

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**

AFFIDAVIT – FINALISING LIABILITIES OF THE EIF

I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Registered Liquidator, say on oath:

1. I am a Registered Liquidator and a Consultant of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand and a professional member of the Australian Restructuring Insolvency and Turnaround Association.
2. By Orders of this Honourable Court made on 21 November 2011 and 23 November 2011 (the **Orders**) I was appointed:
 - (a) pursuant to sections 1101B(1) and 601NF(2) of the *Corporations Act 2001* (Cth) (the **Act**) as the receiver of the property of the Equititrust Income Fund ARSN 089 079 854 (the **EIF**) and the property of the Equititrust Priority Class Income Fund ARSN 089 079 729 (the **EPCIF**) (collectively, the **Funds**); and
 - (b) pursuant to section 601NF(1) of the Act, to take responsibility for ensuring that the Funds are wound up in accordance with the Funds' respective constitutions.
3. The Orders are documents numbered 37 and 39 on the Court's file and the Reasons for Judgment of Justice Applegarth is document number 42 on the Court's file.
4. I make this affidavit from my own knowledge and from reviewing the non-privileged books and records of the Funds and from the non-privileged files held by me in relation to, *inter alia*, the receivership of the EIF. Where I refer to correspondence being sent or received below I believe that such correspondence was sent and received from a review of the letters referred to. Nothing in this Affidavit is intended to, or does, waive any privilege.

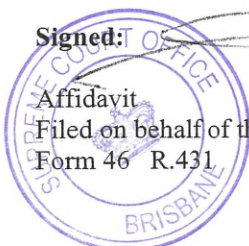
The finalisation of the liabilities of the EIF

5. To finalise the receivership, it is, amongst other things, necessary to "deduct all proper costs",¹

¹ Consolidated Constitution of the Equititrust Income Fund dated 3 June 2011, clause 9.3(b). See exhibit "DW-1" to the Equalisation Payment and Finalisation of the EIF Affidavit.

Signed: 

Affidavit
Filed on behalf of the Court Appointed Receiver
Form 46 R.431



Taken by: 

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

that is, to the extent possible, to ascertain and pay all liabilities of the EIF. I have formed the view based on my experience, work done to date on this matter and my review of the non-privileged books and records of the EIF that this includes ascertaining any liabilities which may be due because of:

- (a) General creditors of the EIF (discussed at paragraphs 6 to 21 below);
- (b) any claim by the Liquidators of Equititrust Limited ACN 061 383 944 (In Liquidation) (Receiver and Manager Appointed) (**EL**), Blair Pleash (**Mr Pleash**) and Richard Albarran (**Mr Albarran**) (together, the **Liquidators**) for an indemnity from the assets of the EIF for the Liquidators' remuneration and expenses which related to the Liquidators acting as liquidators and/or administrators of EL (the **Liquidators' Indemnity Claim**) (discussed at paragraphs 22 to 70 below); and
- (c) the Auditor Proceedings, being the Federal Court of Australia proceedings NSD 2028 of 2013 commenced by the Liquidators against the former auditors and former directors of EL and against EL in its own right, alleging certain breaches of duty (known as the **Auditor Proceedings**) (discussed at paragraphs 53 to 70 below).

The 2 April 2019 Order and the Proof of Debt Process – creditors of the EIF

- 6. To progress the finalisation of the identification and payment of the creditors of the EIF, on 3 August 2018 I made an application in this proceeding (the **Application for Directions**, being Court document 177), seeking orders that *inter alia*:
 - (a) the Liquidators be required to:
 - (i) ascertain the debts payable by, and claims against, EL in accordance with the Act;
 - (ii) adjudicate upon those debts and claims in accordance with the provisions of the Act;
 - (iii) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which is admitted by the Liquidators in the winding up of EL;
 - (iv) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, expense or liability incurred by the Liquidators in acting as administrators or Liquidators of EL (whether incurred in their own name or in the name of EL) insofar as the expense or liability was or is incurred in connection with EL acting as responsible entity for the EIF;
 - (v) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, other expense or liability incurred or paid by EL in its capacity as responsible entity of the EIF or by the Liquidators in acting as administrators or Liquidators of EL (whether incurred in their own name or in the name of EL) insofar as the expense or liability was or is incurred in connection with EL acting as responsible entity for the EIF including any claim the Liquidators maintain for their remuneration as Liquidators or administrators; and
 - (vi) notify me in writing of any of the claims referred to in (iii)-(v) above and provide supporting documentation and relevant information; and
 - (b) I then be required to obtain such further information as required and adjudicate on the claims thus received from the Liquidators.

- 7. The application was heard by his Honour Justice Boddice on 12 October 2018 (the **Hearing**). His Honour reserved his decision. Now produced and shown to me and marked "DW-1" is what

Signed: 

Taken by: 

Scott Couper (**Mr Couper**), partner from Gadens advises me is a true copy of the transcript of that hearing.

8. On 2 April 2019, his Honour Justice Boddice made an Order (the **2 April 2019 Order**), being Court document 215) consequent on the Application for Directions.
9. Paragraphs 1-6 of the 2 April 2019 Order put in place a process (the **Proof of Debt Process**) by which:
 - (a) the Liquidators were required to:
 - (i) ascertain the debts payable by, and claims against, EL in accordance with the Act, excluding any claim by any unitholders of the EIF and any claim against EL by the Liquidators as liquidators or administrators of EL;
 - (ii) adjudicate upon those debts and claims in accordance with the provisions of the Act;
 - (iii) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL admitted by the Liquidators in the winding up of EL following the process in (i)-(ii) above (each such claim for indemnity referred to as a "Creditor Indemnity Claim");
 - (iv) notify me of any Creditor Indemnity Claim within 14 days of admitting the Creditor Indemnity Claim and provide me with the relevant proof of debt and supporting documentation (these notified claims referred to as "Eligible Claims");
 - (v) provide me with requested further information which I reasonably considered to be required to adjudicate on any Eligible Claim within 14 days of my request for that information, with any such request to be made within 30 days of receipt of the Eligible Claim;
 - (vi) within 45 days of receipt of any Eligible Claim or any further information sought, I was required to:
 - (A) accept the Eligible Claim, reject it or accept part of it and reject part of it;
 - (B) give the Liquidators written notice of my determination of the Eligible Claim; and
 - (C) provide the Liquidators with written reasons as to my decision to reject, in whole or in part, any Eligible Claim;
 - (b) within 28 days of receiving notification of my reasons for rejecting any Eligible Claim, the Liquidators were entitled to apply to the Court for directions as to whether or not the Eligible Claim is or is not one for which EL has a right of indemnity out of the scheme property of the EIF.
10. On 4 December 2019, the Liquidators sent a letter to me which notified me of 6 Eligible Claims in a total amount of \$8,640,935.35.
11. On 19 December 2019, by letter from me to the Liquidators I requested further information from the Liquidators in regard to each of the 6 Eligible Claims.
12. On 17 January 2020, the Liquidators sent a letter to me which provided further information regarding each of the Eligible Claims.
13. On 2 March 2020, I sent a letter to the Liquidators which notified the Liquidators of my

Signed: 

Taken by: 

determination of the Eligible Claims, being that I:

- (a) I rejected the following Eligible Claims and explained by reasons for rejecting those Eligible Claims submitted by:
 - (i) MM Holdings Pty Ltd - \$8,390,000.00;
 - (ii) MM Capital Pty Ltd (Deregistered) - \$200,000.00; and
 - (iii) Blacks Beach Cove Pty Ltd - \$25,500.00.
 - (b) I admitted the following Eligible Claims and explained my reasons for admitting those Eligible Claims submitted by:
 - (i) Simon Duke and Sally Tuckfield - \$15,684.12;
 - (ii) Cardno Humphreys - \$4,324.38; and
 - (iii) McCullough Robertson Lawyers - \$3,979.90.
14. The deadline under the 2 April 2019 Order for the Liquidators to bring an application for directions as to whether or not an Eligible Claim is or is not one for which EL had a right of indemnity out of the scheme property of the EIF expired on 30 March 2020 without any application being made.
 15. Consequently, the Proof of Debt Process under the 2 April 2019 Order is at an end.
 16. On 11 June 2020, Gadens received a letter from Hegarty requesting payment of the Liquidator's costs associated with complying with the 2 April 2019 Order from the EIF.
 17. On 23 June 2020, Gadens sent an email to Hegarty by which I agreed to pay the Liquidator's costs associated with the 2 April 2019 Order which I then did pay.

Additional correspondence with the Liquidators regarding separate proofs of debt

18. In addition to the correspondence with the Liquidators referred to above regarding the proof of debt process under the 2 April 2019 Order, I engaged in correspondence with the Liquidators regarding separate proofs of debt which had been lodged with EL which were not the subject of any Eligible Claim.
19. On 18 October 2019, I received an email from the Liquidators regarding four proofs of debt lodged with the Liquidators.
20. On 28 October 2019, I responded to the Liquidators' email, advising the Liquidators that none of the four proofs of debt were in my view related to the EIF.
21. As at the date of swearing this affidavit, there has been no further correspondence regarding the proofs of debt.

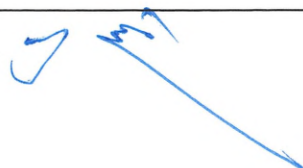
The Liquidators' Indemnity Claim

22. As part of the Application for Directions referred to at paragraph 6 herein, I applied for orders which, *inter alia*, set out a process to resolve the Liquidators' Indemnity Claim.
23. That part of the Application for Directions was adjourned.

Signed:



Taken by:



24. Accordingly, a process to resolve the Liquidators' Indemnity Claim was not included as part of the 2 April 2019 Order, or subsequent orders made by this Honourable Court in this proceeding.
25. I crave leave to refer to paragraphs 26-67, and exhibits "DW-6" to "DW-22" of my affidavit filed in these proceedings on 3 August 2018, being Court documents 180 to 182 (the **August 2018 Affidavit**) and to the defined terms therein.
26. As stated in those paragraphs of the August 2018 Affidavit, since in or about March 2012, I (or my solicitors, on my instructions) have been corresponding with the Liquidators (or their solicitors) in respect of the Liquidators' Indemnity Claim.
27. I state the following in order to update the matters stated in the August 2018 Affidavit.

Approval of the Liquidators' remuneration as administrators of EL

28. On 27 February 2012, at the first meeting of creditors which I attended, Mr Albarran informed investors that no costs of the administration of EL would be levied against the EIF.
29. As indicated above at paragraph 6, part of the Application for Directions was to seek resolution of the Liquidators' Indemnity Claim. That was disputed and the Liquidators' Indemnity Claim was not included in the 2 April 2019 Order.
30. I have reviewed the Liquidators' most recent report to creditors dated 20 August 2019 (the **Report to Creditors**) made available on www.equitytrust.com.au and say that it appears from that report that no further approvals of the Liquidators' remuneration have been given by the COI, the creditors or the Court and that the Liquidators' Indemnity Claim remains to be resolved.
31. Subsequent to the making of the 2 April 2019 Order, my solicitors have further corresponded with the Liquidators' solicitors regarding the Liquidators' Indemnity Claim.
32. On 25 September 2019, Gadens sent an email to the solicitors for the Liquidators, Hegarty Legal, (**Hegarty**), noting that I had not received clarification as to whether the Liquidators maintain a claim for indemnity as either administrators or liquidators of EL. Now produced and shown to me and marked "DW-2" is a true copy of the email dated 25 September 2019 from Gadens to Hegarty.
33. On 10 October 2019, Gadens sent an email to Hegarty, again noting that I had not received clarification as to whether the Liquidators maintain a claim for indemnity as either administrators or liquidators of EL. Now produced and shown to me and marked "DW-3" is a true copy of the email dated 10 October 2019 from Gadens to Hegarty.
34. On 16 October 2019, Gadens sent an email to Hegarty, once again noting that I had not received clarification as to whether the Liquidators maintain a claim for indemnity as either administrators or liquidators of EL. Now produced and shown to me and marked "DW-4" is a true copy of the email dated 16 October 2019 from Gadens to Hegarty.
35. On 19 October 2019, Gadens received an email from Hegarty, which:
 - (a) reserved the Liquidators' rights in regard to "the rights of indemnity available to them"; but
 - (b) did not provide any of the information I had previously sought concerning the Liquidators' Indemnity Claim.
36. Now produced and shown to me and marked "DW-5" is a true copy of the email dated 19 October 2019 from Hegarty to Gadens.

Signed: 

Taken by: 

37. On 4 November 2019, I sent an email to the Liquidators, relevantly noting that I had not received clarification as to whether the Liquidators maintain a claim for indemnity as either administrators or liquidators of EL. Now produced and shown to me and marked "DW-6" is a true copy of the email dated 4 November 2019 from me to the Liquidators.
38. On 24 December 2019, Gadens sent a letter to Hegarty, again requesting that the Liquidators provide me with full details of any claim for indemnity from the EIF that they make. Now produced and shown to me and marked "DW-7" is a true copy of the letter dated 24 December 2019 from Gadens to Hegarty.
39. On 15 January 2020, Gadens received a letter from Hegarty, relevantly stating that:
- (a) they had been instructed to prepare an application for approval of the Liquidators' remuneration, which application would be served on me;
 - (b) the Liquidators did not then intend to advance an indemnity claim, as they intended to wait until their remuneration was approved before doing so; and
 - (c) that I should have "*a very clear understanding of the nature of the indemnity claims advanced by*" the Liquidators, due to "*the significant correspondence which has passed between the parties*".
40. Now produced and shown to me and marked "DW-8" is a true copy of the letter dated 15 January 2020 from Hegarty to Gadens.
41. On 31 March 2020, Gadens sent a letter to Hegarty relevantly stating that:
- (a) I did not have a clear understanding of the Liquidators' Indemnity Claim, despite repeated requests for clarification and information in that regard; and
 - (b) unless the required further information previously requested is provided, I would not agree to providing the Liquidators any indemnity from the EIF beyond the \$7,993.50 already accepted.
42. Now produced and shown to me and marked "DW-9" is a true copy of the letter dated 31 March 2020 from Gadens to Hegarty.
43. On 29 April 2020, Gadens received a letter from Hegarty:
- (a) relevantly stating that they were in the process of preparing an application for approval of the Liquidators' remuneration, which they would serve on me once the application had been filed; but
 - (b) did not provide any of the information I had previously sought concerning the Liquidators' Indemnity Claim.
44. Now produced and shown to me and marked "DW-10" is a true copy of the letter dated 29 April 2020 from Hegarty to Gadens.
45. On 12 May 2020, Gadens sent a letter to Hegarty:
- (a) referring to the indemnity claims made in the letters from Thomsons dated 31 August 2012 and Thomson Geer dated 23 September 2016 contained in exhibits "DW-6" and "DW-9" of the August 2018 Affidavit, and inquiring as to whether the application for approval of the Liquidators' remuneration advised in the letters from Hegarty dated 15 January 2020 and 29 April 2020 included any of those amounts; and

Signed: 

Taken by: 

- (b) noting that I intend to rely on the representation by Mr Albarran at the first meeting of creditors of EL that no costs of the administration would be charged to the EIF referred to above.
46. Now produced and shown to me and marked "DW-11" is a true copy of the letter dated 12 May 2020 from Gadens to Hegarty.
47. On 26 May 2020, Gadens sent an email to Hegarty, seeking a response to Gadens' letter dated 12 May 2020. Now produced and shown to me and marked "DW-12" is a true copy of the letter dated 26 May 2020 from Gadens to Hegarty.
48. Now produced and shown to me and marked "DW-13" is a true copy of an email from Gadens to Hegarty dated 10 September 2020.
49. Now produced and shown to me and marked "DW-14" is a true copy of an email from Gadens to Hegarty dated 21 September 2020.
50. Since 21 September 2020, the Liquidators and I corresponded directly with one another in an attempt to explore a commercial resolution of the Liquidators' Indemnity Claim, however to date this has not been successful.
51. Now produced and shown to me and marked "DW-15" is a true copy of a letter from Gadens to Hegarty dated 17 June 2021.
52. I have not to date been served with any application for approval of the Liquidators' remuneration.

The Auditor Proceedings

53. In 2013, the Liquidators commenced the Auditor Proceedings, against the former auditors and former directors of EL and against EL in its own right, alleging certain breaches of duty.
54. Based upon my review of the Report to Creditors, the Liquidators entered into a litigation funding deed with a litigation funder to fund the Auditor Proceedings which the Supreme Court of New South Wales approved on 21 October 2013. However, the terms of the litigation funding deed were such that it was possible that no recoveries would flow to the investors of the EIF, depending on the quantum of any recoveries.
55. On or about 21 June 2019, the Liquidators issued a notice to creditors and unitholders of the EIF and the EPF. It stated, *inter alia*, that:
- (a) The parties to the Auditor Proceedings attended a mediation in September 2018 executed a confidential settlement deed on 17 December 2018 (the **Settlement Deed**).
 - (b) The terms of the Settlement Deed:
 - (i) Did not provide a recovery for unitholders in the EIF (amongst others) because the funds to be paid by the respondents pursuant to the settlement would 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 6 years; and
 - (ii) The litigation funder's entitlement to those funds, in priority to unitholders in the EIF (amongst others) was provided for in the funding agreement approved by the Supreme Court of New South Wales prior to commencement of the Auditor Proceedings.

Signed:



Taken by:



56. On 22 May 2019, the Liquidators filed an application in Federal Court proceeding NSD 830 of 2019 seeking judicial advice in relation to the Settlement Deed (known as the **Advice Proceedings**).
57. The application filed in the Advice Proceedings was heard by her Honour Justice Jagot on 21 and 28 June 2019.
58. On 28 June 2019, Justice Jagot made orders approving the settlement of the Auditor Proceedings and declared that the Liquidators were justified and acted reasonably in causing EL to enter into the Settlement Deed and would be justified and acting reasonably in causing EL to give effect to the terms of the Settlement Deed.
59. On 9 July 2019, Jagot J delivered her Reasons for Judgment. A true copy of her Honour's Reasons for Judgment delivered on 9 July 2019 is contained in exhibit "DW-10" to my affidavit sworn 12 May 2020 and filed 13 May 2020, being Court documents 217-219.
60. On 21 June 2019, Gadens sent a letter to the Liquidators' solicitors for the Auditor Proceedings, Squire Patton Boggs (**SPB**), seeking from the Liquidators the following information regarding moneys that were then expected to be recovered from the Auditor Proceedings by way of a settlement:
- (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 the Liquidators 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.
61. Now produced and shown to me and marked "**DW-16**" is a true copy of the letter dated 21 June 2019 from Gadens to Hegarty.
62. On 26 June 2019, Mr Pleash sent a letter to Gadens, responding 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;*

Signed: 

Taken by: 

- (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."*²
 - (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), noting that the funds have not been dispersed."*
 - (e) *"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."*
 - (f) *"Following the response in (f) this question is not applicable";*
63. Now produced and shown to me and marked "**DW-17**" is a true copy of the letter dated 26 June 2019 from Mr Pleash to Gadens.
64. On 28 June 2019, at the hearing of the Advice Proceedings:
- (a) the Liquidators 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) I sought a further undertaking from the Liquidators, 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) the Liquidators refused to give this undertaking on the basis that, as the Liquidators' 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"*.³
65. Now produced and shown to me and marked "**DW-18**" is a true copy of the transcript of the hearing before Jagot J on 28 June 2019.
66. On 25 July 2019, Gadens sent a letter to Hegarty, advising the Liquidators of my view that it is appropriate for the Liquidators to seek Court approval of their remuneration and expenses related to the Auditor Proceedings, on the basis that:
- (a) the moneys received by the Liquidators were received by them in the liquidation of EL as RE of the EIF; and

² I note for the sake of completeness that the short minutes of orders referred to were not attached to the letter.

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

Signed:




Taken by:



- (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.
67. Now produced and shown to me and marked "**DW-19**" is a true copy of the letter from Gadens to Hegarty dated 25 July 2019.
68. On 7 August 2019, Gadens received a letter from Hegarty, stating that the Liquidators "*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*".
69. Now produced and shown to me and marked "**DW-20**" is a true copy of the letter from Hegarty to Gadens dated 7 August 2019.
70. As indicated above, I have not to date been served with any application for approval of the Liquidators' remuneration.

ALL THE FACTS and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

SWORN by **DAVID WHYTE** on this 13th
day of August 2021 at Brisbane in the
presence of:


.....
Solicitor

Tania Jessica O'Connor
Solicitor

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)
)
.....
Deponent

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**

INDEX TO EXHIBITS

Exhibits **"DW-1"** to **"DW-20"** to the affidavit of **DAVID WHYTE** sworn at Brisbane on this 13th day of August 2021.

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Signed: 

Certificate of Exhibit
Filed on behalf of the Court Appointed Receiver
Form 47 R.435


Taken by: 

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SZC:201110996

DW-18	Transcript of hearing of Federal Court of Australia proceeding NSD830/2019 before Justice Jagot dated 28 June 2019	98-104
DW-19	Letter from Gadens to Hegarty dated 25 July 2019 (excluding enclosures)	105-109
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 Deponent



 Solicitor

Tamara Jessica O'Connor
 Solicitor

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Ordered by: Renee Cunningham

For: Gadens Lawyers (QLD)

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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BODDICE J

No 10478 of 2011

RE EQUITITRUST LIMITED

BRISBANE

12.20 PM, FRIDAY, 12 OCTOBER 2018

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: Thank you. Now, the matter of – has Equititrust gone? Yes, the matter of Equititrust.

HIS HONOUR: Yes, if you could announce your appearances, please.

5

MR M.S. TRIM: May it please the court, my name is Trim, spelt T-r-i-m, initials M.S., of counsel, and I appear for the receiver of the Equititrust Income Fund and the Equititrust Priority Class Income Fund, David – Mr David Whyte, on the instructions of Gadens Lawyers.

10

HIS HONOUR: Thank you. And for the respondents?

MR S. EGGINS: Yes, may it please the court, my name is Eggins, first initial S., spelt E-g-g-i-n-s. I appear for the applicant in the proceeding and respondent to the application, Equititrust Limited, and also for the receivers of the company – sorry, the liquidators of the company – and I'll just give your Honour the names: Blair Pleash, that's spelt P-l-e-a-s-h, and Richard Albarran, spelt A-l-b-a-r-r-a-n. And I'm instructed by Hegarty Legal.

15

20 HIS HONOUR: Mr Trim, what's your material?

MR TRIM: I hand to your Honour a copy of the document that's titled Revised List of Materials outlined in written submissions that was filed on Tuesday and a copy of the draft order that has some markings that I'll explain to your Honour.

25

HIS HONOUR: Yes.

MR TRIM: And in addition to the material that's in the list, I also need to seek leave to read three additional affidavits and that is an affidavit of David Tucker which was filed yesterday which is court document 199, affidavit of Craig Melrose filed yesterday, court document 198, and an affidavit of Jayden Coulson which is court document 186. And I'll explain that in a moment.

30

HIS HONOUR: All right. Thank you. The applicant's material will be as per the list and I give the applicant leave to read and file the outline of submissions. Yes?

35

MR EGGINS: Thank you, your Honour. Can I hand up to your Honour two copies of my list of materials, a copy of my original submissions that was filed on the 14th of September 2018 – that's on the file, but just a working copy for your Honour – two copies of some further submissions in reply which I seek leave to read and file, and also the original copy of an affidavit of Peter Justin Hegarty that I understand was filed yesterday in court – a copy, but I have the original [indistinct].

40

HIS HONOUR: Yes, I give you leave to read and file the additional submissions and the material will then be as you have indicated, and the original affidavit will just replace the one that was filed yesterday.

45

MR EGGINS: Thank you, your Honour.

HIS HONOUR: Yes, I will have a read of the outlines.

5 Yes. Mr Trim, if these – if the liquidators do not undertake these steps that you want, what will be the consequence?

MR TRIM: Of undertaking any of them, your Honour?

10 HIS HONOUR: Yes.

MR TRIM: Well, at least in the short term, there will be very little Mr Whyte can do to otherwise progress the conclusion of this receivership, is the short answer. Because at this stage, Mr Whyte's affidavit - - -

15 HIS HONOUR: But does he have to take any steps? If they decline to do anything more, presumably that's the end of the liquidation.

MR TRIM: Well, I don't think – if that's – that's the effect of what the liquidator says, your Honour, but in – perhaps that answers the question and Mr Whyte can distribute the rest remainder of the monies he holds. That's the real concern at the heart of all of this, of course. Is, just – does he sit on top of the \$8 million that he's holding, or can he distribute them? Because there's been this outstanding claim by the liquidators for some time. If the position was articulated such that there was no barrier to him doing so then - - -

20 HIS HONOUR: Well, isn't that their – well, I'll ask Mr Eggins. Isn't that your position? Your position is unless you're given some money, you won't be doing anything more.

30 MR EGGINS: That is – that's so, your Honour, yes.

HIS HONOUR: Well, then, doesn't that mean the liquidation has to end?

35 MR EGGINS: Well - - -

HIS HONOUR: We - - -

MR EGGINS: - - - the liquidation - - -

40 HIS HONOUR: We would provide a report to creditors saying that whilst there's other claims, there's no money to pursue them and we don't recommend doing so. Wouldn't that be the end of it?

45 MR EGGINS: It wouldn't be, your Honour, because there's pending litigation, unfortunately. If that litigation succeeds, there will be substantial funds available in the liquidation. So - - -

HIS HONOUR: So why shouldn't this just wait until that litigation is sorted out?

MR EGGINS: That might very well be a wise course, your Honour, yes.

5 HIS HONOUR: And when's that likely to be sorted out?

MR EGGINS: Well, the litigation is set down for a five-week trial in March in the Federal Court. So one would hope in the course of next year, your Honour. I mean, there might be appeals, of course, but we can't control that. But, so it's not at large,
10 it is set down for a final hearing date.

HIS HONOUR: Well, Mr Trim, why wouldn't you just wait until after that trial?

MR TRIM: Well, there's a couple of reasons for that, your Honour, in terms of how
15 this thing has developed. Whilst I think it has to be accepted that the receiver was worth the litigation, he wasn't aware – well, I withdraw that. There's a suggestion in the May creditors' meeting that there were no funds, but it's, sort of, a vague suggestion. The first time it's really raised fairly and squarely is the end of August. So the way it's developed – now, the view that's been taken is that it would be more
20 appropriate for at least some of this to be dealt with now. There's 27 creditors who are not members of the funds. Those matters can be dealt with now, and the receiver has said that he's happy for the funds to pay for - - -

HIS HONOUR: But if they don't have the money, they can't be made to do it under
25 the legislation.

MR TRIM: No, sorry, your Honour. There's a distinction between the two types of claims here. There is a group of claims – so there's 27 creditors on the present affidavit – where the receiver says, "I accept, but have no" – effectively, "I accept
30 that the funds can pay for the identification of those claims, the articulation of any indemnity from a fund and the like," and that can be dealt with now. And it's accepted in the orders that the liquidator can claim reasonable costs and expenses for doing so, subject to court approval. And I could come back to that.

Where the parties differ, really – and there's no dispute about that. So there's no dispute that that part can be – proceed, and it can be funded effectively from the Equititrust Income Fund. The parties diverge about – I'll try to put this as neutrally as I can for reasons that'll become important – claims by the liquidators for their own remuneration. Now, clearly, to make such a claim, it can be done, well, at least two
40 ways on material, and I'll take your Honour to this. It can be done by way of a claim by the company, or on behalf of the company, for indemnity, and my learned friend's articulated some authorities about that. That's a controversial matter, as I understand it, and it's on the way to the High Court, at least in part, as to some of the relevant issues. But it's also put in my learned friend's original submissions from September
45 as a direct claim by the liquidators personally. Now, that's important here because that then means it's not a matter arising in the liquidation that attracts the operation of 545. That's – the liquidator's effectively saying, "I've got \$2 million of fees, or

5 whatever it is that I haven't been paid for. I've got a personal right to be paid for that." And the only dispute from the receiver's perspective is, "Well, hold on, members of the fund shouldn't have to pay if you are articulating a claim for that amount of money. That – I mean, it's in the nutshell. I can expand on aspects of that
- - -

HIS HONOUR: Well - - -

10 MR TRIM: - - - of course, your Honour, but - - -

HIS HONOUR: put it – accepting all of that - - -

MR TRIM: Yep.

15 HIS HONOUR: - - - we're now here, today.

MR TRIM: We are, your Honour, yes.

20 HIS HONOUR: And we're here today and there is litigation that will be the subject of a trial in March, did you say, next year?

MR EGGINS: March, next year, your Honour.

25 HIS HONOUR: Yes.

MR EGGINS: Yes, that's it.

30 HIS HONOUR: Why wouldn't we, in circumstances where the liquidators have now sworn they have \$9700 in the account, let that litigation be determined, because as you say in your material, if that is fruitful then it's a very different position.

MR TRIM: Yes, effectively, it would seem, what'll happen at that point is there's no disagreement.

35 HIS HONOUR: So it's been ambling along for a while. What would be the prejudice to anybody to await that litigation?

40 MR TRIM: Well, only the delay that'd be occasioned by not dealing with the matters that were agreed, effectively, between the parties now. But the process that
- - -

HIS HONOUR: But why do you need orders for that? They can do that. They say they have funds. Why would you need orders in respect of it?

45 MR TRIM: Well, only because they're part of the orders that have been applied for, that in – effectively, consented to that part of the orders, and so there'd be no obstacle to making an order and, in my submission, it'd be desirable for there to be

some regulation given that it's – we are seven years from when this all started, your Honour.

5 HIS HONOUR: Well, we might be, but there's no suggestion the liquidators are not going to do their job. Why do you need a court order in respect of that?

MR EGGINS: There – no - - -

10 HIS HONOUR: Are you suggesting you need a court order?

MR EGGINS: No, your Honour. We would only need a court – it's the receiver's – this is the receiver's application. We're not seeking – all – all we are seeking is that if that order is to be made, that our remuneration expenses be paid out of the fund.

15 HIS HONOUR: Yes.

MR EGGINS: That's all we're seeking. We – and in terms of where there's consent, by the way, liquidators don't actually – don't consent, **as** such, to the order. We simply don't oppose that if the receiver wants the order, that's fine, provided our
20 fees are paid. If we had a choice we probably would choose not to do it, because we don't currently have the funds. But just in terms of the actual draft of the orders, there is a difference between Orders 1A - - -

25 HIS HONOUR: I saw that.

MR EGGINS: - - - in both drafts. Your Honour might have seen that, and your Honour will have read what I've said about that in the submissions.

30 HIS HONOUR: I have seen that. The real issue here is, it seems to me, now we're this close – we're October and we're talking about a trial in the first half of next year – I see no pressing need to pursue this and my preliminary view, in any event, is that you have an arguable case that you're not entitled, that you do not have to do this, so there'll almost have to be a trial of that issue at any event. Why would we incur that cost?

35 MR EGGINS: The liquidators certainly don't oppose that course, your Honour, provided there's an allowance made for the costs the liquidators have had to incur in dealing with this application to date. That order is the same in both recent orders.

40 HIS HONOUR: Well, wouldn't you have that entitlement under the Act?

MR EGGINS: Not against the fund, your Honour, no. We've had no funds – there are no funds currently in the company.

45 HIS HONOUR: Well, why wouldn't I reserve those costs? Because it might be that I come to the conclusion that – it might be that, ultimately, a court comes to the conclusion that you have been unreasonable.

MR EGGINS: Well, I don't think the – that order's not opposed in any event, your Honour. So – I – in my submission, if that's the course that your Honour's proposed to proceed in, then we don't object to that course.

5 HIS HONOUR: Well, Mr Trim, I'll give you an opportunity to say anything more that you want to say, but at the moment that's the obvious course and the interests of justice would be best met by adjourning this application until after that litigation.

MR TRIM: Well, can I seek to persuade your Honour at least - - -
10

HIS HONOUR: Yes.

MR TRIM: - - - to look at a compromised position at least.

15 HIS HONOUR: Yes.

MR TRIM: Can I just, your Honour, take up the draft order - - -

HIS HONOUR: Yes.
20

MR TRIM: - - - that I had with the highlighting on it - - -

HIS HONOUR: Yes.

25 MR TRIM: - - - just to explain briefly. Just before we go any further – and I'm sorry, your Honour, it just occurred to me – it probably would be prudent to have the respondents' names called outside of court for this reason. Strictly speaking, the respondents are the members of the various funds. There was a substituted service. There's affidavit material about how that was effected. But I think, perhaps, it would
30 be prudent for them to be called.

HIS HONOUR: Would you – could you call the respondent's name as the members of it, please.

35 MR TRIM: Unless your Honour would like me to wait, I'm - - -

HIS HONOUR: Yes.

MR TRIM: - - - content just to - - -
40

HIS HONOUR: Yes.

MR TRIM: - - - proceed, but I thought we should just deal with that matter. Your Honour, in relation to the compromise – this – well, the rest of the two positions,
45 your Honour will see in the draft order I've highlighted some parts of the - - -

HIS HONOUR: Yes.

MR TRIM: - - - receiver's draft.

HIS HONOUR: Yes.

5 MR TRIM: Those parts are the parts that were subject to disagreement. Everything
that's not highlighted, there was no – there's no contest – I'll put it that way – from
the liquidators that those parts of the orders were appropriate. And the reason why,
in my submission, the non-highlighted parts of the order, at least ought be made, is it
10 Honour says about, of course, the liquidators have obligations, but in circumstances
where the receiver is trying to bring resolution to these matters, it would at least
allow some of the 27 proofs of debt, at least, that are referred to in Mr Pleash's
affidavit, to the tune of some \$7 million, to be adjudicated upon as between the
liquidators acting on behalf of Equititrust Limited insofar as it wished to press a
15 claim for indemnity - - -

UNIDENTIFIED SPEAKER: [indistinct]

20 HIS HONOUR: Thank you.

MR TRIM: - - - and – on the one hand, and the receiver acting as a receiver of the
property of funds on the other. Well, those matters may take some time, your
Honour, so the prejudice could be, given that we are seven years from where this all
commenced, the further effluxion of yet more time. Mr Pleash in his affidavit says:

25 *This is a very substantial task, admittedly, for all of it.*

But progressing some of it now, in circumstances where the fund can pay for part of
that exercise, would allow the progression, in part, of the receivership towards a
30 conclusion so that what would be left at the conclusion of the litigation would be,
effectively, what happens in relation to claims by unit holders against the company
and what happens in relation to the liquidators' remuneration. And they'd be the
only other remaining matters to deal with, rather than the whole lot being dealt with
together.

35 HIS HONOUR: Mr Eggins, if you were to look at the – what Mr Trim is proposing
– so one-A would stop at the end of the first line at - - -

40 MR EGGINS: Is this one-A of Mr Trim's orders, your Honour?

HIS HONOUR: Yes.

MR EGGINS: Sorry.

45 HIS HONOUR: Stop at the first - - -

MR EGGINS: Sorry, your Honour.

HIS HONOUR: Stop at the end of the first line. Order 5, there might be an issue about what days they should be, but otherwise it would be in those terms what Mr Trim's proposing.

5 MR EGGINS: Is Mr Trim – I'm sorry, your Honour. Is Mr Trim proposing that the liquidators would assess and adjudicate upon all the proofs of debt in what he's just put forward. I wasn't sure that he was - - -

MR TRIM: Sorry, if that's unclear, your Honour. That ought to have been clear.
10 The liquidator would want those three lines because it just narrows the ambit of what's being done.

HIS HONOUR: Well, why is it highlighted?

15 MR TRIM: Sorry, because it wasn't agreed to - - -

HIS HONOUR: All right.

MR TRIM: - - - because the liquidators' perspective is we should just do everything
20 all at once.

HIS HONOUR: All right.

MR TRIM: But – so - - -
25

HIS HONOUR: So what Mr Trim's proposing is that one, two, three, four and five would appear – and six, would appear as they are, as would seven, subject to five having some – maybe, some argument about what days there are. Eight, as I understand it, would be amended so it reads:
30

The liquidators are entitled to claim reasonable remuneration in respect of the time spent –

etcetera.
35

MR EGGINS: There's actually quite a difference between the parties in terms of the wording of those orders, your Honour. Could your Honour possibly look at my draft order.

40 HIS HONOUR: Yes.

MR EGGINS: The – this is another of the points of contention your Honour might have seen in the submissions. The receivers propose that the liquidators be paid their remuneration, subject to court approval, and that's perfectly proper. But in terms of
45 expenses, they also expect that that should be the subject of court approval. Meaning that every time we incur an expense we have to come back to court to get it approved or, indeed, seek approval in advance.

HIS HONOUR: All right.

MR EGGINS: That's not appropriate in - - -

5 HIS HONOUR: What - - -

MR EGGINS: - - - in my submission.

10 HIS HONOUR: - - - what is it from your side that you wouldn't oppose at this stage?

MR EGGINS: We wouldn't oppose an order that – orders 1, 2, 3, 4 and 5 in their current form – there's no – there's actually no disagreement about the dates in five-A - - -

15 HIS HONOUR: Yes.

MR EGGINS: - - - and five-B, by the way, your Honour – orders 6, orders 7, and then instead of the receiver's orders, order 8, our orders 8 and 9. And we also have
20 an order 12 in respect of directing that the receiver not make any distribution to the members of the fund until further order. That's just to protect my client's position in respect of its costs, to make sure those costs aren't distributed before they are paid to them. And then, of course – and there's no objection to the final order, the costs of the application today, on the understanding that when the term "parties" is used – I
25 don't think it's in dispute – that's the parties of the application today, including the liquidators and the company, etcetera. Sorry, does that make - - -

HIS HONOUR: And so - - -

30 MR EGGINS: - - - my client's position clear?

HIS HONOUR: - - - the issue, though, Mr Trim, is that you say that there shouldn't be an indemnification of the assets - - -

35 MR TRIM: Yes - - -

HIS HONOUR: - - - is that so?

MR TRIM: - - - that's right. So there's – can I just put it in this way - - -
40

HIS HONOUR: Yes.

MR TRIM: - - - to try and assist the court. There's really three positions. There's my draft on behalf of the receiver, my learned friend's draft on behalf of the
45 liquidators and, I think, the compromised position, potentially, that your Honour is contemplating which would take orders 1 to 7 which are not contested. There would need to be a new set of orders 8 and 9, effectively, that said something like – that

carved out, rather, the claims by the liquidators for their own remuneration so that they were not part of the process above. It could be as simple as that. And I'd need to perhaps liaise with my learned friend about the wording, but that I think is the compromised position. So that's just put to the side until after the litigation your Honour's referred to. And then order 11. Now, the only live controversy then, is whether order 10 is appropriate, or in my draft. So that's intended to achieve this effect. Simply, that if the liquidators recover funds later in the litigation, for example, they'd be reimbursed. Now, your Honour might take the view – I'll just try to feel the wind from where your Honour's coming from and to how this is best disposed of – that that could also be dealt with later, but I just add that as a live issue.

HIS HONOUR: Well, I would have thought it should be – it could be dealt with later because the liquidators could not, in the circumstances of this case, be distributing funds without coming back to the court if they obtained those funds.

MR TRIM: No, but I think that the point – that's right, your Honour. And if that's the case and if my learned friend's happy to put that on the record, I suspect that disposes of the matter, of course.

HIS HONOUR: And you would accept that. You couldn't possibly distribute funds - - -

MR EGGINS: That is - - -

HIS HONOUR: - - - without - - -

MR EGGINS: That is so, your Honour.

HIS HONOUR: - - - if the liquidator accepts that.

MR EGGINS: Yes.

HIS HONOUR: So do you think that – do you think that if I gave you some time, the two of you could work out a form of orders in eight and nine to, in effect, put that aspect of, or not? You insist that if you have to do one to seven, you want orders about your payment of your costs.

MR EGGINS: So just to be clear, the proposition is that we do the steps in one to five, but in terms of claims for indemnity for the liquidators' remuneration expenses, those are left to another day.

HIS HONOUR: Well, it's - - -

MR EGGINS: We don't have to action those.

HIS HONOUR: - - - it's claims for – not your costs. It's remuneration, isn't it, only?

MR TRIM: Yes, I think that's how it's phrased, your Honour.

HIS HONOUR: So you would get your costs of doing those things. It's a question of remuneration, right?

5

MR TRIM: I think the intention – I have to take some instructions, of course - - -

HIS HONOUR: Yes.

10 MR TRIM: - - - your Honour, but – about all of these matters – but, I'm just at the moment trying to explore – to court the possibility of an alternative scenario given your Honour's indication. Of course, my instructions are to seek those orders - - -

HIS HONOUR: I understand that.

15

MR TRIM: - - - and I'll make some submissions about that. But if your Honour was minded to look at the compromised position, I'm trying to articulate what that might look like. And it may be that over lunch, an adjournment, my learned friend and I can both take some instructions and perhaps come back with a third draft and make some submissions about it [indistinct]

20

HIS HONOUR: Well, I can give you an indication and I will give formal reasons if you want - - -

25 MR TRIM: Yes.

HIS HONOUR: - - - but for the reasons I have indicated, I am satisfied the appropriate course is to adjourn the contentious issues until after the trial of the matter in the Federal Court. If you see a need for that earlier order and the liquidator does not see a problem, I'm happy if you want to frame something that will allow the 27 claims to be determined in a prompt way. That would have to include payment - - -

30

MR TRIM: Yes.

35

HIS HONOUR: - - - at least of the costs of the liquidator in undertaking that course.

MR TRIM: Well, and that was agreed to be fair, your Honour.

40 HIS HONOUR: Then, if there is, however, an issue in respect of remuneration, then it does seem to me that that could be, in effect, deferred in respect of that aspect of it, but - - -

MR TRIM: Yes. Well, perhaps, your Honour – if your Honour's, well, minded to accede to this submission, perhaps if we can adjourn slightly and then I could go and take some instructions, having heard your Honour, including as to the question of

45

reasons, because it may be that upon those instructions that course is not necessary. I can't say one way or another.

HIS HONOUR: No - - -

5

MR TRIM: My learned friend could then - - -

HIS HONOUR: - - - well, also Mr Eggins would have to take some instructions, I'm sure. So what if I just - - -

10

MR EGGINS: Yes, your Honour.

HIS HONOUR: - - - adjourn until 2.30 and see if you can sort things out and if you can't, well, I've given you a view – a preliminary view of what I'm going to order in any event.

15

MR EGGINS: Thank you, your Honour. Did your Honour express a view in terms of the manner in which the liquidators' expenses would be paid in this scenario that we're envisaging?

20

HIS HONOUR: Well, as I understand it, there would be an order that you would get your costs and expenses associated with the 27 claims that I'd be ordering that you undertake - - -

25

MR EGGINS: Yes, your Honour.

HIS HONOUR: - - - but at the question of the remuneration, which I take it is a separate component, in effect, would be deferred. That's what I was looking at.

30

MR EGGINS: Well, I think the order envisages we go to court anyway. But, I think, my client was just concerned that the regime proponent of those expenses – not necessarily just the fact that it's paid – that they're paid, but the regime for payment. My learned friend's order proposes - - -

35

HIS HONOUR: Well, see if the two of you - - -

MR EGGINS: - - - that we have to come back to court.

HIS HONOUR: - - - can sort that out.

40

MR EGGINS: Yes.

HIS HONOUR: I will let you know that if there's no agreement in relation to it, that will be a reason why I won't even order the 27.

45

MR EGGINS: Very well, thank you.

HIS HONOUR: I will just simply adjourn the application, because if there cannot be an agreement in respect of that, I see no reason to even make the order about the 27. The liquidators have their obligations to pursue the liquidation in a timely way. If they didn't pursue those 27 claims when they have the ability to do so, then that
5 would be a factor that would be taken into account into determining whether they should receive remuneration later.

MR EGGINS: Indeed, thank you, your Honour.

10 HIS HONOUR: All right. So you can have – take that on-board - - -

MR TRIM: Thank you, your Honour.

HIS HONOUR: - - - and we'll adjourn until 2.30.

15 MR EGGINS: Thank you, your Honour.

20 **ADJOURNED** [12.50 pm]

RESUMED [2.42 pm]

25 HIS HONOUR: Now, as I understand it, you both are still getting instructions, is that right?

MR TRIM: Yes, essentially. There's no agreement, your Honour. I have got someone outside making a telephone call. I don't want to mislead your Honour,
30 though. I just – I'm not confident that it will get us all the way.

HIS HONOUR: How?

MR TRIM: We have two competing drafts. I think – I want to try and put this
35 neutrally – the sentiment is understood, but some of the mechanics are proving a bit difficult, is the short answer.

HIS HONOUR: Well – do you want to do this – if there's a need for a further hearing then, if you're both available on Monday, we could just continue it - - -
40

MR TRIM: Yeah.

HIS HONOUR: - - - if something becomes an issue. Otherwise, I'm happy to sit at
45 5 o'clock this afternoon. I just have to give this paper, unfortunately, between 3.30 and 4.30. That's all that I have to attend to. So what would you prefer to do?

MR TRIM: I – I’ll – my present instructions are to hand your Honour a draft and seek that draft. It’s in accordance with what you’re – what I’ve intimated to your Honour. In other words, it seeks to strip-out the remuneration, the unit holders, it provides for a mechanism whereby the liquidators can claim their remuneration, including costs and expenses, that, effectively, that’d give us whatever they want to rely on, the [indistinct] 30 days unless we apply.

HIS HONOUR: And what’s unacceptable about that?

MR EGGINS: Well, as you can – in general terms, that is probably acceptable, except we just had a slightly different mechanism and the way in which our expenses are to be paid, there’s a little bit of difference between us on that. The form of order that I have drafted seeks to, sort of, perhaps in a more-clean way, strip-out the extraneous claims. I think my learned friend’s order is very similar to the original draft, but just, sort of, has an exclusionary paragraph which I just – I think it’s better done the way I’ve done it. So it could be that we just provide your Honour with both
- - -

HIS HONOUR: I was just - - -

MR EGGINS: - - - sets.

HIS HONOUR: I was just about – how about we do it this way. That each of you provide a draft – once you have your instructions, a draft in accordance with your instructions and, if necessary, short written submissions as to why you say that draft should be accepted over the other person’s draft. If I have any problem with those submissions, I can then call the parties back. I’ll otherwise prepare reasons and orders in relation to the matter. How about - - -

MR TRIM: Yes.

HIS HONOUR: - - - that course?

MR TRIM: Can I say, your Honour, as well, if – my instructions are that if your Honour wasn’t to accede to the order that my client’s will ultimately present, that we would accede to your Honour’s intimation that the matter be just otherwise generally adjourned with costs reserved - - -

HIS HONOUR: Yes.

MR TRIM: - - - and it can be picked up by the parties at another time.

HIS HONOUR: Yes.

MR EGGINS: We have significant difficulty with a costs reserved order, your Honour. The liquidators at the moment have no funds and are carrying this personally. The receivers are in a very different position. They have access to the

funds. They are able to pay their costs straight out of the fund now. It's very important from my client's perspective, whatever the outcome today, that that order be made. I don't believe it's opposed. It will be made, ultimately, in any event. I would strongly - - -

5

HIS HONOUR: So you would submit that the costs should be – the application be adjourned, but the costs of the application to date of each party be paid out of the fund.

10 MR EGGINS: Indeed, your Honour, yes.

HIS HONOUR: That was what you would say.

MR EGGINS: Yes, your Honour.

15

HIS HONOUR: And you say it - - -

MR TRIM: I can't say anything - - -

20 HIS HONOUR: - - - should be reserved.

MR TRIM: - - - against that your Honour.

HIS HONOUR: Yes.

25

MR TRIM: I said "reserved" simply because your Honour had indicated that – it's true - - -

HIS HONOUR: - - - Yes.

30

MR TRIM: - - - that in both parties competing briefs, it did happen.

HIS HONOUR: Well, it would – certainly I would be satisfied that the order for the costs to date should, in fact, be - - -

35

MR TRIM: Yes.

HIS HONOUR: - - - should, in fact, be determined because it's unfair from a liquidators' point of view.

40

MR TRIM: And I don't seek to make any submissions about that, your Honour.

HIS HONOUR: All right. Well, are you happy with that course that I've proposed?

45 MR EGGINS: Yes, thank you, your Honour.

HIS HONOUR: So the application is – sorry, the decision in the matter is reserved. The parties are to provide a formal draft orders and a short-written submission as to why it is that they contend that that order should be preferred over the other order. And, of course, if you’ve reached agreement, just send through one order with that agreement.

MR EGGINS: Yes, your Honour. When would your Honour like those submissions, if - - -

HIS HONOUR: Well - - -

MR EGGINS: - - - there’s a disagreement?

HIS HONOUR: - - - I realise that you are still obtaining instructions, so if you can have those by 4 pm on 15 October, Monday afternoon. I understand that you might have difficulty on a Friday afternoon getting those instructions.

MR EGGINS: I appreciate that. Thank you, your Honour.

HIS HONOUR: Yes, thank you. Adjourn the court.

ADJOURNED

[2.46 pm]

"DW-2"

Craig Melrose

From: Jacqueline Ogden
Sent: Wednesday, 25 September 2019 10:40 AM
To: Stuart Bailey
Cc: Peter Hegarty; Rachel Sorridimi; Scott Couper; Craig Melrose
Subject: In the matter of Equititrust Limited ACN 061 383 944 (EL) [GQ-BD.FID525428]

Dear Colleagues,

We refer to your correspondence of Thursday, 19 September 2019 **below**.

As to item 1, we note your clarification regarding the invitation to non-unitholders and the form of the notice.

As to item 2, we understand you have now received proofs from non-unitholder creditors in response to your clients' invitation to lodge proofs of debt.

We note that, under the Boddice Orders, your clients are now required to adjudicate upon those debts and claims and identify whether EL has a claim for indemnity from the EIF in respect of any, or any part of any, claim against EL which is admitted by the Liquidators.

We now await your clients' notification in accordance with paragraph 3 of the Boddice Orders, of any Creditor Indemnity Claim identified by the liquidators, as well as receipt of the information referred to in paragraph 4 of the Boddice Orders.

We would expect your clients would be in a position to adjudicate and identify these Creditor Indemnity Claims within 14 days of today.

If that is not the case, please let us know together with an explanation for the delay.

As to item 3, we await receipt of the proofs of debt lodged previously by unitholders. However, we note that the invoice included with your correspondence of 18 September 2019 contains over 10 hours of time for historically reviewing your file. We would have expected this to be enough time to locate the previously lodged proofs referred to in your email. In any event, we are now instructed to write to the unitholders as previously foreshadowed to provide them with an update in this matter and to the steps our client intends to now take to progress the winding up of the EIF. We will provide you with a copy of this correspondence once it is sent.

We will respond separately to your correspondence of Wednesday, 18 September 2019 regarding your clients' claim for payment in accordance with paragraph 10 of the Boddice Orders.

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators. Would you please let us know when we can expect to receive your clients' substantive response to our correspondence.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Thursday, 19 September 2019 9:53 AM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Cc: Peter Hegarty <peterh@hegartylegal.com.au>; Rachel Sorridimi <rachels@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: RE: In the matter of Equititrust Limited ACN 061 383 944 (EL) [GQ-BD.FID525428]

Dear Colleagues,

We refer to your email below. .

In response to your questions:

- 1) The Report, dated 27 August 2019, inviting non-unitholders to submit a proof of debt was not distributed to unitholder creditors. The reason that the Notice on the Insolvency Notices website does not make the distinction between unitholder and non-unitholder creditors is because the Insolvency Notices website does not allow for any amendments to the form of the notice.
- 2) Our clients have received proofs from non-unitholder creditors in response to their call for proofs. Our clients will correspond with your client further regarding these proofs in due course, in accordance with the orders of Boddice J of 2 April 2019.
- 3) Our clients did not receive any proofs from unitholder creditors on this occasion. However proofs of debt from unitholder creditors have previously been lodged with our clients. They are currently reviewing their file for copies of these proofs and will forward on any relevant proofs once that review is complete.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Friday, 13 September 2019 12:47 PM

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

Cc: Peter Hegarty <peterh@hegartylegal.com.au>; Rachel Sorridimi <rachels@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: In the matter of Equititrust Limited ACN 061 383 944 (EL) [GQ-BD.FID525428]

Importance: High

Dear Colleagues,

We refer to your email **below**.

We await your client's substantive response to our letter of 20 August 2019.

In the meantime, and as soon as possible by return, would you please advise:

- a) whether your clients' report dated 27 August 2019, published on the Equititrust website, and the notice inviting non-unitholders to submit a formal proof of debt was sent to unitholders;
- b) the outcome of your clients' invitation for proofs of debt, including how many proofs were received and if there were any received from unitholders (please provide us with a copy of the Proofs of Debt received); and
- c) if proofs of debt were received from unitholders, the nature of the unitholders' claim in each case (please provide us with a copy of the Proofs of Debt received).

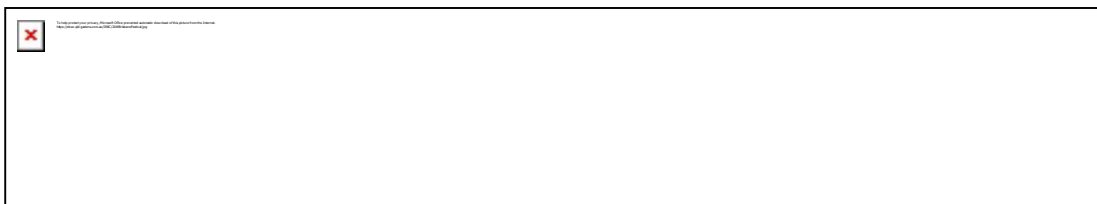
Our client can then consider this further in the context of his proposed correspondence to unitholders to progress the finalisation of the winding up of the EIF.

Our client is keen to issue this correspondence to unitholders as soon as possible so please let us have your clients' response on the above matters as a **matter of urgency**.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](http://gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Wednesday, 11 September 2019 8:02 PM

To: Peter Hegarty <peterh@hegartylegal.com.au>; Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Cc: Rachel Sorridimi <rachels@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: RE: In the matter of Equititrust Limited ACN 061 383 944 (EL) [GQ-BD.FID525428]

Dear Colleagues,

We refer to the below email.

We are preparing a response to your most recent correspondence however we will not be in a position to respond by 12 September 2019.

We are in the process of obtaining instructions and will endeavour to respond shortly.

Kind regards,

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Monday, 9 September 2019 4:20 PM

To: Stuart Bailey <stuartb@hegartylegal.com.au>; Peter Hegarty <peterh@hegartylegal.com.au>

Cc: Rachel Sorridimi <rachels@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: In the matter of Equititrust Limited ACN 061 383 944 (EL) [GQ-BD.FID525428]

Dear Colleagues,

We refer to your email **below**.

We note that your clients have now invited formal proofs of debt from the creditors of EL.

We note the **attached** report published on the Equititrust website which calls for those proofs from non-unitholder creditors in accordance with the Boddice Orders.

The notice seeks that any claims be made by **11 September 2019**.

Notwithstanding that the report seeks claims from non-unitholder creditors, we note that the notice published on the ASIC website (on its face) doesn't limit the claims to non-unitholders and calls for proofs of debt from creditors of EL generally.

In those circumstances, it may be that some unitholders lodge a proof of debt following your client liquidators invitation for proofs.

Accordingly, would you please keep us advised as to the outcome of the invitation for proofs of debt and, in particular, please tell us whether any proofs of debt are received from unitholders and, if so, the nature of the unitholders' claim.

Our client can then consider this further in the context of his proposed correspondence to unitholders to progress the finalisation of the winding up of the EIF.

We otherwise await your clients' response to the balance of the matters set out in our letter of 20 August 2019, which we note you have indicated you will provide by 12 September 2019 (that is, within a week of your below correspondence).

Yours faithfully,

Jacqueline Ogden | Director | **gadens**

jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Wednesday, 4 September 2019 3:19 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>; Peter Hegarty <peterh@hegartylegal.com.au>

Cc: Rachel Sorridimi <rachels@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: RE: In the matter of Equititrust Limited ACN 061 383 944 [GQ-BD.FID525428]

Dear Colleagues,

We refer to the below email.

We have sought instructions from our client regarding a response to your correspondence on 20 August 2019. We expect to receive those instructions within a week. This process has unfortunately been delayed as a key staff member of our client has been out of the country.

We can confirm that our clients have called for proofs of debt in accordance with the Orders of Boddice J (a copy of the Notice Inviting Formal Debt or Claim, lodged on 28 August 2019, can be viewed at <https://insolvencyntices.asic.gov.au/browsesearch-notices/notice-details/Equititrust-Limited-061383944/dd1ca8d5-2c3b-46a3-a080-ff1642b4df46?appointment=All¬icestate=All&companynameoracn=Equititrust&court=&district=&dnotice=> which we note is publicly available). In circumstances where our client is currently in the process of complying with the orders of Boddice J, and this process will likely result in a further work needing to be undertaken by your client, in our view an application to the Court at present is premature.

We are in the process of obtaining instructions to respond to your most recent letter and will endeavour to respond shortly.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Wednesday, 4 September 2019 2:52 PM

To: Peter Hegarty <peterh@hegartylegal.com.au>

Cc: Rachel Sorridimi <rachels@hegartylegal.com.au>; Stuart Bailey <stuartb@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: In the matter of Equititrust Limited ACN 061 383 944 [GQ-BD.FID525428]

Dear Colleagues,

We refer to our **attached** correspondence of 20 August 2019.

We sought your response to the matters raised in our letter by yesterday, 3 June 2019. We have not received any response from you.

In the circumstances, with a view to progressing the finalisation of the winding up of the EIF and as we foreshadowed in our letter of 20 August 2019, our client now intends to write to all unitholders and:

- (a) advise them that he does not consider it necessary that unitholders separately lodge proofs of debt in the liquidation of EL as "creditors" where the basis of that claim is an entitlement as a unitholder of the EIF to a distribution from the EIF;
- (b) refer to his previous reports wherein he has advised unitholders of his intention to apply to the Court to seek directions and/or declarations regarding the distribution of both an equalisation payment and final distribution to unitholders;
- (c) advise that he is not otherwise aware of any claim by any unitholder as a creditor of EL;
- (d) invite any unitholders who consider they have such a claim (being a claim which is separate to their claim to a distribution as a unitholder in the EIF) to write to him to advise him of the nature of that claim within 28 days.

Our client will consider any response received and then give further consideration as to whether any orders need to be sought from the Court to the effect that unitholders are not required to lodge any proof of debt in the liquidation of EL as creditors.

Our client will also now take steps to prepare an application to Court for appropriate directions and/or declarations as may be necessary to attend to the finalisation of the winding up of the EIF, including in relation to the distribution of both an equalisation payment as well as appropriate directions to facilitate the resolution of any claim for an indemnity from the EIF your clients intend to make for their remuneration and expenses as administrators and liquidators of EL.

We will revert again shortly regarding that application.

In the meantime, we note that you advised us in your correspondence of 7 August 2019 that your clients intended to have called for proofs of debt in respect of the non-unitholder creditors by 30 August 2019, in accordance with the orders of Boddice J of 2 April 2019 (the **Boddice orders**).

Would you please confirm that this has now been done.

If not, would you please tell us the reason for the delay and when your clients intend to call for proofs of debt in accordance with the Boddice orders, given it's been over 5 months since those orders were made.

Please let us have your response by return and in any event within 7 days.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Jacqueline Ogden

Sent: Tuesday, 20 August 2019 4:14 PM

To: Peter Hegarty <peterh@hegartylegal.com.au>

Cc: Rachel Sorridimi <rachels@hegartylegal.com.au>; Stuart Bailey <stuartb@hegartylegal.com.au>; Scott Couper (<Scott.Couper@gadens.com>) <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>

Subject: In the matter of Equititrust Limited ACN 061 383 944 [GQ-BD.FID525428]

Dear Colleagues,

Please see **attached** letter for your attention.

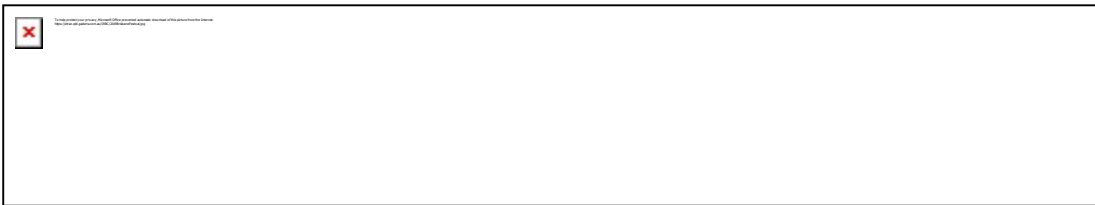
Yours faithfully,

Jacqueline Ogden | Director | **gadens**

jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487

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"DW-3"

Craig Melrose

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: Thursday, 10 October 2019 1:08 PM
To: Stuart Bailey
Cc: Peter Hegarty; Scott Couper; Craig Melrose
Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to our correspondence **below**.

We confirm our client will attend to payment of the GST-exclusive amount of invoice numbered 940 by **COB tomorrow, 11 October 2019**.

For the avoidance of doubt, our client is paying the GST-exclusive amount because the relevant ATO rulings and guidance regarding the GST treatment of payments made under Court orders, including costs Orders, and as applied in Queensland Courts, require payment to persons entitled to input tax credits under an order for costs on the indemnity basis to be made on an ex-GST basis. This is because the GST paid is not an "out of pocket" expense in those circumstances.

Separately, we understood your clients were presently adjudicating on the proofs of debt lodged following their recent invitation to non-unitholder creditors with a view to identifying whether EL has a claim for indemnity from the EIF in respect of any, or any part of any, claim against EL which is admitted by the Liquidators (in accordance with the Boddice Orders).

We have not yet received your clients' notification in accordance with paragraph 3 of the Boddice Orders, of any Creditor Indemnity Claim identified by the liquidators, nor have we received the information referred to in paragraph 4 of the Boddice Orders.

Would you please advise whether your clients have now finalised their adjudication of the proofs of debt and whether your clients have identified any Creditor Indemnity Claim?

Would you please let us have your response by return and in any event **by no later than Tuesday, 15 October 2019**.

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators. Would you please let us know when we can expect to receive your clients' substantive response to our correspondence.

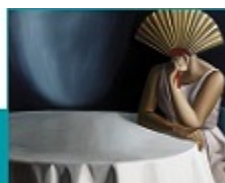
Yours faithfully,

Jacqueline Ogden | Director | [gadens](https://www.gadens.com.au)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Thursday, 3 October 2019 3:55 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Ms Ogden,

Your response is entirely unsatisfactory.

The Orders compelled your client to make payment yesterday. Your client is currently in breach of the Court orders.

Please obtain your client's instructions urgently.

Yours faithfully,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Thursday, 3 October 2019 8:41 AM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to your email **below**.

We are obtaining our client's further instructions and will revert to you further shortly, once those instructions are received.

Yours faithfully,

Jacqueline Ogden | Director | **gadens**

jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Tuesday, 1 October 2019 3:50 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues

We refer to the below email.

As a preliminary point we note that nothing in this email should be considered to be a waiver by our client of their legal professional privilege.

Our clients sought advice regarding the process they ought to follow in complying with the Boddice J orders (**Orders**). This advice was provided to them. It is not clear to us on what basis you suggest that this should not be considered as costs of complying with the Orders. There is nothing in the Orders which suggests that the indemnified costs are limited to advice required after proofs have been called for and received. Our clients reject any suggestion that the Orders ought to be interpreted in this way.

The interpretation you seek to give the Orders is also not supported by the circumstances in which the Orders were made. As you are aware, the Orders were made in response to:

- a) an application by your clients to compel our clients to undertake the tasks set out in the Orders; and
- b) a response from our clients that they ought not to be so compelled in circumstances where the liquidation was unfunded.

Given the above, we can see no reason why advice sought by our client on the process to be followed in complying with the Orders ought to be excluded from the indemnity provided by order 10.

The advice sought by our clients necessitated reviewing certain documents on file. The Orders in no way exclude this occurring and it was entirely proper in the circumstances.

There has also been cost incurred in advising our clients in respect of your correspondence to them regarding your position in respect of their obligations pursuant to and order 11 of the Orders in respect of the settlement sum received in Federal Court Proceedings NSD2028/2013 and NSD2025/2013. We assume that your client does not suggest that such advice is not a cost incurred in complying with the Orders.

Our clients position is that the costs set out in the invoice 940 have been properly incurred in complying with the Orders and ought to be paid in accordance with order 10 of the Orders by **Wednesday, 2 October 2019**.

We look forward to payment of invoice 940 in accordance with the Orders.

Kind regards,

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Monday, 30 September 2019 3:09 PM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Importance: High

Dear Colleagues,

We refer to your correspondence **below** and **attached** of 18 September 2019 and your clients' request for payment of invoice 940 in accordance with paragraph 10 of the Boddice Orders.

As you have identified in your correspondence, paragraph 10 of the Boddice Orders entitles your clients to be indemnified from the EIF for all "proper costs and expenses (including legal costs on a full indemnity basis) incurred by [your clients] in complying with [the Boddice] Order".

We've now reviewed the invoice which you have provided. The invoice totals \$32,985 (excluding GST) and covers costs incurred by your firm, on behalf of the liquidators, during the period from 5 April 2019 to 29 August 2019.

Relevantly, the costs claimed include:

- 105 units (10:30hrs) in respect of undertaking a review/historical review of their file;
- 295 units (29:30hrs) in respect of preparing a note or advice to your client liquidators.

In relation to this last item, we note that it is not entirely clear precisely what the advice/note to your clients relates to. Some of the entries in relation to this item include:

- An entry on 8 April 2019 for 20 units described as "drafting long note to clients regarding compliance with Orders of 2 April 2019, review of relevant principles and caselaw";
- An entry on 9 April 2019 for 60 units described as "drafting advice to client regarding the process to be followed for complying with the orders of the Court and potential issues which may arise";
- An entry on 10 April 2019 for 18 units described as "drafting amendments to note to client regarding compliance with court orders to include case references for particular circumstances which may arise in any review of creditor claims";
- An entry on 24 April 2019 for 39 units described as "drafting amendments to letter of advice to include advice regarding application of proceeds of indemnity if approved in accordance with orders of 2 April 2019, meeting with Peter Hegarty to discuss the same".

It's not clear how the above categories of work fall within paragraph 10 of the Boddice Orders as a cost properly incurred by the liquidators "in complying with the Order".

Indeed, some of the advice to your clients appears to pre-emptively foreshadow issues which may arise upon a creditor indemnity claim (before any advertisement was made for those claims to be made and before any claims were received). It's not clear how this is a cost incurred in "complying with the Order" in circumstances where no proofs of debt had yet been received, nor adjudicated upon.

So that our client may properly consider your clients' request for payment, would you please clarify how the costs contained within the invoice, particularly those relating to the historical review of the file and the preparation of the note/advice to your clients falls within paragraph 10 of the Boddice Orders.

In this regard, we note that the advice given to your clients will be subject to legal professional privilege and, as such, cannot be disclosed to us. Nevertheless, in circumstances where your clients have only recently advertised for proofs of debt to be submitted, and no such proofs of debt had yet been received or adjudicated upon at the time these costs were incurred, our client wishes to understand how the costs fall within the terms of the Boddice Orders. If, for example, that advice or the numerous conferences which are referred to in the invoice relate to consideration of your clients' claim for indemnity as liquidators/administrators of EL, then that will not fall within paragraph 10 of the Boddice Orders (as those claims are specifically carved out of the Boddice Orders). In those circumstances, those costs should be excluded and will need to be dealt with separately.

Would you please let us have your clarification on the above matters at your earliest convenience.

On a separate point, it is otherwise unclear what "extensive demands" your clients are referring to in the letter dated 18 September 2019.

If this is a reference to our correspondence of 20 August 2019, wherein we sought clarification regarding your clients' indemnity claim, that claim (as you are aware) has been unresolved for some years now. Our client simply seeks clarification of your clients' position with respect to their remuneration as administrators and liquidators with a view to either resolving that matter with your clients by way of agreement or otherwise seeking appropriate directions from the Court to facilitate the resolution of any indemnity claim in order to progress and attend to the finalisation of the winding up of the EIF.

If it is otherwise a reference to our recent correspondence wherein we sought an update as to the timing of certain steps your clients are required to undertake under the Boddice Orders, that clarification was sought in order so that our client could provide an update to investors as to the likely timing of resolution of the Creditor Indemnity Claims and finalisation of the winding up generally.

We continue to await your clients' substantive response to our letter of 20 August 2019.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Wednesday, 18 September 2019 12:25 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>; Scott Couper <Scott.Couper@gadens.com>

Cc: Peter Hegarty <peterh@hegartylegal.com.au>

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011

Dear Colleagues,

Please see our letter **attached**.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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"DW-4"

Craig Melrose

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: Wednesday, 16 October 2019 9:57 AM
To: Stuart Bailey
Cc: Peter Hegarty; Scott Couper; Craig Melrose
Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Importance: High

Dear Colleagues,

We refer to our email **below** and note we are still yet to receive your clients' response regarding the outcome of their adjudication of the proofs of debt recently received.

Would you please advise when your clients expect to finalise their adjudication of the proofs of debt and, as part of this process, when they expect to identify any Creditor Indemnity Claim in accordance with the Boddice Orders?

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators.

As previously advised, our client wishes to attend to finalising the winding up of the EIF as soon as possible and intends to provide an update to investors shortly regarding the steps which are necessary in order to finalise the winding up and the expected timing of same. To the extent our respective clients are not able to resolve the outstanding issues as between themselves, our client will apply for appropriate directions or declarations from the Court as may be necessary to attend to the finalisation of the winding up of the EIF. We consider that, to the extent that may be necessary, that should be done as soon as possible.

For that reason, we look forward to your clients' response providing us with an update as to timing as sought above as soon as possible. We would appreciate your client's response by the **close of business this Friday, 18 October 2019**.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: Thursday, 10 October 2019 1:08 PM
To: Stuart Bailey <stuartb@hegartylegal.com.au>

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to our correspondence **below**.

We confirm our client will attend to payment of the GST-exclusive amount of invoice numbered 940 by **COB tomorrow, 11 October 2019**.

For the avoidance of doubt, our client is paying the GST-exclusive amount because the relevant ATO rulings and guidance regarding the GST treatment of payments made under Court orders, including costs Orders, and as applied in Queensland Courts, require payment to persons entitled to input tax credits under an order for costs on the indemnity basis to be made on an ex-GST basis. This is because the GST paid is not an "out of pocket" expense in those circumstances.

Separately, we understood your clients were presently adjudicating on the proofs of debt lodged following their recent invitation to non-unitholder creditors with a view to identifying whether EL has a claim for indemnity from the EIF in respect of any, or any part of any, claim against EL which is admitted by the Liquidators (in accordance with the Boddice Orders).

We have not yet received your clients' notification in accordance with paragraph 3 of the Boddice Orders, of any Creditor Indemnity Claim identified by the liquidators, nor have we received the information referred to in paragraph 4 of the Boddice Orders.

Would you please advise whether your clients have now finalised their adjudication of the proofs of debt and whether your clients have identified any Creditor Indemnity Claim?

Would you please let us have your response by return and in any event **by no later than Tuesday, 15 October 2019**.

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators. Would you please let us know when we can expect to receive your clients' substantive response to our correspondence.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](https://www.gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Thursday, 3 October 2019 3:55 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Ms Ogden,

Your response is entirely unsatisfactory.

The Orders compelled your client to make payment yesterday. Your client is currently in breach of the Court orders.

Please obtain your client's instructions urgently.

Yours faithfully,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Thursday, 3 October 2019 8:41 AM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to your email **below**.

We are obtaining our client's further instructions and will revert to you further shortly, once those instructions are received.

Yours faithfully,

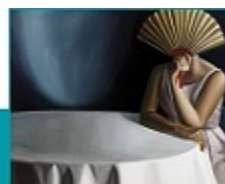
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privilege, confidentiality or copyright associated with it.
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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Tuesday, 1 October 2019 3:50 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues

We refer to the below email.

As a preliminary point we note that nothing in this email should be considered to be a waiver by our client of their legal professional privilege.

Our clients sought advice regarding the process they ought to follow in complying with the Boddice J orders (**Orders**). This advice was provided to them. It is not clear to us on what basis you suggest that this should not be considered as costs of complying with the Orders. There is nothing in the Orders which suggests that the indemnified costs are limited to advice required after proofs have been called for and received. Our clients reject any suggestion that the Orders ought to be interpreted in this way.

The interpretation you seek to give the Orders is also not supported by the circumstances in which the Orders were made. As you are aware, the Orders were made in response to:

- a) an application by your clients to compel our clients to undertake the tasks set out in the Orders; and
- b) a response from our clients that they ought not to be so compelled in circumstances where the liquidation was unfunded.

Given the above, we can see no reason why advice sought by our client on the process to be followed in complying with the Orders ought to be excluded from the indemnity provided by order 10.

The advice sought by our clients necessitated reviewing certain documents on file. The Orders in no way exclude this occurring and it was entirely proper in the circumstances.

There has also been cost incurred in advising our clients in respect of your correspondence to them regarding your position in respect of their obligations pursuant to and order 11 of the Orders in respect of the settlement sum received in Federal Court Proceedings NSD2028/2013 and NSD2025/2013. We assume that your client does not suggest that such advice is not a cost incurred in complying with the Orders.

Our clients position is that the costs set out in the invoice 940 have been properly incurred in complying with the Orders and ought to be paid in accordance with order 10 of the Orders by **Wednesday, 2 October 2019**.

We look forward to payment of invoice 940 in accordance with the Orders.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: Monday, 30 September 2019 3:09 PM
To: Stuart Bailey <stuartb@hegartylegal.com.au>
Cc: Peter Hegarty <peterh@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>
Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]
Importance: High

Dear Colleagues,

We refer to your correspondence **below** and **attached** of 18 September 2019 and your clients' request for payment of invoice 940 in accordance with paragraph 10 of the Boddice Orders.

As you have identified in your correspondence, paragraph 10 of the Boddice Orders entitles your clients to be indemnified from the EIF for all "proper costs and expenses (including legal costs on a full indemnity basis) incurred by [your clients] in complying with [the Boddice] Order".

We've now reviewed the invoice which you have provided. The invoice totals \$32,985 (excluding GST) and covers costs incurred by your firm, on behalf of the liquidators, during the period from 5 April 2019 to 29 August 2019.

Relevantly, the costs claimed include:

- 105 units (10:30hrs) in respect of undertaking a review/historical review of their file;
- 295 units (29:30hrs) in respect of preparing a note or advice to your client liquidators.

In relation to this last item, we note that it is not entirely clear precisely what the advice/note to your clients relates to. Some of the entries in relation to this item include:

- An entry on 8 April 2019 for 20 units described as "drafting long note to clients regarding compliance with Orders of 2 April 2019, review of relevant principles and caselaw";
- An entry on 9 April 2019 for 60 units described as "drafting advice to client regarding the process to be followed for complying with the orders of the Court and potential issues which may arise";
- An entry on 10 April 2019 for 18 units described as "drafting amendments to note to client regarding compliance with court orders to include case references for particular circumstances which may arise in any review of creditor claims";
- An entry on 24 April 2019 for 39 units described as "drafting amendments to letter of advice to include advice regarding application of proceeds of indemnity if approved in accordance with orders of 2 April 2019, meeting with Peter Hegarty to discuss the same".

It's not clear how the above categories of work fall within paragraph 10 of the Boddice Orders as a cost properly incurred by the liquidators "in complying with the Order".

Indeed, some of the advice to your clients appears to pre-emptively foreshadow issues which may arise upon a creditor indemnity claim (before any advertisement was made for those claims to be made and before any claims were received). It's not clear how this is a cost incurred in "complying with the Order" in circumstances where no proofs of debt had yet been received, nor adjudicated upon.

So that our client may properly consider your clients' request for payment, would you please clarify how the costs contained within the invoice, particularly those relating to the historical review of the file and the preparation of the note/advice to your clients falls within paragraph 10 of the Boddice Orders.

In this regard, we note that the advice given to your clients will be subject to legal professional privilege and, as such, cannot be disclosed to us. Nevertheless, in circumstances where your clients have only recently advertised for proofs of debt to be submitted, and no such proofs of debt had yet been received or adjudicated upon at the time these costs were incurred, our client wishes to understand how the costs fall within the terms of the Boddice

Orders. If, for example, that advice or the numerous conferences which are referred to in the invoice relate to consideration of your clients' claim for indemnity as liquidators/administrators of EL, then that will not fall within paragraph 10 of the Boddice Orders (as those claims are specifically carved out of the Boddice Orders). In those circumstances, those costs should be excluded and will need to be dealt with separately.

Would you please let us have your clarification on the above matters at your earliest convenience.

On a separate point, it is otherwise unclear what "extensive demands" your clients are referring to in the letter dated 18 September 2019.

If this is a reference to our correspondence of 20 August 2019, wherein we sought clarification regarding your clients' indemnity claim, that claim (as you are aware) has been unresolved for some years now. Our client simply seeks clarification of your clients' position with respect to their remuneration as administrators and liquidators with a view to either resolving that matter with your clients by way of agreement or otherwise seeking appropriate directions from the Court to facilitate the resolution of any indemnity claim in order to progress and attend to the finalisation of the winding up of the EIF.

If it is otherwise a reference to our recent correspondence wherein we sought an update as to the timing of certain steps your clients are required to undertake under the Boddice Orders, that clarification was sought in order so that our client could provide an update to investors as to the likely timing of resolution of the Creditor Indemnity Claims and finalisation of the winding up generally.

We continue to await your clients' substantive response to our letter of 20 August 2019.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Wednesday, 18 September 2019 12:25 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>; Scott Couper <Scott.Couper@gadens.com>

Cc: Peter Hegarty <peterh@hegartylegal.com.au>

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011

Dear Colleagues,

Please see our letter **attached**.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | **P** 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | **W** www.hegartylegal.com.au

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Craig Melrose

From: Peter Hegarty <peterh@hegartylegal.com.au>
Sent: Saturday, 19 October 2019 12:50 PM
To: Jacqueline Ogden; Stuart Bailey
Cc: Scott Couper; Craig Melrose
Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We are instructed that in the process of adjudicating claims, our clients have sought further information from your client.

Once our clients receive this further information they expect to be able to finalise their adjudications shortly thereafter.

Our clients continue to reserve all of their rights, including with respect the rights of indemnity available to them.

Yours faithfully,



PETER HEGARTY PRINCIPAL

D 02 9056 1736 | **P** 02 9056 1735 | **M** +61 416 052 176

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E peterh@hegartylegal.com.au | **W** www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: Wednesday, 16 October 2019 10:57 AM
To: Stuart Bailey <stuartb@hegartylegal.com.au>
Cc: Peter Hegarty <peterh@hegartylegal.com.au>; Scott Couper <Scott.Couper@gadens.com>; Craig Melrose <Craig.Melrose@gadens.com>
Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]
Importance: High

Dear Colleagues,

We refer to our email **below** and note we are still yet to receive your clients' response regarding the outcome of their adjudication of the proofs of debt recently received.

Would you please advise when your clients expect to finalise their adjudication of the proofs of debt and, as part of this process, when they expect to identify any Creditor Indemnity Claim in accordance with the Boddice Orders?

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators.

As previously advised, our client wishes to attend to finalising the winding up of the EIF as soon as possible and intends to provide an update to investors shortly regarding the steps which are necessary in order to finalise the winding up and the expected timing of same. To the extent our respective clients are not able to resolve the outstanding issues as between themselves, our client will apply for appropriate directions or declarations from the Court as may be necessary to attend to the finalisation of the winding up of the EIF. We consider that, to the extent that may be necessary, that should be done as soon as possible.

For that reason, we look forward to your clients' response providing us with an update as to timing as sought above as soon as possible. We would appreciate your client's response by the **close of business this Friday, 18 October 2019**.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](https://www.gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Thursday, 10 October 2019 1:08 PM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to our correspondence **below**.

We confirm our client will attend to payment of the GST-exclusive amount of invoice numbered 940 by **COB tomorrow, 11 October 2019**.

For the avoidance of doubt, our client is paying the GST-exclusive amount because the relevant ATO rulings and guidance regarding the GST treatment of payments made under Court orders, including costs Orders, and as applied in Queensland Courts, require payment to persons entitled to input tax credits under an order for costs on the indemnity basis to be made on an ex-GST basis. This is because the GST paid is not an "out of pocket" expense in those circumstances.

Separately, we understood your clients were presently adjudicating on the proofs of debt lodged following their recent invitation to non-unitholder creditors with a view to identifying whether EL has a claim for indemnity from the EIF in respect of any, or any part of any, claim against EL which is admitted by the Liquidators (in accordance with the Boddice Orders).

We have not yet received your clients' notification in accordance with paragraph 3 of the Boddice Orders, of any Creditor Indemnity Claim identified by the liquidators, nor have we received the information referred to in paragraph 4 of the Boddice Orders.

Would you please advise whether your clients have now finalised their adjudication of the proofs of debt and whether your clients have identified any Creditor Indemnity Claim?

Would you please let us have your response by return and in any event **by no later than Tuesday, 15 October 2019**.

We otherwise note we are still awaiting your clients' substantive response to our letter of 20 August 2019, and, in particular, clarification as to whether your clients maintain their claim for indemnity as liquidators and administrators. Would you please let us know when we can expect to receive your clients' substantive response to our correspondence.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Thursday, 3 October 2019 3:55 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Ms Ogden,

Your response is entirely unsatisfactory.

The Orders compelled your client to make payment yesterday. Your client is currently in breach of the Court orders.

Please obtain your client's instructions urgently.

Yours faithfully,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Thursday, 3 October 2019 8:41 AM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues,

We refer to your email **below**.

We are obtaining our client's further instructions and will revert to you further shortly, once those instructions are received.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](https://www.gadens.com)

jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

[Brisbane](#) | [Sydney](#) | [Melbourne](#) | [Adelaide](#) | [Perth](#)



[gadens.com](https://www.gadens.com)

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Tuesday, 1 October 2019 3:50 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

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

Subject: RE: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Dear Colleagues

We refer to the below email.

As a preliminary point we note that nothing in this email should be considered to be a waiver by our client of their legal professional privilege.

Our clients sought advice regarding the process they ought to follow in complying with the Boddice J orders (**Orders**). This advice was provided to them. It is not clear to us on what basis you suggest that this should not be considered as costs of complying with the Orders. There is nothing in the Orders which suggests that the indemnified costs are limited to advice required after proofs have been called for and received. Our clients reject any suggestion that the Orders ought to be interpreted in this way.

The interpretation you seek to give the Orders is also not supported by the circumstances in which the Orders were made. As you are aware, the Orders were made in response to:

- a) an application by your clients to compel our clients to undertake the tasks set out in the Orders; and
- b) a response from our clients that they ought not to be so compelled in circumstances where the liquidation was unfunded.

Given the above, we can see no reason why advice sought by our client on the process to be followed in complying with the Orders ought to be excluded from the indemnity provided by order 10.

The advice sought by our clients necessitated reviewing certain documents on file. The Orders in no way exclude this occurring and it was entirely proper in the circumstances.

There has also been cost incurred in advising our clients in respect of your correspondence to them regarding your position in respect of their obligations pursuant to and order 11 of the Orders in respect of the settlement sum received in Federal Court Proceedings NSD2028/2013 and NSD2025/2013. We assume that your client does not suggest that such advice is not a cost incurred in complying with the Orders.

Our clients position is that the costs set out in the invoice 940 have been properly incurred in complying with the Orders and ought to be paid in accordance with order 10 of the Orders by **Wednesday, 2 October 2019**.

We look forward to payment of invoice 940 in accordance with the Orders.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Sent: Monday, 30 September 2019 3:09 PM

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

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

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011 [GQ-BD.FID525428]

Importance: High

Dear Colleagues,

We refer to your correspondence **below** and **attached** of 18 September 2019 and your clients' request for payment of invoice 940 in accordance with paragraph 10 of the Boddice Orders.

As you have identified in your correspondence, paragraph 10 of the Boddice Orders entitles your clients to be indemnified from the EIF for all "proper costs and expenses (including legal costs on a full indemnity basis) incurred by [your clients] in complying with [the Boddice] Order".

We've now reviewed the invoice which you have provided. The invoice totals \$32,985 (excluding GST) and covers costs incurred by your firm, on behalf of the liquidators, during the period from 5 April 2019 to 29 August 2019.

Relevantly, the costs claimed include:

- 105 units (10:30hrs) in respect of undertaking a review/historical review of their file;
- 295 units (29:30hrs) in respect of preparing a note or advice to your client liquidators.

In relation to this last item, we note that it is not entirely clear precisely what the advice/note to your clients relates to. Some of the entries in relation to this item include:

- An entry on 8 April 2019 for 20 units described as “drafting long note to clients regarding compliance with Orders of 2 April 2019, review of relevant principles and caselaw”;
- An entry on 9 April 2019 for 60 units described as “drafting advice to client regarding the process to be followed for complying with the orders of the Court and potential issues which may arise”;
- An entry on 10 April 2019 for 18 units described as “drafting amendments to note to client regarding compliance with court orders to include case references for particular circumstances which may arise in any review of creditor claims”;
- An entry on 24 April 2019 for 39 units described as “drafting amendments to letter of advice to include advice regarding application of proceeds of indemnity if approved in accordance with orders of 2 April 2019, meeting with Peter Hegarty to discuss the same”.

It’s not clear how the above categories of work fall within paragraph 10 of the Boddice Orders as a cost properly incurred by the liquidators “in complying with the Order”.

Indeed, some of the advice to your clients appears to pre-emptively foreshadow issues which may arise upon a creditor indemnity claim (before any advertisement was made for those claims to be made and before any claims were received). It’s not clear how this is a cost incurred in “complying with the Order” in circumstances where no proofs of debt had yet been received, nor adjudicated upon.

So that our client may properly consider your clients’ request for payment, would you please clarify how the costs contained within the invoice, particularly those relating to the historical review of the file and the preparation of the note/advice to your clients falls within paragraph 10 of the Boddice Orders.

In this regard, we note that the advice given to your clients will be subject to legal professional privilege and, as such, cannot be disclosed to us. Nevertheless, in circumstances where your clients have only recently advertised for proofs of debt to be submitted, and no such proofs of debt had yet been received or adjudicated upon at the time these costs were incurred, our client wishes to understand how the costs fall within the terms of the Boddice Orders. If, for example, that advice or the numerous conferences which are referred to in the invoice relate to consideration of your clients’ claim for indemnity as liquidators/administrators of EL, then that will not fall within paragraph 10 of the Boddice Orders (as those claims are specifically carved out of the Boddice Orders). In those circumstances, those costs should be excluded and will need to be dealt with separately.

Would you please let us have your clarification on the above matters at your earliest convenience.

On a separate point, it is otherwise unclear what “extensive demands” your clients are referring to in the letter dated 18 September 2019.

If this is a reference to our correspondence of 20 August 2019, wherein we sought clarification regarding your clients’ indemnity claim, that claim (as you are aware) has been unresolved for some years now. Our client simply seeks clarification of your clients’ position with respect to their remuneration as administrators and liquidators with a view to either resolving that matter with your clients by way of agreement or otherwise seeking appropriate directions from the Court to facilitate the resolution of any indemnity claim in order to progress and attend to the finalisation of the winding up of the EIF.

If it is otherwise a reference to our recent correspondence wherein we sought an update as to the timing of certain steps your clients are required to undertake under the Boddice Orders, that clarification was sought in order so that our client could provide an update to investors as to the likely timing of resolution of the Creditor Indemnity Claims and finalisation of the winding up generally.

We continue to await your clients’ substantive response to our letter of 20 August 2019.

Yours faithfully,

Jacqueline Ogden | Director | [gadens](#)

jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850 | M +61 431 029 487
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Stuart Bailey <stuartb@hegartylegal.com.au>

Sent: Wednesday, 18 September 2019 12:25 PM

To: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>; Scott Couper <Scott.Couper@gadens.com>

Cc: Peter Hegarty <peterh@hegartylegal.com.au>

Subject: In the matter of Equititrust Limited - Supreme Court of Queensland Proceedings 10478 of 2011

Dear Colleagues,

Please see our letter **attached**.

Kind regards,



STUART BAILEY SOLICITOR

D 02 9056 1746 | P 02 9056 1735

A Suite 1303, Level 13, 383-395 Kent Street, Sydney NSW 2000

E stuartb@hegartylegal.com.au | W www.hegartylegal.com.au

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Alisha Morris

From: David Whyte <David.Whyte@bdo.com.au>
Sent: Monday, 4 November 2019 9:10 AM
To: Kristine Hu; bpleash@hallchadwick.com.au
Cc: Jovan Singh; Jayden Coulston
Subject: RE: Equititrust Limited
Attachments: POD - Cassowary Coast Regional Council.pdf

Dear Blair and Kristine

I refer to the attached proof of debt and provide the following comments to assist with the liquidators consideration of the claim:

- Given the age of the loan and the fact that no records were held on the new lending database, the records in relation to this borrower and loan are scant;
- Both the EIF and EPF had loans outstanding to Foxwil Pty Ltd and were repaid in full in 2004;
- The guarantee was issued by Equititrust Ltd and we have been unable to determine if it was issued on behalf of the EIF or EPF;
- When the loan was repaid and the security was released, it would appear, on the information currently available, that Equititrust Ltd failed to take into consideration that contingent liability pursuant to the guarantee;
- There is no evidence provided to establish the allegation that Cassowary Coast Regional Council should benefit from a guarantee issued to Johnstone Shire Council.

Accordingly, having reviewed the Fund's records, in my view there is nothing to suggest that this proof of debt relates to the Fund and could be the subject of an indemnity claim.

As I have previously advised, in the event there are claims you believe should be indemnified from the assets of the EIF, I consider that there are claims the EIF has against EL that are likely to exceed same. Those claims include those set out in your statement of claim against EL. In this respect, I would intend to rely on the clear accounts rule.

Further, as EL has no assets, it would be futile to rule on proofs that are claims against EL only and have no recourse to the EIF. Can you please confirm that is how you are evaluating the proofs.

I once again reiterate my request that you please advise when you intend to comply with order 3 of the Boddice Order and attend to admitting claims and notifying me of any Creditor Indemnity Claims. I note that your solicitors advised my solicitors on 19 October 2019 regarding your request for the above information that "Once our clients receive this further information they expect to be able to finalise their adjudications shortly thereafter".

I also note that my solicitors have still not received a substantive response to Gadens letter of 20 August 2019, and, in particular, clarification as to whether you maintain a claim for indemnity as liquidator and administrator.

I also, once again reiterate that I wish to finalise the winding up of the EIF as soon as possible and as cost effectively as possible. To the extent we are not able to resolve the outstanding issues as between us, unfortunately I will need to apply for appropriate directions or declarations from the Court as may be necessary to attend to the finalisation of the winding up of the EIF. I consider that, to the extent that may be necessary, that should be done in the very near future. I would like to avoid the costs of such application if at all possible.

Now that I have provided you with this further information and the information on the other proofs on 28 October, please may I have your substantive response by return.

I look forward to hearing from you.

Regards

David

From: Kristine Hu <KHu@hallchadwick.com.au>
Sent: 28 October 2019 11:24 AM

To: Jayden Coulston <Jayden.Coulston@bdo.com.au>

Cc: David Whyte <David.Whyte@bdo.com.au>; Blair Pleash <Bpleash@hallchadwick.com.au>; Jovan Singh <JSingh@hallchadwick.com.au>

Subject: RE: Equititrust Limited

Dear Jayden,

Further to my email below, would you please advise whether you have any relevant information in relation to the claim in the attached proof of debt.

Should you have any queries, please do not hesitate to contact me.

Kind Regards,

Kristine Hu
Senior Accountant

HALL CHADWICK 

Level 40 | 2 Park Street | Sydney | NSW 2000 | Australia

T +61 2 9263 2875 | **Main** +61 2 9263 2600 | **F** +61 2 9263 2800

E khu@hallchadwick.com.au | **W** www.hallchadwick.com.au

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From: Kristine Hu

Sent: Friday, 18 October 2019 9:27 AM

To: jayden.coulston@bdo.com.au

Cc: David Whyte <David.Whyte@bdo.com.au>; Blair Pleash <Bpleash@hallchadwick.com.au>; Jovan Singh <JSingh@hallchadwick.com.au>

Subject: RE: Equititrust Limited

Dear Jayden

Thank you for your time earlier on the phone.

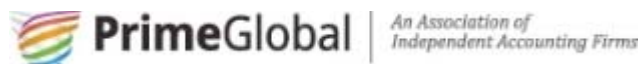
As discussed, please find attached proofs of debt submitted by the purported creditors. Would you please advise whether you have any relevant information in relation to the claim in the attached proofs of debt.

Should you have any queries, please do not hesitate to contact me.

Kind Regards,

Kristine Hu
Senior Accountant

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Australian Company Number: 061 383 944

FORM 535

Subregulation 5.6.49(2)

Corporations Act (2001)

FORMAL PROOF OF DEBT OR CLAIM
(GENERAL FORM)

POSTED
RS 5352

To the Liquidators of Equititrust Limited (In Liquidation)

1. This is to state that the Company was on, Wednesday, 15 February 2012 and still is, justly and truly indebted to: CASSOWARY COAST REGIONAL COUNCIL, 70 RANKIN ST, INNISFAIR QLD 4860
(full name and address of the creditor and, if applicable, the creditor's partners. If prepared by an employee or agent of the creditor, also insert a description of the occupation of the creditor) for \$ 175033 andcents.

Date	Consideration (state how the Debt arose)	Amount \$ c	Remarks (include details of voucher substantiating payment)
17/03/2004	Performance Bond issued for an obligation to undertake road works to the intersection of Porters Promenade & Seaview Sts, Mission Beh demand on funds required to undertake work	\$175033-	Annexure 1 - Performance Bond issued by Equititrust Annexure 2 - Letter of Demand.

2. To my knowledge or belief the creditor has not, nor has any person by the creditor's order, had or received any satisfaction or security for the sum or any part of it except for the following: (insert particulars of all securities held. If the securities are on the property of the company, assess the value of those securities. If any bills or other negotiable securities are held, show them in a schedule in the following form).

Date	Drawer	Acceptor	Amount \$c	Due Date
			NIL.	

- *3. I am employed by the creditor and authorised in writing by the creditor to make this statement. I know that the debt was incurred for the consideration stated and that the debt, to the best of my knowledge and belief, remains unpaid and unsatisfied.
- *4. ~~I am the creditor's agent authorised in writing to make this statement in writing. I know that the debt was incurred for the consideration stated and that the debt, to the best of my knowledge and belief, remains unpaid and unsatisfied.~~

Signature: Terry Brennan
Occupation: Chief Executive Officer
Address: Cassowary Coast Regional Council
70 Rankin St
Innisfair QLD 4860

Dated: 22 MAY 2012

Proof of Debt Reference:

*Do not complete if this proof is made by the creditor personally.

This is a Reprint of a Scanned Image

Legal document - performance bond

Building Relationship

*Records Note: the unmarked original
bond is attached behind
this file copy***EQUITRUST**

Wentworth Bank

EQUITRUST LIMITED ACN 061 383 944 ("Equititrust")

INW041M

PERFORMANCE BOND

Johnstone Shire Council	
TO: COR	TO: TEC
19 MAR 2004	
DOC NO:	
WORKFLOW CODE:	
Description:	
Contracted Service/Project/Job No:	

BENEFICIARY

NAME: JOHNSTONE SHIRE COUNCIL
 ADDRESS: 79 BANKIN STREET, INNVILLE QLD 4060

CUSTOMER

NAME: FOXWILL PTY LTD
 ADDRESS: 8 PORTER PROMENADE, MISSION BEACH QLD 4852

AMOUNT: \$175,039.00

OBLIGATION: ROAD WORKS TO INTERSECTION OF PORTER PROMENADE & SEAVIEW STREET,
 MISSION BEACH

*Photocopied File Copy
ONLY*

- At the request of the Customer and in consideration of the Beneficiary accepting this Performance Bond in relation to the Customer providing security for the performance of the Obligation, Equititrust unconditionally undertakes to pay on written demand any sum or sums which may from time to time be demanded in accordance with this Performance Bond by the Beneficiary to a maximum aggregate sum of the Amount.
- Payment of the Amount or any part or parts of the Amount will be made by Equititrust to the Beneficiary:
 - upon Equititrust receiving while this Performance Bond remains in force an unconditional written demand from the Beneficiary accompanied by this Performance Bond; and
 - whether or not Equititrust gives prior notice of the payment to the Customer; and
 - despite any notice given to Equititrust by the Customer not to pay to the Beneficiary any moneys payable under this Performance Bond; and
 - irrespective of the performance or non-performance by the Customer or the Beneficiary of the Obligation in any respect.
- Equititrust's liability under this Performance Bond is not affected or discharged in any way by any variation of any agreement relating to the Obligation or by any extension of time or other forbearance on the part of the Beneficiary or the Customer to the other.

Equititrust
 Director/Chief
 Executive Officer
 Cassowary Coast Regional Council
 PO Box 100
 Cassowary Coast, QLD
 Australia 4870
 Tel: 07 4667 1000

Equititrust is a registered company in Australia.




Email: info@equitrust.com
 Web: equitrust.com

L.12

TechnologyOne ECM Document Number: 168650

This is the annexure of 2 pages marked Annexure 1 referred to in the Form 535 - Formal Proof of Debt or Claim signed by me and dated 22nd May 2012


 Terry Brennan
 Chief Executive Officer
 Cassowary Coast Regional Council

KO1204051136

Kerry Osmond

10th April, 2012

Robert Malt
Ferrier Hodgson
Level 7
145 Eagle Street
BRISBANE QLD 4000

Dear Sir

EQUITITRUST LIMITED, PERFORMANCE BOND \$175,033
CUSTOMER: FOXWIL PTY LTD:
BENEFICIARY: (Former) JOHNSTONE SHIRE COUNCIL

I refer to the above performance bond issued by EquitiTrust in favour of the former Johnstone Shire Council on behalf of EquitiTrust customer Foxwil Pty Ltd.

As part of the Queensland Council amalgamations in 2008, the Johnstone Shire Council and Cardwell Shire Council were amalgamated to form Cassowary Coast Regional Council (CCRC). All legal rights of the former Councils were passed to the newly formed Council.

The performance bond (copy attached) was issued on 17th March 2004 for road works to be undertaken at the intersection of Porter Promenade & Seaview Street, Mission Beach. Council now needs to draw on these funds to have the work completed.

Council understands that EquitiTrust has been placed into Receivership with a Receiver/Manager appointed. As such this written demand for the funds is being forwarded to your office.

Previous correspondence between Council Officers, Dept Main Roads and EquitiTrust is attached for your information. Copies have been previously sent via email to Ms Evelyn Sanchez of Hall Chadwick.

Payment of the funds can be made directly to Council's bank account:

Bank: Commonwealth Bank
Account Name: Cassowary Coast Regional Council
BSB: 064-818
Account No. 0000 0013


Your earliest advices in relation to this matter would be greatly appreciated.

Yours faithfully

B/C Hall Chadwick
GPO Box 3555
SYDNEY NSW 2000

Terry Brennan
CHIEF EXECUTIVE OFFICER

This is the annexure of 1 page marked Annexure 2 referred to in the Form 535 - Formal Proof of Debt or Claim signed by me and dated 22nd May 2012



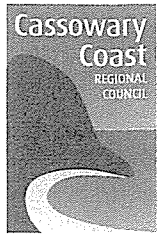
Terry Brennan
Chief Executive Officer
Cassowary Coast Regional Council

PLEASE QUOTE

YOUR REFERENCE:

OUR REFERENCE: KO1205220814

ENQUIRIES TO: Kerry Osmond



22nd May, 2012

Hall Chadwick
GPO Box 3555
SYDNEY NSW 2001

ATTENTION: Evelyn Sanchez

Dear Ms Sanchez

EQUITITRUST LIMITED (Receivers & Managers Appointed)

I refer to your firm's letter of 8th May 2012 and herewith attached Form 535 – Formal proof of debt or claim in relation to our claim against the above company.

If you require any further information, please contact Kerry Osmond of this office on 07 40302280,

Yours faithfully

A handwritten signature in black ink, appearing to be "Terry Brennan".

Terry Brennan
CHIEF EXECUTIVE OFFICER



PLEASE QUOTE

YOUR REFERENCE:

OUR REFERENCE: DG:Jlc-20180504900

ENQUIRIES TO: David Goodman

04 May 2018

Mr Blair Pleash
Liquidator
Hall Chadwick
Level 40
2 Park Street
SYDNEY NSW 2000

Fax: 02 9263 2800

Dear Sir

Equititrust Limited (Receiver Appointed) (In Liquidation) (Receivers and Managers Appointed) - ACN 061 383 944 ("the Company")

I acknowledge receipt of your correspondence of 21 March 2018 in relation to the above.

The Cassowary Coast Regional Council confirms that the Proof of Debt (POD dated 22 May 2012) to the value of \$175,033 previously claimed and lodged by the Council is still correct.

Yours faithfully

A handwritten signature in black ink, appearing to read "D Goodman", with a long horizontal stroke extending to the right.

David Goodman
DIRECTOR INFRASTRUCTURE SERVICES

24 December 2019

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

Attention: Peter Hegarty

By email: 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 (EIF)

We refer to your letter dated 26 November 2019 in response to the email dated 4 November 2019 from our client to your clients.

We note that your clients advised our client by letter dated 4 December 2019 of the claims by non-unit-holder creditors which the Liquidator has adjudicated on and contends are Creditor Indemnity Claims pursuant to paragraph 3 of the Order of Justice Boddice dated 2 April 2019 (the **Boddice Order**). Our client has now considered those claims and the information accompanying the claims and has responded to your clients in accordance with paragraph 5 of the Boddice Order seeking further information.

Our client in his 4 November 2019 email stated that he considers that there are claims the EIF has against EL that are likely to exceed claims by creditors of EL indemnified from the assets of the EIF. You have requested that our client "*set out the nature and alleged quantum of those claims*". We further note that your letter states that such requested information "*will necessarily inform our clients' response to your requests for further information regarding their claims in respect of their indemnity from the assets of the EIF.*"

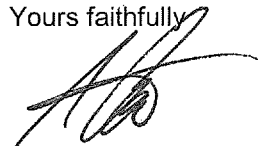
Our client does not agree that your clients require any of the requested information to allow them to properly respond to our requests for further information regarding any indemnity they may still claim from the EIF as Liquidator or Administrator. Our client reserves his rights in regard to the EIF Proceeding (NSD2028/2013 and NSD 2025/2013), and otherwise maintains his position that the EIF has claims against EL which are likely to exceed claims by creditors of EL indemnified from the assets of the EIF. In regard to your client's claims for indemnity, should they still be pressing any such claim, the making of any such claim and the provision of the details of it are not affected by any set-off asserted by our client. Any set-off is a matter for the adjudication of such claims.

We accordingly and once again request that, by Friday, 10 January 2020, your clients provide our client with full details of any claim for indemnity from the EIF that your clients make. Further, we once again request that you inform our client when your clients intend to make the foreshadowed application for approval of their remuneration in respect of the Advice Proceedings (Federal Court of Australia proceedings NSD830/2019) and the EIF Proceeding.

As you are well aware, the above information has been requested from your clients on numerous occasions. The absence of the information is an unnecessary and unacceptable delay to the finalisation of the winding up of the EIF.

Accordingly, should our client not receive the above information by 10 January 2020, our client will seek to have the matter relisted for directions.

Yours faithfully

A handwritten signature in black ink, appearing to be 'SC' with a large flourish extending from the top right.

Scott Couper
Partner

Our Ref: PJH:SB:1012
Your Ref: Scott Couper

15 January 2020

Scott.couper@gadens.com.au; craig.melrose@gadens.com
By email only

Gadens
111 Eagle Street
BRISBANE CITY QLD 4000
Australia

Dear Colleagues

In the matter of Equititrust Limited Supreme Court of Queensland Proceeding 10478 of 2011

We refer to previous correspondence in relation to the above matter.

Adjudication of creditor indemnity claims

We refer to the letter from your client directly to our clients dated 19 December 2019.

Our clients have made further enquiries of creditors in response to your client's letter of 19 December 2019 and expect to be in a position provide a further response by 20 January 2020 once further information is received from the relevant creditors.

Our clients acknowledge that the information they have been able to provide in respect of at least some of the creditor indemnity claims may not be complete. To the extent that your client has any additional information relevant to the subject claims, it is our clients' expectation that it would be provided by your clients. If your client has a different view in this respect, please confirm the position by return.

Once our clients are in receipt of your client's determinations they will of course give proper consideration to them. That said, where there is any doubt as to the position, our clients consider that they would be compelled to seek directions in accordance with Order 6(a) of the orders made by Boddice J. In making those applications, our clients acknowledge that the Court may ultimately direct that those creditor not be entitled to indemnity from the EIF.

Your client's alleged set off

We refer to your letter dated 24 December 2019.

What emerges from your letter is that despite request having been made, your client has declined to provide any further information in relation to the basis upon which your client claims a complete set off in the face of a Deed of Settlement releasing all claims against the company. This approach seems unnecessarily combative and is unhelpful to the efficient winding up of the EIF on a number of levels.

Whilst it is true that our client's right to claim an indemnity from the EIF is not dependant on any offsetting claim made by your client pursuant to the clear accounts rule, the nature and quantum of any offsetting claims your client purports to have is clearly a matter of relevance to any commercial decision our clients may take as to whether they wish to claim on their right to indemnity from the EIF. That is particularly so in circumstances where our clients are currently unfunded.

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The proposed course whereby our clients without the requisite funding incur significant costs only to be surprised by a cross claim from your client at a later point is by no means a sensible use of funds by either of our clients. It is also an unsatisfactory use of the Courts resources. Your client should simply set out clearly the nature of the set off and how he contends it is not affected by the Deed of Settlement or make the appropriate concession that any set offs are not available to your client.

Our clients also do not understand why there would be any reluctance in your client setting out his position in this respect as it will ultimately be necessary in any event, including in relation to the creditor indemnity claims which are currently being progressed by our respective clients. If your client seeks to seriously advance the position that there exists a complete offset to any indemnity claims (as would appear to be the position based on Mr Whyte's email of 4 November 2019) your client would be obliged by Order 5(c) of the Boddice J orders to properly set out his reasons in that respect if he is to reject any creditor indemnity claims.

Accordingly, having regard to the above considerations, our clients again respectfully request that your client set out with particularity the nature and quantum of the claims relied upon by your client to establish a set off with respect to any indemnity claims from our clients. Your client should also give explanation as to how he contends the set off survives the releases contained within the Deed of Settlement.

Your correspondence and that of your client suggests that your client wishes to see an expedient finalisation of the winding up of the EIF. There also appears to be a suggestion that any delay should somehow be attributed to our clients. This suggestion is rejected in its entirety as it is by no means consistent with the manner by which your client has advanced matters to date.

By your client's Application dated 30 August 2018, your client originally sought orders compelling our clients to make all indemnity claims. Our clients consented to those orders on the basis that their costs were met in circumstances where they were unfunded. Your client then, without any real explanation, proceeded to seek a significantly reduced set of relief simply dealing only with the creditor indemnity claims. Had your client wanted a determination on those issues at an earlier point it was open for him to seek those orders at that time.

More recently, as set out above, your letter dated 24 December 2019 is most unhelpful in bringing about an expedient resolution of matters your client failed to set out the basis by which he asserts the maintenance of the clear accounts rule in the face of a Deed of Settlement releasing all claims. Your client can't reasonably on the one hand allege delay from our client but do nothing to clearly articulate his own position.

The significant correspondence which has passed between the parties should give your client a very clear understanding of the nature of the indemnity claims maintained by our clients. The request in your letter that our clients set out the details of indemnity claims advanced by them seems to overlook some detailed correspondence which has been exchanged over a number of years.

Further steps

Notwithstanding the approach taken by your client to date, our clients themselves wish to advance matters. With that consideration in mind, we have been instructed by our clients to prepare an application to the Court for approval of their remuneration. You will however appreciate that a subsequent application will need to be made as further costs are being incurred by our clients in dealing with the Boddice J orders. This application will be served on your client in due course, once it has been prepared and filed.

In making this remuneration application, our clients will not be advancing any indemnity claim at present. Our clients currently intend to bring such claims on a consolidated basis once their remuneration is approved. By that stage, even if your client continues in his refusal to set out his position with respect to the clear accounts rule in advance, our clients will on any view have greater insight into the position upon the creditor indemnity claims being finalised.

We trust that this letter clarifies our clients' position.

Yours faithfully

HEGARTY LEGAL

A handwritten signature in black ink, appearing to read 'Peter Hegarty', is written over a faint, light blue rectangular background.

PETER HEGARTY

PRINCIPAL

D 02 9056 1736

E peterh@hegartylegal.com.au

31 March 2020

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

Attention: Peter Hegarty

By email: peterh@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 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.

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";*¹
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)² 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.

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

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

In *Carter Holt Harvey Woodproducts v Commonwealth*,³ the High Court approved statements of principle made by the Full Court of the Supreme Court of South Australia in *Re Suco Gold*,⁴ 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*,⁵ 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)*,⁶ 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)*,⁷ (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)*,⁸ (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

³ (2019) 368 ALR 390; [2019] HCA 20

⁴ (1983) 33 SASR 99

⁵ [2019] QCS 245

⁶ [2019] FCA 924

⁷ (1933) 48 CLR 171

⁸ [1989] Ch 32

Our Ref: PJH:SB:1012
Your Ref: Scott Couper

29 April 2020

Scott.couper@gadens.com.au; craig.melrose@gadens.com
By email only

Gadens
111 Eagle Street
BRISBANE CITY QLD 4000
Australia

Dear Colleagues

In the matter of Equititrust Limited Supreme Court of Queensland Proceeding 10478 of 2011

We refer to your letter of 31 March 2020 and are instructed to respond as follows.

Your chronology

The chronology set out in your letter contains a selective history. Without wishing to detail the full extent of the omissions made within your chronology, perhaps the most glaring is that no mention whatsoever is made of anything having taken place in the period 23 June 2017 until 25 September 2019.

The period which you have omitted from this selective history, included perhaps the most relevant events, which involved the resolution of the application made by your client in which orders were sought seeking to compel our client to establish any right of indemnity with respect to their own fees. You will recall that our client consented to those orders on the basis that they have their costs funded from the EIF, there being no other immediate source of funds. Our clients remain willing to finalise the Liquidator Claims on a similar basis.

As you are aware, His Honour Boddice J made orders on 2 April 2019 (**Boddice J Orders**) providing that, *inter alia*, our clients be reimbursed from the EIF for their costs of assessing potential eligible creditor claims against the EIF. By reason of the approach taken to the application by your client the orders ultimately made were limited in this respect and did not include the Liquidator Claims for indemnity.

Your client's alleged set off claim

As we have previously made clear to your client, the reason your client has been asked to provide the basis of his alleged set-off is that he has maintained in open correspondence that he has a set off which is larger than any claim for indemnity that our client would be in a position to establish through the Liquidator Claims. Our clients simply wish to make an objective assessment as to the merit of that claim in circumstances where they are unfunded and have again been requested by your client to pursue their Liquidator indemnity claims on an unfunded basis.

With due respect to your client, we cannot understand why your client is unwilling to set out the basis of this alleged set-off where in doing so he would potentially avoid:

- 1) the liquidators and creditors of Equititrust Limited (in Liquidation) incurring the cost of making any application to be reimbursed for costs and expenses under the indemnity; and

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- 2) himself and the unitholders of the EIF incurring the cost of defending any indemnity application brought by our clients.

We ask that your client reconsider his position in this respect.

Our Client's remuneration application

As your letter correctly points out, the process of complying with the Boddice J Orders in respect of the adjudication of eligible creditor claims against the EIF has only recently been concluded. As you would be aware, our client is entitled to be reimbursed from the EIF for their reasonable remuneration in respect of completing this work pursuant to order 8 of the Boddice J Orders.

With a view to limiting unnecessary costs being incurred, our client has taken the approach that it would be most cost effective to apply for the approval of all their remuneration in the one application. It is for this reason that the application has been delayed.

In any event, we can now confirm that we have received instructions to prepare that application and are currently in the process of doing so. We will of course serve that application on your client once that application has been filed.

We trust this letter clarifies our clients' position.

Yours faithfully
HEGARTY LEGAL



PETER HEGARTY

PRINCIPAL

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12 May 2020
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Brisbane QLD 4001

Attention: Peter Hegarty and Stuart Bailey

By email: peterh@hegartylegal.com.au; stuartb@hegartylegal.com.au

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

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 our letters dated 24 December 2019 and 31 March 2020 and your letters dated 15 January 2020 and 29 April 2020.

In our letter dated 31 March 2020, we noted that, contrary to your assertion that our client has "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. This is despite repeated requests for clarification and information in that regard. We referred to the very extensive correspondence from our firm to you in that regard, and in particular referred to 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.

We have sought to obtain from your clients a clear indication of what, if any, claim for indemnity from the assets of the EIF your clients claim in relation 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 sought further information from your clients sufficient to allow our client to properly assess the Liquidators' Claims, if they are being pressed.

We advised in our letter dated 31 March 2020 that, 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.

Your letter dated 29 April 2020 now says your client will apply for approval of remuneration but provides no indication of the nature of the Liquidators' Claims, nor does it provide any of the further information sought by our client.

In an endeavour to clarify what remuneration your clients will be seeking approval for, we note that your clients have previously raised the following claims for indemnity from the assets of the EIF:

1. in regard to the period of the administration of EL, by letter dated 31 August 2012 from your clients' then-solicitors, Thomsons Lawyers (later Thomson Geer – **Thomsons**), to us, your clients claimed an indemnity for "their fees" in the amount of \$805,486; and
2. in regard to the period of the liquidation of EL, by letter dated 23 September 2016 from Thomsons to us, your clients claimed an indemnity in the following amounts:
 - (a) for their remuneration – \$1,228,325.00; and

- (b) for their disbursements – \$929,640.16.

For completeness we note that, in regard to Federal Court of Australia proceedings NSD 2028 of 2013 and NSD 2025 of 2013 (known as the **Auditor Proceedings**), we presume that your clients will be seeking approval of the following remuneration but will not make any indemnity claim against the assets of the EIF, given that:

3. by letter dated 26 June 2019 from your client Mr Pleash to us, Mr Pleash stated that:
 - (a) your clients claim an amount of \$386,654.92 for their remuneration, which amount had already been paid by the litigation funder into the trust account of Squire Patton Boggs, your clients' solicitors in the Auditor Proceedings; and
 - (b) your clients intend to seek approval of their remuneration in the amount of \$273,801, being the balance of the claimed amount of \$386,654.92 that Mr Pleash stated had not then been approved;
4. on 28 June 2019, at the hearing of your clients' judicial advice application in regard to the Auditor Proceedings (NSD 830 of 2019, 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*"; and
 - (b) 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*";¹
5. by letter dated 7 August 2019 from your firm to us, your clients:
 - (a) claimed that they "*have a clear right of recovery from the funds received from the Funder in respect of their remuneration for undertaking*" the Auditor Proceedings and the Advice Proceedings; and
 - (b) advised that, in accordance with the settlement agreement in the Auditor Proceedings, your clients' costs in the Advice Proceedings under paragraph 12 of the Order of Justice Jagot dated 28 June 2019 will be "*satisfied from amounts recovered*".

Request for information

As previously advised, it is our client's intention to now proceed to take steps to conclude his receivership of the EIF. We note your advice that your clients have instructed you to prepare an application seeking approval of unspecified remuneration. Please advise whether your client's application includes any of the amounts referred to in (1) or (2) above, and if so, which amounts. In that regard, we note once again that our client intends to rely on the representation by your client Mr Albarran at the first meeting of creditors of EL that no costs of the administration would be charged to the EIF. Further, please advise whether your clients press an indemnity from the assets of the EIF in regard to any of the categories of costs referred to in (1) or (2) above, and if so, which categories of costs and in what amounts.

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

The above sought information impacts on our client's application to conclude the receivership. Accordingly, please let us have your response to this letter within 7 days.

Yours faithfully



Craig Melrose
Solicitor

Craig Melrose

From: Craig Melrose <Craig.Melrose@gadens.com>
Sent: Tuesday, 26 May 2020 4:34 PM
To: Peter Hegarty; Stuart Bailey
Cc: Scott Couper
Subject: FW: In the Matter of Equititrust Limited [GQ-BD.FID525428]
Attachments: Letter to Hegarty Legal (12.05.2020).PDF

Dear Colleagues,

We called this afternoon regarding the below.

We refer to our attached letter dated 12 May 2020 and in particular to our request that you advise, within 7 days, whether your clients' foreshadowed application for approval of their remuneration includes any of the amounts referred to in paragraphs 1 and 2 of our letter; and whether your clients press an indemnity from the assets of the EIF in regard to any of the categories of costs referred to in those paragraphs.

We have not heard from you in that regard.

This request is relevant to our client's application to finalise the receivership, and is a reasonable request for further information in that context.

Accordingly, please advise by return whether you expect to receive instructions to respond to our letter dated 12 May 2020, and if so, when you expect to respond.

Yours faithfully,

Craig Melrose | Solicitor | [gadens](#)
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Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Craig Melrose <Craig.Melrose@gadens.com>
Sent: Tuesday, 12 May 2020 4:51 PM
To: Peter Hegarty <peterh@hegartylegal.com.au>; Stuart Bailey <stuartb@hegartylegal.com.au>
Cc: Scott Couper <Scott.Couper@gadens.com>
Subject: In the Matter of Equititrust Limited [GQ-BD.FID525428]

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Please see attached correspondence.

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"DW-13"

Alisha Morris

From: Craig Melrose <Craig.Melrose@gadens.com>
Sent: Thursday, 10 September 2020 8:59 AM
To: Peter Hegarty; Stuart Bailey
Cc: Scott Couper; Jacqueline Ogden
Subject: FW: In the Matter of Equititrust Limited [GQ-BD.FID525428]
Attachments: Letter to Hegarty Legal (12.05.2020).PDF

Dear Colleagues,

We refer to our letter attached dated 12 May 2020 and our below email dated 26 May 2020. We note that we have not received a response to that letter or that email.

In previous correspondence to us, you have advised that you hold instructions to make an application for approval of your clients remuneration, and that you would serve us with that application. We have not received service of any such application. Please advise whether your clients still intend to make an application to Court for approval of their remuneration. If so, please advise when they intend to do so, and whether such application is intended to deal with claims for approval of remuneration in regard to your clients' work as administrators of EL, liquidators of EL and/or in regard to the Federal Court proceedings against the auditors.

If, on the other hand, your clients intend to seek approval of their remuneration from a meeting of EL's creditors or committee of inspection, please advise whether your clients have called or intend to call a meeting of creditors or the committee of inspection. If any meeting has been called or is to be called, please provide us of the date and time of that meeting and provide us with copies of the material to be put before the creditors or committee of inspection in support of your clients' claims for approval of their remuneration. In that regard, we note that your clients have advised in a number of occasions that they intend to make an application to the Court for approval of their remuneration rather than seek such approval from a meeting of EL's creditors or committee of inspection.

We note that the above information should be readily available and should not take 4 months to respond to. Please let us have your response to this email by 4pm on Friday, 11 September 2020.

Yours faithfully,

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12 May 2020
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

By email: peterh@hegartylegal.com.au; stuartb@hegartylegal.com.au

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 - (a) your clients claim an amount of \$386,654.92 for their remuneration, which amount had already been paid by the litigation funder into the trust account of Squire Patton Boggs, your clients' solicitors in the Auditor Proceedings; and
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¹ Transcript of hearing in NSD 830 of 2019 dated 28 June 2019 before Jagot J, P-3, L 21-26

The above sought information impacts on our client's application to conclude the receivership. Accordingly, please let us have your response to this letter within 7 days.

Yours faithfully



Craig Melrose
Solicitor

"DW-14"

Alisha Morris

From: Craig Melrose <Craig.Melrose@gadens.com>
Sent: Monday, 21 September 2020 4:00 PM
To: Peter Hegarty; Stuart Bailey
Cc: Scott Couper; Jacqueline Ogden
Subject: FW: In the Matter of Equititrust Limited [GQ-BD.FID525428]

Dear Colleagues,

We refer to the below emails.

We understand that your clients sought approval of their remuneration from the EL committee of inspection last week. Please advise the outcome of that application, and if the remuneration was not approved, whether your clients intend to apply to Court for approval of their remuneration, and if so, when that application is expected to be made.

Please let us have your response to this email by 4pm on Wednesday, 23 September 2020.

Yours faithfully,

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Sent: Thursday, 10 September 2020 8:59 AM
To: Peter Hegarty <peterh@hegartylegal.com.au>; Stuart Bailey <stuartb@hegartylegal.com.au>
Cc: Scott Couper <Scott.Couper@gadens.com>; Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Subject: FW: In the Matter of Equititrust Limited [GQ-BD.FID525428]

Dear Colleagues,

We refer to our letter attached dated 12 May 2020 and our below email dated 26 May 2020. We note that we have not received a response to that letter or that email.

In previous correspondence to us, you have advised that you hold instructions to make an application for approval of your clients remuneration, and that you would serve us with that application. We have not received service of any such application. Please advise whether your clients still intend to make an application to Court for approval of their remuneration. If so, please advise when they intend to do so, and whether such application is intended to deal with

claims for approval of remuneration in regard to your clients' work as administrators of EL, liquidators of EL and/or in regard to the Federal Court proceedings against the auditors.

If, on the other hand, your clients intend to seek approval of their remuneration from a meeting of EL's creditors or committee of inspection, please advise whether your clients have called or intend to call a meeting of creditors or the committee of inspection. If any meeting has been called or is to be called, please provide us of the date and time of that meeting and provide us with copies of the material to be put before the creditors or committee of inspection in support of your clients' claims for approval of their remuneration. In that regard, we note that your clients have advised in a number of occasions that they intend to make an application to the Court for approval of their remuneration rather than seek such approval from a meeting of EL's creditors or committee of inspection.

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We have not heard from you in that regard.

This request is relevant to our client's application to finalise the receivership, and is a reasonable request for further information in that context.

Accordingly, please advise by return whether you expect to receive instructions to respond to our letter dated 12 May 2020, and if so, when you expect to respond.

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17 June 2021

Hegarty Legal
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SYDNEY NSW 2000

ONE ONE ONE
111 Eagle Street
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Australia

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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)*¹ 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 1,² 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.

¹ [2015] VSC 126 at [18].

² "*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



Scott Couper
Partner

Enc.

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31 March 2020

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

Attention: Peter Hegarty

By email: 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.

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";*¹
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)² 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.

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

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

In *Carter Holt Harvey Woodproducts v Commonwealth*,³ the High Court approved statements of principle made by the Full Court of the Supreme Court of South Australia in *Re Suco Gold*,⁴ 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*,⁵ 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)*,⁶ 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)*,⁷ (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)*,⁸ (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

³ (2019) 368 ALR 390; [2019] HCA 20

⁴ (1983) 33 SASR 99

⁵ [2019] QCS 245

⁶ [2019] FCA 924

⁷ (1933) 48 CLR 171

⁸ [1989] Ch 32

21 June 2019

Squire Patton Boggs
Level 17
88 Phillip Street
Sydney NSW 2000

Attention: Susan Goodman and Amanda Banton

By email: susan.goodman@squirepb.com; amanda.banton@squirepb.com

Dear Colleagues

Equititrust: Equititrust Limited (In Liquidation) (Receiver Appointed) (Receivers and Managers Appointed)

Proceedings: Federal Court Proceedings NSD830 of 2019

We refer to our letters dated 11 June 2019 and 18 June 2019.

We also refer to your clients' application heard before Justice Jagot in the Federal Court of Australia yesterday, 20 June 2019 and the orders made by her Honour dated 20 June 2019.

We note that your clients' application is adjourned to 2.15pm on Friday 28 June 2019.

We write to you to further raise with you our client's concerns which were articulated at the hearing yesterday. That is, our client does not oppose the proposed settlement, in principle, but the information provided by the applicants to date does not allow our client to assess whether the proposed settlement is in the best interests of the EIF or the EPCIF and in particular to understand the economic outcome of the proposed settlement.

This is particularly the case given that there will be no return to the EIF or the EPF, or to creditors, as a result of the proposed settlement. That is, the legal and liquidation costs and the litigation funder's commission will consume the entire settlement amount.

As you are aware and as was set out in our letters to you dated 11 and 19 June 2019, to understand the economic outcome of the proposed settlement, our client had asked for further information, including details of the amounts that your clients intend to deduct from the settlement sums they will receive under the deed (assuming that favourable judicial advice is received). These amounts include the funding fee, solicitors' fees and liquidators' fees.

From the information provided to us by you, for the first time, at the hearing yesterday, it appears that in relation to the EIF proceedings, the solicitors fees and disbursements and the liquidators fees incurred and paid total \$10,093,776.49. No further breakdown of these costs has been provided.

From the information provided to us by you, for the first time, at the hearing yesterday, it appears that in relation to the EPF proceedings, the solicitors fees and disbursements and the liquidators fees incurred and paid total \$1,699,557.49. No further breakdown of these costs has been provided.

As you are aware, in our letters to you dated 11 and 19 June 2019 we sought from you a breakdown of the following amounts (adopting the defined terms in the Litigation Funding Deed):

1. the Resolution Sum;
2. the EIF Resolution Sum;

3. the Funding Fee;
4. the EIF Funding Fee;
5. the Legal Costs;
6. the LIQ Costs;
7. the EIF Costs; and
8. the EIF Percentage Payment.

In addition to the above, given our client's interest in the EPF Proceedings, we sought from you a breakdown of the following amounts:

1. the EPF Resolution Sum;
2. the EPF Funding Fee;
3. the EPF Costs; and
4. the EPF Percentage Payment.

To date we have not been provided with this information from you.

Do your clients intend to put further evidence before the Court to fully explain the costs incurred, including the above information? Do your clients intend to put further evidence before the Court to fully explain, in relation to the EIF proceedings, the solicitors' fees and disbursements and the liquidators fees incurred and paid totalling \$10,093,776.49? Do your clients intend to put further evidence before the Court to fully explain, in relation to the EPF proceedings, the solicitors' fees and disbursements and the liquidators fees incurred and paid totalling \$1,699,557.49?

In addition to the above, our client remains concerned that the liquidators intend to deduct costs and expenses from the settlement sum, which they will receive in their capacity as liquidators of the responsible entity and trustee of the EIF and the EPF:

- (a) without any determination having been made as to whether the liquidators are entitled to a right of indemnity from the assets of the EIF or the EPF in respect of their costs and expenses, and if so, to what extent (or if that determination has been made, any explanation of the basis for it); and
- (b) in circumstances where such costs and expenses appear to include liquidators' remuneration, and there is no evidence before the Court that the liquidators have had their remuneration approved either by the Committee of Creditors, the Committee of Inspection or the Court, or any evidence as to whether the liquidators intend to take steps to obtain approval prior to deducting such costs and expenses.

Our client's concerns are heightened in circumstances where the liquidators have stated that they believe that existing orders of the Supreme Court of Queensland dated 2 April 2019 do not apply to sums received in discharge of the liquidators' remuneration with respect to the EIF or EPF Proceedings.

Further, it is not at all clear to us whether the liquidators intend to seek yet further remuneration and costs in relation to the EIF proceedings (including in relation to the present application itself) and to claim an indemnity from the EIF in respect of any such further remuneration and costs. Accordingly, please provide us with the following information:

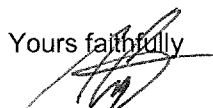
- (a) the total amount of the liquidators' remuneration claimed and paid by the litigation funder for each of the EIF and EPF Proceedings;
- (b) whether the liquidators' remuneration referred to in paragraph (a) above has been approved and if so, how it was approved;

- (c) if the said remuneration has not been approved, when the liquidators intend to seek approval for that remuneration and how they intend to seek that approval;
- (d) if the said remuneration has not been approved, the basis upon which the said remuneration has been paid;
- (e) if the said remuneration has been paid, whether the funds have been dispersed by the liquidators and if so how; if not, where those funds are currently held;
- (f) if the liquidators intend 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, the amount of that remuneration and costs and full details of how that remuneration and costs were incurred;
- (g) how the liquidators intend to make a claim for any further remuneration and costs and the basis for that claim for remuneration and costs.

Your clients will appreciate that the above information is clearly relevant to the economic outcome of the proposed settlement. That is, at present it appears that, at best, the economic outcome of the proposed settlement for the EIF is a nil return. However, if the liquidators intend to seek further remuneration and costs to be paid by the EIF, over and above that which has already been paid by the litigation funder, the economic outcome of the proposed settlement for the unitholders is that the EIF Proceedings will result in a loss to those unitholders.

In order to allow our client sufficient time to consider the information sought in advance of the adjourned hearing on 28 June 2019, would you please let us have your response by close of business, Tuesday, 25 June 2019.

Yours faithfully



Scott Couper
Partner

26 June 2019

Craig Melrose
Gadens
Level 11, 111 Eagle Street
Brisbane, QLD, Australia 4000

Via Email: craig.melrose@gadens.com

Dear Sir,

**Re: Equititrust Limited (Receivers and Managers Appointed)
(In Liquidation) (Receiver Appointed) ("the Company")**

I refer to your correspondence of 21 June 2019 to our lawyers, Squire Patton Boggs.

I have responded to your queries commencing on the second page of your correspondence with respect to our remuneration, noting however this remuneration is only with respect to the Proceedings NSD 2028 of 2013 and NSD 2025 of 2013 (i.e. the EIF and the EPF Proceedings) ("the Proceedings").

This correspondence does not relate to remuneration incurred with respect to the balance of the matter.

In that regard I provide the following:

- 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.
- 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.

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Please don't hesitate to contact me should you wish to discuss this further.

Yours Faithfully



Blair Pleash
Liquidator

CC: Scott Couper, Scott.Couper@gadens.com
Jacqueline Ogden, Jacqueline.Ogden@gadens.com



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Ordered by: Renee Cunningham

For: Gadens Lawyers (QLD)

Email: renee.cunningham@gadens.com

TRANSCRIPT OF PROCEEDINGS

O/N H-1044562

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

JAGOT J

No. NSD 830 of 2019

**IN THE MATTER OF EQUITITRUST LIMITED
(IN LIQUIDATION) (RECEIVER APPOINTED)
(RECEIVERS AND MANAGERS APPOINTED)**

SYDNEY

2.16 PM, FRIDAY, 28 JUNE 2019

MR C.H. WITHERS appears for the applicant

MR J. ENTWISLE appears for KPMG

MS P. AHERN appears for the court appointed receiver

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MR C.H. WITHERS: If it please the court, my name is Withers.

HER HONOUR: Mr Withers.

5 MR WITHERS: I appear for the applicant.

MR J. ENTWISLE: May it please the court, Entwisle, E-n-t-w-i-s-l-e. I appear for KPMG and interested parties seeking leave.

10 MS P. AHERN: May it please the court, my surname is Ahern, initial P. I appear for the court-appointed receiver of the Equititrust Income Fund and the Equity Priority Class Income Fund.

HER HONOUR: Yes. Thank you, Ms Ahern. All right. Now.

15 MR WITHERS: I'm just going to hand up at the moment an affidavit of the liquidator, Mr Pleash, and I seek leave to – sorry, seek leave to file it electronically and hand up a copy to your Honour.

20 HER HONOUR: Yes. Yes. Yes.

MR WITHERS: What your Honour will see from that is that the liquidators have complied with the orders that were made to publish the notice on the website and they have not received any objections from any unit holders or creditors, and the
25 receivers for the EPF have indicated that they don't have any objection to the application.

HER HONOUR: Yes. All right. So nobody has got an objection to that affidavit?

30 MS AHERN: I've just received it, your Honour.

MR ENTWISLE: I don't think I've got a copy - - -

HER HONOUR: You haven't got it yet?

35 MR ENTWISLE: - - - but I don't imagine I would.

HER HONOUR: Is there a spare copy for Mr Entwisle?

40 MR WITHERS: We can give a copy to - - -

MR ENTWISLE: No objection.

HER HONOUR: No objections?

45 MS AHERN: No objection, your Honour.

HER HONOUR: Thank you. All right. So that affidavit is read. Now, there were a few other affidavits that came in as well, I think. Is it one from Mr Melrose?

MS AHERN: Yes, your Honour. That's an affidavit of my instructing solicitor.
5 That was filed last night.

HER HONOUR: Any objections to that affidavit?

MR WITHERS: The matters that it raises aren't really relevant to this application,
10 but we won't take any objection to the affidavit.

HER HONOUR: No. Okay. So that affidavit is read. And then I did receive two sets of submissions: one from KPMG, and one on behalf of Mr Whyte, which I've read. Okay.
15

MR WITHERS: It seems that my learned friend, on behalf of Mr Whyte, has some matters that she wishes to raise about the application. They seem to concern the remuneration for the liquidators and they seek some undertakings from the liquidators in the terms set out in paragraph 24. There is then – the undertaking that's at paragraph 24(b) the liquidators are content to give. The undertaking that's at paragraph 24(a) they are not content to give because 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 and there's nothing –
20 there's no reason why we should have to come back to court to obtain a further order that those funds be distributed.
25

HER HONOUR: So – sorry. What are you saying: that the orders you seek in this – I didn't follow what you just said.
30

MR WITHERS: Yes. There's - - -

HER HONOUR: You have to slow down.

MR WITHERS: There is – we have an application on for approval - - -
35

HER HONOUR: Of the settlement.

MR WITHERS: - - - of the settlement, and our learned Ms Ahern is seeking some undertakings from the liquidators. I'm not really quite sure what basis upon which those undertakings are sought, and perhaps your Honour ought to hear from Ms Ahern about that.
40

HER HONOUR: Right. Okay. And the basis that it's (a) that's in issue. You're willing to - - -
45

MR WITHERS: (a) is the only one that's in issue. We don't really see a need to give an undertaking, but we're prepared to give the one in paragraph 24(b).

5 HER HONOUR: Okay. Well, I'm happy to hear from Ms Ahern about the reason for (a).

10 MS AHERN: Your Honour, we haven't as yet seen any application for approval of this remuneration. If what is sought by way of that application is an order that the liquidators be entitled to an indemnity from the assets of the – I presume Equititrust Income Fund in respect of a certain amount, that might deal with my – with the issue that I have, if that is what Mr Withers' client intends to do as part of that application for remuneration. It would be the ordinary thing, I think.

15 HER HONOUR: Because I take the point that's in – I think it's KPMGs submissions that all I'm doing is approving the settlement and the particular split that the settlement represents. I'm not approving anything else in doing - - -

20 MR WITHERS: That's right. Now, that's why – exactly right, your Honour, and that's why your Honour doesn't need to get into issues about liquidators' remuneration. What your Honour is being asked to do is express a view about whether this is a reasonable settlement and a reasonable division, and it doesn't seem to us that the liquidators' remuneration is a relevant consideration in that analysis.

25 HER HONOUR: Because there will be separate application.

MR WITHERS: Because there will be separate applications.

30 HER HONOUR: So – I mean, that sounds logical – is there will have to be a separate application for liquidators' remunerations. So why would I require what will be required in any event by an undertaking?

MS AHERN: Yes. I will take that point, your Honour. Thank you.

35 HER HONOUR: Okay. But you are happy, Mr Withers, to give the undertaking referred to in paragraph 24(b)?

MR WITHERS: Yes, your Honour.

40 HER HONOUR: Okay. All right. Now, are there other things that people want to put to me?

45 MR ENTWISLE: No. KPMG relies on their written submissions that have been sent to you. The only point of distinction between approving the settlement and what's paid under it – and we all understand what you say on confidentiality. I won't repeat the written submissions save to say it's important to KPMG the confidentiality is observed and both in any judgment arising from today.

HER HONOUR: Ms Ahern, do you have anything further?

5 MS AHERN: The only further thing I wish to raise, your Honour, related to the orders that were made in Supreme Court of Queensland proceedings in April of this year.

HER HONOUR: Yes. I saw that in your submissions.

10 MS AHERN: Yes. My clients have asked on a number of occasions for an indication from the liquidator that the liquidator intends to comply with these orders in respect of the settlement sum. That indication has not been given. We have also invited them to give an undertaking in respect of that. As I apprehend it, it's not yet given. I did want to raise that we have requested – put on the record that we have requested that.

15 MR WITHERS: The liquidators, as officers of the court, don't need to give an undertaking to adhere to orders of the court.

20 HER HONOUR: I mean, the order is there. It's in its terms. They're obliged to comply with whatever the terms are, and that seems to be it, to me.

MS AHERN: Thank you, your Honour.

25 HER HONOUR: Okay.

MS AHERN: The only other thing I would ask is that – the point has been made by KPMG that your Honour is only being asked to approve the payment – sorry, the settlement itself and not the payments being made under that.

30 HER HONOUR: Yes. That's true.

MS AHERN: I would ask if your Honour would be minded to make that clear in any judgment if your Honour intends to reserve it.

35 HER HONOUR: Right. Well, there will be a judgment, but what I proposed to do was to make orders today and give reasons later with the benefit of all the submissions.

40 MS AHERN: Thank you, your Honour.

HER HONOUR: What's the final form of the short minutes of order that you want? I just want to make sure I've got the right version.

45 MR WITHERS: Yes. It was those that were handed up on the last occasion, and I think I - - -

HER HONOUR: I've got a 20 June version.

MR WITHERS: There should be a 28 June – there’s – I’ve now got a 28 June version.

HER HONOUR: Okay.

5

MR WITHERS: They’ve been a little bit updated, apparently.

HER HONOUR: Okay. So annexure A needs to go on these. So is that the amended originating process that was on the 20 June version? It’s exactly the same?

10

MR WITHERS: That’s right. Yes. Yes. That’s right, your Honour.

HER HONOUR: Okay. So – because we will get these electronically sent to us in order to make – so let me just – so when you send it, it just needs to have annexure A on it.

15

MR WITHERS: Annexure – yes. We don’t need order 11, your Honour.

HER HONOUR: Okay. I’m not quite there yet. So you don’t need the confidentiality order?

20

MR WITHERS: No, because that’s about an affidavit I was going to read today, but I haven’t read today.

25

HER HONOUR: I see. Okay.

MR WITHERS: Your Honour has already made confidentiality orders in chambers, I think, after the last hearing.

30

HER HONOUR: Okay. So – well, I assume that 11 will be deleted from the version you send up to me.

MR WITHERS: It will be, yes, your Honour.

35

HER HONOUR: And then the first matter’s costs – I’m content with those orders. Is anybody pointing out anything in the orders? No?

MS AHERN: No, nothing further, your Honour.

40

HER HONOUR: All right. Well, I will make orders – it will be 1 through to 11 – 12. It will be one short. So if they can be emailed up with the annexure. And I will give some reasons for – short reasons in a deferred decision that will be emailed to the parties when it’s ready.

45

MR WITHERS: If it pleases the court. Thank you, your Honour.

HER HONOUR: Thank you. We will adjourn.

MATTER ADJOURNED at 2.27 pm INDEFINITELY

Our Reference Jacqueline Ogden 201110996
Direct Line +61 7 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

"DW-19"

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25 July 2019

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

Attention: Peter Hegarty

By email: 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 (EIF)

We refer to the Orders made by Justice Boddice on 2 April 2019 (the **Boddice Orders**) as well as our subsequent correspondence dated 16 April 2019 wherein we sought confirmation that your clients will comply with the Boddice Orders by proceeding promptly with the process referred to in paragraphs 1(a), 1(b) and 1(c) of that order and your response of 2 May 2019 wherein you indicated your clients were proceeding to comply with the Boddice Orders.

We have not received any further update from you.

We are instructed to now write to you regarding resolving the outstanding matters under the Boddice Orders, as well as addressing other outstanding matters which will need to be finalised in order for the winding up of the EIF to be completed, including your client's claim for an indemnity from the EIF in respect of their remuneration and costs as administrators and liquidators of EL.

We address each of these matters below.

Judicial Advice Application

As you would be aware, your client Liquidators have now sought (and received) orders from the Court in Federal Court Proceedings NSD830 of 2019 (**Judicial Advice Proceedings**) including orders that they are justified in causing EL to give effect to the terms of the Settlement Deed dated 17 December 2018 in relation to the compromise of claims brought by EL in Federal Court of Australia Proceedings no NSD 2028 of 2013 and NSD 2025 of 2013 (collectively, the **Auditor Proceedings**).

The result of this compromise is that no monies will be paid to either the creditors or investors of EIF (or the Equititrust Premium Fund (**EPF**)).

We recently wrote to your clients' solicitors in the Judicial Advice Proceedings, Squire Patton Boggs, regarding two matters which arose out of the hearing of the Judicial Advice Proceedings on 28 June 2019.

A copy of that correspondence dated 4 July 2019, is **enclosed** for your ease of reference.

We have now received a response from Squire Patton Boggs advising that they are not instructed in relation to the Liquidators' remuneration and directing us to correspond directly with the Liquidators regarding the matters raised in our letter.

Given you act for the Liquidators in relation to their claimed remuneration, we consider it appropriate to raise these matters with you at first instance. However, if you are no longer instructed by the Liquidators in respect of their remuneration, please tell us so that we may write to them directly to raise these matters with them.

As stated in our letter of 4 July 2019, at the hearing of the Judicial Advice Proceedings on 28 June 2019 your clients' Counsel advised the Court that your client Liquidators were prepared to provide an undertaking to the Court in the form referred to in paragraph 24(b) of our client's written submissions dated 27 June 2019.

A copy of the transcript of the hearing on 28 June 2019 and our client's written submissions are enclosed with our letter of 4 July 2019.

We note that the undertaking provided by the Liquidators to the Court was that:

"They will not make any further claim for indemnity from the assets of these schemes 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."

In light of this undertaking, we understand your client Liquidators will not be making any further claim for indemnity from the assets of the EIF in respect of their costs or remuneration incurred in relation to the Auditor Proceedings or their application for judicial advice.

Would you please confirm that our understanding is correct within 7 days of this letter.

Your clients' claim for an indemnity from the EIF for their remuneration as administrators and liquidators of EL

As you are aware, we have previously written to you regarding your clients' claim for an indemnity from the EIF in respect of their remuneration as administrators and liquidators of EL (not in relation to the Auditor Proceedings).

For example, by our letter dated 28 November 2017, we outlined our client's position in respect of your client's claim for an indemnity out of the EIF for their remuneration of the period from 20 April 2012 to 29 February 2016.

This claim remains to be resolved.

Subsequent to this and in the context of the Judicial Advice Proceedings, your clients, Mr Pleash, wrote to us on 26 June 2019 and advised that:

- (a) 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;
- (b) the Liquidators will seek *Court approval* for the balance of the \$273,801;
- (c) the litigation funder has paid \$335,000.00 into Squire Patton Boggs trust account on trust for the Liquidators for part of their remuneration claimed;
- (d) the Liquidators intend on seeking approval of the \$273,801 which will be paid by the litigation funder. There is no further remuneration incurred in respect of the Auditor Proceedings for which the Liquidators will be seeking approval or pursuing a claim under the indemnity from the EIF or the EPF.

A copy of that letter is **enclosed** for your ease of reference.

Your clients' Counsel also confirmed to the Court at the hearing on 28 June 2019 that your client Liquidators would be making a separate application for approval of their remuneration (see enclosed transcript p-4, lines 18 to 26). In light of that, it was submitted that the undertaking our client invited your clients to provide to the Court, at paragraph 24(a) of our written submissions, was unnecessary. It was also submitted that an undertaking from your clients that they would comply with the orders of Justice Boddice dated 2 April 2019 (**Boddice Orders**) was also unnecessary given that "[t]he liquidators,

as officers of the court, don't need to give an undertaking to adhere to orders of the court" (see the enclosed transcript at page p-5, lines 16 to 17).

We are instructed that our client has become aware that on or about 8 July 2019 the Liquidators sought approval from the committee of inspection for their remuneration as liquidators of EL.

We are not aware precisely of the period of time being sought for the approval, or the amount of remuneration being sought to be approved by the committee.

We further understand that, contrary to those matters stated in your clients' letter to us dated 26 June 2019, there is an amount of approximately \$500,000 held in trust for payment of their fees. As we understand it, that amount of \$500,000 is comprised of monies produced from the claims brought by EL in Federal Court of Australia Proceedings no NSD 2028 of 2013 and NSD 2025 of 2013, as well as other monies.

It is concerning to our client that, contrary to the statements made previously by your client and by your clients' Counsel to the Court at the hearing on 28 June 2019 – that your clients would be seeking Court approval for their remuneration – that your clients have now approached the committee of inspection to approve their fees.

Furthermore, we note that resolutions for approval of the Liquidators' remuneration were also put to creditors at a meeting held on 28 May 2018, but in each case the resolutions were voted upon and lost on the voices.

As you would be aware, the monies held in trust (to the extent that they are EIF trust monies, being proceeds resulting from the compromise recently reached in relation to the claim brought by EL in Federal Court of Australia Proceedings no NSD 2028 of 2013) can only be used to satisfy trust liabilities.

This matter was considered by the High Court in the recent decision of *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors* [2019] HCA 20. In that case, the High Court finally resolved the longstanding tension between the Full Court of the South Australian Supreme Court's decision in *Re Suco Gold Pty Ltd (In Liq)* (1983) 33 SASR 99 (**Re Suco**) and the Victorian Supreme Court's decision in *Re Enhill Pty Ltd* [1983] 1 VR 561, preferring the approach in *Re Suco*.

Accordingly, proceeds from an exercise of a corporate trustee's right of exoneration in respect of trust liabilities may be applied only in satisfaction of the trust liabilities to which that right relates.

While the High Court decision did not consider specifically the issue of liquidators' remuneration, her Honour Justice Gordon did make the following observations which are directly relevant to your client's position:

- (a) a liquidator of multiple trusts should be viewed as "*holding multiple funds, each directed to different groups of creditors ... the funds can only be applied to satisfy debts incurred to creditors of the relevant trust*";
- (b) "*the trust funds should be kept separate and, where this causes practical difficulties or expense, the liquidator can apply to the court for directions*";
- (c) "*Section 90-15(1) of the Insolvency Practice Schedule now provides a source of power for the court to provide directions to liquidators, and relevantly provides that the court may make "such orders as it things fit" in relation the "external administration" of a company*";
- (d) "*The expenses of the winding up could be apportioned across each trust on the basis of the extent to which the work of the relevant authority related to each trust. However, if apportioning the expenses across the multiple trusts created practical difficulties, the relevant authority (namely, the liquidator...) should apply to the court for directions in relation to their costs*".

Accordingly, to the extent the remuneration being sought by your client Liquidators relates to the EIF (that is the remuneration sought to be approved by creditors or the committee), it is appropriate that your client Liquidators seek directions from the Court in relation to this remuneration, as your clients have advised the Court they would do.

Any creditor approval or committee approval (even if it was obtained) is not determinative, and in the circumstances outlined above our client considers it appropriate that your clients seek the approval of the Court before distributing any monies held in trust, given:

- (a) EL acted for multiple funds and in its own right;
- (b) the previous statements made by your client that they would be seeking Court approval for their remuneration;
- (c) the statement made by your clients' Counsel that Court approval would be sought.

In any event, and for the avoidance of doubt, we note that in accordance with paragraph 11 of the Boddice Orders your clients are required to provide written notice to our client before making any distribution of funds recovered by them in the liquidation. In our view, that includes any distribution of the monies held in trust.

If your clients have a different view regarding the matters set out above, please tell us immediately.

Otherwise, please confirm our understanding that your clients intend to make an application to Court in respect of approval of their remuneration and tell us when they intend to make that application.

Timing of finalising the winding up of the EIF

The Boddice Orders requires your clients (among other things), in paragraphs 1(a), 1(b) and 1(c) of that order, to now ascertain and adjudicate on debts payable by and claims against EL and to identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which is admitted by your clients in the winding up of EL following that process of ascertainment and adjudication.

Your clients had indicated in early May 2019 that they were now proceeding to comply with the Boddice Orders. Notwithstanding this, we have not received any further correspondence from you.

Our client intends to shortly provide an update to EIF investors which will include an update regarding the Judicial Advice Application and a summary of the next steps required to finalise the EIF receivership.

In that update, he would like to indicate to EIF investors when the remaining matters required to finalise the EIF receivership will be completed.

In order so that our client may provide that update to investors, would you please tell us:

- (a) when your clients anticipate ascertaining and adjudicating on the debts payable by and claims against EL;
- (b) when your clients anticipate being in a position to identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which is admitted by your clients in the winding up of EL following that process of ascertainment and adjudication;
- (c) when your clients anticipate making any such claim for an indemnity from the EIF in accordance with the Boddice Orders;
- (d) when your clients anticipate making an application for approval of their remuneration (as foreshadowed by your client and your clients' Counsel at the hearing on 28 June 2019, discussed further above).

Would you please let us have your response within 7 days.

Yours faithfully

A handwritten signature in black ink, appearing to be 'J. Ogden', written over the printed name.

Jacqueline Ogden
Director

Enc.

Our Ref: PJH:SB:1012
Your Ref: Scott Couper

7 August 2019

Scott.couper@gadens.com.au; Jacqueline.ogden@gadens.com
By email only

Gadens
111 Eagle Street
BRISBANE CITY QLD 4000
Australia

Dear Colleagues

In the matter of Equititrust Limited Supreme Court of Queensland Proceeding 10478 of 2011

We refer to your letter of 25 July 2019, Federal Court Proceedings NSD830/2019 (**Advice Proceedings**) and Federal Court Proceedings NSD2028/2013 and NSD2025/2013 (together the **EIF Proceedings**).

Previous undertaking

The scope of the undertaking is clear on its face and from the context in which the undertaking was provided.

It is not entirely clear to us precisely what further confirmation your client is seeking in addition to the undertaking as given. To the extent, your client considers there to be any ambiguity in relation to the matter or requires any clarification, please specify where the confusion lies and we will obtain the necessary instructions.

For the avoidance of doubt, our clients' position is that the undertaking does not preclude them from paying themselves from the funds they receive from International Litigation Partners No. 1 Pte Ltd (**Funder**) in respect of their remuneration for conducting the EIF Proceedings. This is made clear by our clients' refusal to provide the undertaking sought by your client at paragraph 24(a) of their submissions in the Advice Proceedings.

The undertaking relates to any "further" claim in respect of the Auditor Proceedings, as distinct from those already claimed. In this respect, your client would also be aware that Order 12 of the orders made by Jagot J on 28 June 2019 make provision for payment of the Plaintiff's costs from the EIF and EPF. This is of course in addition to the amount held in trust as identified by our clients (albeit in accordance with the settlement agreement it will be satisfied from amounts recovered).

Indemnity claim

Our clients have a clear right of recovery from the funds received from the Funder in respect of their remuneration for undertaking the Advice Proceedings and the EIF Proceedings under the subject Funding Agreement and otherwise pursuant to the principles set out in *Universal Distributing Co Ltd (in Liq)* (1933) 48 CLR 171.

We are instructed that our clients intend to seek Court approval of the remuneration for the work undertaken in respect of the Advice Proceedings and the EIF Proceedings, prior to drawing upon the funds received from the Funder.

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As your letter identifies, our clients also hold further monies received from Vannin Capital in respect of our client's remuneration in pursuing separate proceedings in respect of the Equititrust Premium Fund.

Update in respect of Boddice J Orders

Our clients intend to have called for proofs of debt in respect of the non-unitholder creditors by 30 August 2019, in accordance with the orders of Boddice J of 2 April 2019.

Once our clients have received the necessary information from the creditors, they will proceed to assess these claims in accordance with the terms of the orders of Boddice J of 2 April 2019.

As your client will doubtless appreciate, until such time as our clients have received this information from creditors they are not in a position to comment on the amount of time which may be required to complete this task as they do not know whether any further information will need to be sought from creditors or the extent to which they will need to seek legal advice prior to making any adjudication.

Timing of finalising the winding up of the EIF

Your client has indicated that it is his desire to finalise the winding up of the EIF as quickly as possible.

Despite your clients indication to this effect, it is unclear to us how your client intends to deal with what our clients consider are outstanding issues in respect of the winding up of the EIF which must be resolved if the matter is to be brought to a conclusion. To that end, our clients would be assisted if your client is able to provide us with answers to the following questions:

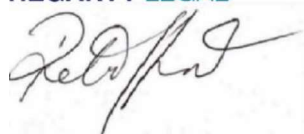
- 1) How can the winding up of the EIF be finalised without our client calling for proofs of debt from the unit holder creditors (noting that they were specifically excluded from the ambit of the Orders of Boddice J at your client's request)?
- 2) How can your client be sure that EL will not have a claim for indemnity from the EIF in respect of claims of unitholders? Does your client intend to seek directions from the Court in respect of these claims?
- 3) Is your client prepared to consent to an order, along the lines of the order made by Boddice J on 2 April 2019, that our clients be indemnified from the EIF for their costs and remuneration in making their application for indemnity from the EIF? If not, why not?
- 4) If your client is not prepared to provide funding for our clients to pursue EL's indemnity claim against the EIF, how do they propose to finalise the winding up with EL's indemnity claim outstanding, absent there being any direction from the Court?

Our clients also wish to see the winding up finalised as promptly as possible, but are constrained by their available funding. Once our clients receive their responses to the above enquiries, they will be better placed to work constructively with your client to try and finalise matters.

We would be obliged if you could provide a response to the above questions within seven (7) days of this letter.

We await your response.

Yours faithfully
HEGARTY LEGAL



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