

Form 2 Amended Originating process

(rules 2.2 and 15A.3)

BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN

First Plaintiffs

**EQUITITRUST LIMITED (IN LIQUIDATION) (RECEIVER APPOINTED) (RECEIVERS
AND MANAGERS APPOINTED) ACN 061 383 944**

Second Plaintiff

A. DETAILS OF APPLICATION

This is an application for orders to be made under section 477(2B) of the *Corporations Act 2001* (Cth) (the **Corporations Act**), rule 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (being Schedule 2 of the Corporations Act), and section 96 of the *Trusts Act 1973* (Qld) (**Trusts Act**), and ancillary orders.

On the facts stated in the supporting affidavits,

The First Plaintiffs seek the following relief:

1. An order, pursuant to section 477(2B) of the Corporations Act, approving the First Plaintiffs entering into, on the Second Plaintiff's behalf, a deed of settlement dated 17 December 2018 (**Settlement Deed**) in relation to the compromise of claims brought by the Second Plaintiff in Federal Court of Australia Proceedings no NSD 2028 of 2013 and NSD 2025 of 2013 (**the FCA Proceedings**).
2. A declaration, pursuant to rule 90-15 of Schedule 2 of the Corporations Act, that the First Plaintiffs were justified, and acted reasonably, in causing the Second Plaintiff to enter into the Settlement Deed.
3. A declaration, pursuant to rule 90-15 of Schedule 2 of the Corporations Act, that the First Plaintiffs would be justified, and act reasonably, were they to cause the Second Plaintiff to give effect to the terms of the Settlement Deed providing for the compromise of the FCA Proceedings.

Filed on behalf of (name & role of party)	Blair Alexander Pleash and Richard Albarran, Plaintiff		
Prepared by (name of person/lawyer)	Amanda Banton		
Law firm (if applicable)	Squire Patton Boggs (AU)		
Tel	(02) 8248 7850	Fax	N/A
Email	amanda.banton@squirepb.com		
Address for service (include state and postcode)	Level 17, 88 Philip Street Sydney NSW 2000		

4. An order that the First Plaintiffs' costs and expenses of this Originating Application and the proceeding commenced by this Originating Application be costs and expenses in the liquidation of Equititrust.
- 4A. A declaration, pursuant to rule 90-15 of Schedule 2 of the Corporations Act, that the First Plaintiffs would be justified, and act reasonably, were they to cause the Second Plaintiff to account for:
 - a. 88% of the amount to be paid by KPMG to the Second Plaintiff under clause 3.1(b) of the Settlement Deed as being proceeds from the compromise of proceeding NSD 2028 of 2013 against KPMG and Mr Paul Steer; and
 - b. 12% of the amount to be paid by KPMG to the Second Plaintiff under clause 3.1(b) of the Settlement Deed as being proceeds from the compromise of proceeding NSD 2025 of 2013 against KPMG and Mr Paul Steer.

The Second Plaintiff seeks the following relief:

5. A direction, pursuant to section 96(1) of the Trusts Act, that the Second Plaintiff was justified, and acted reasonably, in entering into the Settlement Deed.
6. A declaration, pursuant to section 96(1) of the Trusts Act, that the Second Plaintiff would be justified, and act reasonably, were it to give effect to the terms of the Settlement Deed providing for the compromise of the FCA Proceedings.
- 6A. A direction, pursuant to section 96(1) of the Trusts Act, that the Second Plaintiff would be justified, and would act reasonably, were it to account for:
 - a. 88% of the amount to be paid by KPMG to the Second Plaintiff under clause 3.1(b) of the Settlement Deed as being proceeds from the compromise of proceeding NSD 2028 of 2013 against KPMG and Mr Paul Steer; and
 - b. 12% of the amount to be paid by KPMG to the Second Plaintiff under clause 3.1(b) of the Settlement Deed as being proceeds from the compromise of proceeding NSD 2025 of 2013 against KPMG and Mr Paul Steer.
7. A direction, pursuant to section 96(2) of the Trusts Act, that it is not necessary to serve this application on the beneficiaries of the Equititrust Income Fund or the Equititrust Premium Fund.

The Plaintiffs seek the following relief:

8. An order, pursuant to section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) and upon the grounds identified in section 8(1)(a) and (e) of that statute, or pursuant to the Court's inherent jurisdiction, that the originals and/or copies of the Confidential Affidavit of Blair Alexander Pleash sworn 21 May 2019 and Confidential Exhibit BAP-25 to that affidavit that are provided to the Court be suppressed and not disclosed to any person other than:
 - a. any judge hearing this proceeding or who is assigned to deal with applications in this proceeding; and
 - b. the Executive Assistant and Associate to any such judge,and be placed in a sealed envelope on the Court file marked "*Confidential – Not to be opened other than by a judge of this Court*". This order applies throughout the Commonwealth of Australia.

Substituted Service

On the grounds stated in the accompanying affidavit of Blair Alexander Pleash sworn 21 May 2019, the Plaintiffs seek the following relief:

9. By 27 May 2019, the Plaintiffs serve by post on creditors and unitholders of the Equititrust Income Fund (**EIF**) and the Equititrust Premium Fund (**EPF**) for whom the Plaintiffs have a postal address, a notice in the form of Annexure A to this application (**Notice**) concerning the application filed on today's date for directions under 477(2B) of the Corporations Act, rule 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (being Schedule 2 of the Corporations Act), and section 96 of the Trusts Act (**Application**).
10. By 27 May 2019, the Plaintiffs serve on all creditors and unitholders of EIF and EPF the Notice by uploading a copy of the Notice on <http://www.equititrust.com.au/Updates.html> (**Equititrust Website**).
11. By 27 May 2019, the Plaintiffs are to upload on <http://jobs.hallchadwick.com.au/> (**Hall Chadwick Portal**):
 - a. the Notice;
 - b. the Application; and
 - c. any substantive affidavits (including all exhibits) that the Plaintiffs intend to rely upon in support of their Application, which are not confidential

(Application Material).

12. Pursuant to rule 10.24 of the *Federal Court Rules 2011* (Cth), service in accordance with orders 9, 10 and 11 be deemed to be effective on each of the EIF and the EPF creditors and unitholders as at the later of five days from the date of uploading the Notice on to the Equititrust Website or five days from the date of posting the Notice.
13. Where the Plaintiffs propose to rely on further material in support of their Application, they may serve that material on the creditors and unitholders of EIF and EPF by uploading a further notice on the Equititrust Website.
14. The Plaintiffs' costs and expenses of and incidental to their application for these orders be paid on an indemnity basis out of the EIF and the EPF.
15. Such further or other orders as the Court thinks fit.

Date: ~~22 May~~ 13 June 2019


.....
Amanda Kim Banton

Legal practitioner for the plaintiffs
Practising certificate number 41719
Squire Patton Boggs:

This application will be heard by at Law
Courts Building, 184 Phillip Street, Queens Square, Sydney NSW 2000 at
*am/*pm on

D. FILING

Date of filing: [date of filing to be entered by Registrar]

.....
Registrar

This originating process is filed by Amanda Banton for the plaintiffs.

E. SERVICE

The plaintiffs' address for service is Squire Patton Boggs, Level 17, 88 Phillip Street, Sydney NSW 2000.

It is intended to serve a copy of this originating process on each defendant and on any person listed below:

EIF Receiver

David Whyte

BDO

Level 10, 12 Creek Street

Brisbane QLD 4000

EPF Receivers

Michael Richard Peldan and Christopher Richard Cook

Worrells

Level 8, 102 Adelaide Street

Brisbane QLD 4000

ASIC

Level 5, 100 Market Street

Sydney NSW 2000

*

ANNEXURE A

TO THE CREDITORS AND UNITHOLDERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 (EIF) AND THE EQUITITRUST PREMIUM FUND (EPF)

TAKE NOTICE that the Liquidators of Equititrust Limited (in liquidation) (Receiver appointed) (Receivers and managers appointed) ACN 061 383 944 as the Responsible Entity of the EIF and the Trustee of the EPF (**Equititrust**) have applied to the Federal Court of Australia for:

1. An order, pursuant to section 477(2B) of the Corporations Act, approving the Liquidators entering into, on Equititrust's behalf, a deed of settlement dated 17 December 2018 (**Settlement Deed**) in relation to the compromise of claims brought by Equititrust in Federal Court of Australia Proceedings no NSD 2028 of 2013 and NSD 2025 of 2013 (**the FCA Proceedings**).
2. A declaration, pursuant to rule 90-15 of Schedule 2 of the Corporations Act, that Liquidators were justified, and acted reasonably, in causing Equititrust to enter into the Settlement Deed.
3. A declaration, pursuant to rule 90-15 of Schedule 2 of the Corporations Act, that the Liquidators would be justified, and act reasonably, were they to cause Equititrust to give effect to the terms of the Settlement Deed providing for the compromise of the FCA Proceedings.
4. An order that the Liquidators' costs and expenses of this Originating Application and the proceeding commenced by this Originating Application be costs and expenses in the liquidation of Equititrust.

TAKE NOTICE that Equititrust Limited (in liquidation) (Receiver appointed) (Receivers and managers appointed) ACN 061 383 944 as the Responsible Entity of the EIF and the Trustee of the EPF (**Equititrust**) have applied to the Federal Court of Australia for:

5. A direction, pursuant to section 96(1) of the Trusts Act, that Equititrust was justified, and acted reasonably, in entering into the Settlement Deed.
6. A declaration, pursuant to section 96(1) of the Trusts Act, that Equititrust would be justified, and act reasonably, were it to give effect to the terms of the Settlement Deed providing for the compromise of the FCA Proceedings.

7. A direction, pursuant to section 96(2) of the Trusts Act, that it is not necessary to serve this application on the beneficiaries of the Equititrust Income Fund or the Equititrust Premium Fund.

TAKE NOTICE that the Liquidators of Equititrust Limited (in liquidation) (Receiver appointed) (Receivers and managers appointed) ACN 061 383 944 as the Responsible Entity of the EIF and the Trustee of the EPF (**Equititrust**) and Equititrust have applied to the Federal Court of Australia for:

8. An order, pursuant to section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) and upon the grounds identified in section 8(1)(a) and (e) of that statute, or pursuant to the Court's inherent jurisdiction, that the originals and/or copies of the Confidential Affidavit of Blair Alexander Pleash sworn 21 May 2019 and Confidential Exhibit BAP-25 to that affidavit that are provided to the Court be suppressed and not disclosed to any person other than:

- a. any judge hearing this proceeding or who is assigned to deal with applications in this proceeding; and
- b. the Executive Assistant and Associate to any such judge,

and be placed in a sealed envelope on the Court file marked "*Confidential – Not to be opened other than by a judge of this Court*". This order applies throughout the Commonwealth of Australia.

Background

On 27 September 2013, Equititrust in its capacity as responsible entity of the EIF filed an Originating Application and Statement of Claim in the Federal Court of Australia, which commenced proceeding no NSD 2028 of 2013 (the **EIF Proceeding**). That Statement of Claim has since been amended.

On 27 September 2013, Equititrust in its capacity as trustee entity of the EPF filed an Originating Application and Statement of Claim in the Federal Court of Australia, which commenced proceeding no NSD 2025 of 2013 (the **EPF Proceeding**). That Statement of Claim has since been amended.

The EIF Proceeding concerned the failure of Equititrust Limited and two of its directors, Mark and Wayne McIvor, to comply with their obligations in relation to the EIF, and KPMG's failure to comply with its obligations as auditors of the EIF's financial statements and compliance plans.

The EPF Proceeding concerned KPMG's failure to comply with its obligations as auditors of EPF's financial statements and compliance plans.

On 13 September 2018, the parties to the EIF Proceeding and the EPF Proceeding took part in a court ordered mediation. The mediation was successful and the parties entered into a settlement deed on 17 December 2018, the terms of which are confidential but include the possibility of the Court making the directions sought in this application.

This application is set down to be heard by the Federal Court of Australia at Sydney on [date] at [time].

Copies of the non-confidential court documents in respect of this application will be made available on <http://jobs.hallchadwick.com.au/> (**Hall Chadwick Portal**) progressively as and when they are filed with the Court.

Please email equititrust@hallchadwick.com.au to obtain access details to the Hall Chadwick Portal.

Any creditor or unitholder who reasonably requires a hard copy of the application and supporting material, or a copy of the confidential court documents should put the request in writing to equititrust@hallchadwick.com.au.

Dated: [date]

Hall Chadwick