IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COURT OF APPEAL

SACPI 2011 0103

BETWEEN:

GRAHAM GOLDENBERG & ORS (according to the Schedule)

Appellants

- and -

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) & ORS (according the schedule attached)

Respondents

OUTLINE OF SUBMISSIONS OF THE FUNDERS

Date of document:	~~28 September~~3 October 2012
Filed on behalf of:	MRB Equities Pty Ltd, Redvil Pty Ltd and Ferrari Investments Holdings Pty Ltd ("**Funders**")
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Introduction

1. The Funders support the approval of the compromise agreement entered into between the parties to the appeal. They do not seek to make any substantive changes to that agreement. Rather, in addition to the orders sought by the parties, they seek an additional declaration to the effect that they are entitled to an indemnity for their costs and fees, and an equitable lien to support that indemnity, from the settlement proceeds (known as the "Almond Settlement Amount" in the Deed of Compromise) that certain of the Respondents will pay to Timbercorp Securities Ltd ("**TSL**") if the compromise is approved.

2. The form of the order that the Funders seek is annexed as a schedule to these submissions. Paragraph A of "other matters" and paragraphs 1 and 3 of the substantive orders are based upon the form of orders set out in the Deed of Compromise. Paragraph 2 of the substantive orders is based upon the form of

order made her Honour, Davies J, in *Thackray v Gunns Plantations*[1], which case is referred to further below

Facts

3. The Funders assume that the history of the proceeding will be provided by the parties to the appeal. However, if that is not forthcoming in the submissions from the parties, then the Funders will provide a chronology to the court setting out the key events.

4. Nonetheless, it is relevant to note that, following the orders of Robson J made 17 June 2009, the various almond land assets that were the subject of this appeal were sold and although this resulted in a substantial fund, the claims upon that fund were even more substantial. The First Respondent then commenced proceedings by Originating Motion dated 15 December 2009. On 22 December 2009, Davies J ordered, pursuant to rule 16.01(2) of the Rules, that the Appellants would be the appointed representatives of the growers for the relevant particular Timbercorp Almond Projects and that they would joined as defendants to the proceeding. She also ordered that the costs of the representative parties (ie the Appellants) be paid from the fund.

5. In her judgment of 15 June 2011, Davies J found for the First and Second respondents ("**the Banks**"). By notice of appeal dated 11 July 2011, the representative parties (ie the Appellants) appealed.

6. By a summons dated 27 July 2011, the representative parties sought orders that the fund be reconstituted and they sought pre-emptive costs orders to be made in respect of the appeal in the same way as had occurred for the trial. However, this application was withdrawn as the lawyers for the representative parties formed the view that it would be unsuccessful. The representative parties were required to pay the Banks' costs of that aborted application which have been quantified at $25,000. As explained below, the Funders have paid this amount on behalf of the representative parties.

7. The solicitors for the representative parties sought funding from three commercial litigation funders. All refused to fund it. The solicitors also approached the chairpersons of various Timbercorp growers groups to see if the growers or

[1] (2011~~09~~) 85 ACSR 144.

financial planners might be prepared to fund the appeal. Those representatives said that the financial planners and the growers (who had already contributed significant funds to fight the various legal cases) would not be prepared to provide more funds.

8. One of those chairpersons, Chris Garnaut, then approached three of his clients to provide the funding for the litigation. They agreed to supply the funding in the circumstances set out in the affidavit of Eli Goldfinger dated 19 September 2012 and a funding agreement ("**Funding Agreement**") was entered into on 22 October 2011 between the Funders and the representative parties. The terms and conditions of the arrangement were based upon the terms and conditions that commercial litigation funders use in similar circumstances.

9. In essence, the Funding Agreement provided that the Funders would pay the costs of the appeal and any adverse costs orders made against the representative parties. In consideration for this, if the proceedings were successful or a settlement was obtained, the Funders would be entitled to:

   (a) repayment of any costs or expenses incurred;

   (b) 35% of any judgment amount (capped at $5,000,000); or

   (c) if the proceeding settled, then

      i. 17.5% of the settlement sum if the settlement was a global sum for all Timbercorp schemes; or

      ii. 35% of the settlement sum if the settlement allocated a discreet portion to the Almond Land schemes (which is what ultimately occurred).

10. Based upon this agreement, the appeal was able to proceed.

11. The Funding Agreement was subsequently amended on two occasions. On 18 December 2011 the premium to be paid to the Funders was reduced from 17.5%/35% to 15%/25%. The Funders openly acknowledge that this was to assist in the agreement being accepted by the Court as reasonable when the time came (as it now has) for a settlement to be approved. The amendments also provided for a mechanism to deal with any dispute between the Funders and the representative parties in the event that there was a disagreement amongst

them on whether the appeal should be settled. The amendments also imposed an obligation on the representative parties to use their best endeavours to obtain the approval of the Court for the payment of amounts due to the Funders under the Funding Agreement.

12. As set out below, the Funders claim is for 25% of the settlement sum relating to the Almond Land appeal only – that is 25% of the settlement sum of $6 million. A premium of 25% is at the lowest end of the premium usually required by litigation funders[2]. Of course, if one considers the entire settlement amount that the percentage of the premium would have been even lower (approximately 7.5%).

13. The Funding Agreement was again amended on 24 July 2012. In addition to a number of administrative corrections, the second amending agreement provided an acknowledgement by the Funders that the representative parties had complied with their obligation to use their best endeavours to have the moneys paid to the Funders. They had done this by seeking to have the rights of the Funders under the Funding Agreement inserted in the Deed of Compromise. The other parties had refused to agree to this as they were concerned that it may have complicated the process of having the compromise approved by the Court. Nonetheless, the Funders acknowledged that the representative parties had used

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[2] The percentage of the proceeds is usually between 30 to 40% of the proceedings – per :

(i) Standing Committees of Attorneys-General, Litigation Funding in Australia (May 2006) pp 4, 7 (premiums can be up to 75% in some matters);

(ii) V Morabito, "An empirical study of Australia's Class Action Regimes" (September 2010), Second Report, p 41

(iii) M Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach' (2011) 30 (1) *Civil Justice Quarterly* 52 at 56;

(iv) M Legg, "Funding a class action through limiting the group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) permit?" (2010) 33 *Aus Bar Review* 17

(v) M Legg, "Litigation Funding in Australia, Identifying and Addressing Conflicts of Interest for Lawyers", February 2012 at p 4 suggested that the premiums are usually between 1/3 and 2/3 of the proceeds

Further, in all of the reported decisions, the premiums were 25% or higher: As examples the premiums in some significant reported cases were:

(vi) *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 - the premium was 35%.

(vii) *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138 at [18] – the premiums ranged between 25% and 40% depending on when resolution was achieved;

(viii) *Brookfield Multiplex Ltd v International Litigation Funding Partners Ltd* (2009) 1809 FCR 11 at [189] – the premiums again ranged between 25% and 40% depending on the number of shares purchased as part of the settlement;

(ix) *Campbells Cash and Carry V Fostif Pty Ltd* (2006) 229 CLR 386- one third

their best endeavours to have the moneys due to the Funders under the Funding Agreement paid to them.

14. The Deed of Compromise was then entered into on 25 July 2012. Again, the Funders will not set out the details of the Compromise Agreement as it is assumed that this will be done by the parties. Relevantly, for current purposes, the Banks have agreed to pay $6 million to TSL which will hold the moneys on trust for the growers. If a grower is indebted to a Timbercorp company then the payment will be used in reduction of that indebtedness. If the relevant grower is not so indebted then the money will be paid by TSL to the grower. That is, the payment of $6 million by the Banks will constitute a fund, of which TSL will be the trustee, and the growers will initially have equitable interests only in that money as beneficiaries of the trust.

15. In accordance with the Funding Agreement, the Funders have paid $186,796.95 in legal costs and disbursements for the appeal. A rough break-down of these costs is provided at paragraph [33] of the affidavit of Michael Fernon sworn 19 September 2012. In addition, the Funders were required to pay $25,000 in respect of the First Respondent's costs for the aborted pre-emptive costs application. As a result the amount actually paid by the Funders has been $211,796.95. The Funders are not required to pay the Appellants' costs of this approval application, so this amount should not change.

16. The lawyers for the representative parties acknowledge that without the assistance provided by the Funders then the appeal could not have proceeded and the compromise obtained could not have been achieved. The benefit of the funding of the appeal goes beyond those represented by the Appellants to the appeal. The appeal resulted in the compromise of almost all of the litigation between the Banks and the growers in the various Timbercorp projects. If this appeal had not been funded then it would have been necessary for the growers in the other schemes to run a trial (which, in all likelihood would have failed given Davies J decision in this matter) and then run another appeal which would then have had to be funded (and if this appeal could not be funded, one would have little confidence that any future appeal could be funded). This additional cost and expense was avoided by the funding provided by the Funders in this case.

17. The claims being brought by the Funders were referred to in the First Notice to Growers. This notice was posted on the website of the solicitors for the

Appellants and the Liquidator, and it was placed in *The Australian* newspaper and it was posted to participant growers. The claim was also referred to in the Frequently Asked Questions document that was posted on the relevant websites. No grower has raised any objection to the claim by the Funders.

Legal Principles

Representative Proceedings

18. Under rule 16.01(4) the Court must, before it can approve any proposed compromise involving "absent person", be satisfied that the proposed compromise is "for the benefit" of the "absent persons" – in this case, the Almond Land growers were who represented by the representative parties.

19. The Court's role in such a compromise was considered by Habersberger J in *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd*[3]. In that case, his Honour made the following observations:

    (a) The representative's responsibility is to represent the interests of the represented group[4];

    (b) A compromise will be for the benefit of an absent party if it provides an advantage or profit for that person or a gain for that person[5];

    (c) "Benefit" is not limited to financial benefits but includes non-financial benefits such as being spared the anxiety of a trial and peace of mind. Nonetheless, the benefit of such matters to the absent person has to be weighed against the absent person's prospects of success if the matter was to proceed to trial[6];

    (d) Although the statutory language is different, there are passages relating to the approval of compromises under Part IVA of the *Federal Court Act* and Part 4A of the *Supreme Court Act* that provide assistance in relation to the approach to be followed under s 16.01(4). These cases provide that the Court should consider matters such as the amount offered to group

[3] (2010) 29 VR 356; [2010] VSC 357 at [47] – [64]

[4] At [48]

[5] At [52]

[6] At [54] to [57]

members, the prospects of success, the likelihood of group members obtaining judgment for an amount far in excess of the offer, the likely duration of the trial and the attitude of group members to the settlement[7];

(e) If the settlement is fair and reasonable when weighed against the chances of absent members obtaining a better outcome at trial and the risks and burdens of a trial then it will be for the benefit of the absent persons[8];

(f) It is difficult for a Court to know more about the actual risks than the legal advisors[9];

(g) The Court considers whether the settlement is within a range considered fair and reasonable rather than deciding for itself what particular amount it thinks would be fair and reasonable[10].

20. The question of whether approval of the Funder's claim is "for the benefit" of the absent parties needs to consider what is likely to occur if the Funder's claim is not approved. The Funders would simply bring a fresh proceeding, with appropriate interlocutory relief to prevent some or all of the $6 million fund being paid out, and seek to prove its claim in that proceeding – based on exactly the same submissions and evidence that are currently before this Court. Fresh litigation and a delay in payments of the settlement amounts would not be for the benefit of the absent parties.

21. Hence, it is submitted that, ultimately, it will be for the benefit of the absent parties for the Court to approve the compromise as proposed by the Funders if the Court forms the view that the Funders have a good legal or equitable entitlement to part of the settlement proceeds.

22. The Funders submit that there are two legal bases for their claim against the absent parties:

(a) in contract, on the basis that the representative parties entered into the funding agreement as agents for the absent parties under the principle of agency of necessity; and

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[7] At [60]

[8] At [62]

[9] At [63(a)]

[10] At [63(b)]

(b) Pursuant to the rule arising out of *Re Universal Distributing*[11] that a where a person incurs fees and expenses in assembling a fund for the benefit of others then the fund itself should bear the fees and expenses in priority to all other claimants and the person whose expenditure or efforts created the fund is entitled to an equitable lien over the fund to secure their entitlement.

Agency of Necessity

23. The leading decision on agency of necessity remains the (albeit dissenting) judgment of Latham CJ in *Burns Philp v Gillespie Bros Pty* Ltd[12] ("**Burns Philp**"). In that case, his Honour made the following observations[13]:

(a) The phrase "agent of necessity" is a shorthand phrase for rationalizing the rights and obligations which are created in certain circumstances of emergency or necessity[14];

(b) The agency arises from the necessity and is not based upon any actual or presumed intention or agreement of the parties[15]. The fact that the "agent" did not intend to act as an agent of the principal does not matter[16];

(c) The question of whether the "agent" should seek express instructions from the "principal" (in which case the doctrine of agency of necessity will not arise) depends on what is reasonable in the circumstances[17]. If possible, the "agent" should communicate with the "principal" but there may be circumstances where the urgency of the situation means that it is necessary to act without waiting for instructions. Further, where there are multiple "principals" their instructions may differ and, in those circumstances, the "agent" may – and, indeed may be bound to - adopt a reasonable and prudent course of action[18]. One factor to consider in

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[11] (1933) 40 CLR 171

[12] (1947) 74 CLR 148

[13] *Burns Philp* pat 172

[14] *Burns Philp* at 175

[15] *Burns Philp* at 175

[16] *Burns Philp* at 174

[17] *Burns Philp* at 173, 176 (Latham CJ), 191 (Dixon J).

[18] *Burns Philp* at 176

determining whether the "agent" has acted reasonably is whether it was practicable to communicate with the "principal"[19].

24. In addition to the points raised above, the cases show that:

(a) The requirement of "emergency" or "necessity" will be satisfied if there is a commercial necessity for the agent to act without express approval from the principal[20]. As noted above, the relationship does not arise from any real or presumed agreement between the agent and the principal;

(b) It must not have been reasonably possible for the agent to seek and obtain consistent instructions from all of the principals[21];

(c) The class of situations in which the doctrine of agency of necessity will arise is not closed[22];

(d) The steps taken by the agent must have been reasonable in the circumstances[23];

(e) While the doctrine of agency of necessity needs to be distinguished from the principal of necessitous intervention, more recent authority tends to consider both principles within the framework of unjust enrichment. In that context, the principal does not have to request the intervention but the actions by the agent must have bestowed an incontrovertible benefit upon the principal[24];

(f) There is some English authority for the proposition that there must be some pre-existing agency relationship between the parties[25] but this appears to be contradicted by the decision in *Burns Philp*[26].

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[19] *Burns Philp* at 176

[20] G E Dal Pont, *Law of Agency*, (2nd ed 2008) para [6.6]; *Australian Steam Navigation Co v Morse* (1872) LR 4 PC 222 at 231; *James Phelps and Co v Hill* [1981] 1 QB 605, 610

[21] *Burns Philp* at pp 173, 175 (Latham CJ) , 191 (Dixon J); *Sachs v Miklos* (1948) 2 KB 23 at 25 where it was said that if it became "commercially impossible" or "extraordinarily difficult" for the agent to contact the principal then there was no reason why the principle would not be invoked.

[22] *Prager v Blatspiel, Stamp and Heacock* Ltd [1924] 1 KB 566 at 569-570

[23] *Broom v Hall* (1859) 7 CB (NS) 503; Goff R and Jones G, *The Law of Restitution* (5 ed, London: Sweet & Maxwell, 1998), 465.

[24] *J Gadsen Pty Ltd v Strider 1 Ltd* (1990) 20 NSWLR 57 at 70

[25] *Jebara v Ottoman Bank* [1927] 2 KB 254 (CA), Scrutton LJ (Atkin LJ concurring) at 270–271; *China Pacific SA v Food Corp of India* [1982] AC 939; [1981] 3 WLR 860; [1981] 3 All ER 688, Lord Diplock (Lords Simon, Keith, Roskill and Brandon agreeing)

25. It is submitted that in this case each of the requirements for an agency of necessity to arise was met.

26. In October 2011 the appeal was already well underway and it was of some (albeit indeterminate) value to the growers. It had been expected that funding would be forthcoming from a commercial litigation funder but in early October 2011 the representative parties learned that this would not be the case. Funding for the appeal was urgently required and if it was not forthcoming then the appeal would have to be abandoned (potentially with costs against the representative parties). The value of the appeal to the growers would have been lost entirely (and the position of growers in other schemes would have been prejudiced also).

27. While communication between the representative parties and the absent parties may have been technically possible, it was not a realistic option to seek to obtain consistent instructions from all of the growers as to whether they approved the representative parties entering into the Funding Agreement. No matter how much time was available (and the matter was clearly urgent) there was no realistic prospect that all growers would have agreed. Further, it should be recalled that, in the context of this case, if a grower did not approve the course being taken, there was no scope to "opt out" as exists under a proceeding under Part 4A of the *Supreme Court Act.* This was a case of "one in, all in". As such, there was no practical utility in the representative parties seeking to obtain the consent of the absent parties prior to entering into the Funding Agreement.

28. Because the appeal would have to be abandoned if the funding was not forthcoming, it was a commercial necessity for the representative parties to enter into the agreement with the Funders lest the value in the appeal would all be lost. The appeal was a wasting asset in the same way as tomatoes that are deteriorating while the unloading of a steamship was delayed due to poor weather and a strike[27].

29. It is submitted that the representative parties clearly acted reasonably in entering into the Funding Agreement. As noted, the Funders agreed to pay for costs of the appeal together and any adverse costs orders (and, in that context, recall that there were three different sets of lawyers acting for the Respondents so the size

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[26] At 175

[27] *Springer v Great Western Railway Company* [1921] 1 KB 257. See also *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 at [17];

of the legal bills following an adverse costs order would have been significant). In consideration for this, in the event of a settlement or a successful outcome, the representative parties agreed that the Funders would be repaid the costs they had paid plus, relevantly, 25% (originally 35%) of the settlement or judgment sum. As set out above, this premium is at the lowest end of the range for funding agreements of this type. Further, the terms were otherwise the standard terms and conditions that one of the largest litigation funders (IMF) uses. Moreover, three other litigation commercial funders had been approached to fund the litigation and refused and those closest to the growers and financial planners were of the view that they would not fund the appeal. As such, it was entirely reasonable for the representative parties to enter into the Funding Agreement with someone who would fund it.

30. There can be little doubt that the outcome of the appeal (assuming the compromise is approved) has bestowed an incontrovertible benefit upon the growers generally in the form of their entitlement to the settlement proceeds. In the circumstances, it is submitted that it would be inequitable for a grower to take that benefit without accepting the costs that were involved in obtaining such an outcome.

31. The question of whether there needs to be a pre-existing agency relationship is not resolved but, in any event, if such a requirement exists, it is satisfied in this case. Although not a traditional form of agent, the representative parties did, in effect, act as the agents of the absent parties insofar as the conduct of the litigation was concerned. All instructions for the running of the trial and the appeal had to come from the representative parties.

32. Similarly even though it does not matter whether the agent intends to act as an agent, in this case, the form of the Funding Agreement suggests that they did intend to so act.

33. In this case, it is submitted the representative parties did act as the agents for the absent parties when they entered into the Funding Agreement. All of the relevant indicia of an agent by necessity were met. In the circumstances, the absent parties are bound by the terms of the Funding Agreement in the same way as the representative parties clearly are.

Establishment and Maintenance of a Fund

34. Even if there is no contract is existence between the Funders and the absent parties, it is submitted that the Funders would nonetheless be entitled to the premium and the legal costs they have paid on behalf of the growers. This entitlement arises due to their funding of the appeal and it was only by reason of the appeal having been funded that there is a fund available for distribution to the growers.

35. Of course, courts have long been concerned that officious meddlers could not impose themselves on other people and then seek payment for the unrequested goods or services[28]. A person who expends money or otherwise improves the property of another, without their express or implied permission, is not – without more – entitled to be paid[29]. However, there are a number of exceptions to this principle.

36. In *Re Universal Distributing Co Ltd (in Liq)*[30] Dixon J (as his Honour then was) said[31]

> *If a creditor whose debt is secured over the assets of the company come in and have his rights decided in the winding up, he is entitled to be paid principal and interest out of the fund produced by the assets encumbered by his debt after the deduction of the costs, charges and expenses incidental to the realization of such assets (Re Marine Mansions Co). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it (Re Oriental Hotels Co; Perry v Oriental Hotels Co.). The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit (cf Re Regent's Canal Ironworks Co; Ex parte Grissell and see Batten v Wedgwood Coal and Iron Co (1884) 28 Ch D 317, per Pearson J, at 325).*
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> *In applying this principle, only those expenses that appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which*

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[28] It remains the law that officious meddling will defeat a restitutionary claim - *J Gadsen Pty Ltd v Strider 1 Ltd* (1990) 20 NSWLR 57 at 70

[29] *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234, 248

[30] (1933) 48 CLR 171

[31] Ibid 174-175

ensure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it.

37. This principle has been developed over the years and has been the subject of detailed judicial consideration recently in *Thackray v Gunns Plantations*[32], *Coad v Wellness Pursuit Pty Ltd (in Liq)*[33] and *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq*[34]*)*. These cases are considered in detail below. However, in short, it is submitted that the principle derived from *Re Universal Distributing* (as developed over time) is that where a person incurs expense in assembling a fund for the benefit of others then:

    (a) the fund itself should bear the costs and fees of realization and maintenance of the fund;

    (b) those costs will be satisfied out of the fund in priority to any other claims upon the fund; and

    (c) the person whose expenditure or efforts created the fund is entitled to an equitable lien over the fund[35].

*Thackray v Gunns Plantations ~~(2009)~~(2011) 85 ACSR 144 (**Thackray**)*

38. In *Thackray*, the receivers and managers of 45 different managed investment schemes sought to establish their entitlement to be indemnified out the scheme property in priority to all other creditors. The complicating factor in the case (which does not arise in the case before this Court) was that there were 45 individual schemes and the receivers and managers were seeking to be

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[32] (201~~09~~) 85 ACSR 144

[33] (2009) 40 WAR 53

[34] (2009) 253 ALR 240

[35] *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 at [63]; Shirlaw v Taylor (1991) 31 FCR 222 at 228

indemnified in respect of the steps taken in respect of ten of those schemes. The receivers and managers sought to be indemnified for their remuneration and expenses under what was described as the "salvage" principle from *Re Universal Distributing*. The principle was described[36] as:

> *"...entitling a person who has incurred expenses in caring for, preserving or realising assets to an indemnity for those expenses out of, and secured by an equitable lien over, the resulting asset pool."*

39. Her Honour noted[37] that the relevant principles were not in doubt but found that it was necessary to set out those principles in some detail. In summary, her Honour[38] cited the passage from *Re Universal Distributing* quoted above and made the following observations:

(a) the principle to be derived from Re Universal Distributing was that "*a person who works and incurs expenses to care for, preserve or realise property to create a fund is entitled to a charge against the fund... in priority to any other claimant*"[39];

(b) the claim is against the fund irrespective of the others claiming an interest in the fund[40];

(c) although the cases often refer to liquidators (or receivers) the existence of the lien does not depend on the status of the person claiming it and the categories of persons to whom the principle applies is not closed (at [41]). She said[41]:

> *The underlying principle in each case is that it would be inequitable for the person who has created or realised a valuable asset, in which others claim an interest, not to have his or her costs, expenses and fees incurred in producing the asset paid out of the fund or property created.*

(d) there is no limit on the type of expense or work done for which remuneration is claimed that may be the subject of the *Re Universal Distributing* principle other than the expenditure and remuneration must

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[36] At [3]

[37] At [39]

[38] At [40]

[39] At [40]

[40] At [41] - citing Robson J from *Re S & D International Pty Ltd (in liq)* [2009] VSC 225 at [257])

[41] At [41]

be referable to the care and protection of or calling in and conversion of the assets producing the fund[42]. Her Honour[43] noted the diverse types of expenses to which the principles have been applied including liability the costs and fees payable to a litigation funder[44].

40. In *Thackray* the court was predominately interested in the question of priorities and in respect of which claims the equitable lien could be maintained. There was no need to consider the source of an entitlement to payment because the receivers and managers had a contractual right to payment from the banks that appointed them[45]. Nonetheless her Honour noted[46] that their entitlement did not depend on any contractual right of indemnity which the claimant may have. She also said that the equitable lien "*does depend on the source of the claimant's entitlement*".

41. In support of this proposition, her Honour cited Ryan J in *Arms v WSA Online Limited (Subject to a Deed of Company Arrangement)* [2007] FCA 1712 ("***Arms***"). In *Arms,* the applicant sued and obtained judgment against WSA in the sum of $58,331. WSA's insurer paid WSA under a policy of insurance and, after WSA entered into a deed of company arrangement, Arms claimed a lien for the costs and expenses it incurred in prosecuting the action. (That is, Arms did not seek a lien in respect of the amount paid under the policy but just the costs it spent in bringing the insurance moneys into the company). At paragraph [12] (the paragraph relied upon by Davies J in *Thackray*), Ryan J said (emphasis added):

> ***It makes no difference that the costs of getting in the fund have been incurred by a person other than a liquidator or trustee in bankruptcy.*** *Indeed, in* Deputy Commissioner of Taxation v Government Insurance Office NSW *(1993) 117 ALR 61, the solicitor who succeeded in enforcing the lien for costs relied solely on a prior retainer from the debtor and had no relationship with either the trustee in bankruptcy or any of the other creditors. It was only coincidental that in* Moodemere Pty Ltd (in liq) v Waters *[1988] VR 215, to which I was referred by Mr Cawthorn, it was a liquidator who successfully enforced the lien. The salient passages in the judgments of Murphy J and Tadgell J make it clear that the entitlement to the lien did not depend on the*

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[42] At [48]

[43] At [49]

[44] In this context, her Honour was referred to *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 referred to below.

[45] *Thackray* at [3].

[46] At [51]

capacity of the person claiming it or the source of his entitlement. Thus, Murphy J, after referring to the line of authority which culminated in Re Universal Distributing Co Ltd *(above), observed, at 221:*

> ***The emphasis in all of these cases is that the costs of realising assets, and creating a fund from which to satisfy a secured debt are payable out of the fund so created before the debt itself is satisfied.***
>
> *I think it follows that where a company charges its assets, and a default occurs so that the creditor becomes entitled in equity to the assets charged, a person, validly appointed to realise the assets so as to provide a fund to satisfy the debt, is entitled to look to the fund itself to reimburse his proper costs, charges and expenses of realisation and his just remuneration attendant on the realisation, before even the creditor is paid his secured debt out of the fund.*
>
> *In my opinion, this principle applies whether the receiver is appointed by the court or not, and even if he be also the liquidator of the company. So that even if the fund is insufficient to pay both the just costs of realisation of the receiver, and the debt owed to the debenture holder, the receiver remains entitled to deduct and retain his moneys first.*
>
> *There may be private contracts made between the receiver and the debenture holder and between the debenture holder and the company.* ***No doubt such private contracts should, as a matter of prudence, always be made. For the fund may be insufficient even to pay the receiver's costs, etc. But these contracts would not as a rule affect the receiver's non-contractual rights****.*

To similar effect, Tadgell J concluded, at 229;

> *... Thus, where property providing the security is realised in the winding up with the consent of the chargee, the liquidator's costs, charges and expenses of the realisation are the first charge, the encumbrances rank next and the general costs of the winding up are payable only out of the surplus, if any:* Re Marine Mansions Co *(1867) LR 4 Eq 601;* Re Oriental Hotels Co *(1871) LR 12 Eq 126;* Re Regent's Canal Ironworks Co, *supra, and* Batten v Wedgwood Coal and Iron Co *(1884) 28 Ch D 317. Where, as in this case, such property is not realised in the winding up but is realised by a receiver, the receiver is entitled, subject always to the terms of his appointment, express or implied, to resort to the proceeds of realisation of the chargeable fund for the costs and expenses of realisation, including his proper remuneration. The chargee will also have a right (which is nowadays, having regard to the entitlement usually conferred by a debenture deed to appoint a receiver out of court, largely theoretical rather than practical) to bring proceedings for the realisation of the fund.* ***But, whether realisation is achieved by the intervention of a liquidator or a receiver appointed out of Court or by suit or otherwise, the expense attendant on the realisation is thrown upon the fund being realised, and is ultimately extracted from the proceeds of its realisation in priority to the rights of the chargee as creditor.***

42. In the case last quoted from, *in Moodemere Pty Ltd (in liq) v Waters*[47], Murphy J also said:

> *But where a person duly appointed to realise the assets, the subject of the charge, performs his duty and incurs costs, charges and expenses in the realisation, as well as earning just remuneration, he should be entitled (in the absence of any contrary agreement made by him) to deduct and retain such sums out of the fund realised, whether he is appointed by the court or duly appointed by the debenture holder. He is entitled to do this in priority to payment to the debenture holder from the fund of the debenture debt itself.*

43. Hence, the *Re Universal Distributing* principle is not limited to providing priority to a person who can otherwise demonstrate a claim over the fund. This can be further seen in the case of *Young v ACN 081 162 512*[48] ("***Young***") a company received an order for over $260,000 for the design and supply of Estee Lauder uniforms. The company went into administration owing its manufacturer about $14,000. The manufacturer refused to manufacture the Estee Lauder uniforms unless the bill for $14,000 was paid. The administrator refused to pay it and so a director of a company paid the bill. The Estee Lauder uniforms were then manufactured and the company received over $260,000 from Estee Lauder.

44. The director sought an order that she was entitled to be paid the $14,000 in priority the other debts of the company including the secured creditors. The Court, relying on the *Re Universal Distributing*, agreed. Although the director was a creditor of the company, that was unimportant to the court's reasoning. The director had paid the debt of the company without any request and otherwise without any entitlement to be paid other than an entitlement that arose by reason of the *Re Universal Distributing* principle. In determining that the director was entitled to be paid the $14,000 in priority to all other debts of the company, Gzell J said[49]:

> *[9] Young J analysed the development of the equitable lien outside contract in* Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd *(1990) 20 NSWLR 26. Having referred to P Birks, An Introduction to the Law of Restitution, rev ed 1989, Clarendon Press, New York, his Honour, at p 33, pointed to three such situations in which the lien arose:*
>
> > *The twentieth century has seen a freeing up of the situations in which a person will have to pay for a benefit which has been received at the expense of another. It is now recognised that the nineteenth century*

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[47] [1988] VR 215 at 222

[48] (2005) 218 ALR 449; (2005) 52 ACSR 629; [2005] NSWSC 139 (Gzell J)

[49] Ibid at [9] to [10]

cases were decided at a time when there was an over-emphasis on the importance of having to be bound by contract before one could be made liable. In Cooke and Oughton, Common Law of Obligations (1989) at 102–3, the cases, such as there are, and the learned writings on the subject are summarised by saying that there are three situations where the court may compensate a person who has enriched another outside the field of contract. These are:

(a) where the defendant has freely accepted the benefit;
(b) where the benefit is incontrovertible so that no reasonable person could say that the defendant was not enriched; and
(c) where on an objective valuation of the benefit conferred by the plaintiff it is conscionable that the defendant should have to pay for it.

This third class of case is, perhaps, not yet fully developed, but Professor Birks clearly acknowledges (at 124 and following) that there is a third class outside adoption and incontrovertible benefit.

[10] Young J had earlier held in Monks v Poynice Pty Ltd *(1987) 8 NSWLR 662 at 664 ; 11 ACLR 637 at 639 that one class of case in which a person was liable to pay a reasonable sum for services provided, notwithstanding that there was no contract, was where the service conferred incontrovertible benefit on the defendant and it would be unconscionable for the defendant to keep the benefit of the service without paying a reasonable sum for it. At NSWLR 665–6; ACLR 640 his Honour said that while the court had no power to make an order that the receiver be given his costs and expenses out of the assets of the company, it was competent for the court under the Supreme Court Act 1970 (NSW), ss 23 and 75 to make a declaration that the liquidator would be justified in allowing a proof of debt by the receiver for such of his expenses and claims as conferred incontrovertible benefit upon the company.*

45. The decision in *Young* was referred to with apparent approval in *Coad v Wellness Pursuit Pty Ltd (in Liq)*[50] which is referred to below. *Monks v Poynice Pty Ltd*[51] (referred to in the quote from *Young*, above) involved the invalid appointment of a receiver and manager whose only basis to claim for remuneration and costs arose on the basis that there was an incontrovertible benefit to a party and it would be unconscionable for the party to keep the benefit without paying a reasonable sum for it. It was said in that case that the basis of the principle lies not so much in the acceptance of the service but in the incontrovertible benefit derived from the service[52].

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[50] (2009) 40 WAR 53 at [73] – [77]

[51] (1987) 8 NSWLR 662

[52] See also *Dean Willcocks v Notintoohard Pty Ltd (in Liq)* [2006] NSWCA 311 at [103]

46. A similar approach was suggested by the trial judge (Barrett J) and the NSW Court of Appeal in *Dean Willcocks v Notintoohard Pty Ltd (in Liq)*[53]

47. In *Thackray* the Court also considered the principle developed *in Re Berkley Applegate*[54]– that is, the court has an inherent power to require an allowance be made for the costs of beneficial work done by insolvency practitioners in relation to trust property before enforcing the interests of trust beneficiaries. While, the principle has been applied in respect of insolvency practitioners, the basis for the principle is much wider and was stated in *Re Berkley Applegate* (and quoted by Davies J in *Thackray*[55]) is as follows:

> *" where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in* Re Marine Insurance Mansions Co, *LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v Nesbitt 14 Ves Jun 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in Phipps v Boardman [1964] 1 WLR 993 ; [1964] 2 All ER 187). In my judgment this is a case in which the jurisdiction can properly be exercised.".*

48. That is, the case was an application of the principle that he who seeks equity must do equity[56]. Although the principle in *Re Berkley Applegate* applies in particular to insolvency practitioners there seems no reason in principle why it should be so restricted. Nonetheless, the extent to which it differs from the *Re Universal Distributing* principle may be a matter for debate.

*Coad v Wellness Pursuit Pty Ltd (in Liq) (2009) 40 WAR 53 ("**Coad**")*

49. In *Coad* the voluntary administrator of a company claimed an equitable lien over the assets of the company he had realized in the administration of the company.

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[53] (2005) 53 ACSR 587 at [22] (Barrett J) and [2006] NSWCA 311 at [102].(Court of Appeal)

[54] [1989] Ch 32

[55] (2011~~09~~) 85 ACSR 144 at [53]

[56] *Berkley Applegate* [1989] Ch 32 at 50

The work of the administrator was described as nothing more than the work an administrator would do in the ordinary course of an administration[57].

50. The Western Australian Court of Appeal considered the nature of an equitable lien including those which arise independently of agreement[58] and noted that the classes of cases in which an equitable lien may be granted are not closed. The Court then went on[59] to consider the entitlement of an insolvency practitioner in accordance with the principles of *Re Universal Distributing* and also considered the principle of "salvage" including a review of a number of the cases considered by Davies J In *Thackray*[60].

51. Under the heading, "*The rule that costs incurred for the benefit of all persons having an interest in the fund must be borne by the fund*" the Court of Appeal made the following points:

    (a) the costs incurred for the benefit of persons having an interest in an asset (usually a fund that is subject to various claims) must be borne by the fund. In this context the Court of Appeal reviewed, with approval, the decision of Finkelstein J in *ASIC v GDK Financial Solutions Pty Ltd* (in liq) (No 3)[61]. He described this rule as the principle in *Ford v Earl of Chesterfield (No 3)*[62] ("***Ford's* case**"). The Court of Appeal[63] approved the comments of Finkelstein J in that case;

    (b) in two cases (*DCT v GIO of NSW*[64] and *Arms v WSA Online Ltd*, above) the plaintiffs were held to be entitled to the their costs and expenses of litigation which resulted in the payment of insurance moneys to a company in liquidation. The basis for these decisions was that it would be unconscientious for a priority creditor to take the benefit of the judgment

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[57] *Coad* at [98]

[58] At [41]-[45]

[59] At [46] – [54]

[60] At [55] – [59]

[61] (2008) 246 ALR 580; [2008] FCA 448

[62] (1856) 21 Beav 426

[63] (2009) 40 WAR 53 at [91], [96]

[64] (1993) 117 ALR 61

without being subject to the lien to secure the costs needed to bring about the judgment[65];

(c) the Western Australian Court of Appeal referred[66], seemingly with approval, to the approaches in of the Victorian Court of Appeal in *Moodemere Pty Ltd (in Liq) v Waters* and Gzell J in *Young*[67], referred to above. The Court of Appeal summarized the principle in *Young*[68] as being that a person was liable to pay a reasonable sum for services provided, notwithstanding that there was no contract, where the service conferred an incontrovertible benefit on the defendant and it would be unconscionable for the defendant to keep the benefit without paying a reasonable sum for it[69] and that a person who relies on this principle is entitled to an equitable lien in addition to the personal claim in restitution[70].

IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq) (2009) 253 ALR 240 ("***IMF v Meadow Springs***")

52. In *IMF v Meadow Springs*, Meadow Springs had a claim against a property valuer, Colliers. Meadow Springs went into liquidation before proceedings were issued. The liquidator and the company entered into a funding agreement with IMF under which IMF agreed to pay the costs of the litigation and any adverse costs orders. In consideration for this IMF was entitled, upon the successful resolution of the case, to the reimbursement of any costs paid plus a premium, being 35% of the judgment amount or settlement amount. The litigation was settled for $8.6 million and the liquidator sought guidance from the court as to whether the fees and premium that were payable to IMF under the funding agreement should have priority over the claims of secured creditors. IMF and a secured creditor (Balanced), amongst others, were made defendants to that proceeding and various cross claims were filed. Balanced disputed IMF's entitlement to be paid its fees in priority to secured creditors.

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[65] (2009) 40 WAR 53 at [70] and [71]

[66] (2009) 40 WAR 53 at [72] to [77]

[67] [2005] NSWSC 139

[68] (2009) 40 WAR 53 at [73] – [77]

[69] (2009) 40 WAR 53 at [74], [76]

[70] (2009) 40 WAR 53 at [77]

53. At first instance, the trial judge determined that the legal fees paid by IMF came within the *Universal Distributing* principle (and, on appeal, that finding was not challenged). However, the trial judge determined that the funder's premium was not the type of claim that was contemplated within the *Universal Distributing* principle[71]. The question for the Full Federal Court on appeal was whether this finding was correct.

54. The Full Court held that there was no reason to distinguish the funder's premium and the legal costs paid by IMF. It found that that the funder's premium and the legal costs both fell within the *Universal Distributing* principle. The Full Court said that the consideration for IMF entering into the funding agreement was the promise to repay the legal costs *and* the 35% premium upon a successful resolution of the case and there was no basis for distinguishing the two items. It was necessary and reasonable for the liquidator to agree to enter into an agreement that to pay both of them[72]. The Full Court said that the fact that a funder's premium of this nature would not have been in the contemplation of the High Court when deciding *Re Universal Distributing* was not the point – as a matter of principle, there was no reason to exclude the litigation funder's fee[73].

55. In coming to this conclusion, the Full Federal Court reviewed a number of the authorities referred to above and made the following points:

    (a) Where a party has, by its efforts, brought into court a fund in the administration of which other parties are interested, the costs and expenses of that party in preserving and realizing the fund will be a first charge upon the fund. So, if a person seeks to enforce a claim to an equitable interest in property, the court will require, as a condition of giving effect to that equitable interest, that an allowance be made for the costs incurred and the skill and labour expended in connection with the preservation, realization and administration of the property[74];

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[71] (2009) 253 ALR 240 at [49]

[72] (2009) 253 ALR 240 at [65]-[67], [72] – [73], [82].

[73] *Ibid* at [78]

[74] At [63]

(b) It is only those expenses that have been reasonably incurred in the care, preservation and realization of the property that are payable out of the fund[75];

(c) It was reasonable for the liquidator to enter into the funding agreement although, according to the trial judge, the liquidator could have paid more attention to the question of whether the consideration payable to IMF was a reasonable return on its investment[76]. Further, although Balanced could have appointed a receiver and run the litigation itself – potentially at a much lower cost than was being paid to IMF – it did not do so and, in any event, the fact that Balanced could have done it cheaper did not take into account the risk assumed by IMF in funding the case[77]. If IMF had not funded the case then the cause of action against Colliers was likely to have been lost entirely[78]. In all of the circumstances, the consideration to be paid to IMF was reasonable [79].

Summary

56. The relevant principles are expressed differently in different cases. Nonetheless, it is submitted that the following legal principles can be derived from the cases:

(a) where a person incurs fees and expense in assembling a fund for the benefit of others then the fund itself should bear the costs and fees of realization and maintenance of the fund. Those fees and expenses will be satisfied out of the fund first and the person whose expenditure or efforts created the fund creditors is entitled to an equitable lien over the fund[80];

(b) a person who has incurred expenses in caring for, preserving or realising assets is entitled to an indemnity for those expenses out of, and secured by an equitable lien over, the resulting asset pool[81];

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[75] At [64]

[76] At [48], [74], [79]

[77] At [79]

[78] At [77]

[79] At [80] – [81]

[80] *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq)* (2009) 253 ALR 240 at [63]; Shirlaw v Taylor (1991) 31 FCR 222 at 228

[81] *Thackray* at [3]; *Moodemere Pty Ltd (in liq) v Waters* [1988] VR 215 at 222

(c) if a person seeks to enforce a claim to an equitable interest in property, the court will require, as a condition of giving effect to that equitable interest, that an allowance be made for the costs incurred and the skill and labour expended in connection with the preservation, realization and administration of the property[82];

(d) the existence of the lien does not depend on the status of the person claiming it and the categories of persons to whom the principle applies is not limited to insolvency practitioners[83];

(e) the entitlement of the claimant does not depend on any contractual right of indemnity which the claimant may have or on the source of the claimant's entitlement. The principle is that it would be inequitable for the person who has created or realised a valuable asset, in which others claim an interest, not to have his or her costs, expenses and fees incurred in producing the asset paid out of the fund or property created[84];

(f) The principle may extend to the grant of an equitable lien where a person seeks to unconscientiously reap the reward of an outlay by another which outlay has produced an "incontrovertible benefit" to the property. To put that principle another way, a person is liable to pay a reasonable sum for services provided, notwithstanding that there is no contract, where the service confers an incontrovertible benefit on the defendant and it would be unconscionable for the defendant to keep the benefit without paying a reasonable sum for it. Further, a person who relies on this principle is entitled to an equitable lien in addition to the personal claim in restitution[85];

(g) According to the principle in *Ford's case*, the costs and fees incurred for the benefit of persons having an interest in an asset (usually a fund that is subject to various claims) must be borne by the fund itself[86];

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[82] *IMF v Meadow Springs* at [63]

[83] *Thackray* at [41]; *Arms* at [12]

[84] *Thackray* at [40]

[85] *Coad* at [73]-[77]

[86] *Ford v Earl of Chesterfield (No 3)* (1856) 21 Beav 426; *ASIC v GDK Financial Solutions Pty Ltd (in liq) (No 3)* (2008) 246 ALR 580; [2008] FCA 448; *Coad* at [91[, [96]

(h) There is no limit on the type of expense or work done for which remuneration is claimed that may be the subject of the *Re Universal Distributing* principle other than:

i. the expenditure and remuneration must be referable to the care and protection of or calling in and conversion of the assets producing the fund;

ii. It must have been reasonable to agree to incur the expenditure[87].

(i) The principle has been held to apply to a litigation funder's premium as well as the costs of the litigation. In applying the *Re Universal Distributing Principle*, there is no reason to distinguish between these two fees[88].

Application to Facts

57. It is submitted that the claims of the Funders in this case fit within the principles outlined above.

58. The evidence demonstrates that the appeal could not have proceeded were it not for the funding supplied by the Funders. The appeal was a wasting asset (in the same way as the cause of action in *IMF v Meadow Springs*[89]) in the sense that if the lawyers had to withdraw and the appeal could not be prosecuted (and it clearly could not without legal representation) then the settlement would not have been achievable.

59. Further, the decision to enter into the Funding Agreement was a reasonable one for the representative parties. Although the premium means that, in the event, the Funders will make a significant profit, at the time that it entered into the Funding Agreement, the Funders faced significant risks including the potential for three sets of costs orders in addition to the costs of the Appellants. Given that the costs of the Appellants alone reached $200,000 and no submissions had been drafted and the appeal had not even been set for hearing, it is conceivable that

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[87] *Thackray* at [48]; *IMF v Meadow Springs* at [64]

[88] *IMF v Meadow Springs* at [65]-[67], [72] – [73], [82]. *Thackray* at [49]

[89] *IMF v Meadow Springs* at [17]

the Funders could have faced a bill many hundreds of thousands of dollars (potentially up to $1 million) in the event of an adverse outcome.

60. Even though the individual growers were not asked for funding, that was because those with knowledge of what the growers were likely to do (the solicitors and those running the various grower groups) determined that they would not supply the funding (or, presumably, provide the indemnity in the event of an adverse costs order). In any event, it would now be inequitable for absent parties to take the benefit of the compromise but to refuse to pay the costs that were associated with generating that settlement. If a grower wishes to take the benefit of the settlement that could not have been achieved without the funding provided by the Funders, it is equitable that they should pay the costs associated with the funding.

61. Indeed, if one is to apply the principle in *Ford's case*, once it is shown that the funding provided by the Funders resulted in a benefit to the growers (which it clearly did) then the Funders costs and premium are a claim against the fund itself.

62. The costs claimed by the Funders are referable only to the care and protection of calling in the fund. While it is true that bringing the appeal had some residual benefits, the bringing of the appeal was entirely for the purposes of those growers represented by the representative parties in the appeal.

63. Further, the amounts claimed are reasonable. They constitute the legal costs which they have paid by the Funders and a premium of 25% which is below that usually charged by commercial litigation funders.

DATE: 28 September 2012

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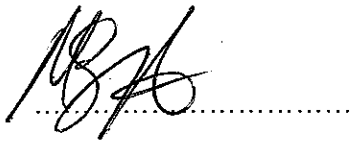
Marcus J Hoyne



MGA Lawyers

Solicitors for the Funders

SCHEDULE

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COURT OF APPEAL

SACPI 2011 0103

BETWEEN:

GRAHAM GOLDENBERG & ORS (according to the Schedule)

Appellants

- and -

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) & ORS (according the schedule attached)

Respondents

DRAFT MINUTE OF ORDER

JUDGE : The Honourable Justice Judd

DATE MADE:

ORIGINATING PROCESS: Originating Motion

HOW OBTAINED: Return of Summons

ATTENDANCE:

OTHER MATTERS:

A. By a deed of compromise, a copy of which is annexed to this Order (***Deed of Compromise***) the parties have agreed to compromise the proceeding (the ***Compromise***) conditional upon, among other things, the Court making orders satisfying the condition precedent set out in clause 3 of the Deed of Compromise (including ordering that the Compromise shall be binding on the absent persons (**absent persons**) represented respectively by each of the Appellants pursuant to rule 16.04(1) of

Chapter 1 of the Supreme Court (General Civil Procedure Rules 2005 (Vic) (the ***Rules***)).

B. Further, pursuant to a management and funding agreement for the funding of the appeal in this proceeding dated 22 October 2011 as amended by further agreements dated 18 December 2011 and 24 July 2012 (the ***Funding Agreement***) between the Appellants, on the one hand, and MRB Equities Pty Ltd ACN 102 694 708, Redvil Pty Ltd ACN 115 017 162 and Ferrari Investments Holdings Pty Ltd ACN 133 024 549 (the ***Funders***), on the other hand, the Funders agreed to, inter alia, fund the appeal in return for certain payments.

C. The Court, being satisfied that the Compromise, as affected by the rights and obligations on the Appellants and the absent persons set out in the Funding Agreement, is for the benefit of the absent persons, approves the Compromise (as affected by the Funding Agreement) in accordance with the orders set out herein.

THE COURT ORDERS THAT:

1. Subject to paragraph 2, pursuant to rule 16.01(4) of Chapter 1 of the Rules, the Court approves the Compromise and orders that it shall be binding on the absent persons who are represented respectively by each of the Appellants.

2. The Court declares that the Funders are entitled to an indemnity secured by an equitable lien over the proceeds of the Almond Settlement Amount (as defined in the Deed of Compromise) held by Timbercorp Securities Ltd (In Liq) ACN 092 311 469 (***TSL***) on trust for the Appellants and the absent persons pursuant to clause 3 of the Deed of Compromise in respect of:

   (a) the Appellants' costs and disbursements incurred in respect of the appeal in the amount of $186,796.95;

(b) the costs paid to the Respondents upon the Appellants not proceeding with the application in respect of a pre-emptive costs order in the amount of $25,000; and

(c) the amount to which the Funders are entitled by reason of clause 8(a)(III) of the Funding Agreement in the amount of $1,500,000.

3. There be no order as to costs.

DATE AUTHENTICATED:

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The Hon. Justice Judd