Federal Court of Australia

Rapsey, in the matter of Australasian Mortgage Finance Limited (Administrator Appointed) [2021] FCA 189

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| File number: |  |
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| Judgment of: | **NICHOLAS J** |
|  |  |
| Date of judgment: | 9 March 2021 |
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| Catchwords: | **CONTRACTS** – where directors of company remunerated under consulting agreements made with them or their related entities – where directors made statements to auditors stating that they agreed to take equity in lieu of cash under those agreements – where financial statements and shareholder updates reference that agreement – where two of the contracts contain express provision allowing for agreement to receive payment in form of shares in the company – where contracts contain a no oral modification clause – whether consultants and company agreed to accept equity in lieu of cash – where directors failed to take any steps to procure allotment of shares – whether modification required to be in writing – whether any agreement to vary consultancy agreement supported by consideration **CONTRACTS** – whether company breached consultancy agreements – whether consultants estopped from relying on alleged breach – time at which damages for breach of contract should be assessed – whether consultants have suffered any loss in circumstances where shares in company are now worthless  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 208-211, 436A  |
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| Cases cited: | *Cenric Group v TWT Property Group* [2018] NSWSC 1570*GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1*Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91*Hill v Forteng Pty Ltd* [2019] 138 ACSR 344*Johnson v Agnew* [1980] AC 367 (HL)*Johnson v Perez* (1988) 166 CLR 351*MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119*The Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547*Toprak v Finagrain* [1979] 2 Lloyd’s Rep 98  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 61 |
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| Date of hearing: | 8 February 2021 |
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| Counsel for the Plaintiffs: | Mr N Mirzai |
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| Solicitor for the Plaintiffs: | Henry Williams Lawyers |
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| Counsel for the First, Second and Third Defendants: | The First, Second and Third Defendants did not appear |
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| Counsel for the Fourth and Fifth Defendants: | Mr C O’Neill |
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| Solicitor for the Fourth and Fifth Defendants: | Hamilton Locke |

ORDERS

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|  | NSD 15 of 2021 |
| IN THE MATTER OF AUSTRALASIAN MORTGAGE FINANCE LIMITED (ADMINISTRATOR APPOINTED) (ACN 615 711 772) |
| BETWEEN: | CHAD ROBERT RAPSEY IN HIS CAPACITY AS VOLUNTARY ADMINISTRATOR OF AUSTRALASIAN MORTGAGE FINANCE LIMITED (ACN 615 711 772) (ADMINISTRATOR APPOINTED)First PlaintiffAUSTRALASIAN MORTGAGE FINANCE LIMITED (ACN 615 711 772) (ADMINISTRATOR APPOINTED)Second Plaintiff |
| AND: | PETER JULIAN COSSETTOFirst DefendantLENROSS FINANCIAL GROUP PTY LTD (and others named in the Schedule)Second Defendant  |

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| order made by: | NICHOLAS J |
| DATE OF ORDER: | 9 March 2021 |

THE COURT DIRECTS THAT:

1. The first plaintiff is not justified in permitting the first, second or third defendants to vote at the second meeting of creditors in respect of any amount claimed to be presently or contingently owed under their consultancy agreements with the second plaintiff.
2. The plaintiffs and the fourth and fifth defendants (“the parties”) file and serve written submissions in relation to costs by 4.00pm 12 March 2021 limited to 2 pages.
3. The parties file and serve written submissions in reply by 4.00pm 17 March 2021 limited to 2 pages.

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

REASONS FOR JUDGMENT

NICHOLAS J:

# Background

1. Before me is an application made by Mr Chad Rapsey in his capacity as the Voluntary Administrator of Australasian Mortgage Finance Limited (Administrator Appointed) (“AMFL”) seeking judicial direction under section 90-15(1) of the *Insolvency Practice Schedule (Corporations)* contained within sch 2 of the *Corporations Act 2001* (Cth) (“the Corporations Act”) as to whether he should permit three defendants who claim to be creditors to vote at the second meeting of creditors and, if so, whether he should permit them to do so to the full extent of the amount claimed by each of the them.
2. AMFL is an unlisted public company limited by shares which was incorporated on 3 November 2016 with the intention that it would become a full service Australian non-bank lender. Between November 2016 and January 2019 AMFL pursued a strategy of designing, distributing and managing lending products and programs, and arranging related facilities to fund a portfolio of residential loans. However, after January 2019, that strategy changed to instead seek to invest in and partner with Mortgageport Management Pty Ltd, the owner and operator of an established mortgage management and non-bank lending platform.
3. A directors’ meeting was held on 3 November 2020 at which it was resolved by a majority vote that a Voluntary Administrator be appointed to AMFL. Mr Rapsey was appointed on that date pursuant to s 436A of the Corporations Act.
4. Mr Peter Cossetto is the first defendant and claims to be owed a debt of $429,750 by AMFL pursuant to a consultancy agreement made on or about 22 May 2017 (“the Cossetto Agreement”) under which he provided services to AMFL.
5. The second defendant is a company called Lenross Financial Group Pty Ltd (“Lenross”) which is controlled by Mr Leonard McKinnon. Lenross claims to be owed a debt in the amount of $242,100 by AMFL pursuant to a consultancy agreement (“the Lenross Agreement”) made on or about 30 March 2019 (but which took effect from 1 July 2018) under which Mr McKinnon provided services to AMFL.
6. The third defendant is a company called Crayform Pty Ltd (“Crayform”) which is controlled by Mr Rodney Payne. Crayform claims to be owed a debt in the amount of $240,000 by AMFL pursuant to a consultancy agreement (“the Crayform Agreement”) made on or about 30 March 2019 (but which took effect from 1 July 2018) under which Mr Payne provided services to AMFL. The Crayform Agreement is in substantially identical terms to the Lenross Agreement, including the net monthly fee amounts.
7. At all relevant times Mr Cossetto, Mr McKinnon and Mr Payne were directors of AMFL. Mr McKinnon was also the chairman of the board of directors and Mr Cossetto was also the company secretary.
8. Separate debts are owed to each of the three directors or their related entities the second and third defendants in relation to expense reimbursements, proceeds owed for a share buy-back to Mr Cossetto and a debt arising from a personal loan that Mr Payne entered into with AMFL (“the undisputed debts”). These debts were not contained in the relevant proofs of debt, but were identified by Mr Rapsey in the Voluntary Administrator’s report to creditors of 30 November 2020. The approximate total of the undisputed debts for each of the three defendants is: $47,700 owed to Mr Cossetto from the unpaid proceeds of a share buy-back, $2,654 owed to Mr Cossetto for expense reimbursements, $1,500 owed to either Lenross or Mr McKinnon for expense reimbursements, and $7,590 owed to Mr Payne in fulfilment of a loan he entered into with AMFL.
9. No application has been made to the Court in relation to the undisputed debts.
10. The fourth and fifth defendants are creditors of AMFL. Mr Rapsey has received a proposed deed of company arrangement (“DOCA”) produced by the fourth and fifth defendants and Hargreaves Singapore Pte Ltd (which is not a party to this proceeding). He has also received a separate proposed DOCA from Mr Cossetto and Mr McKinnon. Based on correspondence between the defendants and the administrator, which of these competing proposals is approved by the creditors will very likely depend on whether the directors and their related entities are permitted to vote at the second meeting of creditors, and if so whether they are permitted to vote only in relation to the undisputed debts, or whether they can also vote up to the amounts claimed to be owing under the consultancy agreements.
11. The questions that arise in this application according to the agreed statement of issues signed by the solicitors for the Administrator and the fourth and fifth defendants are as follows:

1. Did the First, Second and Third Defendants (together, **Director-Related Defendants**) agree to vary the terms of the separate consultancy arrangements between each of the Director-Related Defendants and the Second Plaintiff (**Consultancy Agreements**) to convert fees owing (**Consulting Debts**) to equity?

(a) If yes:

(i) was the agreement between the Second Plaintiff and the Director-Related Defendants legally binding?

(ii) are the Director-Related Defendants entitled to claim damages against the Second Plaintiff for a failure to issue equity in lieu of the Consulting Debts?

(iii) what is value of any such entitlement?

(b) If not are the Director-Related Defendants, in any event, estopped from claiming the Consulting Debts as a debt due and payable?

2. What is the value of any entitlement of the Director-Related Defendants (if anything)?

3. Whether the Administrator is justified in permitting the Director-Related Defendants to vote at the second meeting of creditors of the Second Plaintiff to the full extent of the Consulting Debts.

4. Whether the Administrator is justified in recognising the Consulting Debts for dividend purposes in the voluntary administration of the Second Plaintiff.

1. There are some minor difficulties with the way in which some of these questions have been framed, but they broadly reflect the issues to be decided. The first is whether the first, second and third defendants (collectively “the consultants”) are creditors of AMFL (leaving to one side the undisputed debts) because it is indebted to them for consultancy fees payable in cash or whether their only claim is to receive shares in AMFL in lieu of any such payment and, if so, on what terms. There is also an issue as to whether, if the consultants were required to accept equity in lieu of cash under the consulting agreements, AMFL is liable to them for breach of contract arising out of a failure by AMFL to allot shares when required under those agreements.

# The Consultancy Agreements

1. The Cossetto Agreement records that Mr Cossetto had agreed to provide consultancy services to AMFL as a consultant and independent contractor. Clause 4 states:

The Net Monthly Fee, and the Payment Date on which AMF will pay you, are set out in the Schedule. You are responsible for any taxes related to these payments …

1. The Schedule referred to in cl 4 appears in cl 9 which provides:

**Schedule**

Commencement Date: 12 April 2017

Duties and Functions: Negotiations with counterparties, stakeholders and key shareholders during the start-up phase.

 Performance of assignments as designated by the Company from time to time.

 Attendance at required executive meetings.

Net Monthly Fee (excluding GST): $12,500 for the first month (non pro-rated) and $12,500 for each month thereafter (pro-rated for each part month)

Payment Date: 15th day of each month until termination

1. Clause 8 provides:

You expressly agree and understand that there are no other oral agreements or understanding between you and AMF, or any of AMF's officers, agents or representatives, concerning or affecting this Agreement and that no alterations, modifications or amendments of the terms and conditions of this Agreement are binding upon either party unless agreed in writing by you and AMF's authorised officers.

1. The Crayform Agreement and the Lenross Agreement were both entered into pursuant to a resolution of the directors made on 19 March 2019. According to that resolution, those consultancy agreements would operate with effect from 1 July 2018. I will say more about the minutes of the directors’ meeting of 19 March 2019 later in these reasons.
2. The Lenross Agreement and the Crayform Agreement are in similar terms. However, the terms of cl 9 in those agreements are materially different from cl 9 of the Cossetto Agreement. Clause 9 in the Lenross Agreement and the Crayform Agreement is as follows:

**Schedule**

Commencement Date 1 July 2018

Role Consultant

Responsibilities Performance of work as designated by the Company from time to time …

Net Monthly Fee (excluding GST) $10,416.66, or pro-rated for each part month

Payment Date In arrears on receipt of invoice around 1st day of each month until termination

Payment Method By agreement between the Parties, accrued fees may be paid:

 (a) in cash;

 (b) via issue of AMF ordinary shares, with the issue price per share to be:

 (i) if AMF is conducting an offer of ordinary shares at the expected date of payment – the price at which the ordinary shares are being offered; or

 (ii) if AMF is not conducting an offer of ordinary shares at the expected date of payment – the last price at which the ordinary shares were issued.

1. There are two significant differences between cl 9 in the Cossetto Agreement and cl 9 in the Lenross Agreement and the Crayform Agreement. Clause 9 in the form it appears in the Lenross Agreement and the Crayform Agreement expressly contemplates that the parties may agree that accrued fees be paid via an issue of shares rather than cash. It also contemplates that payment in cash or via the issues of shares will occur “[i]n arrears on receipt of invoice around first day of each month until termination”. The evidence indicates that Lenross did not issue any invoices to AMFL until 2 April 2020, and that Crayform has never issued any invoices.

# The Financial Statements

1. The evidence includes draft financial statements and the accompanying directors’ report in respect of AMFL for the period 3 November 2016 to 30 June 2017. The draft financial statements disclosed that the company suffered a net loss of $541,935 during that period. A note under the heading “Directors’ remuneration” states:

Since 1 July 2018 directors have agreed to take equity in lieu of accrued and unpaid salary and consulting fee entitlements, apart from reimbursement of expenses of approximately $20,000 incurred in the course of the discharge of employment or consulting responsibilities. The arrangement to meet director entitlements apart from expense reimbursement will continue until a funding event defined as the establishment of a warehouse or similar financing facility under which residential loans can be funded. After the funding event, any agreed salaries and fees will be paid in cash in accordance with contracts of employment or services. The directors are considering the most appropriate mechanism for the award of equity, in particular whether such award should be by way of ordinary shares under an employee share scheme or through the award of options.

The draft financial statements also show that at 30 June 2017 the company had total assets of $148,321 and total liabilities of $134,455.

1. On 18 December 2018 a representative of the independent auditor sent an email to Mr Cossetto seeking confirmation that the directors had “agreed to take equity in lieu of unpaid salaries etc from 1 July 2018”. Another email was sent on 20 December 2018 requesting that AMFL send through “the remainder of the subsequent events documents” including “[d]irector confirmation of equity in lieu from 1 July 2018”. These requests were referred by Mr Cossetto to Mr McKinnon on 20 December 2018 following which Mr McKinnon sent an email to the auditor, copied to Mr Cossetto, which relevantly states:

The board have resolved that, apart from a liability of $4,000 per month to Simon Robinson from 1st January, 2019:

- All directors of Australasian Mortgage Finance (AMF) will receive their full salary entitlement in equity or options in AMF.

- The equity or options to be awarded will be based on the value established by the most recent equity issuance to third parties.

- This will continue until a new equity raising of at least $2.5 million by AMF.

1. The audited financial statements and accompanying directors’ report were signed by Mr McKinnon on behalf of the directors on 21 December 2018. The auditors signed the accompanying audit report on the same date. Details of the assets and liabilities and the note concerning the directors’ remuneration under the consultancy agreements did not change.
2. The financial statements and accompanying directors’ report for the financial year ended 30 June 2018 disclose that AMFL suffered a loss of $1,227,363. The consolidated statement of financial position as at 30 June 2018 shows total assets of $35,965, total liabilities of $575,384, and negative equity of $539,419. The financial statements also include a note in relation to directors’ remuneration in nearly identical terms to the note discussed above. The relevant note includes some additional information concerning the Crayform Agreement and the Lenross Agreement entered into on 1 July 2018.
3. The directors’ report was signed by Mr McKinnon as Chairman on behalf of the directors on 19 November 2019.
4. The evidence also includes a document entitled “Shareholder Update” dated 19 September 2019 which appears to have been issued by or with the authority of the directors. The Shareholder Update includes the following note:

All directors have been retained as consultants to provide executive services to the Company, with agreed consultancy fees accruing in each case to preserve the Company’s available cash. Directors have determined that it is in the Company’s interest for accrued fees to be paid through the issue of ordinary shares at the current issue price. The value of accrued consulting fees is included in the accounts for the periods ending 30 June 2018 (completed and provided with this update) and 30 June 2019 (completion pending).

1. The evidence also includes minutes for a meeting of directors dated 2 December 2019 attended by Mr Cossetto, Mr McKinnon and Mr Payne. The minutes are mostly concerned with what is referred to as the Mortgageport transaction (referred to in the minutes as the “MP transaction”) which would have, if completed, enabled AMFL to execute its business plan.
2. Paragraph 5.3 of the minutes of the 2 December 2019 meeting is concerned with the directors’ consulting fees. It states:

**Accrued consulting fees**

* Directors discussed the accrued consulting fees under the consultancy service arrangements with PC (as sole trader), Crayform Pty Ltd (a related entity of RP) and Lenross Financial Group Pty Ltd (a related entity of LM).
* Since 1 July 2018 all directors engaged directly or indirectly as consultants to the Company have conditionally agreed to take equity in lieu of accrued and unpaid salary and consulting fee entitlements, apart from reimbursement of expenses in the course of the discharge of employment or consulting responsibilities. The arrangement to meet director entitlements apart from expense reimbursement was to continue until a funding event defined as the establishment of a warehouse or similar financing facility under which residential loans can be funded. After the funding event, any agreed salaries and fees were to be paid in cash in accordance with contracts of employment or services.
* Directors identified in December when preparation of the Company’s 2019 accounts was underway that the condition of the establishment of a warehouse or similar financing facility under which residential loans can be funded is no longer capable of being satisfied given the adopted change in the Company’s and entry into the acquisition transaction with MP.
* NOTED that each consultant has subsequently agreed that:
* Payment of accrued and unpaid salary and consulting fee entitlements will be deferred until the earlier of completion of the MP transaction or 31 March 2020.
* Subject to any required prior approval of the Company’s members, accrued and unpaid salary and consulting fee entitlements may be paid through the issue of new ordinary shares in the Company. No such member approval has yet been sought.
* Any agreed salary and fees accruing after the date of completion of the MP transaction will be paid in cash in accordance with contracts of employment or services.
1. It was submitted on behalf of the Administrator that the evidence did not establish that the directors had in fact agreed with AMFL to receive equity in the company in lieu of cash. I do not accept that submission. The evidence establishes that the directors agreed to take equity in lieu of cash in satisfaction of their claim for accrued and unpaid consulting fees. The notes in the financial statements of AMFL for the period ending 30 June 2017 and the period ending 30 June 2018 make this clear. The email correspondence between Mr McKinnon and the auditors in December 2018 also confirms that the directors had resolved to take equity in lieu of “their full salary entitlement”. The shareholder update of 19 September 2019 also makes clear that the directors providing services to AMFL under the consultancy agreements, had agreed to take their consultancy fees through the issue of ordinary shares. The clear inference is that the directors agreed to this arrangement on their own behalf, their related entities (ie. Lenross and Crayform), and also on behalf of AMFL.
2. Counsel for the Administrator placed some emphasis in his submissions in reply on para 5.3 of the minutes of the directors meeting dated 2 December 2019 which, he argued, showed that [T51]:

… what the directors appear to have been trying to achieve was the deferral of any entitlement flowing to them. Not the sacrifice of it, not the conversion of it, but the deferral of it to allow the company to continue to do what it needed to do. And, indeed, the point is made by point 2 on the page which says it’s not only conditional upon what the directors want to do, but also upon the members agreeing to it. That never occurs, but it’s not as if the directors are not conscious of it. The difficulty – and this is the point that I make about an enforceable agreement. I’m not saying that the directors never evinced an intention to take equity or to defer their fees … what I am saying is that … on the face of the record … it appears regardless of which the documents you look at it, all that is clear is that the directors agreed to defer their entitlement.

1. This seems to be not very different to the previous submission to which I have referred. In essence, this further submission was that the directors merely agreed to defer taking up their entitlement *to cash*. I do not accept this submission which is in my view clearly inconsistent with unequivocal statements made by the directors to the auditors, shareholders and in the financial statements to which I have referred.
2. The second bullet point in para 5.3 refers to the directors having “conditionally agreed” to take equity in lieu of accrued consulting fee entitlements. The financial statements do not refer to the agreement as conditional but Mr McKinnon’s email to the auditors suggests that it was conditional in the sense that it would “continue until a new equity raising of at least $2.5 million” occurred. That the directors and the company would agree to such a condition is understandable because, if recapitalised by new equity, the financial circumstances of the company may well have improved to the point where it could then afford to pay the directors in cash.
3. The fourth bullet point in para 5.3 refers to matters that are said to have been “subsequently agreed”. Although this subsequent agreement is said to involve a deferral of the payment of accrued and unpaid consulting fees until the earlier of completion of the Mortgageport transaction or 31 March 2020, para 5.3 when read as a whole does not suggest that AMFL had agreed to vary the existing arrangements to permit the directors to receive cash in lieu of the equity. In fact, para 5.3 explicitly states that the consulting fee entitlements may be paid through the issue of new ordinary shares.
4. Counsel for the Administrator submitted that para 5.3 of the minutes makes clear that any allotment of shares would be subject to shareholders’ approval. The evidence does not show what the source of this requirement was (eg. a provision in AMFL’s Constitution or a Shareholders’ Agreement). Absent such evidence, it seems likely that the statement refers to the requirements contained in the Corporations Act regarding related party transactions. If so, that requirement, if it did apply, applied at all relevant times including at the time the financial statements were signed and the email was sent to the auditors by Mr McKinnon.
5. The last point to note about para 5.3 of the minutes is that it indicates that the directors had agreed that payments would be made to them in cash *after* the date of completion of the Mortgageport transaction. What is significant, to my mind, is that the minutes make clear that, once the Mortgageport transaction was completed, fees accruing under the consultancy agreements would *thereafter* be payable in cash. This is consistent with the earlier statements in the financial reports and to the auditors that once a funding event (as defined in the financial reports) occurred the payments would be made in cash. There is no suggestion in the 2 December 2019 minutes that entitlements which had *already* *accrued* at any time prior to the completion of the Mortgageport transaction would also be payable in cash. In any event the Mortgageport transaction was not completed.
6. Counsel for the fourth and fifth defendants referred me to an email sent by Mr Payne to the Administrator on 25 November 2020 in which Mr Payne said:

It was never intended that the Directors could claim any cash from the consultancy contracts until a funding event had occurred.

This was a start up business model and we agreed that Directors would sweat until a funding event had occurred. That funding event did not occur!

The minutes referred to the only other option which would be for fees to convert to equity.

1. Mr Payne went on to state that he would not be claiming any cash in respect of consultancy fees owing to Crayform and that he wished for them to be converted to equity in the hope that the proposed new structure could go forward and create value for shareholders.
2. It appears that the other directors took a different view to Mr Payne and that he was eventually persuaded to join them in submitting a proof of debt for the full amount now claimed to be owing under the Crayform Agreement. Mr Cossetto sent an email to the Administrator on 25 November 2020 asserting that the agreement was to defer the payments owed under the consulting agreements. In the absence of any evidence from Mr Cossetto or Mr McKinnon I do not find this email persuasive. In particular, Mr Cossetto’s assertion in his email to the Administrator that the conditions under which the “equity in lieu of cash” arrangements were to be made were never finalised and that “there was a general acceptance of the need to preserve cash through the issue of equity in lieu *or through deferred cash payment*s” (emphasis added) is inconsistent with the contemporaneous documents.
3. The suggestion that the directors would be entitled to recover their accrued consultancy entitlements in cash at some later date is inconsistent not only with the statements made in the financial statements approved by Mr Cossetto but also in Mr McKinnon’s email of 20 December 2018 to the independent auditor which was copied to Mr Cossetto. I think Mr Payne’s email of 25 November 2020 reflects the true position from 1 July 2018 that, from that date, it was never intended that the consultants could claim cash until such a time as a new equity raising of at least $2.5 million occurred.
4. I have previously referred to the directors’ minutes of 19 March 2019. No party referred me to these minutes but they are in evidence and I have had regard to them. Paragraph 3.2 of the minutes states:

3.2 **Consulting agreement with Lenross and Crayform**

* The directors discussed the Company’s existing consultancy arrangements, noting that all remaining consultants had previously agreed in principle to deferred payment pending a financing event.
* Directors recognised the need to revisit arrangements given the changes in recent months to the Company’s personnel and acknowledgement that the anticipated financing event is likely to take longer to achieve.
* NOTED that Peter Cossetto continues to be contracted in accordance with the terms of the consultancy agreement dated 22 May 2017.
* NOTED that Len McKinnon continues to provide consultancy services to the Company on the basis that the consultancy agreement with Lenross Financial Group Pty Ltd (**Lenross**) dated 1 May 2018 expired on 30 June 2018 and that the terms of a new consultancy agreement will be agreed and documented in a consultancy agreement with Lenross. Mr McKinnon is a director and principal consultant of Crayform.
* NOTED that Rodney Payne continues to provide consultancy services to the Company on the basis that the terms of a consultancy agreement will be agreed and documented in a consultancy agreement with Crayform Pty Ltd (**Crayform**). Mr Payne is a director and principal consultant of Crayform.
* RESOLVED that the Company enter into consultancy arrangements with the following entities and principal consultants with effect from 1 July 2018:

|  |  |  |
| --- | --- | --- |
| **Entity** | **Principal consultant** | **Agree Net Fee p.a.****(ex GST)** |
| Crayform | Rodney Payne | $125,000 |
| Lenross | Len McKinnon | $125,000 |

* NOTED that the new consultancy agreement with Lenross supercedes the previous consultancy agreement dated 1 May 2018.
* RESOLVED that consulting fees payable to Lenross, Crayform and Peter Cossetto will continue to accrue for the time being to conserve cash given the Company’s cash resources and material accrued liabilities.
1. I do not accept that the first or third bullet pointed entries accurately reflect the terms on which the directors were providing their services to AMFL as at the date of these minutes. In particular, these entries are inaccurate in so far as they suggest that the consultants “… had previously agreed in principle to defer payment pending a financing event” or that Mr Cossetto “… continues to be contracted in accordance with the terms of the consultancy agreement dated 22 May 2017”. They are at odds with the contemporaneous documents to which I have referred that make clear that the directors had agreed to take equity in lieu of cash on the terms communicated by Mr McKinnon to the auditors. In my view they are also inconsistent with para 5.3 of the minutes of 31 March 2020 and Mr Payne’s email to the Administrator of 25 November 2020. In the absence of evidence from any of the directors verifying the accuracy of the minutes, including, in particular, the resolution recorded next to the last bullet point, I approach these minutes with caution and give them very little weight.

# Variation of the consultancy agreements

1. Looking at the evidence as a whole, I think it is clear that the directors agreed to receive their consultancy entitlements in equity or options as stated in Mr McKinnon’s email of 20 December 2018. To hold otherwise would imply that Mr McKinnon and Mr Cossetto had misled AMFL’s auditors in a deliberate or reckless manner. None of the directors gave evidence to contradict the content of Mr McKinnon’s email and, in the circumstances, I think it provides a sure foundation for finding that all three directors agreed to the arrangements set out in that email at some time between 1 July 2018 and 20 December 2018.
2. The inference I draw is that the directors acting on their own behalf, and on behalf of Lenross, Crayform and AMFL, agreed to these new arrangements. In the case of the Cossetto Agreement this amounted to an agreed contractual variation. As to the Lenross Agreement and Crayform Agreement, it amounted to a mutual election under cl 9 to receive equity at an issue price that would be determined in accordance with that clause. I also infer that Mr Cossetto agreed that the issue price of the equity would be calculated on the same basis.
3. The directors’ resolution referred to in Mr McKinnon’s email to the auditors refers to “equity or options”. That language is not the same as found in the Lenross Agreement or the Crayform Agreement. But the commercial purpose of the arrangement was clear: Mr Cossetto, Lenross and Crayform would accept either equity or options in lieu of cash in full satisfaction of their entitlements under the consultancy agreements until such time as a new equity raising of at least $2.5 million took place.
4. The Administrator submitted that any such variation would not have been supported by consideration. I do not accept that submission. In the present case the consideration flowing to and from AMFL is clear. The company received a benefit through reducing its need to draw on cash reserves. In return AMFL provided Mr Cossetto the opportunity to grow his shareholding and share in the potential success of the company: see *Hill v Forteng Pty Ltd* [2019] 138 ACSR 344.
5. The Administrator referred to cl 8 in the consultancy agreements and suggested that it may not be open to find that the consultancy agreements had been varied given the terms of that clause. I do not accept that submission. There is authority in this country that a “no oral modification” clause cannot prevent the parties to a contract from later agreeing orally to vary it: see *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [217]–[218] per Finn J; *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91; *Cenric Group v TWT Property Group* [2018] NSWSC 1570 at [101]–[103] per McDougal J; cf *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119.
6. The resolution referred to in Mr McKinnon’s email was on my findings carried after the Cossetto Agreement was made. In the circumstances, cl 8 does not preclude a finding that the Cossetto agreement was effectively varied otherwise than in writing.

# Damages for Breach of Contract

1. Counsel for the Administrator submitted that, if the consultants had agreed to receive equity in lieu of cash, AMFL had failed to allot shares to them at or about the time their entitlements to receive those shares accrued. He submitted that by failing to make such allotments, AMFL breached the consultancy agreements and that it is liable to the consultants for breach of contract. He then says that on this basis the Administrator is entitled to treat the consultants as creditors who have unliquidated claims against AMFL to the approximate value of the amounts contained in their respective proofs of debt.
2. There are a number of difficulties with the Administrator’s submissions based on what he suggests was AMFL’s breach of the consultancy agreements.
3. First, there is no evidence that the directors took any steps to require AMFL to issue shares pursuant to the agreement. The only persons in a position to take steps to procure an allotment of shares were the directors themselves. The evidence indicates that the three directors and the company were acting on the common assumption that there was no requirement that the equity to which they were entitled in lieu of cash had to be issued at any particular time and that any shareholders’ meeting at which any necessary approval could be sought could take place at such time as the directors saw fit. In my view this is a case in which the directors and their related entities are estopped from relying on any failure by AMFL to allot shares because the directors failed to take steps to procure the allotment. Whether the facts are analysed in terms of conventional estoppel or promissory estoppel, the practical result is the same, and the directors and their related entities are not permitted to depart from what was at all relevant times a common shared assumption, namely, that the necessary allotment of shares need not occur on a periodic basis. Further, delaying the allotment of shares may well have had effect of increasing the number of shares that the consultants would receive if the issue price declined. This is because the details of the relevant arrangement require that the shares be issued at the latest issue price. It follows that the directors may well have had a financial incentive to delay any allotment of shares for so long as the underlying financial position of AMFL continued to deteriorate.
4. Second, there is a difficulty in the way in which the Administrator says damages should be assessed for the purported breaches of the consultancy agreements. Counsel first submitted that damages should be assessed based on the market value of the shares at the date of the purported breach. He then submitted that the consultants’ losses should therefore be assessed on the basis that a breach of the consultancy agreements occurred each and every month that AMFL failed to allot new shares to the consultants pursuant to the agreement noted in the financial statements. In the result, counsel for the Administrator submitted that the damages should be assessed as equal to the full amounts payable under the consultancy agreements.
5. It appears to be common ground that shares in AMFL are now worthless. This is confirmed by the Administrator’s projections as to the likely return to creditors under each of the competing DOCAs.
6. I have already rejected the premise on which the Administrator’s submissions are based. But even if there had been breaches of consultancy agreements as alleged by the Administrator for which AMFL could be liable in damages, it seems to me that this is not a case in which it would be appropriate to assess damages as at the date of breach. As Mason CJ said in *Johnson v Perez* (1988) 166 CLR 351 at 356:

The general rule that damages are assessed as at the date of breach or when the cause of action arose has been applied more uniformly in contract than in tort and for good reason. But even in contract cases courts depart from the general rule whenever it is necessary to do so in the interests of justice.

See also *The Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547 and *Johnson v Agnew* [1980] AC 367 (HL). In the latter case, Lord Wilberforce said at 400-401:

The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

1. One situation in which a different date for the assessment of damages has been adopted is where the party in breach of contract arising out its failure to perform its obligations by an agreed contractual date has been induced by the other party to believe that strict compliance with that requirement will not be insisted upon.
2. In *Toprak v Finagrain* [1979] 2 Lloyd’s Rep 98 at 109, Goff J (as his Lordship then was) referred to a situation in which an innocent party had led the party in breach to believe that he would not exercise his strict legal rights. Having found that, upon its proper construction, a relevant contractual provision provided that damages for breach should be assessed “on the day of default”, his Lordship continued at 109:

Of course, the subsequent actions of the parties may have some effect upon their respective rights. If, for example, there is an agreed postponement of the contractual date for performance, then there may be a variation of the contract resulting in a new date for performance, in which event there can be no default until that date has passed; a similar result may be achieved if, though there is no variation to the contract, there has been a representation by the innocent party that he will not exercise his strict legal right to performance on the contractual date, and the circumstances are such that it would be inequitable for him thereafter to treat that date as the date of default for the purposes of assessing damages under the clause. But here one has to be careful. If the contractual date for performance comes and goes, the innocent party may not immediately treat the other party as in default. He has an election whether to do so or not; he may, for a variety of reasons, decide to wait for a time, and while he waits the contract remains open to performance. But the mere fact that he waits, and does not treat the other party as in default until a later date, does not mean that, for the purposes of the clause, the “date of default” is changed; that date remains the day when the time for performance came and went without due performance.

1. His Lordship went on to hold that the sellers in that case were entitled to have damages for breach fixed by reference to the market price of the relevant goods on the date after which they ceased granting indulgence to the buyers.
2. In the present case it would be unjust to assess any damages payable to the consultants on the basis that they should have been allotted shares at some previous date when it was the directors’ failure to take steps to procure the relevant allotments that gave rise to what the Administrator now submits was a breach of contract. There are three reasons for this.
3. First, the commercial purpose of the agreement between the consultants and AMFL recorded in the financial statements was to obviate the need for AMFL to draw on its limited capital reserves to make cash payments to the consultants for their services and to relieve the company of some of the significant financial pressure that it was under. As previously mentioned, as at 30 June 2018, AMFL had total assets of $35,965 against total liabilities of $575,384. On the approach contended for by the Administrator, the company’s debt burden will not have been relieved at all and the consultants would be entitled to prove as creditors for the full value of their entitlements under the consultancy agreements as if they had never agreed to take equity in lieu of cash.
4. Second, there is no evidence to suggest that the consultants would have sold any shares allotted to them. Nor is it apparent from the evidence whether there was any market for the shares and, if so, at what price.
5. Third, assessing the consultants’ damages on the basis contended for by the Administrator would allow the consultants to profit from the directors’ own lack of diligence. If the company was in breach of the consultancy agreements by not issuing equity to the consultants, then this was due to the failure of the directors to take any steps to arrange any such allotments.
6. In the circumstances, I do not think it would be just to assess damages as at the date of breach even if, as was submitted by the Administrator, AMFL had breached the relevant consultancy agreements in failing to allot shares on a continuing basis (eg. from month to month). It is unnecessary to determine on what date any such damages should be assessed but I am inclined to think that it could not be any earlier than the date on which the consultants notified AMFL that they required the company to allot them shares. This they have never done.
7. In the result, I do not consider that the consultants are creditors either for the liquidated or unliquidated sums they allege are owed to them under the consultancy agreements. The consultants are entitled to equity in AMFL in accordance with their consultancy agreements as varied by the agreement recorded in the financial statements and the email from Mr McKinnon to the auditors of 20 December 2018. These entitlements do not provide the directors with any basis to prove as creditors in the company.
8. There will be a direction that the Administrator is not justified in permitting the first, second or third defendants to vote at the second meeting of creditors in respect of any amount claimed to be presently or contingently owed under their consultancy agreements with AMFL. The parties will be given the opportunity to make submissions on the question of costs.

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| I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Nicholas. |

Associate:

Dated: 9 March 2021

SCHEDULE OF PARTIES

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| Defendants |  |
| Third Defendant: | CRAYFORM PTY LTD |
| Fourth Defendant: | ROUS INVESTMENTS PTY LTD IN ITS PERSONAL CAPACITY AND AS TRUSTEE FOR ROUS INVESTMENTS TRUST |
| Fifth Defendant: | REMARA CAPITAL PTY LTD |