SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS 10478/11

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

First Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Second Applicant: **BLAIR ALEXANDER PLEASH AND RICHARD ALBARRAN IN THEIR CAPACITY AS LIQUIDATORS OF EQUITITRUST LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ACN 061 383 944**

AND

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729**

LIQUIDATORS' OUTLINE OF ARGUMENT

Application (CFI-257)

I Overview

[1] The first applicant (**Company**) was the responsible entity (under Chapter 5C of the *Corporations Act 2001* (Cth)) of two managed investment schemes (**EIF** and **EPCIF** respectively)[1] and trustee of an unregistered managed investment scheme (**EPF**).

[2] Mr Whyte (**Receiver**) was appointed by this Court to be responsible for the winding up of, and receiver of, the EIF and EPCIF on 21 November 2011.[2] After that, the Company entered administration on 15 February 2012 and was wound up on 20 April 2012.[3]

[3] The second applicants (**Liquidators**) have been the administrators and liquidators for the duration of the administrations.[4]

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[1] Amended points of claim (**POC**), [2](b)-(c); Admitted that the EIF and EPCIF are managed investment schemes in points of defence (**POD**), [4](b)-(c), the Company is recorded as Responsible Entity of the EIF and EPCIF in searches obtained from ASIC Exhibit BAP-6, 40, 52.
[2] POC, [10]; Admitted, POD, [5].
[3] POC, [11]-[12]; Admitted, POD, [6].
[4] Together with Glen Oldham between 15 February 2012 and 17 July 2013.

[4] Over the period 2012 to 2017 the Liquidators and the Company corresponded with Mr Whyte in relation to their entitlement to be paid their remuneration and costs from the assets of the EIF.[5] No agreement could be reached.

[5] By 2018 Mr Whyte was desirous of finalising the EIF and filed an application on 3 August 2018 for directions in relation to the Liquidators determining certain proofs of debt and the issue of the Liquidators' and the Company's right to be indemnified in respect of remuneration and costs from the assets of the EIF.

[6] On 2 April 2019 the Liquidators were ordered by this Court to carry out certain work (**Order Work**) relating to the debts provable in the liquidation by unit holders of the EIF (which they did) on the basis, inter alia, that they were entitled to claim reasonable remuneration for themselves and their employees for performing the work "*at rates and in the sums approved from time to time approved by the Court, and to be indemnified out of the assets of the EIF in respect of such remuneration for any amounts which the Court approves by way of further order*".[6]

[7] On 31 August 2021 the Liquidators and the Company were directed to file any application in respect of the payment of remuneration and expenses from the property of EIF, and on 28 September 2021 Liquidators and the Company did so (**Indemnity Application**).[7] These orders were made following an application being filed by Mr Whyte in August 2021 to compel the Liquidators to make such an indemnity application.

[8] On 1 October 2021 the Liquidators were joined to the proceeding as the second applicants and orders for the Indemnity Application to proceed on points of claim were made.

[9] By the Indemnity Application and the points of claim, in short:

(a) the Liquidators have sought to have the sum of their remuneration in respect of:

(i) the liquidation work they performed in the period 1 May 2013 to 31 March 2018 fixed in the sum of $857,179.55 plus GST pursuant to section 499 of the Act (**Liquidation Remuneration**);

(ii) the Order Work fixed in the sum of $87,319 plus GST (**Order Remuneration**) pursuant to, inter alia, the 2 April 2019 order;

(b) the Liquidators have sought to identify the parts of the parts of earlier remuneration previously approved (**Earlier Remuneration**), the Liquidation Remuneration and the Administration Expenses and Liquidation Expenses

[5] Affidavit of Whyte sworn 2 August 2018.
[6] CFI-215 (**Order**). See in particular order 8.
[7] The Liquidator were subsequently joined as second respondents by order made 1 October 2021

that are attributable to or for the benefit of the EIF, being the **EIF Liquidation Remuneration**, the **EIF Administration Expenses** and **EIF Liquidation Expenses (EIF Amounts)**;

(c) the Company has sought to be paid the EIF Amounts from the assets of the EIF pursuant to:

(i) section 72 of the Trusts Act;

(ii) section 101(1) of the Trusts Act;

(iii) clause 6.1 (indemnity for certain expenses) of the Constitution;

(iv) clause 21.1 (entitlement to management fee) of the Constitution; and

(v) the common law or in equity (together with (i) to (iv), the **Company's Claims**);

(d) the Company seeks to have determined whether certain claims asserted by EIF as giving rise to a crossclaim and the application of the clear accounts rule (**CAR Claim**) so as to defeat the Company's Claims were compromised by the **Deed of Settlement**; and

(e) the Liquidators have sought to be paid the EIF Amounts from the assets of the EIF (**Liquidator's Direct Claims**).

[10] This is an application by the Liquidators for orders:

(a) fixing the amount of its remuneration for the Order Work;

(b) about the Liquidators' Direct Claim and in particular their entitlement to be paid remuneration and expenses (but not the quantum of those amounts) from the assets of the EIF on a summary basis, or alternatively, the referral of separate questions for determination and associated interlocutory relief; and

(c) other ancillary matters addressed in more detail below.

II Order on admission[8] (paragraph 1 of the relief)

A Principles

[11] Rule 658, in terms, empowers the court, at any stage of the proceeding, to make any order, including a judgment, that the nature of the case requires. The Court can, again in terms, make an order under this rule even though there is no claim for that order sought in the originating process or similar document.

[12] Further, the Work Order expressly contemplates the Court making a further order to fix the amount of the Order Remuneration.

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[8] On reflection, "Order in face of non-admission" would be more apt.

B Submissions

[13] The Liquidators seek to have their remuneration for undertaking the work the subject of the Work Order fixed by the court in the sum of $87,319 plus GST.

[14] The issue is dealt with at POC [23] to [26]. No substantive defence is raised at POD [13] and [14].

[15] Particulars[9] of the work undertaken were provided by the Liquidators to Mr Whyte on 27 November 2020, 2 December 2021 and again on 8 December 2021.[10]

[16] On 9 December 2021 Mr Whyte took the position that he would not oppose an order fixing the Order Remuneration in the sum claimed.[11]

[17] The members of the EIF have been served[12] with the application and have had an opportunity to make any submissions as to the quantum of the amount sought for the Order Remuneration – no such submissions have been filed.

[18] The Liquidator has deposed to the relevant work being reasonably necessary to carry out the work the subject of the Work Order and the total sum being a fair and reasonable amount for the performance of that work.[13]

[19] The work was performed in the period 2 April 2019 to 30 April 2020 and the costs of same carried by the Liquidators since that time. There is no reason to hold the Liquidators out of their remuneration any longer.

[20] It is appropriate for the court to fix the Order Remuneration in the sum of $96,050.90.

III Liquidator's Direct Claims

A Principles

[21] It is now settled that a liquidator may directly claim against the assets held on trust by the company for payment of his or her remuneration and expenses incurred in undertaking general liquidation work in certain circumstances.

[22] In *Re Suco Gold Pty Ltd* (1982) 33 SASR 99, the principle was expressed by King CJ at 11 as follows:

> On these principles which I have discussed, the liquidator is entitled to have recourse to the property of each trust for the purpose of meeting the costs and expenses of

[9] Exhibit BAP-6 at page 64 et seq.
[10] Exhibit PJH-3 at page 34.
[11] Exhibit PJH-3 at page 37.
[12] Order made 17 December 2021 concerning substituted service of the members of the EIF. An affidavit of service of the members of the EIF will be filed by the time of the hearing.
[13] [31] of the Pleash affidavit.

winding up, the petitioner's costs and the liquidator's remuneration, so far as they are incurred in relation to each trust. As there are no non-trust assets or liabilities, all the expenses are attributable to one or other of the trusts and must be apportioned between them. The liquidator will be able to make an estimate of the work and expense involved in the liquidation so far as it relates to each trust. Where no apportionment is possible, the maxim that equality is equity should provide the solution to the problem of apportionment.

[23] A broader statement of the principle emerged in the later case of *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)* [1989] Ch 32. There, a liquidator applied for directions as to whether any part of his expenses and remuneration could be paid out of trust assets. The court held at 50:

> The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest ... or by a receiver appointed by the court whose fees would have been borne by the trust property ... and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity.

[24] Broader still, in *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd* (in liq) (1999) 30 ACSR 377, Finkelstein J held at 385:

> These cases establish, clearly enough in my opinion, that provided a liquidator is acting reasonably he is entitled to be indemnified out of trust assets for his costs and expenses in carrying out the following activities: identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; distributing trust assets to the persons beneficially entitled to them.
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> The position is a little more involved as regards work done and expenses incurred in what may be described as general liquidation matters. If that work is unrelated to the beneficiaries and their claims it is difficult to see how the cost could be charged against their assets. In the case of a company that has carried on the business of trustee it might be that much of the work involved in the liquidation is chargeable against trust assets if it can be shown that the liquidation is necessary for the proper administration of the trust. But it is unlikely that this will be so where the company did not act solely as trustee or at least did not act in that capacity to a significant extent. In that event, the liquidator will be required to estimate those of his costs that

are attributable to the administration of trust property and only those costs will be charged against the trust assets.

[25] In *Parbery v ACT Superannuation Management Pty Ltd* (2010) 79 ACSR 425 at [34], it was held that a liquidator's costs and expenses in relation to one trust could not be charged to another trust where the company is trustee of more than one trust, but that if expenses of administration between various trusts cannot be apportioned with some accuracy, they were to be borne equally.

[26] These authorities are cited with approval by Jackson J in *Park v Whyte (No 2)* (2018) 2 Qd R 413 at 429 to 432 and helpfully collated *AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13] to [14] (Brereton J)[14] as follows:

> (1) Where the company is trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses, whether for administering the trust assets or for "general liquidation work", out of the trust assets: *Re Suco Gold Pty Ltd* (1993) 33 SASR 99; 7 ACLR 873; *Grime Carter & Co Pty Ltd v Whytes Furniture (Dubbo) Pty Ltd* [1983] 1 NSWLR 158; *Re French Caledonia Travel Service Pty Ltd* (in liq) [2003] NSWSC 1008; (2003) 59 NSWLR 361; *Bastion v Gideon Investments Pty Ltd (in liq)* (2000) 35 ACSR 466 at 480 [70]; *In the matter of North Food Catering Pty Ltd* [2014] NSWSC 77 .
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> (2) Where the company does not act solely as trustee, costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit: *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 685-689; *Re Greater West Insurance Brokers Pty Ltd* [2001] NSWSC 825; (2001) 39 ACSR 301; *French Caledonia* at [209].
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> (3) At least where the non-trust assets do not permit that course, and perhaps even when they do, a liquidator is entitled to be indemnified out of trust assets for his costs and expenses, but only to the extent that they are referable to administering the trust assets: *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 at 385; *French Caledonia* at [211], [213]. This is pursuant to the court's equitable jurisdiction to allow a trustee remuneration costs and expenses out of trust assets, which extends to a person such as a liquidator who is, for practical purposes, controlling a trustee: *Berkeley Applegate (Investment Consultants) Ltd*; *Harris v Conway* [1989] Ch 32 at 50–51; *Re Application of Sutherland* [2004] NSWSC 798; (2004) 50 ACSR 297; *Trio Capital Ltd (Admin App) v ACT Superannuation Management Pty Ltd* [2010] NSWSC 941; (2010) 79 ACSR 425; *In re MF Global*

[14] This collation was cited with approval in *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 6)* [2019] FCA 2111 at [6] (Gleeson J) and *Australian Securities and Investments Commission v Marco (No 9)* [2021] FCA 1306 at [49] (McKerracher J)

Australia Ltd (in liq) (No 2) [2012] NSWSC 1426, [55]; *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd atf Joseph Family Trust* [2013] NSWSC 447; (2013) 94 ACSR 160.

(4) In principle, where the liquidator does work which would entitle him both to remuneration as liquidator by the company, and recovery from the trust assets, there are two funds liable and there should be contribution between them. However, where there are no assets of the company available, it is unnecessary to consider the question of contribution. If a liquidator has done work which is attributable equally to the winding up of the company and the administration of trust assets, and there are no assets of the company at all to meet his expenses in doing so, the expenses are payable solely from the trust assets: French Caledonia at [212].

(5) Where the liquidator is administering, through the company of which he/she is liquidator, more than one trust, the liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other, although where allocation is not possible a pari passu allocation may be permitted: Re Suco Gold at 882–3; 13 Coromandel at 386.

[27] See also *Australian Securities and Investments Commission v Marco (No 9)* [2021] FCA 1306.

B Submissions

[28] The law is well settled. The declarations sought reflect the law as set out above.

[29] The declarations are confined to the Liquidator's entitlement vis-á-vis the assets of the EIF. The rights and entitlements of the EPCIF and EPF are not affected by the declaration sought.

[30] The following relevant facts are admitted or uncontroversial:

(a) the Company was the responsible entity of the EIF and EPCIF;

(b) the EIF[15] and EPCIF were established as trusts;

(c) the Company was the trustee of the EPF, EIF and EPCIF;

(d) the Company also conducted, in its own right, the business of a professional funds manager;[16]

(e) the Company is being wound up, and the Liquidators were the administrators and are now the liquidators;[17]

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[15] POC, [6].[8]; Admitted POD, [7].
[16] POC, [2](b)-(c); Admitted POD, [4](b)-(c).
[17] POC, [11]-[12]; Admitted, POD, [6].

(f) the Company is without funds;[18] and

(g) the EPCIF and EPF are without funds.[19]

[31] If the Liquidators or the Company are not entitled to recover the EIF Amounts from the EIF, there will be no need for the parties and the Court to engage in the lengthy trial (or other process – see below) required to determine the amount of the Liquidation Remuneration (a notoriously lengthy and costly process) and then determine the EIF Amounts (a process that experience strongly suggests will be highly productive of disputes and add a further layer of complexity, delay and cost).

[32] If the declarations sought are made:

(a) the court will not be required to determine the Company's Claims (the basis of recovery making no difference to the Liquidators and the Company) and whether the CAR Claim survives the Deed of Settlement;

(b) the EPF can be joined as a party to the proceeding (the Liquidators and the Company accept for present purposes that their rights will likely be affected by the determination of the Liquidation Remuneration and the EIF Amounts);

(c) following (b), the determination of the Liquidation Remuneration and the EIF Amounts can be dealt with by:

(i) an order for mediation;

(ii) in the alternative to or failing success by (i), a referral to a referee/s; and

(iii) in the alternative to or failing success by (i), a trial.

[33] The making of the declarations sought will aid in the resolution of the balance of the dispute.

[34] It is desirable that the Liquidators (particularly as they are unfunded and already personally carrying the substantial Liquidation Remuneration) be given certainty at an early date that they will ultimately be entitled to recover from EIF (presently the only source of funds) such part of the their remuneration and expenses as they may ultimately be able to prove, before the costs of doing so are expended. To expend the time and money necessary to litigate all issues to the conclusion of a trial, to have the Liquidation Remuneration and the EIF Amounts determined, but be found to have no entitlement to have the those sums paid from the assets of EIF, will be an

[18] Exhibit PJH-3, 49-52, Affidavit of Pleash [8], Affidavit of Hegarty 17 December 2021, [18]-[19]
[19] Affidavit of Pleash [15]-[17]

immense waste of money for the Liquidators and the members of EIF and a poor use of the court's resources.

[35] It is expected the Receiver will submit that no declaration should be made because the issue of whether the Liquidators are entitled to be paid from the assets of the EIF cannot be determined until the amount they are entitled to be paid is determined. That submission should not be accepted.

[36] A declaration in similar circumstances was made in *Australian Securities and Investments Commission v Marco (No 9)* [2021] FCA 1306, following which the parties were ordered to a mediation to attempt to resolve the issue of quantum.

[37] It is also expected the Receiver will submit that no declaration should be made because the Liquidators have not proved the remuneration and expenses were reasonably and properly incurred and those issues will still need to be determined.

[38] It is not the Liquidators' case that the declaration will resolve the entire proceeding - that is not the test for a declaration (or a separate question, as discussed below).

[39] In *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, the High Court said at 357:

> Preliminary questions may be questions of law, questions of mixed law and fact or questions of fact. Some questions of law can be decided without any reference to the facts. Others may proceed by reference to assumed facts, as on demurrer or some other challenge to the pleadings. In those cases, the judicial process is brought to bear to give a final answer on the question of law involved. Findings of fact are made later, if that is necessary. Where a preliminary question is a pure question of fact that, too, can be answered finally in accordance with the judicial process if the parties are given an opportunity to present their evidence and, also, to challenge the evidence led against them.

[40] The proposed declaration would:

(a) have utility because it would resolve significant questions of law in the proceeding;

(b) obviate the need for the determination of other claims as to liability;

(c) be based on admitted and uncontested facts;

(d) would resolve discrete issues in the proceeding and render others otiose (i.e. the Company Claims and the CAR Claim); and

(e) not overlap with any of the remaining issues in the proceeding (i.e. quantum).

[41] Further, the discretion conferred by rule 658 (here to make the declaration) (and in exercising the court's inherent jurisdiction) should be exercised in light of the purpose of the UCPR – to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense – and with the objective of avoiding undue delay, expense and technicality.[20] The making of the declarations at this time achieves that purpose.

[42] Accordingly, it is submitted that the declaration sought by the Liquidators would resolve a substantial question of law in the proceeding via an application of the judicial process. Moreover, there is no good reason to delay determination of the issues.

IV Separate question (paragraphs 3 and 4 of the relief)

A Principles

[43] Rule 483 of the UCPR provides for the separate determination of questions prior to trial.

[44] Historically, separate questions were reserved for instances where a question (or questions) would probably "settle the litigation between the parties."[21] In modern times, the discretion is more liberal. The Court of Appeal held in *Re Multiplex* [1999] 1 Qd R 287:

> There are often questions in a dispute the decision of which, whilst it may not necessarily resolve the whole dispute, may nevertheless lead to its resolution, in a way which results in considerable savings in time and cost, often for reasons which are neither strictly legal nor logical. It is therefore desirable that, whenever possible, judges should decide summarily questions which can be conveniently so decided.[22]

[45] Whilst that case was decided under the old Rules, such an approach is consistent with the philosophy of the UCPR set out in r 5 which guides the exercise of the discretion.[23]

[46] In *Landsdale Pty Ltd v Moore* [2009] WASCA 176, Newnes JA, with whom Buss JA agreed, considering the equivalent rule in that State, noted at [19]:

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[20] Rule 5 of the UCPR. See *Courtney v Pinnacle Media Group Ltd & Ors* [2020] QSC 50 at [62] by way of example.
[21] *Lewis v Green* [1905] 2 Ch 340 at 344 (Warrington J). See to similar effect *Evans Deakin Industries Ltd v Commonwealth of Australia* [1983] 1 Qd R 40 at 45 (Andrews SPJ) and 50 (Campbell J).
[22] At 288 (Davies JA and Lee J).
[23] *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3)* [2015] QSC 295 at [44] (Flanagan J).

the court should "approach each case with the object of eliminating any unnecessary delay or cost, and ensuring the efficient and timely resolution of the case, consistent with doing justice to both sides.

[47] The rule is intended to provide for the determination of an issue or issues the resolution of which is likely to lead to substantial savings and expense.[24]

[48] Whether an order is made is subject to the exercise of the discretion of the Court.[25]

[49] In *Advance Traders Pty Ltd v McNab Constructions Pty Ltd & Anor* [2011] QSC 212 Boddice J at [10][26] said:

> In exercising that discretion, a relevant consideration is whether it would be convenient to determine first the issues raised, and, in particular, whether the successful determination of the separate issues would:
>
> (a) relieve the parties and the Court of the need to otherwise consider a significant volume of documents;
> (b) avoid the need for the Court at trial to consider expert evidence;
> (c) avoid, or at the very least reduce, the necessity for a lengthy trial.

[50] At [11] his Honour set out Branson J's convenient collation of the relevant principles in *Reading Australia Pty Ltd v Australian Mutual Provident Society & Anor* (1999) 217 ALR 495 at [8] (which are incorporated by reference) before observing that that the relevant Federal Court rule was in materially the same terms as r 483 UCPR and that the principles had previously been identified as relevant to the exercise of the discretion thereunder.[27] The applicable principles from *Reading* are set out hereunder.

[51] A separate question can be determined even though a determination on such a question will not determine any of the parties' rights.[28] Nevertheless, for the separate question to have any utility, it must be capable of giving rise to conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties.[29]

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[24] *Evans Deakin Industries Ltd v Commonwealth* [1983] 1 Qd R 40 at 45-46.
[25] *Body Corporate for Sun City Resort CTS v Sunland Constructions Pty Ltd* [2010] QSC 463 at [19].
[26] Citing *State of Queensland v Dale and Meyers Operations Pty Ltd* [2010] QSC 361 at [19], [20].

[27] *Body Corporate for Sun City Resort CTS v Sunland Constructions Pty Ltd* [2010] QSC 463 per Applegarth J at [19].
[28] *Landsal Pty Ltd (in liq) v REI Building Society* (1993) 41 FCR 421 at 425 (Keely, Burchett and Drummond JJ). See also *City of Swan v Lehman Brothers Australia Ltd* (2009) 73 ACSR 86 at [27] (Rares J).
[29] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [45]. See also *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [8] (Branson J); cited with approval in *Queensland Harness Racing Ltd v Racing Queensland Ltd* [2011] QSC 125 at [32] (Daubney J).

[52] In other words, the separate question must be "ripe".[30] In *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 60, Kirby P said 606:

> [a] matter is 'ripe' for separate and preliminary determination where it is a central issue in contention between the parties, the resolution of which will either obviate the necessity of litigation altogether or substantially narrow the field of controversy".

[53] A separate question would not be "ripe" if the determination of the separate question would create significant contested factual issues both at the time of the hearing of the separate question and at the time of trial; if the determination of the separate question would require the court to make credit findings; or if determination of the separate question would prolong rather than shorten the litigation.[31]

[54] It is relevant to consider whether the separate questions would:

(a) contribute to the settlement of the proceedings; and

(b) cause significant overlap between the evidence adduced on the hearing of the separate question and a trial.[32]

B Submissions

Questions

[55] If the declaration sought is made, there is no need to consider this issue.

[56] The questions are set out in the application. They are in substance the declaration reframed as preliminary questions.

[57] The separate questions are directed to the Liquidators' entitlement vis-á-vis the assets of the EIF. The rights and entitlements of the EPCIF and the EPF are not affected by the determination of the questions posed.

[58] In short, the questions will determine whether or not the Liquidators are entitled to be paid certain parts of their remuneration and expenses from the assets of the EIF. In other words, the questions decide "liability" – they are essentially a questions of law.

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[30] *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd* [2010] QSC 463 at [18] (Applegarth J). See also *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [8] (Branson J); cited with approval in *Queensland Harness Racing Ltd v Racing Queensland Ltd* [2011] QSC 125 at [32] (Daubney J).

[31] *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [8] (Branson J); cited with approval in *Queensland Harness Racing Ltd v Racing Queensland Ltd* [2011] QSC 125 at [32] (Daubney J).

[32] *City of Swan v Lehman Brothers Australia Ltd* (2009) 73 ACSR 86 at [27] (Rares J); cited with approval in *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 3)* [2015] QSC 295 at [45] (Flanagan J).

[59] Issues of "quantum" are tied up with issues of reasonably and properly incurred (in the case of expenses) and remuneration approval (in the case of remuneration). The questions proposed do not require a consideration or determination of those matters.

Established or agreed facts

[60] The following facts are admitted by the points of claim and points of defence or are uncontroversial:

(a) the Company was the responsible entity of the EIF and the EPCIF. The Company also conducted, in its own right, the business of a professional funds manager.[33]

(b) the EIF and EPCIF were trusts.[34]

(c) the Company is being wound up, and the Liquidators were the administrators and are now the liquidators.[35]

[61] There is not contest that the Company is without funds.

[62] For the reasons set out above under Part IV, those facts alone are sufficient to determine the proposed questions.

Quantum and liability do not overlap

[63] As submitted above, the proposed questions would decide "liability".

[64] Issues of "quantum" are tied up with issues of reasonably and properly incurred (in the case of expenses) and remuneration approval (in the case of remuneration). Proof of quantum will require the Liquidators to prove what they did, how then did it, and justify the amount they claim to be paid.

[65] Conversely, proof of liability is essentially a question of law that can be answered on the established or agreed facts.

[66] There is no overlapping evidence. Nor is there any overlapping issues of law.

No issues of credit

[67] The separate questions rely on facts admitted on the pleadings. No issues of credit could arise.

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[33] POC, [2](b)-(c); Admitted POD, [4](b)-(c), the Company is recorded as Responsible Entity of the EIF and EPCIF in searches obtained from ASIC Exhibit BAP-6, 40, 52.
[34] POC, [6].[8]; Admitted POD, [7].
[35] POC, [11]-[12]; Admitted, POD, [6].

The separate questions may shorten the proceedings and may increase the prospects of settlement

[68] The separate questions can only be determined by a court. Given the position adopted by the Receiver, there is no alternative.

[69] However, there are alternatives for the balance of the proceeding. If the separate questions are determined favourably to the Liquidators, the balance of the proceeding (being the quantum issue) could be sent to mediation (as occurred in *Australian Securities and Investments Commission v Marco (No 9)* [2021] FCA 1306 (McKerracher J)); and/or a referee could be appointed under r 501 (such an appointed would free say 10 hearing days – see below).

[70] If the separate questions are answered favourably to the Liquidators, the court will not be required to determine the Company's Claims and whether the CAR Claim survives the Deed of Settlement.

[71] The Liquidator's solicitor estimates that trial in respect of only quantum, will cost approximately $478,000 plus GST[36] and require 10 hearing days.

[72] The Liquidator estimates his (and his firm's) costs of:

(a) providing the particulars of the EIF Amounts sought by Mr Whyte to be $50,000; and

(b) undertaking the work associated with a trial in respect of only quantum to be between $50,000 and $100,000.

[73] Further, if the separate questions are determined against the Liquidators that will no doubt inform their view as to their prospects of successfully recovering any amount for remuneration regardless of what it might be fixed at (the Liquidators and the Company then being confined to the Company Claims and having to deal with the CAR Claim).

[74] Given the substantial costs of determining the quantum of their remuneration and the EIF Amounts and the fact that the other two trusts have no money, a commercial settlement will become all the more attractive.

The questions are ripe

[75] For the foregoing reasons, it is submitted that the separate questions are ripe in that:

(a) they can be determined on admitted facts;

(b) they do not overlap with the remaining issues in the proceeding;

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[36] Affidavit of Peter Hegarty sworn 4 February 2022 at [19].

(c) they do not call for findings on credit; and

(d) they are essentially questions of law.

[76] This is an appropriate matter for the court to exercise its discretion to order that the separate questions proposed be determined prior to trial.

V Strike out (paragraph 6 of relief)

A Principles

[77] The court can strike out all or part of a defence if it, relevantly, discloses no reasonable defence; has a tendency to prejudice or delay the fair trial of the proceeding.[37]

[78] Where, as here, the application to strike out is based on deficiency in the pleading, which may be remedied by re-pleading, the particularly cautious approach warranted in cases of summary dismissal does not apply.[38]

[79] A pleading fulfils its function if "the case is presented with reasonable clearness".[39]

[80] The applicable principles were conveniently collated and summarised by Bowskill J in *Equititrust Ltd v Tucker* [2019] QSC 51 at [13] to [18] and *Equititrust Ltd v Tucker (No 2)* [2019] QSC 248 at [5] to [18]. Insofar as they are relevant to the application, the principles are set out below.

[81] The focus of such an application is the pleading itself.[40]

[82] The application concerns a points of defence and not a defence proper. Whilst r 171 does not apply to a points of claim, a strike out order can be made under r 658[41] or in the exercise of the Court's inherent jurisdiction.

[83] It is submitted that the principles relevant to rule 171 inform the exercise of the discretion to make an equivalent order under r 658 or the Court's inherent jurisdiction – so too r 5.

B Submissions

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[37] *Uniform Civil Procedure Rules 1999*, r 171.
[38] *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [24]-[26] (Philippides J, with whom Chesterman JA and North J agreed).
[39] *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 293 (Dawson J), referring to *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd* (in liq) (1916) 22 CLR 490 at 517.
[40] *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583 at [67]-[69] (Jackson J).
[41] By analogy: a summary judgment application was heard under r 658 in *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265 at [25]-[28] (Davis J). The trial judgment was reversed on appeal in *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* (2020) 5 QR 521, but on other grounds.

[84] Paragraphs 31 to 35 of the amended points of claim is a negative pleading. That is, those paragraphs plead that the Company's right of indemnity is not affected by the so called "clear accounts rule" because of a settlement deed.

[85] The Receiver responds to those paragraphs in paragraph 16 of the points of defence.

[86] A proper response to paragraphs 31 to 35 calls for the Receiver to either admit there is no "clear accounts rule" issue, or to assert that the Company's right of indemnity is affected by the so-called "clear accounts rule". If the Receiver does the latter, the Receiver is mounting a positive case, which must comply with r 149.[42] The points of defence fails to do that.

[87] The Liquidators had also sought to clarify Mr Whyte's position in respect of the operation of the clear accounts rule by way of correspondence.[43] The response was of no assistance.[44]

[88] Moreover, paragraph 16 of the point of defence is evasive. It does not respond in substance to paragraphs 31 to 35 of the amended points of claim.

[89] Unless paragraph 16 is struck out, Liquidators do not and cannot know the case the Receiver will run at trial vis-à-vis the clear accounts rule. Thus, paragraph 16 does not fulfil the essential function of a pleading and should be struck out.

[90] The relief claimed is not pressed in respect of para 21 of points of defence.

VI Payment on account (paragraph 7 of relief)

[91] If the declaration sought is made or the separate questions determined in favour of the Liquidators, their entitlement to payment from the assets of EIF of their costs to date in respect of the Indemnity Application ought to be paid forthwith. Thus far the Application has been concerned almost solely with the issue of the Company's and the Liquidators' entitlement to payment. They ought not be held out of that money.

[92] As to the costs of litigating the balance of the dispute, an appropriate regime for the timely payment of the Liquidators' accounts ought to be put in place. The likely expenditure is large and the time to finalisation long. Again, there is no reason that the Liquidators ought to have to fund this expenditure from their own pockets (as they have to date).

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[42] *Tri-Star Petroleum Company & Ors v Australia Pacific LNG Pty Limited & Ors* [2017] QSC 136 at [25] (Bond J).
[43] Exhibit PJH-3, 30
[44] Exhibit PJH-3, 36-37

[93] The order sought is similar to orders made by Boddice J in these proceedings on 2 April 2019[45] to allow for the Order Work to be carried out and paid from the EIF in circumstances where the Mr Whyte was:

(a) seeking to compel the Liquidators and the Company to make a claims for indemnity from the assets of the EIF; and

(b) the Liquidators and the Company were without funds.

VII Conclusion

[94] It is respectfully submitted that the Court ought to make orders as sought in paragraphs 1, 2 and 6 of the application.

[95] Alternatively, if the Court is not minded to make the declarations sought in paragraph 2 on this application, the court should (in addition to making order 1) make the following orders:

(a) that the questions set out paragraph 3 of the application be determined separately, along with directions for the expedited hearing of the separate questions; and

(b) striking out paragraph 16 of the points of defence.

[96] The Liquidators would be heard on the question of costs of the application at an appropriate time.

B W J Kidston and M J Downes
Counsel for the liquidators
16 February 2022

[45] CFI-215