

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

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**IN THE MATTER OF GUNNS PLANTATIONS LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) (ACN 091 232 909)**

**DANIEL MATHEW BRYANT and CRAIG DAVID CROSBIE (in their capacities as
joint and several Liquidators of GUNNS PLANTATIONS LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)) (ACN 091 232 909)**
First Plaintiffs

and

**GUNNS PLANTATIONS LIMITED (IN LIQUIDATION) (RECEIVERS AND
MANAGERS APPOINTED) (ACN 091 232 909)**
Second Plaintiff

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 13 July 2021
Filed on behalf of: The Plaintiffs

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This is the exhibit marked "**CDC-5**" now produced and shown to **CRAIG DAVID CROSBIE** at the time of swearing that person's affidavit on 13 July 2021:


Craig David Crosbie

Before me: 

Samuel Martin Crock
Arnold Bloch Leibler
Level 21, 333 Collins Street, Melbourne 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

Exhibit "CDC-5"
Orders of Ball J dated 4 December 2019



**Equity Division
Supreme Court
New South Wales**

BALL J

4 December 2019

2018/76580 Giabal Pty Limited v Gunns Plantations Limited (In Liquidation)

EX TEMPORE JUDGMENT

- 1 By a notice of motion filed 26 November 2019, the first and second defendants seek an order revoking leave given to the plaintiffs by Hammerschlag J on 13 April 2018 to proceed against the first and second defendants under s 500(2) of the *Corporations Act 2001* (Cth). Both defendants are in liquidation.
- 2 At the time leave was granted the first and second defendants, together with the third to ninth defendants who were the former directors of the first defendant, were insured under a policy with AIG up to a limit of \$2.5 million. That policy covered both liability and defence costs cumulatively.
- 3 The application is made on the basis that the funds available to the first and second defendants under that policy have been, or are close to being, exhausted and that the liquidators have no other funds available to them to continue to defend the proceedings.
- 4 At present, the first and second defendants are subject to an order of the Court to agree to a discovery regime with the plaintiffs. I will say more about this shortly but the evidence before the Court is that the defendants' costs of complying with the discovery regime proposed in draft orders circulated by the plaintiffs on 28 November 2019 would be approximately \$140,000.

- 5 The evidence before the Court is that the first defendant currently holds approximately \$2.3 million in a bank account.
- 6 According to Mr Craig David Crosbie, one of the liquidators, approximately \$500,000 of that amount is held in respect of unpaid liquidators' costs. The balance is held on trust by the first defendant for unit holders of a number of managed investment schemes of which the first defendant was the responsible entity.
- 7 The evidence also is that the second defendant holds \$1,071,833.56 in its bank account. A sum of \$256,000 of that amount relates to a refund of GST which properly should be regarded as money held in connection with a settlement to which I will refer shortly and consequently does not belong to the second defendant.
- 8 In addition, the evidence is that the second defendant is entitled to be reimbursed from the proceeds of that settlement approximately \$73,000 for expenses paid by the second defendant in connection with proceedings that were settled.
- 9 On that basis, the second defendant holds approximately \$815,000 to which it is entitled. In addition, it is entitled to recover \$73,000, making a total of \$888,000.
- 10 The evidence from Mr Crosbie is that the liquidators' unpaid costs are \$2,510,850 with the result that no part of the money currently held by the second defendant or to which it is entitled would be available to fund these proceedings.
- 11 The settlement in question is a confidential settlement of proceedings in Tasmania. The liquidators hold a further sum in respect of that settlement.
- 12 According to Mr Crosbie, the settlement amount is the subject of securities in favour of the first and second defendants' financiers. In any event, the plaintiffs have asserted a security interest in that settlement amount which takes priority over any security held by the lenders.

- 13 The result is that until those competing claims to the money held in respect of the settlement have been resolved, the amount held in respect of that settlement is not be available to the liquidators to fund the current proceedings.
- 14 Lastly, the liquidators have bought three preference claims in the Federal Court which are the subject of reserved judgements. Until those judgements are delivered, realistically those preference claims cannot be a source of funds for the liquidators to fund the defence of this action. Mr Sullivan QC, who appeared for the plaintiffs, submitted that it would be possible for the liquidators to raise funds against security over the proceeds of those actions. In my opinion, however, that possibility is simply speculative and I cannot see the basis on which the liquidators would have some obligation to the plaintiffs, possibly to the detriment of unsecured creditors, of seeking to raise funds on security of those proceeds. It follows that apart from the amount available to the liquidator under the insurance policy, there are no funds available to the liquidators to fund these proceedings.
- 15 The evidence is that on 26 November 2019 the insurer's solicitor advised the first and second defendants' solicitor that there was \$128,835.29 remaining out of the cover available under the policy. Mr Crosbie gives evidence that the first and second defendants' solicitors have rendered an invoice dated 27 November 2019 in the amount of \$26,352.15 which has not yet been reimbursed by the insurers. He also gives evidence that the first and second defendants' solicitors' unbilled WIP to 29 November 2019 is approximately \$39,000, and estimates that the unbilled fees in connection with the current application are approximately \$20,000, leaving a balance of \$43,483.14. Mr Sullivan takes issue with some of these figures. He does so on the basis that Mr Crosbie cannot have personal knowledge of the first and second defendants' unbilled WIP and that there is no information before the Court providing details of how the \$39,000 is calculated, or for that matter, how the unbilled fees of \$20,000 is estimated.
- 16 I accept Mr Sullivan's submission that the evidence in relation to those figures is scant. Nonetheless, it is reasonable to assume that the first and second defendants have continued to incur costs in connection with the proceedings and, having regard to the material before me, that those costs are significant.

Consequently, a further investigation of those costs would be unlikely to produce a substantially different conclusion from the one that only approximately \$43,000 remains before the limits of the insurance are reached. In addition, as I have said, and as might be expected, the third to ninth defendants are insured in respect of their legal costs under the same policy, and it is reasonable to infer that their legal costs are also likely to erode the amount available under the policy, with the result that there is already a substantial risk that no further funds are available to be recovered under the policy.

- 17 As I have said, Mr Crosbie estimates that the costs of complying with the proposed discovery regime are in the order of \$140,000. Those costs are broken down into the following components by Mr Crosbie: (a) \$66,500 on account of the liquidators' staff for data copying; (b) \$22,500 on account of third party data processing costs, (c) \$1,000 on account of general out of pocket expenses; (d) \$10,000 to produce documents relating to earlier Victorian proceedings; (e) \$35,000 to supervise inspection of hard copy records in Tasmania and Victoria; and (f) \$5,000 for contingency costs for the general management of the discovery process. Mr Sullivan QC submits that these estimates are given at such a high level of generality and are unsupported by any documents with the result that the Court should not accept them. Mr Crosbie does, however, provide a description of the material held by the liquidators and the extent of that material. Although Mr Crosbie's estimates must be regarded as rough, having regard to the material he has identified I do not think that his estimates are so great that his evidence should be discounted altogether. I accept his evidence that on any view the costs of complying with the proposed discovery regime would be substantial.
- 18 As I have said, on the evidence before me the amount still available from the insurers is small and may be non-existent. The likelihood is that it will be less than the costs of complying with the discovery order. At the time leave to proceed was given, it appeared that there was a substantial amount available from insurers to meet the liquidators' costs and to satisfy any judgment that the plaintiffs might obtain. That is no longer the case. On the evidence before me, the liquidators will have little option if leave to proceed is not revoked but to cease to participate in the proceedings. In my opinion, that is not an appropriate way to resolve the

plaintiffs' claims against the defendants in liquidation. A more appropriate way would be to revoke leave and to leave it to the plaintiffs to submit a proof of debt if they choose to do so.

19 I am conscious of the fact that the plaintiffs may need access to the documents held by the liquidators in order to pursue their claims against the remaining defendants. However, there is nothing to prevent the plaintiffs from serving subpoenas on the liquidators to obtain those documents.

20 Therefore, the orders of the Court are:

- (a) Revoke leave granted to the Plaintiffs by order 1A made on 13 April 2018 by Hammerschlag J under s 500(2) of the *Corporations Act 2001* (Cth) to commence and continue this proceeding against the first and second defendants;
- (b) Grant leave to discontinue the amended second cross-claim cross-summons filed by the first and second defendants on 31 August 2019;
- (c) Reserve the question of costs of the discontinuance;
- (d) The plaintiffs pay the first and second defendants' costs of the notices of motion filed 26 November 2019 and 28 November 2019; and
- (e) I stand the matter over for directions on 13 December 2019 before the Commercial List Judge.

I certify that this and the 4 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Ball given on 4 December 2019 ex tempore and revised


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Associate

Date 10/12/19