartylegal.com.au)



**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

First Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

**AND**

Second Applicant: **BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN IN THEIR  
CAPACITY AS LIQUIDATORS OF EQUITITRUST LIMITED (IN  
LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER  
APPOINTED) ACN 061 383 944**

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854  
AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME  
FUND ARSN 089 079 729**

**ORDER**

Before: **Justice Boddice**

Date: **4 November 2021**

Initiating documents: **Application filed 13 August 2021 (Court document 228)  
(the Winding Up Application)**

**Application filed 28 September 2021 (Court document 238) (the Indemnity  
Application)**

**BY CONSENT, THE COURT DIRECTS THAT:**

1. The time for compliance with paragraph 4 of the order of Boddice J made on 1 October 2021 be extended to 9 November 2021.
2. Any application for the determination of separate questions prior to trial is to be filed by 16 November 2021.
3. If no application is filed pursuant to order 2, the balance of the Indemnity Application, and the Winding Up Application are to be listed for directions on 18 (or 19) November 2021.
4. Liberty to apply on three days' notice in writing to each other.
5. Costs of both applications be reserved.

**Service of funds**

6. Notice and service of the Indemnity Application filed by the First and Second Applicants be effected on the members of the Equititrust Income Fund ARSN 089 079 854 (EIF) and the members of the Equititrust Priority Class Income Fund ARSN 089 079 729 (EPCIF) by:

---

**ORDER**

Filed on behalf of the First and Second Applicants  
Form 58 Rule 661

**HEGARTY LEGAL**  
Suite 2, Level 3, 99 Elizabeth Street  
Sydney NSW 2000  
Tel No.: 02 9056 1736  
PJH:SB:1404

- (a) posting a notice of the Indemnity Application in a prominent location on the Equititrust Limited Website of [www.equititrust.com.au](http://www.equititrust.com.au); and
  - (b) posting a notice of the Indemnity Application in a prominent location on the Equititrust Income Fund website of [www.equitrustincomefund.com.au](http://www.equitrustincomefund.com.au).
- 7. The form of the notice be substantially the same form as the Notice annexed to these orders.
- 8. Service of the Indemnity Application on each of the members of the EIF and the EPCIF, pursuant to rule 112 of the *Uniform Civil Procedure Rules 199 (Qld)* (or otherwise), be dispensed with.
- 9. Service of the Indemnity Application be deemed effected on each member of the EIF and the EPCIF seven (7) days after those documents are made available in PDF format on the following websites: "[www.equititrust.com.au](http://www.equititrust.com.au)" and "[www.equitrustincomefund.com.au](http://www.equitrustincomefund.com.au)".
- 10. Service of any further documents to be relied upon by the First and Second Applicants in respect of the Indemnity Application including any application pursuant to paragraph 2 herein, be deemed effected on each of the members of the EIF and the EPCIF seven (7) days after those documents are made available in PDF format on the following websites: "[www.equititrust.com.au](http://www.equititrust.com.au)" and "[www.equitrustincomefund.com.au](http://www.equitrustincomefund.com.au)".

Signed:

## **Annexure A**

**TO THE MEMBERS OF:**

**EQUITITRUST INCOME FUND ARSN 089 079 854 ("EIF") [or other fund as required]**

Take notice that Equititrust Limited (in liquidation)(Receiver and manager Appointed) (**Company**) and Blair Pleash and Richard Albarran have applied to the Supreme Court of Queensland for the fixing of the amount of their remuneration and expenses in their role as Liquidators of the Company and the right to be paid those amounts from the assets of the EIF.

The application has been allocated proceeding number BS10478 of 2011.

If you wish to be heard in relation to the application you should file a notice of appearance and /or seek legal advice.

Copies of the court documents in respect of this application will be available on the Equititrust Limited website of "[www.equititrust.com.au](http://www.equititrust.com.au)" and the Equititrust Income Fund website of "[www.equititrustincomefund.com.au](http://www.equititrustincomefund.com.au)"

## Stuart Bailey

---

**From:** Tahlia O'Connor <Tahlia.OConnor@gadens.com>  
**Sent:** Wednesday, 3 November 2021 4:36 PM  
**To:** Stuart Bailey  
**Cc:** Scott Couper; Peter Hegarty  
**Subject:** RE: In the matter of Equititrust Limited (in Liquidation) - Supreme Court of Queensland Proceedings No. BS 10478/11 [GQ-BD.FID525428]  
**Attachments:** Draft orders (revised 03\_11\_2021).DOCX

Dear Colleagues,

We refer to your letter dated 3 November 2021 and proposed draft order. We assume that this is your clients' response to our draft order proposed in our email dated 2 November 2021.

We are instructed to respond to your clients' draft order on behalf of the Receiver as follows:

1. Your draft order includes orders regarding an application for determination of separate questions and contains orders for substituted service. We note that we have not been provided with a copy of an application for such orders or supporting affidavit material. In any event it is a matter for your client to satisfy the Court as to such orders; and
2. We disagree with your position as to whether our client requires the Particulars of the Points of Claim in order to prepare a Points of Defence. Our client's position in relation to the Points of Defence is as set out in our letter dated 27 October 2021.

In those circumstances, our client will seek the **attached** order at tomorrow's hearing.

Yours faithfully,

Tahlia O'Connor | Senior Associate | gadens  
[tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com) | T +61 7 3231 1625 | F +61 7 3229 5850  
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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---

**From:** Stuart Bailey <stuartb@hegartylegal.com.au>  
**Sent:** Wednesday, 3 November 2021 10:39 AM  
**To:** Scott Couper <Scott.Couper@gadens.com>; Tahlia O'Connor <Tahlia.OConnor@gadens.com>

**From:** Stuart Bailey  
**Sent:** Mon, 10 Jan 2022 17:10:45 +1100  
**To:** Mr Scott Couper (Other side's solicitor);Tahlia O'Connor  
**Cc:** Peter Hegarty;Annita Stucken  
**Subject:** In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings No. BS10478/11  
**Attachments:** Letter to Gadens - 10 January 2022.pdf, Proposed order - 28 02 22[1].docx

Dear Colleagues,

Please see our letter **attached**.

Kind regards,



**STUART BAILEY SENIOR ASSOCIATE**  
D 02 9056 1746 | P 02 9056 1735 | M +61 448 417 029  
A Suite 3.02, Level 3, 99 Elizabeth Street, Sydney NSW  
2000  
E [stuartb@hegartylegal.com.au](mailto:stuartb@hegartylegal.com.au) | W [www.hegartylegal.com.au](http://www.hegartylegal.com.au)

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Our Ref: PJH:SEB:1404  
Your Ref: Scott Couper 201110996

10 January 2022

Gadens  
11 Eagle Street  
BRISBANE CITY QLD 4000

By email: [scott.couper@gadens.com](mailto:scott.couper@gadens.com); [tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com)

Dear Colleagues

**In the matter of Equititrust Limited (in Liquidation) ACN 061 383 944  
Supreme Court of Queensland Proceedings No. BS 10478/11 (Proceeding)**

We refer to our clients' Separate Question Application currently listed for hearing on 28 February 2022 and the orders made on 17 December 2021 that facilitating that hearing.

#### **Order on Admission**

**Please confirm that your client will consent to an order being made in terms of paragraph 1 of the Separate Question Application.**

**Obviously, the members of the EIF will be entitled to be heard on, inter alia, this issue and their views, if any, in respect of the quantum of this remuneration and the court will give any such submissions the weight they deserve.**

We have taken steps to serve Separate Question Application on the members of the EIF in accordance with the court's earlier order in this regard (**Service Order**).

#### **Declaration and Separate question**

You have complained that our clients have not referred you to the authorities upon which they rely in respect of their entitlement to have their remuneration and costs paid from the assets of EIF.

Please see, inter alia, *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 and *Australian Securities and Investments Commission v Marco (No 9)* [2021] FCA 1306, and the authorities referred to therein.

We note that:

1. the "Whyte" in the abovementioned Queensland decision and your client are one and the same; and
2. in the abovementioned Federal Court decision, his Honour determined, by way of a declaration, the issue of the right of the administrators therein to have their remuneration paid from trust property separately and prior to the determination of the quantum of that remuneration (which was postponed until an ordered mediation had been carried out).

You have further complained that the admission as to our liquidator clients' entitlement to have their remuneration and expenses paid from the assets of EIF (**Entitlement**) that we distilled from the points of claim and points of defence and put to you seeking your client's agreement does not appear "verbatim" in "the Points of Claim or any authority [you] are aware of" and stated that "there is no apparent benefit to formulating the words in our letter for some kind of judicial determination."

26750

**HEGARTY LEGAL**

Suite 2, Level 3, 99 Elizabeth Street, Sydney NSW 2000 | 02 9056 1735 | [info@hegartylegal.com.au](mailto:info@hegartylegal.com.au) | [www.hegartylegal.com.au](http://www.hegartylegal.com.au)

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As to the latter, the time and costs savings to the parties and your client from a separate determination of the Entitlement is significant, obvious and already the subject evidence from Mr Hegarty in his affidavit sworn 17 December 2021. Further, if the Entitlement is determined in favour of our liquidator clients, it will be unnecessary for the parties to argue and for the court to determine the other various entitlements claimed by our company client to be paid from the assets of EIF.

As to the former, the form of declaration and separate questions set out in the Separate Question Application have been framed by reference to statements of the law set out in the abovementioned decisions.

#### **Strike out**

The relief sought at paragraph 5 of the Separate Question Application is only sought in the event that neither the declaration nor order in relation to separate question are made.

#### **Payment on account**

If the declaration is made, there is no reason that our liquidator clients ought not be forthwith be reimbursed for the expenses that they have incurred to date in relation to the Indemnity Application (a negligible amount of which concerns the quantification of our liquidator clients' remuneration) and the Separate Question Application.

**Please confirm that your client will consent to an order being made in terms of paragraph 6 of the Separate Question Application.**

#### **Consent order**

We propose that our clients and your client consent to orders being made in terms of the attached draft order in relation to our clients' Separate Question Application and before further time and costs are expended on it.

If your client will consent to same (including with such reasonable changes to the wording we have used that your client might require), we propose to serve a copy of the proposed consent order on the members of the EIF in accordance with the Service Order and informing them that our respective clients intend requesting the court to make orders in those terms at the expiration of a say 10 days, unless written submissions opposing the making of those orders are filed in the court.

This way, if no such submissions (or none of substance) are filed, the matter can be listed for in the applications list (at an early date) at which the consent orders and directions for the future conduct of the matter can be made (then or at an early date as contemplated by the proposed order) and the hearing on 28 February 2022 can be vacated.

If your client does not consent to orders being made in terms of the attached draft order, we intend to serve a copy of the proposed consent order (save insofar as it provides for costs) on the members of the EIF in accordance with the Service Order in any event and inform the said members that your client's consent has been sought and not provided, thus necessitating the hearing.

We will further inform the said members that costs will be sought against your client in his personal capacity and such members that file submissions opposing the making of the orders (if any) on an indemnity basis and that if such an order is made, our clients will reserve the question of whether costs ought to be paid from the assets of the EIF and only seek to have that question determined in the event that the said costs order against your client and any opposing members goes unsatisfied. That is the course we instructed to adopt, and will, at the hearing on 28 February 2022.

Please provide us with your client's response to this letter by 11 January 2022.

This letter is sent on an open basis.

Yours faithfully  
**HEGARTY LEGAL**

A handwritten signature in black ink, appearing to read 'Peter Hegarty', with a long horizontal stroke extending to the right.

**PETER HEGARTY**

PRINCIPAL

D 02 9056 1736

E [peterh@hegartylegal.com.au](mailto:peterh@hegartylegal.com.au)



**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

First Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

**AND**

Second Applicant: **BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN IN THEIR CAPACITY AS LIQUIDATORS OF EQUITITRUST LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ACN 061 383 944**

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729**

**ORDER**

Before: The Honourable Justice (insert)

Date: (insert) 2022

Initiating documents: Application filed 13 August 2021 (Court document 228)  
(the **Winding Up Application**)

Application filed 28 September 2021 (Court document 238) (the **Indemnity Application**)

Application filed 16 December 2021 (Court document 257) (the **Separate Question Application**)

BY CONSENT, THE COURT ORDERS THAT:

1. Orders 3 to 6 made on 17 December 2021 be vacated.
2. The hearing of the Separate Question Application in the civil list on 28 February 2022 be vacated.
3. That the remuneration of the second applicants be approved and fixed in the sum of \$87,319 plus GST for the work they and their employees performed in carrying out the work they were required to perform under paragraph 1 of the order of Justice Boddice made on 2 April 2019, in the period 2 April 2019 to 20 April 2020.

---

**ORDER**

Filed on behalf of the applicants  
Form 58 Rule 661

**HEGARTY LEGAL**  
Suite 2, Level 3, 99 Elizabeth Street  
Sydney NSW 2000  
Tel No.: 02 9056 1736  
PJH:SB:1404

4. It is declared that the second applicants are entitled to be indemnified out of the assets of the Equititrust Income Fund ARSN 089 079 854 (EIF) in respect of:
  - (a) the expenses they incurred as administrators of the first applicant; and
  - (b) the remuneration and expenses they incurred as liquidators of the first applicant; to extent:
    - (c) such amounts were reasonably and properly incurred; and
    - (d) such amounts concern remuneration, are fixed by the court; and
    - (e) such amounts are attributable to EIF; and
    - (f) such amounts as are attributable to the winding up of the first applicant and EIF; and
    - (g) such amounts as are attributable to the winding up of the first applicant and EIF and any other trust, equally between those trusts.
5. Subject to further order, the applicants be indemnified from the property of EIF for all proper costs and expenses (including legal costs on a full indemnity basis) incurred by them:
  - (a) to date, and in the future, in relation to the Indemnity Application; and
  - (b) the Separate Question Application;with such amounts to be paid by Mr David Whyte in his role as Court appointed receiver of the EIF (**Receiver**) to the applicants from the property the EIF, within 14 days of demand for payment (accompanied by copies of the tax invoices or other documents evidencing the costs and expenses) being made on the said Receiver, from time to time.
6. The balance of the Indemnity Application and the Winding Up Application be listed for hearing on (insert date) 2022 for directions.
7. Liberty to apply on not less than two business days' notice in writing

Signed: .....

**From:** Tahlia O'Connor <Tahlia.OConnor@gadens.com>  
**Sent:** Fri, 14 Jan 2022 10:20:23 +1100  
**To:** Stuart Bailey  
**Cc:** Scott Couper; Annita Stucken; Peter Hegarty  
**Subject:** In the matter of Equititrust Limited - Supreme Court of Queensland  
Proceedings No. BS10478/11 [GQ-BD.FID525428]  
**Attachments:** Letter to Hegarty Legal (14\_01\_2022).PDF

Dear Colleagues,

Please see the **attached** correspondence.

Yours faithfully,

**Tahlia O'Connor** | Senior Associate | **gadens**  
[tahlia.oconnor@gadens.com](mailto:tahlia.oconnor@gadens.com) | T +61 7 3231 1625 | F +61 7 3229 5850  
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

Gadens acknowledges the Traditional Custodians of the land upon which we work, and pay our respects to Elders past, present and emerging.

Brisbane | Sydney | Melbourne | Adelaide | Perth



**[gadens.com](http://gadens.com)**

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Liability limited by a scheme approved under professional standards legislation.*

*We will never change our bank details by email. If you have received an email purporting to be from us advising of new bank account details for the transfer of funds, please confirm these details with us first by contacting the lawyer in charge of the matter by telephone before making any transfer or deposit of funds into our bank account.  
We cannot accept responsibility for any loss or damage arising from any electronic transfers or deposits made that are not received into our bank account.*

14 January 2022

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**Attention: Peter Hegarty; Stuart Bailey ; Annita Stucken**

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gadens.com

Dear Colleagues

**In the Matter of Equititrust Limited ACN 061 383 944 (EL)**

**Your clients: Blair Pleash and Richard Albarran as liquidators of EL (*the Liquidators*)**

**Our client: David Whyte, the court appointed receiver of the Equititrust Income Fund (*the EIF*)  
and the Equititrust Priority Class Income Fund (*the EPCIF*)**

We refer to your letter dated 10 January 2022 enclosing a proposed consent order and to your subsequent email dated 11 January 2022.

We are instructed to respond to that correspondence on behalf of our client as follows:

**1. Authorities on which the Liquidators rely**

By your letter, you advise that your clients intend to rely on the following authorities in support of their claim for an entitlement to have their remuneration and costs paid from the assets of the EIF.

**1.1 *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2 [2017] QSC 229***

As you know, we have previously explained our client's position in respect of the above authority by our letter dated 17 June 2021. A copy of that letter is **enclosed**.

To date, as you are aware, our client is of the view that your clients have not put on sufficient affidavit evidence. Critically, your clients have failed to put on any evidence to explain the basis upon which the remuneration and costs incurred the subject of your clients' claim were performed on behalf of the EL as responsible entity of the EIF (as distinct from EL in its own right or the other scheme which EL managed), or put another way, how the tasks performed were performed by EL as responsible entity for the EIF and for the benefit of members of the EIF.

**1.2 *Australian Securities and Investments Commission v Marco (No 9) [2021] FCA 1306***

One of your clients was an interested party in this case, in which we understand that the Court ordered that, *inter alia*:

- The former administrators (and liquidators for a short time) were entitled to remuneration and payment of disbursements of costs from the property of the second and third defendants; and
- The issue of quantum be referred to mediation by a Registrar and failing agreement on quantum being reached at mediation, the question of quantum would be referred back to a Judge of the Court for resolution.

We consider that there are a number of factors which distinguish the current proceedings to that in *Marco*.

The orders made in *Marco* were made (in part) pursuant to the *Insolvency Practice Schedule* (the *IPS*).

It seems to us that your clients rely on this authority to support their approach that your clients' right to be indemnified for their remuneration and expenses from the assets of the EIF should be dealt with separately, namely (a) determination of the legal entitlement as is contemplated in the Separate Question Application and (b) determination of the quantum of that entitlement.

Whilst that approach was adopted in that case, in our view that was because of the wording of s 60-5 of the *IPS*. As you know, pursuant to section 1581(1) of the *Corporations Act 2001* (Cth) (the *Act*), the 'old Act' continues to apply for the Liquidators' remuneration given that the Liquidators were appointed before the commencement day (not the *IPS*). Your clients apparently acknowledge this at paragraph 14 of your clients Amended Points of Claim and similarly your clients' Indemnity Application seeks the fixing of remuneration pursuant to, *inter alia*, section 473 of the *Act*, not the *IPS*.

Whilst the Honourable Justice McKerracher ordered that an entitlement existed under s 60-5 of the *IPS*, we draw to your attention his Honour's comments at [71] that:

***"The previous mechanism for remuneration was contained in s 449E of the Corporations Act which entitled an administrator to receive 'such remuneration as is determined... by the Court'. It did not confer on an administrator, as s 60-5 of the IPSC now does, an entitlement to remuneration independently of any determination made by the Court as to the quantum of that remuneration. The language of s 60-5 does not condition an administrator's entitlement by reference to the availability of a company's assets or the discretion of the Court. It simply entitles an administrator to receive 'remuneration for necessary work properly performed... in relation to the external administration...'" [71].***

Section 449E of the *Act* employs the same wording as s 473 of *Act* under which your clients seek to fix their remuneration and consequently Justice McKerracher's statement equally applies.

## **2. Order Remuneration**

By your letter dated 10 January 2022, you have asked our client to consent to an order in terms of paragraph 1 of the Separate Question Application (that is, the Order Remuneration).

Our client's position remains as set out in our letter dated 9 December 2021. That is, our client will not object to an order being sought from the Court and that it is matter for your clients to satisfy the Court that they are entitled to payment of the Order Remuneration.

## **3. Payment out of the assets of the EIF within 14 days of demand**

By your letter dated 10 January 2022, you have asked our client to consent to an order in terms of paragraph 6 of the Separate Question Application. Your clients have previously sought similar orders at the hearing before Justice Boddice on 31 August 2021. His Honour did not make those orders, commenting that it would seem to 'put the cart before the horse'. That reasoning equally applies here. Again, an order in those terms is a matter for the Court and not an order our client can simply consent to.

Accordingly, we are instructed that our client does not consent to an order in terms of paragraph 6 of the Separate Question Application.

## **4. Strike Out**

We note your comments about paragraph 5 of the Separate Question Application.

## **5. Consent Order**

As you know, our client has repeatedly urged your clients not to file an application for the determination of your client's entitlement to any indemnity from the assets of the EIF by separate questions and instead to focus on the substance of the matter and have the matter of entitlement and quantum determined in one hearing.

Notwithstanding this, in order to progress this matter (against the background of our client's application to finalise the winding up of the EIF) our client agreed to a timetable for the affidavit evidence, exchange of

submissions and the determination of your clients' Separate Question Application by order dated 17 December 2021 (the **Order**).

The substantive declaration sought by your clients at paragraph 2 of the Separate Question Application and as set out in paragraph 4 of your proposed consent orders are a matter for the Court's discretion and not something our client can simply consent to.

We are instructed that our client is not agreeable to the terms of the proposed order enclosed with your letter dated 10 January 2022 for the reasons set out in this letter.

As you know, pursuant to paragraph 3 of the Order your clients are to file and serve any further material on which they intend to rely by this Friday, 14 January 2022. We refer to your email dated 11 January 2022 in which your clients seek an extension for this to occur until Wednesday, 19 January 2022.

We are instructed that our client will allow your clients until COB AEST on Wednesday, 19 January 2022 to file and serve any further material on which they intend to rely in support of their Separate Question Application. We invite your clients to provide us with a draft order to this effect for our client to consider.

We otherwise look forward to receipt of all of your clients' further material in support of their Separate Question Application by COB on Wednesday, 19 January 2022.

Yours faithfully

A handwritten signature in black ink, appearing to read 'SCOTT COUPER', written over the closing 'Yours faithfully'.

**Scott Couper**  
Partner

Enc.

17 June 2021

Hegarty Legal  
Suite 1303  
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Australia

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**Attention:      Peter Hegarty and Stuart Bailey**

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F +61 7 3229 5850

**By email: [peterh@hegartylegal.com.au](mailto:peterh@hegartylegal.com.au) ; [stuartb@hegartylegal.com.au](mailto:stuartb@hegartylegal.com.au)**

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Dear Colleagues

**In the Matter of Equititrust Limited ACN 061 383 944 (EL)**

**Your clients:    Blair Pleash and Richard Albarran as liquidators of EL (*the Liquidators*)**

**Our client:      David Whyte, the court appointed receiver of the Equititrust Income Fund (*the EIF*)  
and the Equititrust Priority Class Income Fund (*the EPCIF*)**

We continue to act on behalf of David Whyte, the court appointed receiver of the EIF.

We refer to our letter dated 31 March 2020 (copy **enclosed**) which contains a detailed background of relevant matters between our respective clients.

Against the background set out in our 31 March 2020 letter, as you know, since in or about March 2012 we have corresponded with your clients' solicitors in respect of your clients' claim, for payment from the EIF, for an indemnity in their capacity as (a) voluntary administrators of EL and (b) liquidators of EL (**the Indemnity Claim**).

Since September 2020, our respective clients have been liaising directly with a view to exploring a commercial resolution of the Indemnity Claim. Despite extensive correspondence between our respective firms and our respective clients, the claim by your clients remains unresolved.

Our client maintains that any indemnity which your clients may be entitled to call upon is limited to remuneration and disbursements which relate to the EIF (as opposed to, for example, another fund of which EL was also responsible entity, such as the Equititrust Premium Fund).

Insofar as the tasks undertaken by your clients relate to general costs of the liquidators of EL which are not related to any particular fund, we refer to the recent decision of *Park v Muller (liquidators of LM Investment Management Limited) v Whyte No 2* [2017] QSC 229.

Relevantly in that decision:

- The applicant liquidators in that case divided their claim for payment of remuneration and some expenses from the trust property of the funds and determination of the liquidators' remuneration by reference to the different appointments, different time periods and the connection of the claimed item to a particular fund. Separately, a category of remuneration was also identified that was not specific to any one fund which the applicants proposed to apportion among the funds (being the category described as "Category 2" in the decision) (see [34] and [35]);
- Jackson J stated that where a trustee acts for more than one trust, whilst that does not preclude an order for payment of a liquidators' remuneration and expenses from trust property, it requires that the trustee's recourse to trust property be the "*appropriate amount attributable to each of the relevant trusts*" as well as separating the liquidators' remuneration and expenses attributable to non-trust business where the trustee also carries on non-trust business (see [96] and [97]);
- His Honour stated that it is up to the liquidators to separate the relevant tasks and remuneration and expenses, commenting that "*it is a question of adequate record keeping, not a lack of any*

*legal entitlement, if the liquidator is unable to separate the non-trust remuneration and expense" (see [108]). In our view, this equally applies to separating remuneration and expenses as between different managed investment schemes;*

- Whilst his Honour noted that both parties in that case accepted that the determination of remuneration does not require a line by line analysis (see [160]), his Honour cited *Re Traditional Values Management Ltd (in liq) (No 2)*<sup>1</sup> which relevantly provides that *"There is no absolute rule regarding the amount of detail required to support such a claim but it should enable potential objectors to review the amounts claimed and to ascertain whether there are matters to which objection should be taken. If a prima facie case is established, the application should provide for an objection procedure to enable objections to be made. If there are objectors, the court should then establish the validity of those objections."* (see [158]); and
- With respect to the Category 2 remuneration, the applicant liquidators submitted that there were 4 possible methods of apportionment (see [251]).

In the result, in respect of Category 2 remuneration, His Honour found that there was no sufficient basis to conclude that the Category 2 remuneration should be more heavily allocated to a particular fund based on the ratios calculated using method 1,<sup>2</sup> or funds under management, of the remaining funds. This is because Category 2 remuneration was by definition not specified to a fund (see [257]).

His Honour was of the view that whilst it may not be *"possible to ascertain that the work was done for one fund or another, the ratio of the values using method 1 or funds under management for the various funds reflects the relative value of the amounts of the undifferentiated work that was done for them. A risk is that some of the funds will not be able to bear their share and the first applicants may be out of pocket. In my view, that is not a reason to throw a higher proportion of the amount upon the FMIF"* (see [251]).

Taking into consideration his Honour's findings set out above, it is our client's view that your clients have yet to provide sufficient information in order for our client to reasonably satisfy himself that the amounts claimed by your clients in their Indemnity Claim were reasonably and properly incurred in the care, preservation and realisation of property of the EIF, or reasonably and properly incurred in the administration of property of the EIF and not in the administration or liquidation of EL or another scheme managed by EL.

Our client has requested on numerous occasions that your clients provide a full explanation of:

- The tasks undertaken and why those tasks were necessary and proper and for the benefit of the EIF;
- The remuneration incurred and the disbursements incurred with respect to those tasks; and
- Critically, the basis upon which the remuneration and disbursements incurred the subject of the Indemnity Claim were performed on behalf of the EL as responsible entity of the EIF, or put another way, how the tasks performed were performed by EL as responsible entity for the EIF and for the benefit of members of the EIF.

See for example, our letters dated 17 April 2012, 19 September 2012, 31 August 2016, 23 June 2017, 28 November 2017 and 31 March 2020 (the latter letter being **enclosed**).

In the absence of the full explanation sought above, our client is unable to properly consider payment of your clients' Indemnity Claim from the EIF at this time. The Committee of Inspection, nor the creditors generally, have approved your Clients' remuneration and expenses. In any event, we understood that your clients had intended to make a formal application to Court for approval of that remuneration. This is consistent with your clients' statements to the Court and to our office as detailed in the **enclosed** letter.

---

<sup>1</sup> [2015] VSC 126 at [18].

<sup>2</sup> *"being an equal split among all the funds and the MPF (until 12 April 2013)"* (see [251]).

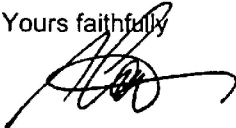


In all of the circumstances and given our respective clients have not been able to agree a commercial resolution, our client intends to seek orders regulating the resolution and any approval of your clients' Indemnity Claim.

To this end, we propose to include orders facilitating the resolution of your clients' Indemnity Claim, including that any claim for an indemnity by your clients against the EIF (in their capacity as liquidators and/or voluntary administrations of EL) be made by a date to be determined by the Court and such application be heard by a separate date to be determined by the Court.

We are presently finalising that application and will file it shortly. Please confirm whether you hold instructions to accept service of the same.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Scott Couper', with a stylized flourish extending to the right.

**Scott Couper**  
Partner

Enc.

Our Reference      Craig Melrose 201110996  
Direct Line        +61 7 3231 1659  
Email               craig.melrose@gadens.com  
Partner Responsible   Scott Couper

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31 March 2020

Hegarty Legal  
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Level 13, 383 Kent Street  
SYDNEY NSW 2000

Attention:        Peter Hegarty

By email: [peterh@hegartylegal.com.au](mailto:peterh@hegartylegal.com.au)

Dear Colleagues

**In the Matter of Equititrust Limited ACN 061 383 944 (EL)**

**Your clients:    Blair Pleash and Richard Albarran as liquidators of EL (*the Liquidators*)**

**Our client:       David Whyte, the court appointed receiver of the Equititrust Income Fund (*the EIF*)  
and the Equititrust Priority Class Income Fund (*the EPCIF*)**

We refer to recent correspondence in this matter, including our letter dated 24 December 2019 and your letter dated 15 January 2020, and in particular to your clients' claims for an indemnity from the assets of the EIF in regard to their remuneration and costs for the period of the administration of EL and the period of the winding up of EL (**the Liquidators' Claims**). We also refer to the 6 Eligible Claims (as that term is defined in paragraph 4 of the Order of Justice Boddice dated 2 April 2019 (**the Boddice Order**)) adjudicated on by our client under that paragraph (**the Eligible Claims**).

#### **The Eligible Claims**

In regard to the Eligible Claims, we note that our client provided notification of his adjudication of those claims on 2 March 2020, rejecting three in their entirety and accepting three on a commercial basis. As you are aware, pursuant to paragraph 6 of the Boddice Order, your clients had until 30 March 2020 to make an application for directions as to whether or not any Eligible Claim is or is not one for which EL has a right of indemnity out of the scheme property of the EIF. We note that they did not do so. Accordingly, the Eligible Claims are now finalised in accordance with our client's adjudication of them.

#### **Our client's set-off claims**

We note that our client is not required by the Boddice Order or otherwise to incur costs in detailing his set-off claims in advance of the Liquidators' Claims being in fact pressed by your clients and in circumstances where the Eligible Claims have been disposed of as indicated above.

#### **The Liquidators' Claims**

In regard to the Liquidators' Claims, contrary to your assertion that the correspondence that has passed between the parties should give our client *"a very clear understanding of the nature of the indemnity claims maintained by"* your clients, our client does not have a clear understanding of the Liquidators' Claims, despite repeated request for clarification and information in that regard. The very extensive correspondence from our firm to you makes this abundantly clear. We invite you to review our letters dated 17 April 2012, 19 September 2012, 31 August 2016, 1 November 2016, 24 January 2017, 21 March 2017, 5 May 2017, 23 June 2017, 28 November 2017, 25 September 2019, 10 October 2019, 16 October 2019, 4 November 2019 and 24 December 2019.

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### The administration of EL

In regard to that part of the Liquidators' Claims related to the period of the administration of EL, we note that:

1. on 27 February 2012, at the first meeting of creditors, your client Mr Albarran informed investors that no costs of the administration of EL would be levied against the EIF;
2. on 17 April 2012, by letter from us to your clients' then-lawyers, Thomsons Lawyers (later Thomson Geer – **Thomsons**) our client noted that:
  - (a) the unit holders of the EIF would be expected to rely on Mr Albarran's comments at the first meeting of creditors referred to in (1) above, that no costs of the administration of EL would be levied against the EIF;
  - (b) any indemnity your clients may be entitled to call upon is limited to the indemnity contained in clause 6.1 of the Constitution of the EIF; and
  - (c) that indemnity extends only to EL performing its duties as responsible entity (RE) of the EIF, not to any steps taken by EL in its own right or in respect of EL acting as RE of the other funds for which EL was RE;
3. on 20 April 2012, the second meeting of creditors fixed the remuneration of your clients in their capacity as administrators of EL from the commencement of the administration to 20 April 2012 up to a maximum of \$400,000;
4. on 31 August 2012, by letter from Thomsons to us, your clients claimed an indemnity from the assets of the EIF in the amount of \$805,486;
5. on 19 September 2012, by letter from us to Thomsons, our client sought from your clients:
  - (a) a full explanation of the tasks undertaken by your client for which indemnity was claimed;
  - (b) the amount of remuneration incurred; and
  - (c) how the tasks the subject of the claim for remuneration were performed by EL as responsible entity of the EIF;
6. on 31 August 2016, by letter from us to Thomsons, our client sought from your clients:
  - (a) further information to support your clients' claim for an indemnity under clause 6.1 of the Constitution of the EIF and the general law for their remuneration as administrators (and liquidators) and outlays, including, but not limited to:
    - (i) an explanation as to what tasks were undertaken in respect of which indemnity is sought from the EIF; and
    - (ii) an explanation as to why such tasks were necessary and proper and for the benefit of the EIF;
7. on 21 March 2017, by letter from us to Thomsons, our client sought confirmation from your client as to whether they maintained a claim for indemnity for any remuneration or costs in their capacity as administrators of EL;
8. on 5 May 2017, by letter from your firm to us, your clients:
  - (a) confirmed they maintain a claim for indemnity for remuneration or costs in their capacity as administrators of EL; and
  - (b) advised that details of the claims were set out in the letter dated 31 August 2012 referred to in (4) above;

9. on 23 June 2017, by letter from us to your firm, our client:
  - (a) informed your clients that the explanations in the letter dated 31 August 2012 referred to in (4) above were insufficient to allow him to properly consider the matters for which indemnity was sought; and
  - (b) reiterated the request for information previously made;
10. on 25 September 2019, by letter from us to your firm, our client noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as administrators (or liquidators);
11. on 10 October 2019, by letter from us to your firm, our client again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as administrators (or liquidators);
12. on 16 October 2019, by letter from us to your firm, our client once again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as administrators (or liquidators);
13. on 19 October 2019, by letter from your firm to us, your clients:
  - (a) reserved their rights in regard to *"the rights of indemnity available to them"*; but
  - (b) did not provide any of the information sought;
14. on 4 November 2019, by letter from us to your firm, our client again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as administrators (or liquidators);
15. on 24 December 2019, by letter from us to your firm, our client again requested that your clients provide our client with full details of any claim for indemnity from the EIF that your clients make;
16. despite the above repeated requests, your client has not provided the information sought by our client to allow him to properly understand or adjudicate on your clients' claim for indemnity for remuneration and costs in their capacity as administrators of EL.

#### The liquidation of EL

In regard to that part of the Liquidators' Claims related to the period of the liquidation of EL, we note that:

1. on 1 November 2013, the Court approved your clients' remuneration in the following amounts:
  - (a) from 20 April 2012 to 30 November 2012 – \$497,714.03; and
  - (b) from 1 December 2012 to 30 April 2013 – \$402,525.45;
2. your clients have sought, but been refused, approval from meetings of either the committee of inspection or creditors, for remuneration in the following amounts:
  - (a) from 1 May 2013 to 30 September 2013– \$206,946.00 plus GST;
  - (b) from 1 October 2013 to 30 June 2014 – \$143,473.00 plus GST;
  - (c) from 1 July 2014 to 31 August 2016– \$192,513.00 plus GST; and
  - (d) from 1 September 2016 to 31 March 2018 – \$290,056.50 plus GST;
3. on 31 August 2016, by letter from us to Thomsons, our client sought from your clients:

- (a) further information to support your clients' claim for an indemnity under clause 6.1 of the Constitution of the EIF and the general law for their remuneration as liquidators (and administrators) and outlays, including, but not limited to:
    - (i) an explanation as to what tasks were undertaken in respect of which indemnity is sought from the EIF; and
    - (ii) an explanation as to why such tasks were necessary and proper and for the benefit of the EIF;
4. on 23 September 2016, by letter from Thomsons to us, your clients:
- (a) claimed an indemnity from the assets of the EIF in the following amounts:
    - (i) for their remuneration – \$1,228,325.00; and
    - (ii) for their disbursements – \$929,640.16; and
  - (b) provided as support for their remuneration claim spreadsheets detailing the time entries for which indemnity was sought;
5. on 1 November 2016, by letter from us to Thomsons, our client:
- (a) noted that:
    - (i) your clients' remuneration had been approved by the Court for the period 20 April 2012 to 30 April 2013 in the amount of \$900,239.48;
    - (ii) your clients' ASIC filings show that:
      - (A) your clients had been paid remuneration in an amount of \$1,430,263.43; and
      - (B) your clients had been paid on account of disbursements in the amount of \$287,413.87;
      - (C) Thomsons had been paid legal fees and disbursements in the amount of \$464,506.86;
    - (iii) the spreadsheets provided with the letter dated 23 September 2016 referred to in (4) above recorded work for the period 20 April 2012 to 26 February 2016 in the amount of \$1,228,355.00; and
    - (iv) on a preliminary review of the legal fee disbursements claimed, it appeared that some amounts claimed referred to proceedings in which your clients were ordered to pay our client's costs; and
  - (b) sought:
    - (i) clarification of the periods to which fees already paid relate;
    - (ii) copies of any documents evidencing the fixing and/ or approval of your clients' remuneration;
    - (iii) copies of the invoices for the legal fee disbursements claimed;
    - (iv) clarification of the amounts already paid to your clients by way of disbursements; and

- (v) clarification of the basis for the claim for disbursements in the amount of \$929,640.16, given it appears your clients had already been paid \$751,920.73 for disbursements in the same period for which they were now claimed;
- 6. on 24 January 2017, under cover of a letter from Thomsons to us, your clients provided our client a copy of the Court order dated 1 November 2013 referred to in (1) above, by which your clients' remuneration from 20 April 2012 to 30 April 2013 was approved;
- 7. on 21 March 2017, by letter from us to Thomsons, our client noted that the invoices sought in our letter dated 1 November 2016 referred to in (5) above, had not been received;
- 8. on 5 May 2017, under cover of a letter from your firm to us, your clients provided redacted invoices related to their legal costs referred to in the letter dated 23 September 2016 referred to in (4) above;
- 9. on 28 November 2017, by letter from us to your firm, our client advised that, based on the information he had received, he:
  - (a) accepted that your clients were entitled to an indemnity from the assets of the EIF for remuneration in the amount of \$7,993.50;
  - (b) otherwise rejected your clients' claims; and
  - (c) advised that the redactions of the legal invoices were so extensive that it was impossible for him to accept that your clients were entitled to any indemnity from the assets of the EIF for legal fee disbursements;
- 10. on 25 September 2019, by letter from us to your firm, our client noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as liquidators (or administrators);
- 11. on 10 October 2019, by letter from us to your firm, our client again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as liquidators (or administrators);
- 12. on 16 October 2019, by letter from us to your firm, our client once again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as liquidators (or administrators);
- 13. on 19 October 2019, by letter from your firm to us, your clients:
  - (a) reserved their rights in regard to "*the rights of indemnity available to them*"; but
  - (b) did not provide any of the information sought;
- 14. on 4 November 2019, by letter from us to your firm, our client again noted that our client had not received clarification as to whether your clients maintain a claim for indemnity as liquidators (or administrators);
- 15. on 24 December 2019, by letter from us to your firm, our client again requested that your clients provide our client with full details of any claim for indemnity from the EIF that your clients make;
- 16. despite the above repeated requests, your clients have not provided the information sought by our client to allow him to properly understand or adjudicate on your clients' claim for indemnity for remuneration and costs in their capacity as liquidators of EL.

#### The Auditor Proceedings

Further, in regard to Federal Court of Australia proceeding NSD 2028 of 2013 and NSD 2025 of 2013 (known as the **Auditor Proceedings**), we note that:

1. on 21 June 2019, by letter from us to your clients' solicitors for the Auditor Proceedings, Squire Patton Boggs, our client sought from your client the following information regarding moneys that were then expected to be recovered from the Auditor Proceedings by way of a settlement, and in particular requested the following information:
  - (a) the total amount of the Liquidators' remuneration claimed and paid by the litigation funder for each of the Auditor Proceedings;
  - (b) whether the Liquidators' remuneration referred to in paragraph (a) above had been approved and if so, how it had been approved;
  - (c) if that remuneration had not been approved, when your clients intended to seek approval for that remuneration and how they intended to seek that approval;
  - (d) if that remuneration had not been approved, the basis upon which the remuneration had been paid;
  - (e) if that remuneration had been paid, whether the funds had been dispersed by the Liquidators and if so how; if not, where those funds were then held;
  - (f) if the Liquidators intended to seek further remuneration and costs, and to make a claim for an indemnity from the EIF in respect of that further remuneration and costs, details of the amount of that remuneration and costs and full details of how that remuneration and costs had been incurred; and
  - (g) how the Liquidators intended to make a claim for any further remuneration and costs and the basis for that claim for remuneration and costs;
  
2. on 26 June 2019, by letter from your client Mr Pleash to us, Mr Pleash responded to the above questions respectively as follows:
  - (a) *"The Liquidators have claimed \$386,654.92 in regards to their remuneration from the litigation funder which is yet to be paid to the Liquidators;*
  - (b) *"An amount of \$112,853.92 was approved by the Court in Proceedings 136475 of 2013. This was part of a broader approval of the remuneration of the Liquidators and the short minutes of orders are attached for your reference. [We note for the sake of completeness that the short minutes of orders referred to were not attached to the relevant letter.]*
  - (c) *"The Liquidators will seek Court approval for the balance of the \$273,801 not yet approved.*
  - (d) *"The litigation funder has paid \$335,000.00 into Squire Patton Boggs trust account on trust for the Liquidators for part of the remuneration claimed as noted in (a).*
  - (e) *"The litigation funder has paid \$335,000.00 into Squire Patton Boggs trust account on trust for the Liquidators for part of the remuneration claimed as noted in (a), noting that the funds have not been dispersed.*
  - (f) *"The Liquidators intend on seeking approval of the \$273,801 noted above in(c) which will be paid by the litigation funder. There is no further remuneration incurred in respect of the Proceedings for which the Liquidators will be seeking approval or pursuing a claim under the indemnity from the EIF or the EPF.*
  - (g) *"Following the response in (f) this question is not applicable";*
  
3. on 28 June 2019, at the hearing of your clients' judicial advice application in regard to the Auditor Proceedings (Federal Court of Australia Proceeding NSD 830 of 2019, known as the **Advice Proceedings**):
  - (a) your clients gave an undertaking to the Court that they *"will not make any further claim for indemnity from the assets of these schemes [that is, the EIF and the EPCIF] in respect of*

*the costs and remuneration they incurred in respect of the Auditor Proceedings, including in relation to the present application for judicial advice";*

- (b) our client sought a further undertaking from your clients, that *"the amount of \$335,000.00 held in the trust account of Squire Patton Boggs on trust for the applicants for part of their remuneration claimed in the Auditor Proceedings will not be disbursed until further order of the Court, following any approval by the Court of the liquidators' remuneration in respect of the Auditor Proceedings";*
  - (c) your clients refused to give this undertaking on the basis that, as your clients' counsel told the Court: *"what will happen once the relevant approvals are in place for those parts of the liquidator remuneration that require approval, then the money will be distributed to the liquidators, and that will be the subject of a court order approving the remuneration";*<sup>1</sup>
4. on 25 July 2019, by letter from us to your firm, our client advised your client of our client's view that it is appropriate for your clients to seek Court approval of their remuneration and expenses related to the Auditor Proceedings, on the basis that:
- (a) the moneys received by your clients were received by them in the liquidation of EL as RE of the EIF; and
  - (b) as discussed further below, those moneys can only be used to satisfy debts of the EIF and not debts of EL in its own right or EL as RE of other trusts;
5. on 7 August 2019, by letter from your firm to us, your clients informed our client that your clients *"intend to seek Court approval of the remuneration for the work undertaken in respect of the Advice Proceedings and the Auditor Proceedings, prior to drawing upon the fund received from the Funder";*
6. we have not to date been served with any application for approval of the Liquidators' remuneration, despite repeated advice from you that your clients intend to make that application.

#### The basis of the Liquidators' entitlement to indemnity

The following summary of our client's position relates to any claim your clients still intend to make for remuneration and expenses as administrators or liquidators of EL, not including in respect of the Auditor Proceedings or the Advice Proceedings given your clients' undertaking to the Court that your clients will make no further claim for indemnity for remuneration or costs in respect of those proceedings.

The information our client has requested in regard to the Liquidators' Claims is necessary because any such claim requires proof that tasks in relation to which the indemnity is claimed have the requisite connection to the trust from which the indemnity is claimed.

This requirement is shown firstly in clause 6.1 of the EIF Constitution, which provides that EL as RE of the EIF is entitled to indemnity out of the assets of the EIF in regard to costs *"reasonably and properly incurred"* by EL as RE *"in the proper performance of its functions and duties and exercising its powers under this Constitution or at law."* There is no entitlement under the EIF Constitution to an indemnity for costs incurred in operating EL's funds management business or in performance of its functions and duties and exercising powers under the constitution of a trust other than the EIF.

Recent cases have clarified the basis on which a liquidator (and an administrator)<sup>2</sup> of a company that traded as a trustee of multiple trusts and on its own account, as did EL, may claim an indemnity for payment of their remuneration and costs out of the assets of the trust.

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<sup>1</sup> Transcript of hearing in NSD 830 of 2019 dated 28 June 2019 before Jagot J, P-3, L 21-26

<sup>2</sup> *Park v Whyte (No. 2)* [2018] 2 Qd R 413 at [109] per Jackson J



In *Carter Holt Harvey Woodproducts v Commonwealth*,<sup>3</sup> the High Court approved statements of principle made by the Full Court of the Supreme Court of South Australia in *Re Suco Gold*,<sup>4</sup> including the following (at [41] in *Carter Holt*):

*"The Full Court [in Re Suco Gold] concluded that since the power of exoneration could be used, in each case, to pay the creditors of each of the two trusts of which the company was trustee, and since the liquidator's remuneration and the costs and expenses of winding up were to be given priority over those unsecured creditors, the liquidator was entitled to have recourse to the property of each trust for that remuneration and those costs, so far as they were incurred in relation to each trust."*

The High Court clearly endorsed the principle that a liquidator may only claim an indemnity for remuneration and costs incurred in relation to the trust from which the indemnity is claimed.

Two further decisions from 2019 reiterate this principle. In *LM Investment Management Limited v Whyte*,<sup>5</sup> Justice Jackson held (at [34]) that a liquidator does not have a "general right to reimbursement from trust property for remuneration for work necessary for the winding up of the company trustee, where that work was not carried out in relation to the trust or relevant trusts, if more than one." In *Staatz v Berry, re Wollumbin Horizons Pty Ltd (No.3)*,<sup>6</sup> Justice Derrington held (at [211]) that a liquidator "may have recourse to the trust assets for his costs and expenses of the liquidation and for recovery of his remuneration to the extent to which his work concerned the assets of the trust."

These recent cases are consistent with the principles articulated by Justice Dixon in *Re Universal Distributing Company Ltd (in liq)*,<sup>7</sup> (at 174) that a liquidator is entitled to obtain payment from the property of a trust for costs "reasonably incurred [by the liquidator] in the care, preservation and realization of the property" of the trust; and Edward Nudgee QC in *Re Berkeley Applegate Investment Consultants Ltd (in liq)*,<sup>8</sup> (at 50) that such indemnity is available to a liquidator for "costs incurred and for skill and labour expended [by the liquidator] in connection with the administration of the property".

We need hardly repeat the number of times our client has sought this information from your clients and your clients' failure to provide that information.

#### **Request for information**

The authorities clearly show that proper evidence must be provided to ground a successful claim for an indemnity out of a trust by a liquidator or administrator. It is for this reason that our client has repeatedly requested further information from your clients regarding their indemnity claims.

Unless that required further information is provided, our client will not agree to providing your client any indemnity from the EIF beyond the \$7,993.50 already accepted.

On the basis of the detailed history of this matter (as set out in this letter), it is our client's intention to now proceed to take steps to conclude his administration of the receivership of the EIF. Your client will be served with the application seeking the finalisation of the receivership in due course.

Yours faithfully

  
**Craig Melrose**  
Solicitor

<sup>3</sup> (2019) 368 ALR 390; [2019] HCA 20

<sup>4</sup> (1983) 33 SASR 99

<sup>5</sup> [2019] QCS 245

<sup>6</sup> [2019] FCA 924

<sup>7</sup> (1933) 48 CLR 171

<sup>8</sup> [1989] Ch 32