



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD830/2019

BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN and others named in the schedule
Plaintiff

ORDER

JUDGE: JUSTICE JAGOT

DATE OF ORDER: 20 June 2019

WHERE MADE: Sydney

THE COURT DIRECTS THAT:

1. By 5pm on Friday 21 June 2019, the applicants post:
 - (a) a further notice in the form of Annexure A to this order; and
 - (b) a copy of this order;to the website <http://www.equititrust.com.au/Updates.html>; and
 - (c) exhibit BAP-26 to the affidavit of Blair Pleash sworn 19 June 2019 to the website <http://jobs.hallchadwick.com.au>.
2. By 5pm on Wednesday 26 June 2019, any creditors or unitholders of the Equititrust Income Fund or the Equititrust Premium Fund notify the applicants of any objections they may wish to make to the relief sought in the amended originating application filed 18 June 2019.
3. The applicants provide copies of any objections received from creditors or unitholders of the Equititrust Income Fund or the Equititrust Premium Fund to:
 - (a) Gadens Lawyers, the solicitors for Mr David Whyte;
 - (b) Allens, the solicitors for KPMG;
 - (c) James Conomos & Carly Hanson of James Conomos Lawyers, the solicitor for Mark McIvor;
 - (d) Greg Rodgers of RBG Lawyers, the solicitor for Wayne McIvor; and
 - (e) Moray & Agnew, the solicitors for Liberty;by 10am on Thursday 27 June 2019.

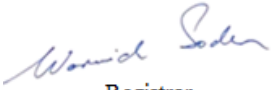


4. A copy of the Settlement Deed entered into by the Plaintiffs in relation to Federal Court Proceedings no NSD 2028 of 2013 and no NSD 2025 of 2013 (**Settlement Deed**) be provided to the EIF Receiver and his legal representatives upon the terms set out in clause 8.2(c) of the Settlement Deed.
5. A copy of the Settlement Deed entered into by the Plaintiffs in relation to Federal Court Proceedings no NSD 2028 of 2013 and no NSD 2025 of 2013 (**Settlement Deed**) be provided to the EPF Receiver and his legal representatives upon the terms set out in clause 8.2(c) of the Settlement Deed.

THE COURT ORDERS THAT:

1. Pursuant to *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) section 37AF(1), and on the ground stated in FCA Act section 37AG(1)(a), the Court orders that, until further order, 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, Confidential Affidavit of Blair Alexander Pleash sworn 19 June 2019 and Confidential Exhibit BAP-27 to that affidavit, the confidential Counsel opinions dated 16 December 2015, 1 April 2019 and 4 April 2019, and the confidential submissions dated 19 June 2019, 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 judgeand 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 is to apply throughout the Commonwealth of Australia.
2. The amended originating application filed 18 June 2019 be adjourned to 2:15pm on Friday 28 June 2019.

Date that entry is stamped: 21 June 2019


Registrar



Schedule

No: NSD830/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Plaintiff EQUITRUST LIMITED (IN LIQUIDATION)(RECEIVER
APPOINTED)(RECEIVERS AND MANAGERS APPOINTED)
ACN 061 383 944

Interested Person DAVID WHYTE



ANNEXURE A

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

Please note: the contents of this notice have been updated. Please refer to the underlined passages on pages 3 and 4.

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 2001 (Cth)* (**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 the 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 1973 (Qld)* (**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 alleged failure to comply with its obligations as auditors of the EIF's financial statements and compliance plans.

The EPF Proceeding concerned KPMG's alleged 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.

The settlement will not provide a recovery for unitholders or creditors (secured or unsecured) in the EIF or the EPF. This is because the funds to be paid by the respondents pursuant to the settlement will be distributed to the litigation funder by way of a funding commission and reimbursement of legal fees and payment of liquidator's remuneration paid by the litigation funder over the course of the past six years.

The funder's entitlement to those funds, in priority to unit holders and creditors, is provided for in a funding agreement approved by the Supreme Court of NSW prior to the commencement of the litigation in circumstances where the liquidators had no other means of funding the litigation other than through a litigation funding agreement.

Because the litigation was complex, involved two sets of proceedings against multiple well-resourced defendants, was hard fought, and a settlement was only achieved three months before the trial was due to commence, the legal fees incurred, and required to be repaid to the funder, were substantial.

The settlement represented, in the Liquidators' opinion, the maximum amount that could be recovered from the respondents without proceeding to trial with its associated risks and costs.

This application has been adjourned for further hearing by the Federal Court of Australia at Sydney on 28 June 2019 at 2:15pm.



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, and include two new documents, a non-confidential 19 June 2019 affidavit, and non-confidential submissions.

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.

Pursuant to the Court's orders, any creditors or unitholders must notify any objection to the relief sought by 5pm on 26 June 2019. You may do so by contacting the solicitors for the Liquidators, using the email address amanda.banton@squirepb.com, and providing any objection (including the basis for such objection) in writing by no later than 5pm on 26 June 2019. Please also indicate whether you wish to appear in person and make submissions to the Court on 28 June 2019.

Dated: [date]

Hall Chadwick