Federal Court of Australia

Livingstone, in the matter of NewSat Ltd (in liq) [2022] FCA 1559

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| File number: | NSD 1092 of 2022 |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 16 December 2022 |
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| Date of publication of reasons: | 21 December 2022 |
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| Catchwords: | **CORPORATIONS** – Court approval of funding deed and indemnity to pursue recovery action under s 477(2B) of the *Corporations Act 2001* (Cth) – where appointment of special purpose liquidator to pursue recovery action previously refused – different considerations and circumstances**CORPORATIONS** – direction that entry into funding deed and performance of obligations under it to pursue recovery action is justified under s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* – material considerations**CORPORATIONS** – whether creditor of company in liquidation should be given leave to be heard under r 2.13 of *Federal Court (Corporations) Rules 2000* on liquidator’s application for approval to enter into funding deed – considerations**PRACTICE AND PROCEDURE** – whether suppression orders should be made in respect of details of funding deed and indemnity, advices on prospects of success and approaches to other potential funders for liquidator’s pursuit of recovery action – material considerations  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) s 12GF*Competition and Consumer Act 2010* (Cth) Sch 2 ss 21, 236*Corporations Act 2001* (Cth) ss 9, 447D(1) (repealed), 477(2B), 479(3) (repealed), 511 (repealed), 564; Sch 2 ss 90-15, 90-20(1)(d)*Federal Court Act 1976* (Cth) ss 17(4), 37AF, 37AG *Federal Court (Corporations) Rules 2000* r 2.13(1)(a) |
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| Cases cited: | *ACCC v Air New Zealand Ltd (No 3)* [2012] FCA 1430*ACCC v Origin Energy Electricity Ltd* [2015] FCA 278*Brown v DML Resources Pty Ltd (in liq)* [2001] NSWSC 590; 52 NSWLR 685*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 93 ALJR 807*Clark v Digital Wallet Pty Ltd* [2020] FCA 877*Deloughery v Weston* [2010] NSWCA 148; 79 ACSR 180*Hall v Poolman* [2007] NSWSC 1330; 65 ACSR 123*Hall v Poolman* [2009] NSWCA 64; 75 NSWLR 99*Hancock (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2019] FCA 71*Hundy (liquidator), in the matter of 3 Property Group 13 Pty Ltd (in liq)* [2022] FCA 1216*In the matter of Jabiru Satellite Ltd (in liq) and NewSat Ltd (in liq)* [2022] NSWSC 459*In the matter of One.Tel Ltd* [2014] NSWSC 457; 99 ACSR 247*In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859*Jones, Saker, Weaver and Stewart (Liquidators), in the matter of Great Southern Ltd (in liq) (Receivers and Managers Appointed)* [2012] FCA 1072*Kelly (in the matter of Halifax Investment Services Pty Ltd (in liq) (No 8)* [2020] FCA 533; 144 ACSR 292*Kelly (liquidator), in the matter of Australian Institute of Professional Education Pty Ltd (in liq)* [2018] FCA 780*Krejci (liquidator), in the matter of Community Work Pty Ltd (in liq)* [2018] FCA 425*McGrath & Anor Re HIH Insurance Ltd* [2005] NSWSC 731*Needham, in the matter of Bruck Textile Technologies Pty Ltd (in liq)* [2016] FCA 837*Onefone Australia Pty Ltd v One.Tel Ltd* [2010] NSWSC 498; 78 ACSR 163*Pascoe (Liquidator), in the matter of Matrix Group Ltd (in liq) (Trustee)* [2019] FCA 1844*Re Ambient Rail Pty Ltd (in liq); Ex parte Tonks* [2019] FCA 1556*Re Ansett Australia Ltd (No 3)* [2002] FCA 90; 115 FCR 409*Re Bell Group Ltd (in liq)* [2009] WASC 235*Re Jabiru Satellite Ltd (in liq) and NewSat Ltd (in liq)* [2022] NSWSC 459*Reidy, in the matter of eChoice Ltd (Administrators Appointed)* [2017] FCA 1582*Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375*Thorn (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2022] FCA 143*Tracy, in the matter of Linchpin Capital Group Ltd (In Liq)* [2022] FCA 104*Woods, in the matter of Paladin Energy Ltd (Administrators Appointed)* [2017] FCA 836 |
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| Counsel for the Plaintiffs: | D Krochmalik and N Bailey |
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| Solicitor for the Plaintiffs: | Johnson Winter & Slattery |
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| Counsel for La Compagnie Francaise D’Assurance Pour Le Commerce Extérieur (COFACE) in its application to be heard: | R Sud (on 14 December 2022) |
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| Solicitor for COFACE: | Dentons Australia Ltd |

ORDERS

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|  | NSD 1092 of 2022 |
| IN THE MATTER OF NEWSAT LTD (IN LIQUIDATION) (ACN 003 237 303) AND JABIRU SATELLITE LTD (IN LIQUIDATION) (ACN 121 667 365) |
|  | GLENN IAN LIVINGSTONE IN HIS CAPACITY AS LIQUIDATOR OF NEWSAT LTD (IN LIQUIDATION) AND JABIRU SATELLITE LTD (IN LIQUIDATION)First PlaintiffNEWSAT LTD (IN LIQUIDATION)Second PlaintiffJABIRU SATELLITE LTD (IN LIQUIDATION)Third Plaintiff |

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| order made by: | STEWART J |
| DATE OF ORDER: | 16 DECEMBER 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 37AF read with s 37AG(1)(a) of the *Federal Court Act 1976* (Cth),
	1. the Confidential Affidavit of Glenn Ian Livingstone sworn 14 December 2022 and Confidential Exhibit GIL-2 thereto; and
	2. the document titled Confidential Submissions dated 14 December 2022,

be marked “confidential” on the electronic court file and not be published or accessed other than by duly authorised staff of the Court for the purpose of their work for the Court until the final determination of the proceeding in the Supreme Court of Victoria No. S ECI 2020 02631 and any appeals therefrom or further order of the Court.

1. Pursuant to s 477(2B) of the *Corporations Act 2001* (Cth) (**Act**), the first plaintiff (**liquidator**) be granted approval, *nunc pro tunc*, to enter into the deed of indemnity in the form appearing at tab 24 of Exhibit GIL-1, between the liquidator, the second plaintiff (**NewSat**), the third plaintiff (**Jabiru**) and RockGold Holdings Pty Ltd dated 10 August 2022.
2. Pursuant to s 477(2B) of the Act, the liquidator be granted approval, *nunc pro tunc*, to enter into the funding deed, in the form appearing at tab 27 of Confidential Exhibit GIL-2, between the liquidator, NewSat, Jabiru and Ever Tycoon Ltd (*Funding Deed*).
3. Pursuant to s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (being Schedule 2 to the Act), the liquidator is justified in entering into and performing (and causing NewSat and Jabiru to enter into and perform) the obligations of the plaintiffs under the Funding Deed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. Glenn Ian Livingstone in his capacity as **liquidator** of **NewSat** Ltd (in liquidation) and **Jabiru** Satellite Ltd (in liquidation), together with those **companies**, sought orders pursuant to s 477(2B) of the *Corporations* ***Act*** *2001* (Cth) for approval, *nunc pro tunc*, for the liquidator to enter into a deed of indemnity between the liquidator, the companies and **RockGold** Holdings Pty Ltd and a **Funding Deed** between the liquidator, the companies and Ever Tycoon Ltd. The liquidator also sought a direction under s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016* (**IPS**) that he is justified in entering into and performing, and causing the companies to enter into and perform, the Funding Deed.
2. Section 477(2B) of the Act relevantly provides that except with the approval of the court (or the committee of inspection or a resolution of the creditors) a liquidator of a company must not enter into an agreement on the company’s behalf if the term of the agreement may end, or the obligations of a party to the agreement may be discharged by performance, more than three months after the agreement is entered into.
3. The liquidator also sought suppression orders under ss 37AF and 37AG of the *Federal Court Act 1976* (Cth) (**FCA Act**) in respect of an affidavit of the liquidator dated 14 December 2022 that is marked “Confidential Affidavit” and Confidential Exhibit GIL-2. That was on the basis that it is necessary to prevent prejudice to the proper administration of justice for those documents to be suppressed.
4. For the purpose of hearing the application insofar as it concerned and relied on the material in respect of which suppression orders were sought, including the application for the suppression orders, I closed the court under s 17(4) of the FCA Act for a period because I was satisfied that the presence of the public would be contrary to the interests of justice. The reasons for that are, self-evidently, that it would not be practical to hear argument on the aspects of the application in respect of which the liquidator claims such confidentiality as to justify suppression without losing that confidentiality and thereby destroying the benefit of any suppression that the liquidator might be able to justify. Only Mr Livingstone and his solicitors and counsel, and, of course, the Court’s staff, were permitted to remain in the court during the period it was closed.
5. Ultimately I granted the liquidator the relief that he sought. These are my reasons for doing so.

## Background

1. Prior to its liquidation, NewSat was listed on the Australian Securities Exchange (ASX) and traded with Jabiru in a group of companies known as the Newsat Group. Newsat and certain of its subsidiaries conducted a “teleport” business, which included the offer of satellite solutions to deliver internet, voice data and video connectivity to a range of government and private clients in remote locations in Australia, Asia, Europe, the Middle East, Africa and the United States of America.
2. Jabiru and other entities conducted a satellite business, which involved the acquisition of rights to multiple satellite orbital slots, the investment in the Jabiru-2 payload hosted on a satellite known as the MEASAT 3-b satellite, and the construction of a separate commercial satellite called Jabiru-1.
3. On 17 April 2015, Messrs Ayres and Parbery were appointed voluntary administrators of each of the companies and Messrs Jason Preston and Matthew Caddy were appointed as receivers and managers of the assets and undertakings of the companies. The receivers initially attempted a restructure of the NewSat Group entities, however that effort failed. Thereafter, the receivers realised the assets of the companies and retired as receivers and managers of Jabiru on 16 June 2020 and of NewSat on 19 June 2020.
4. The administrators identified total creditor claims of $345,543,629, of which $169,109,962 represented unsecured creditor claims. One has to pause over these figures and re-read them to appreciate the size of the liquidations.
5. On 7 August 2015, Messrs Ayres and Parbery were appointed as liquidators of the NewSat Group, including the companies, by resolution of the creditors on that date. Messrs Ayres and Parbery identified potential voidable transactions totalling in excess of $10,136,000, however they were unable to secure funding to pursue those claims, which subsequently became statute-barred.
6. On 6 March 2017, Mr Ayres resigned as liquidator of the companies and Mr Parbery remained as sole liquidator. From about July 2018, the present liquidator assisted Mr Parbery with the liquidation of the NewSat Group. Then, on 10 December 2020, the present liquidator was appointed as liquidator of the companies to replace Mr Parbery.
7. The only recovery made in the liquidations to date comprises a GST and FBT refund to NewSat from the Commissioner of Taxation totalling nearly $315,000. Priority creditor claims in the winding up of NewSat (for example, employee entitlements) are approximately $1.5m and the liquidator presently expects that such creditors may receive a dividend of 0.065 cents in the dollar from the recovery of the refund. No dividend is expected for unsecured creditors based on the limited recoveries.
8. In about July 2019, during the course of separate proceedings commenced by the receivers against former directors of the companies, potential claims against certain secured creditors of the companies were identified. Certain shareholders of the companies, including RockGold, indicated an interest in pursuing those claims.
9. On 18 June 2020, a proceeding was commenced in the Supreme Court of Victoria against a number of secured creditors of the companies who were lenders to the companies as well as a trade credit insurance provider referred to as COFACE (La Compagnie Francaise D’Assurance Le Commerce Exterieur). Although the proceeding has been discontinued against certain defendants, five defendants remain – four lenders and COFACE.
10. The Victorian proceeding concerns, at a very high level, conduct which is alleged to be in breach of an implied duty of good faith and/or unconscionable in contravention of s 21 of the Australian Consumer Law. The relief sought in the proceeding includes an order for damages and compensation (in favour of the companies) under s 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth) and/or s 236 of the Australian Consumer Law. There are 70 financial transfer requests totalling over USD$66 million that are the subject of the proceeding. If successful, the proceeding has the potential to realise damages or compensation in the order of multiple hundreds of millions of dollars. On any view, the litigation is large and complex with very substantial claims at stake.
11. Mr Parbery, as former liquidator, and the liquidator sought funding on behalf of the companies to enable the claims to continue to be prosecuted. Before such investigations were concluded, RockGold, a shareholder of NewSat (and also a creditor following the assignment of certain claims to it), filed an application for leave to bring the claims the subject of the proceeding on a derivative basis (ie, on behalf of and in the name of the companies).
12. However, in January 2022, RockGold’s derivative proceeding application was discontinued and, instead, RockGold proposed to fund the liquidator to continue the Victorian proceeding. RockGold was ordered to pay the costs incurred by the defendants in the derivative proceeding application. The companies are not liable for the costs order.
13. In February 2022, the liquidator discontinued the Victorian proceeding against two of the lender defendants, and was ordered to pay those parties’ costs on an indemnity basis.
14. In March 2022, with no funding arrangements able to be agreed between RockGold and the liquidator for the companies to continue to prosecute the claims in the proceeding, RockGold filed an application in the Supreme Court of New South Wales to seek the appointment of a special purpose liquidator to conduct the proceeding on behalf of the companies pursuant to a proposed funding deed with a wholly-owned subsidiary of RockGold. It was not the liquidator’s proposal and he did not endorse the funding proposal that underlay the application, but he nevertheless consented to the orders that were sought by Rockhold on the basis that there was, at that time, no other proposal to advance the claims in the proceeding.
15. On 14 April 2022, that application was dismissed by Black J: *Re Jabiru Satellite Ltd (in liq) and NewSat Ltd (in liq)* [2022] NSWSC 459. I will return to his Honour’s reasons as they have some significance to the present application.
16. On 29 April 2022, RockGold provided a short-term indemnity to the liquidator in respect of any adverse costs in the Victorian proceeding. That arrangement terminated on 26 July 2022 (that is, less than three months after it was entered into). For that reason, no approval was sought by the liquidator in respect of that deed.
17. On 10 August 2022, by a deed executed on that date, RockGold provided a further **short-term indemnity** to the liquidator in respect of the proceeding. The term of the indemnity was extended, pursuant to the exercise of an option within the agreement, to 18 October 2022. The liquidator identified three clauses of the indemnity that have, or may have, the effect that the operation of the indemnity can extend beyond three months. On that basis, as well as the fact that the indemnity may be seen to operate together with the earlier indemnity entered into in April 2022, approval was sought, *nunc pro tunc*, pursuant to s 477(2B) of the Act.
18. The short-term indemnity was entered into in circumstances where the liquidator was exploring the prospect of ongoing funding for the proceeding from various prospective funders. Its role was to indemnify the companies and the liquidator against adverse costs exposure arising from the continuation of the proceeding whilst the liquidator’s funding investigations were taking place. It was essentially a short-term arrangement to keep alive the prospect of the claims in the proceeding being funded in circumstances where the proceeding was already on foot.
19. In those circumstances, the liquidator was of the view that entry into the short-term indemnity was for the benefit of creditors, including because it enabled the proceeding not to be brought to a premature end, protected the companies from costs in the proceeding, and did not particularly prolong the liquidations. I accept that that view was reasonable.
20. On 6 September 2022, orders were made in the Victorian proceeding including that:
21. NewSat and Jabiru pay the sum of $599,393.18 as security for the lenders’ costs up to but not including discovery in the proceeding; and
22. Jabiru pay the sum of $513,093.48 as security for COFACE’s costs up to but not including discovery; and
23. Jabiru pay 35% of COFACE’s costs incurred in defence of the proceeding from 17 June 2021 to 4 May 2022 inclusive.
24. The amount required to be paid to satisfy the security for costs orders is $1,112,486 in total. That amount has not been paid as the liquidator has insufficient funds in the liquidations to pay it. The defendants in the proceeding have made their position clear that if the security for costs orders are not satisfied, they will apply to seek to dismiss the proceeding. Given the passage of time, the liquidator is concerned that that could happen at any time.
25. During the period from September 2019 to May 2021, the liquidator was involved in discussions with funders as to the potential funding of the proceeding. Following the dismissal of RockGold’s application in the NSW Supreme Court to appoint a special purpose liquidator, the liquidator again undertook investigations as to prospective funding of the proceeding. A comprehensive suite of documents was provided to potentially interested funders.
26. The liquidator approached at least 19 litigation funders. These included all of the litigation funders operating in the Australian litigation-funding market known to the liquidator who the liquidator considered might be able to fund the proceeding. Ten of those funders returned executed non-disclosure agreements and were then provided with copies of the amended statement of claim, an opinion from Australian senior and junior counsel on the prospects of the claims in the proceeding, and a preliminary budget for the proceeding to trial. Six of those funders then continued to express interest, and were accordingly provided with a damages analysis and an opinion from senior and junior counsel in England on the claims that are subject to English law. Ultimately, those final six funders indicated they did not wish to proceed with funding.
27. I accept that the liquidator has undertaken exhaustive efforts to obtain litigation funding to fund the claims in the proceeding. I also accept that the liquidator has received counsel’s advice that the claims asserted in the Victorian proceeding are at least reasonably arguable. I deliberately avoid saying anything more about the advice given to the liquidator because to do so would give the defendants in the proceeding an advantage that a defendant would not normally get. That would be to the prejudice of the liquidator’s position in the litigation, and hence to the prejudice of creditors.
28. On or about 9 November 2022 the liquidator came to an agreement with Ever Tycoon Ltd as set out in the Funding Deed.
29. The liquidator has formed the view that entry into the Funding Deed is in the best interests of creditors of the companies. The factors considered by the liquidator in coming to that view include the following.
30. First, the only assets of the companies other than the GST/FBT refund which has been recovered are their claims in the proceeding.
31. Secondly, other than a recovery in the proceeding, there is no current or anticipated source of funds to enable any distribution to ordinary unsecured creditors or to enable a dividend in full to priority creditors. That is because the GST refund is relatively small and, after the deduction of the costs and remuneration of the liquidator, it will lead to only a relatively meagre dividend to priority creditors.
32. Thirdly, there are no funds otherwise available to the companies to fund the proceeding, and the liquidator will not cause the companies to continue the proceeding absent a satisfactory indemnity to the liquidator for costs for which he would otherwise be personally liable in the proceeding.
33. Finally, the net amount of the GST refund amount already recovered is protected from dissipation under the Funding Deed, such that priority creditors, who are the only creditors who would receive even a partial dividend from that recovery, are protected and cannot be worse off from the Funding Deed being performed.

## The applicable principles: s 477(2B) of the Corporations Act

1. In *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at [26], Gordon J identified a number of relevant principles governing the exercise of the court’s discretion to approve the liquidator entering into an agreement caught by s 477(2B), including the following:
2. The court does not simply “rubber stamp” whatever is put forward by a liquidator.
3. The court will not approve an agreement if its terms are unclear.
4. The role of the court is to grant or deny approval to the liquidator’s proposal. Its role is not to develop some alternative proposal which might seem preferable.
5. In reviewing the liquidator’s proposal the task of the court is not to reconsider all of the issues weighed by the liquidator in developing the proposal, and substitute its determination in a hearing de novo, but to pay due regard to the liquidator’s commercial judgment and knowledge of all of the circumstances of the liquidation, satisfying itself there is no error of law or grounds for suspecting bad faith or impropriety, and weighing up whether there is any good reason to intervene in terms of the expeditious and beneficial administration of the winding up.
6. In judging whether or not a liquidator should be given permission to enter into a funding agreement, whether retrospective or not, it is important to ensure, amongst other things, that the entity or person providing the funding is not given a benefit disproportionate to the risk undertaken in light of the funding that is promised or a “grossly excessive profit”.
7. Generally the court grants approval under s 477(2B) of the Act only where the transaction relates to the proper realisation of the assets of the company or otherwise assists in the winding up of the company.
8. In addition, the court will have regard to the impact that entering into the agreement will have on the duration of the liquidation and whether that impact is, in all the circumstances, reasonable in the interests of the administration: *In the matter of* ***One.Tel*** *Ltd* [2014] NSWSC 457; 99 ACSR 247 at [30] per Brereton J.
9. Although s 477(2B) contemplates that approval will be obtained before an agreement is entered into, retroactive approval may be granted in certain circumstances: *Newtronics* at [25]; *Re Ambient Rail Pty Ltd (in liq); Ex parte Tonks* [2019] FCA 1556 at [9] per Yates J.

## The applicable principles: s 90-15 IPS direction

1. A court is empowered by s 90-15(1) of the *Insolvency Practice Schedule* to “make such orders as it thinks fit in relation to the external administration of a company”. The power conferred by s 90-15(1) is “very broad”: *Kelly (in the matter of Halifax Investment Services Pty Ltd (in liq) (No 8)* [2020] FCA 533; 144 ACSR 292 at [51] per Gleeson J. It includes a power to make orders determining any question arising in the external administration of a company: s 90-15(3)(a). A liquidator of a company may apply for such an order: s 90-20(1)(d), read with s 9 of the Act (paragraph (f) of the definition of “officer”).
2. The court’s power under s 90-15(1) includes a power to give directions about a matter arising in connection with the performance or exercise of an external administrator’s functions or powers: ***Reidy****, in the matter of eChoice Ltd (Administrators Appointed)* [2017] FCA 1582 at [26]-[27] per Yates J. In this respect, s 90-15(1) confers a power to give directions that was previously conferred by ss 447D(1) and 479(3) of the Act concerning administrators and liquidators, respectively: see *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 93 ALJR 807 at [166] per Gordon J; *Reidy* at [27]; and *Kelly (liquidator), in the matter of Australian Institute of Professional Education Pty Ltd (in liq)* [2018] FCA 780 at [30] per Gleeson J. The principles governing directions to administrators and those governing directions to liquidators are relevantly analogous: *Re* ***Ansett*** *Australia Ltd (No 3)* [2002] FCA 90; 115 FCR 409 at [43] per Goldberg J.
3. The function of a judicial direction of this kind is not to determine rights and liabilities arising out of a particular transaction, but to confer a level of protection on the external administrator. An external administrator who acts in accordance with a judicial direction, having made full and fair disclosure to the court of the material facts, has “protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct” proposed: *Ansett* at [44].
4. A court may give a direction on a legal issue of “substance or procedure” or “of power, propriety or reasonableness”: *Ansett* at [65]. Although a court will not give a direction on a decision that is purely commercial, a direction may be provided where there is a “particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought”: *Ansett* at [65]. As Black J observed in *In the matter of RCR Tomlinson Ltd (administrators appointed)* [2018] NSWSC 1859, a decision may have a “commercial character” but nonetheless be amenable to judicial direction. His Honour said (at [14]) of the application before him (which sought a direction as to whether a company should borrow loan funds):

The Court has been prepared to give directions of this kind, where the decision is a complex one, and where it has to be made, as here, under circumstances of time pressure, in respect of a very large corporate group, and by balancing different interests. The Court’s preparedness to grant such a direction in those circumstances reflects the intrinsic unfairness of leaving a voluntary administrator to be at risk of liability, in respect of a complex decision of that kind, where any decision that is made, including making no decision, will have inevitable risks for some or all of the affected constituencies.

1. Because the effect of a direction under s 90-15 is to exonerate the liquidator or administrator if full disclosure is made, it will usually necessitate consideration by the court of the liquidator’s or administrator’s reasons and decision making process: see *One.Tel* at [36] (referring to the former s 511 of the Act).
2. The matters taken into account in an application for approval of a funding agreement under s 477(2B) and in an application for judicial directions under s 90-15 are essentially the same, although additional questions will arise in an application for judicial directions concerning the appropriateness of the Court acceding to the application: *Hall v Poolman* [2009] NSWCA 64; 75 NSWLR 99 (***Hall v Poolman CA***) at [172] per Spigelman CJ, Hodgson JA and Austin J. The Court of Appeal approved what was said by Palmer J in the judgment under appeal, *Hall v Poolman* [2007] NSWSC 1330; 65 ACSR 123 (***Hall v Poolman SC***) at [386], with regard to the common criteria for approval of a funding agreement. It was held that the non-exhaustive list of factors which the court may take into account in determining whether the liquidator is justified in the proceeding include:
3. the liquidator’s prospects of success;
4. the amount of costs likely to be incurred in the conduct of the liquidator’s case and the extent to which the litigation funder is to contribute to them;
5. the extent to which the funder is to contribute to the costs of the defendant if the liquidator’s action is not successful;
6. the extent to which the liquidator has canvassed other funding options;
7. the level of the funder’s “premium”;
8. the risks involved in the claim; and
9. the wishes of the creditors.
10. See also *Needham, in the matter of Bruck Textile Technologies Pty Ltd (in liq)* [2016] FCA 837 at [30] per Gleeson J for a similar list of relevant factors.
11. It was said in *Hall v Poolman SC* at [386] (approved in *Hall v Poolman CA* at [172]) that the court is essentially assessing whether the interests of creditors are likely to be served by the funded litigation proceeding and whether the proposed litigation will be conducted in a way consistent with justice to all concerned.
12. In *Hall v Poolman CA* at [173], the proposition that the court would be likely to decline to give directions to liquidators concerning a litigation funding agreement on the ground that it is not appropriate for the court to make a liquidator’s commercial decisions for him or her was rejected. It was held that the question whether to give directions or decline to give them will depend on the nature of the direction sought and the facts of the case, and in particular the extent to which the funding agreement and the contemplated recovery proceedings raise issues capable of affecting the administration of justice.

## Consideration

1. In dismissing RockGold’s application to appoint a special purpose liquidator and for approval of the proposed funding deed for the purpose of pursuing the Victorian proceeding, Black J identified a number of factors that weighed against the relief that was sought. They included that the “Funding Fee” in the funding deed was at least 70% of the recovery (at [8]) and that there was no evidence of what information had been provided by the liquidator to potential funders in order to try to secure other funding, and in particular that potential funders had not been given any financial modelling of potential damages or any advice on prospects (at [12]-[13]). His Honour was therefore unpersuaded that there was little prospect of finding an alternative third-party funder (at [17]).
2. His Honour was not satisfied that it was in the interests of creditors to approve the funding deed where insufficient information had been provided to third-party funders to allow them to determine whether they would fund the proceedings on less onerous terms (at [34]). For the same reason, his Honour was not satisfied that the Victorian proceeding was unlikely to continue without the appointment of the special purpose liquidator and approval of the funding deed (at [35]). His Honour found that although the possibility exists of very substantial damages, the diversion of at least 70% of such a recovery to a funder associated with shareholders is adverse to the interests of the unsecured creditors (at [37]). Because of the very large minimum percentage of the funding fee, his Honour found it to be wholly disproportionate to the costs likely to be incurred, and if the proceeding actually had poor prospects reflected in any settlement then the benefit to creditors would be insufficient to support the special purpose liquidator’s entry into the funding deed on such onerous terms (at [38]).
3. The position presented by the liquidator in the present case is materially different in a number of respects with the result that the decision of Black J is no bar to the relief that the liquidator seeks.
4. First, the considerations relevant to the appointment of a special purpose liquidator on the application of a shareholder of the company on the basis that a related party would be the funder are quite different to the considerations relevant to the present application. Notably, the application is made by the liquidator and the proposed funder is an unrelated third party.
5. Secondly, the structure of the funding fee is quite different and the percentage that may be applicable is very considerably less than the 70% funding fee that was previously presented. It would seem to me to be a funding fee that is more or less in line with what has been presented to the court and approved in other cases. Further, given the extensive unsuccessful efforts to find other third-party funding and the evident risk that the funder is undertaking, it seems to me that the funding fee is within a reasonable range.
6. Thirdly, the liquidator has presented detailed evidence of the approaches that have been made to potential third-party funders, including the information given to them, the enquiries raised by them and the answer that was given to those enquiries. The information given to potential funders who were prepared to sign a non-disclosure agreement included counsel’s advices on prospects of success and modelling of potential recoveries.
7. The result is that I am persuaded that if I did not approve the entry into the Funding Deed by the liquidator it is unlikely that any other viable funding proposal would materialise and the Victorian proceeding would likely not proceed.
8. There are further material considerations weighing in favour of the approval that is sought. They include the following.
9. The terms of both the short-term indemnity and the Funding Deed are clear and documented. There is no apparent ambiguity or uncertainty which might leave the Court to have to guess at critical parts of the arrangement.
10. The liquidator’s commercial judgment in concluding that entry into the short-term indemnity and the Funding Deed was and is in the best interests of creditors follows the protracted exploration by him of potential funding on appropriate terms. It is made in the context of his knowledge of the affairs of the companies emanating from his role as liquidator for more than two years and his previous assistance to Mr Parbery, the former liquidator.
11. As mentioned, I am satisfied that although the claims in the Victorian proceeding are highly complex, the liquidator has received independent advice that they are reasonably arguable and that there is a proper basis to bring them. Although the advice has been tendered, I have not seen the documents and other instructions on which it is based and am therefore not in a position to form my own view. Nevertheless, the fact of such advice having been given and received is important.
12. I am satisfied that there is no basis, including in light of the above factors, to consider that the liquidator has acted in bad faith or with impropriety, or on some error of law that might cause the court to withhold approval.
13. Entry into the short-term indemnity did not delay or prolong the liquidations of the companies in any material respect. The object and effect of the indemnity was to give the liquidator a short further period of time to try and find funding for the proceeding, which he was successful in doing. It also protected the companies from potential adverse costs orders in the proceeding.
14. As to the Funding Deed, it will, obviously enough, prolong the liquidations. However, that is on the premise that the Funding Deed will permit the claims in the proceeding to be prosecuted which, if successful, will accrue to the benefit of the creditors of the companies and cannot cause them any detriment. In the meanwhile, if approval was to be refused, the tiny benefit to creditors represented by the payment of the GST/FBT refund in dividends means that there is almost no downside to granting approval and thereby prolonging the liquidations. Put differently, the Funding Deed is in my assessment a price worth paying for the potential to substantially augment the assets in the winding up of the companies.
15. For reasons that I will come to with regard to suppression orders, it is not in the interests of the administration of justice for me to reveal in these reasons any particular details about the terms of the Funding Deed. Aside from what I have already said about the funding fee, I note that the funding arrangement has the result that the outstanding security for costs orders (discussed at [25(1)-(2)] above) will be paid which will allow the stay of the proceeding to be lifted and for the proceeding to progress. Further, the costs order against RockGold for discontinuing the derivative proceeding application (discussed at [17] above), the indemnity costs order in favour of two of the lenders following the withdrawal of the proceeding against them (discussed at [18] above) and the costs order in favour of COFACE (discussed at [25(3)] above) will all be paid.
16. I have also given consideration to the extent to which, if at all, the liquidator has given up to the funder any authority to instruct lawyers in the proceeding and to take decisions in the proceeding in accordance with his own best judgement and any advice received. I am satisfied in relation to those matters.
17. There is also an advantage to creditors by the arrangements that have been made with regard to RockGold’s statutory entitlement under s 564 of the Act to seek priority payment from any recovery made from the claims in the proceeding, having regard to the funding provided by RockGold pursuant to the short-term indemnity.
18. In all the circumstances, I am satisfied that the liquidator’s entry into the short-term indemnity and the Funding Deed are in the best interests of creditors and that they should be approved. There should also be the direction that is sought under s 90-15 of the IPS.

## Suppression orders

1. In presenting evidence in support of the application, the liquidator and those representing him have drawn a line between what they regard as “open” and available to any interested party or the public without restriction and what they regard as “confidential” in respect of which they have sought suppression orders. Loosely speaking, that line is drawn so as to maintain the confidentiality of the legal advice that the liquidator has sought and obtained with regard to the prospects in the Victorian proceeding, the identity of the potential third-party funders that the liquidator approached and the information sought by and given to those potential funders, and the details of the funding arrangement as agreed in the Funding Deed and a Deed Poll furnished by RockGold. The liquidator, however, consented to the disclosure that the percentage return to the funder under the Funding Deed is substantially less than that considered by Black J in the special purpose liquidator application.
2. The liquidator sought suppression of all that “confidential” evidence on the basis that suppression “is necessary to prevent prejudice to the proper administration of justice” as referred to in s 37AG(1)(a) of the FCA Act. The suppression is sought until the resolution of the Victorian proceeding, including any appeal/s from it.
3. Suppression orders of this kind are commonly made where a liquidator has obtained litigation funding for recovery proceedings or to investigate the possibility of claims being available in a winding up: *Woods, in the matter of Paladin Energy Ltd (Administrators Appointed)* [2017] FCA 836 at [34]; *Krejci (liquidator), in the matter of Community Work Pty Ltd (in liq)* [2018] FCA 425 at [58]-[64]; *Hancock (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2019] FCA 71 at [10]; *Pascoe (Liquidator), in the matter of* ***Matrix Group*** *Ltd (in liq) (Trustee)* [2019] FCA 1844 at [58]-[60]. It is well-established that commercial sensitivity can be an appropriate basis for making a suppression or non-publication order, the reasoning being that to fail to provide such protection would unduly inhibit liquidators or commercial parties from being able to utilise the processes of the law: *Tracy, in the matter of Linchpin Capital Group Ltd (In Liq)* [2022] FCA 104 at [21] and the authorities cited therein, namely *Clark v Digital Wallet Pty Ltd* [2020] FCA 877 at [21]-[22]; *ACCC v Air New Zealand Ltd (No 3)* [2012] FCA 1430 at [35]; *ACCC v Origin Energy Electricity Ltd* [2015] FCA 278 at [148].
4. In *Onefone Australia Pty Ltd v One.Tel Ltd* [2010] NSWSC 498; 78 ACSR 163 at [2], Barrett J referred to the “funding of the litigation” as information of a “commercially confidential and sensitive kind”. In *McGrath & Anor Re HIH Insurance Ltd* [2005] NSWSC 731 at [12]-[13], Barrett J explained that the administration of justice is very likely to be prejudiced in two ways by the availability to potential defendants of, and any public airing of, information concerning the liquidator’s proceeding that will inevitably be divulged by the adducing of evidence in the making of submissions on the hearing of an application under s 477(2B) with regard to litigation funding. First, there is a likelihood of a real and negative impact on the due and orderly conduct of the proposed proceeding itself in that the defendants in the proceeding will have access to information that, in the ordinary course, a plaintiff is entitled to keep confidential in the plaintiff’s own interests. Secondly, any such access would produce an undue distorting effect in relation to the due conduct of the proceeding.
5. I accept the submissions on behalf of the liquidator that information as to a litigant’s financial position is forensically strategic information in the hands of the counterparty to the litigation because it informs the litigant’s appetite to settle. In the case of funded claims, especially where the claimants are in liquidation, the funding arrangements bear on that question and also inform the claimants’ willingness and ability to continue to prosecute their claims. Further, knowledge by the defendants of the funding commission and its structure may inform the defendants as to how much of any settlement offer will provide a return to creditors as opposed to how much will be received by the funder. This is a factor that could shape the terms of any settlement offer.
6. In the circumstances, I am satisfied that the terms of the funding arrangements, including the terms of the Funding Deed, save for those disclosed in the reasons given above, must be suppressed in order to prevent prejudice to the proper administration of justice. It goes without saying that privileged material, such as legal advice that is sought and received, must be suppressed for the same reason. I am also satisfied that the information in relation to the third-party funders who were approached should be suppressed in order to endeavour to avoid undue efforts being made to obtain otherwise suppressed information from them.

## COFACE’s application to be heard

1. The liquidator quite correctly, although, for reasons I will come to, unnecessarily, gave notice to the companies’ creditors of his intention to make the present application. The result was that when the matter was called, Mr Sud of counsel, on behalf of COFACE, applied for leave to be heard. That was with reference to r 2.13(1)(a) of the *Federal Court (****Corporations****)* ***Rules*** *2000* on the basis that COFACE is a creditor of Jabiru. Mr Sud explained that if leave were granted, COFACE would apply for a direction that it be provided with all the material to be relied on by the liquidator and for the hearing to be adjourned to enable it to consider that material. With regard to the confidential material, COFACE offered an undertaking by its solicitors to keep the material confidential except that they would “communicate the essential terms” of the Funding Deed to COFACE for the purpose of taking instructions.
2. I refused COFACE leave to be heard. These are my reasons for doing so.
3. Mr Sud referred to two authorities in support of the application to be heard. The first was the decision of Gleeson J in *Matrix Group*. In that case, a Mr Oates was granted leave pursuant to r 2.13 of the Corporations Rules to be heard in the proceeding without becoming a party to the proceeding (at [4]). The proceeding was for the approval under s 477(2B) of the Act of a funding agreement. Whilst that case is an example of leave being given to another party to be heard in such an application, it is not pertinent authority in support of COFACE’s position in the present case. That is because Mr Oates appears to have previously provided the liquidator in *Matrix Group* with funding and there was a dispute between them whether that previous funding agreement had terminated which would have a bearing on whether the approval should be granted in respect of a second funding agreement with someone else. Also, it is not apparent that the liquidator opposed Mr Oates being given leave to be heard.
4. The second authority referred to by Mr Sud was the decision by Black J, to which I have already referred, in which RockGold applied for the appointment of a special purpose liquidator to continue the Victorian proceeding in the present case, ie, *In the matter of Jabiru Satellite Ltd (in liq) and NewSat Ltd (in liq)* [2022] NSWSC 459. The secured lenders who were the then defendants in the Victorian proceeding (ie, other than COFACE which was only subsequently joined to the Victorian proceeding) were granted leave to be heard under r 2.13 of the Corporations Rules (at [1]). It is, however, to be noted that an application by a creditor to appoint a special purpose liquidator is quite distinct and different from an application by a liquidator for approval under s 477(2B) of the Act and a direction under s 90-15 of the IPS. The former is necessarily of pertinent interest to other creditors, whereas the latter is in the nature of judicial advice from the court. Further, it does not appear from the reasons for judgment that leave to be heard was opposed and accordingly no pertinent reasoning is furnished for such leave having been granted.
5. Mr Krochmalik, who appeared with Ms Bailey for the liquidator, referred me to two authorities in which leave to be heard was refused to creditors in applications for approval under s 477(2B).
6. In *Thorn (liquidator), in the matter of South Townsville Developments Pty Ltd (in liq)* [2022] FCA 143, I refused leave to be heard to Mr Bega who was a defendant to the liquidator’s proceeding and the director of a creditor of the company in liquidation (see [58]). That is clearly a different and more distant position to COFACE in the present case. However, I noted (at [52]) that in *Re Bell Group Ltd (in liq)* [2009] WASC 235 at [58], Hasluck J held that on an application under s 477(2B) it is not necessary for notice of the application to be given to the “defendant banks” (i.e., the defendants to the liquidators’ proceeding) or actual or prospective creditors with a view to affording them an opportunity to be heard. That is because the application under s 477(2B) would not determine any matters in issue.
7. I also referred (at [53]) to *Brown v DML Resources Pty Ltd (in liq)* [2001] NSWSC 590; 52 NSWLR 685 in which Austin J (at [54]-[55]) observed, with regard to the right of interested parties to a hearing in corporations cases, that at one extreme there are cases where it is plain that the application seeks relief against a person and the person should therefore be a respondent to the application; but at the other extreme there are cases (such as the present) where the court is asked to exercise a discretion to permit an administrative step to be taken where there is no need to join any respondent or give notice to any affected person. See also *Jones, Saker, Weaver and Stewart (Liquidators), in the matter of Great Southern Ltd (in liq) (Receivers and Managers Appointed)* [2012] FCA 1072 at [50] per Gilmour J which is to the same effect. In the absence of even any need to give notice to a person, it is difficult to see why they should have leave to be heard.
8. In *Deloughery v Weston* [2010] NSWCA 148; 79 ACSR 180, particularly at [36] and [42], it was said by Giles JA and Handley AJA (Spigelman CJ agreeing) that the right to be heard by a judicial officer before an order is made depends on the existence in fact of a relevant right, interest or expectation that would or might be affected by the order. A defendant to a proceeding in respect of which a liquidator seeks approval to enter into a funding agreement has no such right, interest or expectation. It seems to me that a creditor of the company in liquidation is in a similar position.
9. The other authority relied on by Mr Krochmalik is the decision of Wigney J in *Hundy (liquidator), in the matter of 3 Property Group 13 Pty Ltd (in liq)* [2022] FCA 1216. His Honour canvassed some of the authorities referred to above and observed (at [28]) that on an application under s 477(2B), a creditor has no right to be heard but has, at most, a right to apply for leave to be heard pursuant to r 2.13. His Honour noted (at [29]) that the court’s power under r 2.13 to grant leave to, relevantly, a creditor is plainly discretionary and that considerations which may be relevant to the exercise of the discretion would include the nature of the relevant proceeding in respect of which leave is sought, the nature and extent of the relevant party’s interest in the outcome of that proceeding, and the extent to which their participation in the proceeding would assist the Court in the resolution of the proceeding.
10. Although Mr Sud identified COFACE’s interest as being that of a creditor, its more pertinent interest is that of being a defendant in the Victorian proceeding in respect of which litigation funding approval was sought. Clearly it would be in the interests of a defendant to the proceeding to throw up whatever obstacle it could to such approval being granted regardless of the interests of the general body of creditors, yet it is the latter that is at the heart of the exercise of the court’s discretion under s 477(2B). More particularly, COFACE would not be able to make valuable submissions to the court on the central questions relating to the funding arrangements without having access to the details of those arrangements, whereas giving COFACE such access would clearly be potentially prejudicial to the liquidator’s and the companies’ position in the litigation against COFACE. Also, the undertaking proffered by COFACE’s solicitors would still mean that COFACE would have access to “the essential terms” of the funding arrangement.
11. For the reasons already given, I was satisfied that giving COFACE access to the terms of the Funding Deed, or, especially, its “essential terms”, was not justified. Further, in the absence of COFACE having access to such details it was unlikely to be able to make any submissions in support of the interests of creditors that would be of any value.
12. In short, I saw no reason why the hearing should be adjourned to allow COFACE to be heard, and no reason why COFACE should be heard.

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| I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 21 December 2022