

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: BS 10478/2011

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**

**POINTS OF CLAIM**

(Pursuant to the order of Boddice J made on 1 October 2021)

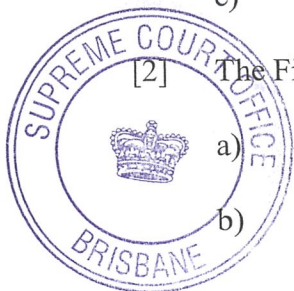
**The Parties**

[1] The Second Applicants (**Liquidators**):

- a) are and were at all material times registered liquidators within the meaning of section 9 of the *Corporations Act 2001* (Cth) (**Act**);
- b) are the joint and several liquidators of the First Applicant, Equititrust Limited (Receiver Appointed) (Receivers and Managers Appointed) (in Liquidation) (**Company**); and
- c) were members of the firm Hall Chadwick.

[2] The First Applicant (**Company**) is and at all material times:

- a) was a company able to sue and be sued in its corporate name;
- b) was the Responsible Entity of the Equititrust Income Fund (ASRN 089 079 854) (**EIF**), a managed investment scheme registered under Chapter 5C of the Act which had been established by Deed Poll dated 9 August 1999;



- c) was responsible entity of Equititrust Priority Class Income Fund (ARSN 089 079 729) (**EPCIF**), a managed investment scheme registered under Chapter 5C of the Act which had been established by Deed Poll dated 9 August 1999;
- d) was the trustee of the Equititrust Premium Fund (**EPF**), an unregistered managed investment scheme formed on 14 May 2003; and
- e) until 15 February 2012 conducted the business of professional funds manager (**Non-Trust Business**).

[3] David Whyte (**Receiver**) is:

- a) the person appointed by the Supreme Court of Queensland to be responsible for the winding up of the EIF and the EPCIF; and
- b) the receiver of the property of the EIF and the EPCIF by order of the Supreme Court of Queensland on 21 November 2011.

## **Background**

[4] The Company was incorporated on 18 August 1993.

[5] On or around 9 August 1999, the EIF was established by Deed Poll.

[6] At all material times, the EIF was and is a trust subject to the *Trusts Act 1973* (Qld) (**TA**).

[7] On or around 9 August 1999, the EPCIF was established by Deed Poll.

[8] At all material times, the EPCIF was and is a trust subject to the TA.

[9] On or around 3 June 2011, the Company entered into a Deed Poll containing the consolidated constitution of the EIF (**Constitution**) that relevantly:

- a) by clause 6.1, entitles the Company to be indemnified from the EIF in respect of certain expenses; and
- b) by clause 21.1, entitles the Company to be paid out of Income received by the EIF a management fee of up to 1.5% per annum of the Gross Assets Value of the EIF, calculated and payable monthly in arrears (**Management Fee**).

[10] On 21 November 2011, the Supreme Court of Queensland in Proceedings No. BS 10478 of 2011 ordered that:

- a) the Company be directed to wind up the EIF and the EPCIF;

- b) the Receiver be appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the EIF and EPCIF are wound up in accordance with their constitutions; and
- c) the Receiver be appointed, pursuant to sections 1101B(1) and 1101B(5) of the Act as a receiver of the property of the EIF and the EPCIF.

- [11] On 15 February 2012, the Liquidators, together with Glen Peter Oldham (**Mr Oldham**), were appointed as joint and several administrators of the Company by resolution of the Company's directors in accordance with section 436A of the Act.
- [12] On 20 April 2012, the Liquidators, together with Mr Oldham, were appointed as joint and several liquidators of the Company by resolution of the Company's creditors in accordance with section 439C of the Act.
- [13] On 17 July 2013, Mr Oldham resigned as a liquidator of the Company.
- [14] Pursuant to section 1581(1) of the Act, the provisions of the Act in force immediately prior to 1 September 2017 continue to apply in respect of the remuneration of the Liquidators.
- [15] The Company was last paid Management Fee in respect of the month of February 2011 (**Last MF Payment Date**).
- [16] At all material times since the Last MF Payment Date:
  - a) EIF has each month had certain investments, cash and amounts owing to it, with a Market Value in the range of say, \$80,000,000 to excess of \$8,000,000, excluding distributions to unit holders made by the Receiver from time to time (**EIF Gross Assets Value**);
  - b) EIF has each month, or some of them, generated Income (**EIF Income**); and
  - c) each month, or some of them, the EIF Income exceeded the amount required to pay the amounts at subclauses 21.5(a) to (c) of the Constitution, to the extent any of those amounts were payable (such excess amount being the **Available EIF Income**).

### Particulars

Capitalised terms (not in bold) in this paragraph have the meaning ascribed to them in the Constitution. Particulars will be provided once disclosure has been completed.

## Quantification

### Liquidation Remuneration

- [17] On 1 November 2013 in Supreme Court of New South Wales Proceedings No. 2013/136475, the Supreme Court of New South Wales approved the Liquidators' remuneration for the period 20 April 2012 to 30 April 2013 in the amount of \$900,239.48 (**Earlier Liquidation Remuneration**).
- [18] Between 1 May 2013 to 31 March 2018, the Liquidators (personally and including by the employees of Hall Chadwick) engaged in the work particularised in schedule 1 (**Liquidation Work**).
- [19] On 7 October 2020, the Liquidators convened a meeting of the Company's Committee of Inspection (**2020 Meeting**) for the purpose, *inter alia*, of putting a motion to approve the Liquidators' remuneration for the period 1 May 2013 to 31 March 2018 in the amount of:
- a) \$857,179.55 plus GST in respect of the Liquidation Work (**Liquidation Remuneration**);
  - b) the Order Remuneration (as defined below);
  - c) \$341,951.00 plus GST in respect of legal proceedings undertaken on behalf of the EIF (**EIF Proceedings Remuneration**); and
  - d) \$289,864.00 plus GST in respect of legal proceedings undertaken on behalf of the EPF (**EPF Proceedings Remuneration**).
- [20] At the 2020 Meeting, the Company's Committee of Inspection:
- a) did not approve the Liquidation Remuneration and the Order Remuneration; and
  - b) approved the EIF Proceedings Remuneration and the EPF Proceedings Remuneration.
- [21] The Liquidation Work was:
- a) calculated on a time basis on the ordinary rates of Hall Chadwick from time to time;
  - b) completed in a reasonable, proper and efficient amount of time based on the nature of the work undertaken;
  - c) reasonably necessary for the orderly conduct of the Liquidation of the Company;

- d) complex in that the affairs of the Company were complex and involved assets held in multiple trusts;
- e) involved the Liquidators dealing with multiple different Receivers and Managers, including the Receiver and Receivers of the Company and of the EPF;
- f) involved the Liquidators and their staff dealing with:
  - i) 1,677 potential creditors of the Company, including 1,663 unit holders of the EIF; and
  - ii) 132 proofs of debt, of which 106 were lodged by unit holders of the EIF;
- g) required to be performed by the Liquidators and their staff, and had they not done so would have been, at least to the extent of the below mentioned EIF Liquidation Remuneration and EIF Liquidation Expenses, required to be performed by the Receiver at the cost of the EIF; and
- h) related at least in part to the assets of the EIF and the orderly winding up of the EIF.

[22] In the premises, the Court ought to make an order pursuant to section 499 of the Act approving the Liquidation Remuneration.

#### Order Remuneration

[23] On 2 April 2019, the Supreme Court of Queensland made orders (**2 April 2019 Orders**) requiring that the Liquidators perform certain tasks in respect of proofs of debt lodged by creditors with the Company.

[24] Pursuant to Order 8 of the 2 April 2019 Orders, the Liquidators are entitled to:

- a) be paid reasonable remuneration in respect of the time spent by them and employees of Hall Chadwick in carrying out the work required under the 2 April 2019 Orders at rates and in sums from time to time approved by the Court; and
- b) be indemnified out of the assets of the EIF in respect of such remuneration.

[25] Pursuant to the 2 April 2019 Orders, the Liquidators (personally and by the employees of Hall Chadwick) performed the work particularised in schedule 2 (**Order Work**).

[26] The reasonable remuneration for performing the Order Work is \$87,319 plus GST (**Order Remuneration**).

[27] In the premises, the Liquidators' remuneration pursuant to the Order Remuneration ought be fixed in the sum of \$87,319 plus GST, pursuant to:

- a) Order 8 of the 2 April 2019 Orders;
- b) alternatively, the Court's inherent jurisdiction;
- c) alternatively, section 499 of the Act approving the Order Remuneration; or
- d) alternatively, section 101(1) of the TA.

### Expenses

[28] The Company incurred expenses of:

- a) \$203,388.99 in relation to the Administration of the Company (**Administration Expenses**); and

#### **Particulars**

As set out under the heading "Amount" in Schedule 3 to the Applicants' Particulars to Points of Claim, that will be provided separately.

- b) \$614,738.38 in relation to the Liquidation of the Company (**Liquidation Expenses**).

#### **Particulars**

As set out under the heading "Amount" in Schedule 4 to the Applicants' Particulars to Points of Claim, that will be provided separately.

[29] The Administration Expenses were:

- a) reasonably incurred by the Company;
- b) attributable to EIF in the amount stated under the heading "Total claim" in Schedule 3 to the Applicants' Particulars to Points of Claim, that will be provided separately (**EIF Administration Expenses**);
- c) further or in the alternative to b), for the benefit of the EIF and/or the unitholders of the EIF in the amount of the EIF Administration Expenses; and
- d) properly incurred in the proper performance of its functions and duties and exercising its powers under the Constitution or at law.

[30] The Liquidation Expenses were:

- a) reasonably incurred by the Company;
- b) attributable to EIF in the amount stated under the heading “Total claim” in Schedule 4 to the Applicants’ Particulars to Points of Claim, that will be provided separately (**EIF Liquidation Expenses**);
- c) further or in the alternative to b), for the benefit of the EIF and/or the unitholders of the EIF in the amount of the EIF Liquidation Expenses; and
- d) properly incurred in the proper performance of its functions and duties and exercising its powers under the Constitution or at law.

**Company’s rights of indemnity and to payment from the EIF**

[31] By at least the letter from Gadens, for the Receiver, to Hegarty Legal, for the Company and the Liquidators, dated 28 November 2017, stated, relevantly, that:

- a) certain claims on behalf of the EIF for, relevantly, damages and/or compensation, were made against the Company in its own right;
- b) the claims at subparagraph a) were then the subject of Federal Court of Australia proceeding number NSD2028/2013; and
- c) the claims at subparagraph a) were, or would be, relied on by the EIF in respect of any claim by the Company to be indemnified from the assets of the EIF to insist on the application of the “clear accounts rule” (**CAR Claim**).

[32] On or about 17 December 2018, relevantly, the Company, for the EIF, and the Company, in its own right, made a deed entitled “Settlement Deed” (**Settlement Deed**).

[33] By clause 4.1(a) of the Settlement Deed, relevantly, the Company, for the EIF, released and discharged the Company, in its own right, from “any Relevant Claim”.

[34] The:

- a) CAR Claim; and
- b) any other cause of action that the EIF had, or might have had, against the Company;

was:

- c) a Relevant Claim for the purpose of the Settlement Deed; and
- d) released and discharged upon the condition in clause 4.1(a) of the Settlement Deed being satisfied (which has occurred).

[35] As at the date of this points of claim, the EIF has no cause of action or other entitlement to payment from the Company upon which it can rely to insist on the application of the “clear accounts rule” in response to any claim by the Company to be indemnified, or paid, from the assets of the EIF.

[36] The Company, in its own right, has no material assets (save for rights of indemnity as trustee and the right to be paid Management Fees) from which the remuneration and expenses the subject of this points of claim can be paid, in whole or in part.

[37] The Company is entitled to be indemnified from, or alternatively paid from, the assets of the EIF in respect of:

- a) the EIF Administration Expenses; and
- b) the EIF Liquidation Expenses;

pursuant to:

- c) section 72 of the TA;
- d) further or alternatively, clause 6.1 of the Constitution; and
- e) further or alternatively, the common law or in equity.

[38] The Liquidation Remuneration and the Earlier Liquidation Remuneration was:

- a) reasonably incurred by the Company;

#### **Particulars**

As set out at paragraph 21.

- b) attributable to EIF in the amount stated under the heading “Total claim” in Schedules 1 and 5 to the Applicants’ Particulars to Points of Claim, that will be provided separately (**EIF Liquidation Remuneration**);
- c) further or in the alternative to b), for the benefit of the EIF and/or the unitholders of the EIF in the amount of the EIF Liquidation Remuneration; and
- d) properly incurred in the proper performance of its functions and duties and exercising its powers under the Constitution or at law.

[39] The Company hereby demands payment, if it be necessary, of the Management Fee:

- a) payable but unpaid since the Last MF Payment Date; and



- b) to the extent same is able to be satisfied out of the Available EIF Income each month since the Last MF Payment Date.

[40] Further and alternatively, the Company is entitled to be indemnified from, or alternatively paid from, the assets of the EIF in respect of:

- a) the EIF Liquidation Remuneration; and
- b) the Order Remuneration;

pursuant to:

- c) section 101(1) of the TA; and
- d) further or alternatively, the common law or in equity.

#### **Liquidators' entitlement to direct payment from the EIF**

[41] In the premises, the Court ought to order that the Liquidators be paid:

- a) the EIF Administration Expenses;
- b) the EIF Liquidation Expenses;
- c) the EIF Liquidation Remuneration; and/or
- d) the Order Remuneration;

from the assets of the EIF.

#### **Prayer for relief**

[42] The Company and the Liquidators seek the relief claimed at paragraphs 3, 4, 5 and 8 of the application filed 28 September 2021.

Signed:

*Hegarty Legal*

Description: Solicitor for the first and second applicants

Dated: 22 October 2021

This points of claim was settled by Mr BWJ Kidston of counsel and Mr MJ Downes of counsel.