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2 April 2015

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Dear Colleagues

Retail Adventures Pty Limited (In Liquidation)
Supreme Court Matter Number 2014/376655

We **enclose** by way of service a sealed copy of the Third Defendant's Outline of Submissions.

Yours sincerely
Bradfield & Scott Lawyers

Sarah Toomey Westcott
Solicitor

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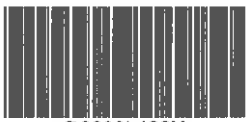

Written Submissions

COURT DETAILS	
Court	Supreme Court of NSW
Division	Equity
List	Corporations Registrar's List
Registry	Supreme Court Sydney
Case number	2014/00376655

TITLE OF PROCEEDINGS	
First Plaintiff	Sperling Enterprises Pty Ltd ACN 001882364
First Defendant	Retail Adventures Pty Limited (in Liquidation) ACN 135890845
Second Defendant	Vaughan Strawbridge, John Lethbridge Greig & David John Frank Lombe as Liquidators of the First Defendant
Number of Defendants	3

FILING DETAILS	
Filed for	TNW Australia Pty Ltd, Defendant 3
Legal representative	Lawrence John Graves
Legal representative reference	
Telephone	
Your reference	WLH:STW:400244

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

General Form (400244 TNW 020415 Third Defendants Outline of Submissions.pdf)

[attach.]

In the Matter of Retail Adventures Pty Limited (in liquidation)

Supreme Court of New South Wales proceedings no 2014/376655

Third Defendant's Outline of Submissions

Introduction

1. This is an application under s 564 of the *Corporations Act 2001* (Cth) brought by creditors of Retail Adventures Pty Ltd (in liq) (**RAPL**) who are funded by IMF Bentham Ltd (**IMF**).
2. The application seeks orders which would vary the priority of an interim distribution proposed to be made by the liquidators of RAPL (the **Liquidators**). The IMF funded creditors in essence seek to be paid, in priority to other creditors, an amount which would allow them to discharge their liability to IMF under their funding agreements.
3. The third defendant, TNW Australia Pty Ltd (**TNW**), has been joined to the proceeding at the suggestion of the Liquidators, to provide a contradictor to the application on behalf of RAPL creditors who are not funded by IMF.
4. TNW submits that the orders sought should not be made, in summary for the following reasons.
5. First, the Court lacks the power to make an order, because the pre-requisites for the making of an order have not been met. That is because:
   (a) the IMF funded creditors gave no "indemnity" to IMF;
   (b) if, contrary to (a), an indemnity was given by the IMF funded creditors to IMF, it was not given "in the winding up";
   (c) there is no, or no sufficient, causal link between the giving of any indemnity by the IMF funded creditors (if any indemnity was given) and the recovery, protection or preservation of property;
   (d) the "payment of money" relied upon by the applicant is after the event and no property has been protected or preserved by that payment (including because whether or not the money is now paid will not make any difference); and/or
   (e) the IMF funded creditors assumed no risk.

6. Secondly, assuming the Court has power, the Court could not conclude that it is "just" to make the orders sought having regard to:

   (a) the absence of any risk assumed by the IMF funded creditors;

   (b) unlike the traditional case of a creditor funding a liquidator, the inability of the Court (on the approach propounded by the plaintiff) to assess an appropriate reward for the person funding the litigation (here IMF), in circumstances where the amounts apparently claimed by IMF are (1) determined by contract rather than Court award, and (2) excessive when compared to any amount that the Court would award;

   (c) the fact that neither the IMF-funded creditors nor IMF itself funded the prosecution and resolution of the particular claims that have resulted in the payments received in the course of the liquidation;

   (d) further to (c), the fact that the relevant settlement of claims in the present case was made in part on the basis of a desire to avoid having to pay out a percentage of any recovery to a litigation funder, which basis would in part be frustrated if the orders sought by the plaintiff were made;

   (e) the fact that IMF has already been repaid the agreed costs of the proceedings brought by it (both at first instance and on appeal), part of which was borne by all creditors as being costs of the liquidation;

   (f) the absence of any evidence as to what the funds expended by IMF were used for; and

   (g) the absence of any admissible or reliable evidence as to what amounts IMF says the IMF funded creditors are liable to pay to it, or the basis on which such amounts are calculated.

7. Further to (g), the orders sought by the plaintiff would, in effect, amount to a blank cheque, including because the amount payable to IMF has not been ascertained, and because the orders would not permit the non-IMF creditors (who will bear the majority share of the burden of the payments to IMF) to test the entitlement of IMF to the categories of payments claimed under the IMF Funding Agreement or the quantum of those payments.

8. The orders also seek to impose the burden of the IMF commission on non-IMF creditors regardless of the reasonableness of the amounts payable and without regard to the fact that the funded creditors chose to incur that liability. Such a precedent would be of significant benefit to IMF and other funders in future

actions because creditors could be induced to enter a funding agreement on the footing that the funder's commission will be spread over a wider group and funded creditors will be in the same position as creditors who do not consider the terms of the funding agreement to be prudent or appropriate. In the present case, if the orders are made then their practical effect will be that each Funded Creditor's liability to IMF will be approximately one quarter of what each Funded Creditor agreed to pay. IMF also thereby reduces the chance of any Funded Creditor challenging IMF's commission.

9. The IMF funded creditors have submitted in the alternative that they are entitled to an equitable lien. That submission is a novel one with no basis in authority or principle and should be rejected.

Facts

10. A brief summary of relevant facts is provided in the Schedule to these submissions. For present purposes, TNW notes the following matters.

11. First, it appears that IMF was retained by substantially all of the funded creditors well prior to the commencement of the winding up of RAPL. IMF's costs of the matter which they seek to have paid by all creditors extend back to November 2012, shortly after the present Liquidators were first appointed Administrators.

12. Secondly, aside from the failed defence of an application to extend the second creditors' meeting of RAPL (*Strawbridge v Retail Adventures Pty Ltd* [2013] FCA 151), the only litigation funded by IMF has been the proceedings to set aside the creditors' resolution to enter into a Deed of Company Arrangement (**DOCA**) under s 600A of the Act, and the appeal in those proceedings. IMF subsequently extended an offer of funding to the Liquidators, but that offer was not taken up. IMF therefore did not fund any of the actions by the Liquidators in the liquidation, including the actions that led to the recoveries that have given rise to the current application.

13. Thirdly, IMF announced that it would commence, and then commenced the s 600A proceedings almost immediately after the passage of the creditors' resolution to enter into the DOCA. There was thus no scope for creditors to consider whether they would (independently of IMF) seek to set aside the DOCA. The plaintiff has not adduced any evidence that creditors were not prepared to bring such proceedings. This is in circumstances where the

Administrators in their s 439A report (demonstrating their independence) made a strong recommendation against the DOCA and in favour of winding up the company. Amongst other things, the Administrators pointed to:[1]

(a) the likelihood that RAPL was insolvent from at least May 2012, and that it was possibly insolvent from 1 July 2011;

(b) a potential insolvent trading claim for approximately $48.2 million;

(c) potential preference payments of approximately $50.1 million;

(d) the potential invalidity of the security taken by Bicheno;

(e) an estimate that in the event of a liquidation, creditors might be expected to receive 20.71 cents to 45.12 cents per dollar, rather than the 6.46 cents per dollar from the DOCA; and

(f) the lack of certainty that the creditors would even receive the 6.46 cents per dollar under the DOCA.

The report contained the following recommendation:[2]

> We are of the opinion that the return to creditors would **not** be greater under the proposed DOCA than in a liquidation scenario. The proposed DOCA estimates that unsecured creditors may receive a distribution in the vicinity of 6.46 cents in the dollar to creditors whereas our view is that liquidation provides a return of between 20.71 and 45.12 cents in the dollar.
>
> We are also of the opinion that the inherent risks to creditors in the DOCA proposal outweigh any potential benefits.
>
> Taking all factors into account we **do not** recommend that it is in the best interests of creditors to enter into the proposed DOCA.

14. Fourthly, save for a claimed amount of approximately $11,582, IMF has been paid the legal costs of the s 600A proceedings, including the appeal. IMF was paid the amount of $450,000 by the active defendants to the s 600A proceedings and also recovered a further $153,687.50 from the Liquidators, treated as expenses in the winding up. The Liquidators did not pay the balance of $11,582 on the basis that these expenses (including the issuing of IMF press releases) did not appear to be costs of the s 600A proceedings, and IMF accepted the reduced amount.[3] Presumably, the $11,582 (including the cost of IMF press releases) is included in the "Project Costs" sought to be recovered from creditors pursuant to the present application.

15. Fifthly, there is no evidence as to the breakdown or calculation of IMF's "Project Costs" over the period from November 2012 until the present day, which IMF is

[1] Hedge, 23.12.14, Exh SGH-1, pages 7 – 9, 62, 64 – 65.
[2] Hedge, 23.12.14, page 66
[3] Strawbridge, 27.3.15, page 9

apparently seeking to recover from creditors (plus various extra components calculated on a percentage basis). IMF has apparently incurred "Project Costs" of $726,636.94 prior to the winding up and $332,879.95 since the winding up.[4] However, no detail is provided of the costs (of $434,386.84) which are not legal costs from the s 600A proceedings.[5] For example, we do not know whether some of this represents time-costed work performed by IMF itself.

16. Sixthly, there is no proper evidence, nor any explanation, of how IMF calculates or will calculate the amount owing to it from the IMF funded creditors. The only evidence on this matter is given by one of the Liquidators, Mr Strawbridge. That evidence is stated to be "*[b]ased on information provided by IMF*",[6] but the underlying information has not been put in evidence by the plaintiff.

17. Seventhly, it is clear that among the Liquidators' reasons for recommending the settlement of $13.84 million to creditors on 4 August 2014, was the fact that by accepting the settlement, the Liquidators would not have to seek litigation funding to pursue proceedings against the former directors and related parties of RAPL and could thereby avoid having to pay some percentage of any recovery to a funder. The Committee of Inspection approved the settlement on that basis.

18. Eighthly, the IMF information pack sent to creditors has some curious features. The information pack consisted of a cover letter, a "Frequently Asked Questions" document, and a copy of the litigation funding agreement. The cover letter set out a range of potential actions which IMF might fund, including the possibility of funding a liquidator, if one was appointed, to pursue claims against the former director of RAPL, Jan Cameron, and related parties, or alternatively unsecured creditors themselves pursuing those claims directly.[7]

19. The attached document is headed "*Retail Adventures Pty Ltd (Administrator Appointed) – Potential Class Action – Frequently Asked Questions*".[8] It appear to have been adapted from a *pro forma* document used for more traditional class action litigation funding.

20. Under the heading, "***What will the claim cost me?***", the document stated:[9]

> The claim will cost you nothing. Any legal proceedings (including the current investigation) will be funded by IMF on a "no win, no pay" basis. This means

[4] Khouri 27.2.15 at [17].
[5] Strawbridge, 27.3.15, at [9]
[6] Strawbridge 27.2.15 at [63].
[7] Exh PH-1 at 17-19.
[8] Exh PH-1 at 20.
[9] Exh PH-1 at 21.

that you do not have to pay anything in the event that your claim is unsuccessful or if the class action does not proceed.

If your claim is successful, IMF will be entitled to a commission, management fee and the reimbursement of the costs it has paid out but only from what is recovered.

Whether the present application falls within s 564

21. Section 564 of the Act is in the following terms:

> Where in any winding up:
>
> (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
>
> (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;
>
> the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

22. It appears to be common ground that s 564(b) does not apply to the present case.

23. In order for the Court to have power to make an order under s 564(a), the following jurisdictional prerequisites must be met:

(a) there must exist some property capable of distribution to creditors; and

(b) that property must have been:

(i) "*recovered under an indemnity for costs of litigation given by certain creditors*"; or

(ii) "*protected or preserved by the payment of money … by creditors*"; or

(iii) "*protected or preserved by … the giving of indemnity by creditors*"; and

(c) the above must have occurred "*in any winding up*".

24. The latter part of the section implies a further jurisdictional requirement. Any order under the section must be made "*with a view to giving those creditors an advantage over others in consideration of the risk assumed by them*". It follows that one must be able to identify a risk assumed by the relevant creditors for the Court to have power to make such an order.

Recovered under an indemnity

25. The expression "recovered under an indemnity for costs for litigation" has been said to be "*a little elliptical*" and seems to mean "*recovered by reason of steps taken under an indemnity for costs of litigation*": *Re Webb* (1987) 76 ALR 139 at 141 (Pincus J). The

plaintiff seems to accept that the requirement that recovery be "under" an indemnity implies a causal connection. TNW agrees.

26. An important question is whether there is a relevant "indemnity". The general meaning of the term "indemnity" was explained as follows by the NSW Court of Appeal in *Total Oil Products (Australia) Pty Ltd v Robinson* [1970] 1 NSWR 701 at 703:

> An indemnity is a contract whereby the promisor (the person giving the indemnity) undertakes to the promisee (the person indemnified) to save the promisee harmless from such loss as the promisee might suffer as the result of entering into a transaction with a third party at the request of the promisor.

27. It should be noted that more recent authority has held that the latter part of this definition ("*at the request of the promisor*") is not necessarily required for an indemnity to arise (for example, an indemnity may be given in respect of a transaction which has already been concluded): *Canty v Paperlinx Australia Pty Ltd* [2014] NSWCA 309 at [51]-[52].

28. The Court in *Total Oil Products* made reference to the decision in *Davys v Buswell* [1913] 2 KB 47, in which Vaughan Williams LJ described an indemnity as "*a contract by one that, if the other will put himself in a certain situation, the first will indemnify him against the consequences.*"

29. Similarly, in *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, an indemnity was described as "*a contract by one party to keep the other harmless against loss*". See also *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254 per Mason CJ.

30. There is no reason to think that the term has any different meaning in the present statutory context. In particular, there is no reason to give the term "indemnity" some broader meaning that extends to a contract where the promisee (the person receiving the "indemnity") bears the risk and the promisor does not. The concluding words of s 564 ("with a view to giving those creditors an advantage over others in consideration of the risk assumed by them") indicate that the section is concerned with situations involving creditors undertaking a risk by giving an indemnity.

31. In the present case, the IMF Funding Agreement is not an indemnity by the funder creditors. The very nature of the agreement is that IMF is taking the risk, rather than the funded creditors. The funded creditors are not undertaking to keep IMF harmless from such loss as it might suffer. IMF is fully exposed to loss (including investigation costs, administrative costs, and legal costs of any party) in

respect of any unsuccessful application. It is also exposed to loss to the extent to which such loss exceeds its entitlement to payment out of any recoveries in any successful application. The funded creditors have no obligation to make any payments to IMF, except out of proceeds. The relevant payment clause (clause 12) only provides for payments out of the Resolution Sum. All risk lies with IMF.

32. It follows that there has been no property "recovered under an indemnity".

Property

33. The plaintiff has submitted that the relevant "property" that has been protected, preserved or recovered comprises the choses in action which gave rise to the settlement funds: plaintiff's subs at [17]. A number of cases have held that a chose in action is capable of constituting relevant property under the section. In such a case the "distribution" of that property extends to include the distribution of the realisation of the property: *Re Kyra Nominees Pty Ltd* (1987) 11 ACLR 767 at 773 (***Kyra Nominees***).

34. However, a chose in action is not distributable to creditors unless and until it is realised by way of judgment or settlement. Until the outcome of litigation (or threatened litigation) is known, it cannot be seen that any property has in fact been protected: *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (1996) 22 ACSR 337 at 348; *Commissioner of Taxation v Currockbilly Pty Ltd* (2002) 172 FLR 99 at [29] (***Currockbilly***). Until judgment or settlement occurs, any application under s 564 is premature: *Currockbilly* at [33].

35. Accordingly, it is not enough for the plaintiff to show that by reason of an indemnity given or payment made to IMF, the DOCA was set aside. The question is whether the payments in fact received in the liquidation were recovered under an indemnity or protected or preserved by the payment or money or the giving of an indemnity.

Protected or preserved by the payment of money or ... by creditors

36. The plaintiff accepts that the word "by" requires a causal connection between the payment of money and the protection or preservation of the relevant property: plaintiff's subs at [19]. TNW agrees.

37 The "payment" relied upon in the present case is a *future* payment: plaintiff's subs at [23]. The payment will only be made at the time that any interim distribution is made, and after any protection or preservation of property. The property has not been protected or preserved by the payment of money. For example, if the

funded creditors were, for some reason, not to pay IMF, then this would not affect in any way the assets that have already been recovered or their availability to creditors in the winding up.

Protected or preserved by … the giving of indemnity by creditors

38. For the reasons already discussed, in the present case relevant property was not protected or preserved by the giving of any "indemnity".

39. In the event that is not correct, however, it would be relevant to consider the scope and extent of the indemnity which, it is alleged, has been given. The plaintiff contends that the relevant indemnity is the promise to pay a share of the "Project Costs" contained in clause 12.1.1 of the IMF funding agreement (Exh PH-1 at 38) because the Project Costs, it is contended, included the money IMF outlayed for the purpose of the section 600A proceedings: plaintiff's subs at [20].

40. It is clear, therefore, that the plaintiff does *not* rely on the amounts it is required to pay to IMF by way of a success fee (up to 35% of recovery), or a "Project Management Fee" (a 20% uplift on IMF's costs) as part of the relevant "indemnity".

41. Therefore, in considering what is "just", the Court would have to take into account the facts that:

    (a) since the agreed costs of the s 600A proceedings have already been paid back, the only portion of the indemnity that will be called upon relating in any way to the proceedings is an amount of $11,582 which the Liquidators did not consider reasonable costs of the proceedings; and

    (b) the other portions of the indemnity that may be called upon relate to other work done by IMF and there is no evidence as to how any of that work resulted in any recovery, protection or preservation of property.

42. The plaintiff contends that there is no restriction in the words of the statute as to whom the indemnity is provided to: plaintiff's subs [21]. For the reasons developed in paragraphs 43 to 54 below, TNW submits that that contention should be rejected and the section should not be construed as applying to the indemnity given by creditors to IMF in this case.

In any winding up

43. The plaintiff makes a submission to the effect that the words "in any winding up" require that the recovery, protection or preservation of property and the

payment of money must occur "*during the winding up*": plaintiff's subs at [18]. The plaintiff appears to regard this as a purely temporal requirement.

44. That submission does not reflect the law.

45. In *Fuji Xerox Australia Pty Ltd v Tolcher* (2004) 60 NSWLR 696; [2004] NSWCA 284, the Court of Appeal considered the meaning of the words "in any winding up" in s 564. In that case the question was whether expenditure by the appellant to meet the operations of an administrator should be included in the computation of the amount it ought to recover under a s 564 order (funding also having been provided in due course to the liquidator).

46. The Court of Appeal (Spigelman CJ, Sheller and Tobias JJA agreeing) held that the funds advanced to the administrator could not be taken into account. The Court approved and adopted (at [4] – [5]) the reasoning at first instance of Barrett J, who observed that there were textual indications in s 564 that "in the winding up" refers to a situation where the liquidator is in office.

47. On appeal, the appellant relied on ss 513B and 513C of the Act, which provide (in the context of a voluntary winding up) that the winding up is deemed to commence on the day on which the administration began. (The same would apply in the present case by reason of s 513A(d) of the Act.)

48. Accordingly, the question on appeal was (at [7] per Spigelman CJ):

> whether the words "in any winding-up" in s 564 refer to the period of time during which a winding up is deemed to have occurred, or whether those words should be understood as meaning, "in the course of and for the purposes of the winding-up".

49. Spigelman CJ held that the latter was the correct construction (at [13]-[14]):

> [13] The factors to which Barrett J gave particular attention in his Honour's judgment and, in my opinion, the views his Honour expressed, were correct and are determinative of the proposition, that the words "in any winding-up" in the context of s 564 do not refer to a period of time during which there can be said to have been a winding-up, but refer to facts and matters that occurred in the course of the winding-up.
>
> [14] His Honour directed attention to the specific reference to liquidator in par (b) of s 564 and his Honour was correct to do so. Similarly, as his Honour noted, the acts referred to as triggering the ability of the court to make the subject orders in par (a), being acts of recovering property under an indemnity or protecting and preserving property by means of payment of money or indemnity from a creditor, are facts and matters that occur typically in the course of a liquidation, rather than in the course of an administration, where the focus of attention is on the carrying on of the business.

50. The conclusion of Spigelman CJ is consistent with the general policy behind s 564 as consistently interpreted by the courts. In *State Bank of NSW v Brown* (2001) 38 ACSR 715; [2001] NSWCA 223 (***Brown***), Spigelman CJ explained (at [22]-[24], emphasis added):

> There is a public interest dimension in proceedings by a liquidator. As the Full Court of the Federal Court said in *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301 at 306:
>
> > A liquidator, when engaged in litigation on behalf of a company which is being wound up, or when contemplating instituting such litigation, is not in the same position as an ordinary litigant. The liquidator comes to the company as an officer of the court under a duty and responsibility to get in and maximise the assets of the company for distribution for the benefit of creditors.
>
> With respect to s450 of the Code, Hayne J said in *Re Ken Godfrey Pty Ltd (In liq)* (1994) 14 ACSR 610 at 612:
>
> > ... the discretion covered by s450 is a broad and general discretion and one that is to be exercised having regard to the desirability in the public interest of encouraging creditors to indemnify liquidators who desire to pursue claims in the winding up of companies.
>
> It is in the public interest that all of the assets of a company are available for creditors. This extends to assets which can only be collected by litigation. Encouragement of liquidators to realise all of the assets of a company, if necessary by litigation, is intended to redound to the advantage of all creditors.

51. In the same case, Hodgson JA (with whom Handley JA agreed) said (at [91], emphasis added):

> I accept that it is not the object of the section to encourage litigation for the sake of litigation, or for the private benefit of creditors who provide the indemnity or the funds. In my opinion, there are two public purposes involved in the encouragement of pursuit of claims by liquidators, namely to benefit creditors and shareholders generally, and to recover property from wrong-doers and thus discourage misconduct in relation to corporations.

52. The general policy of the section to encourage the bringing of claims *by liquidators* underscores the reasoning of the Court of Appeal in *Fuji Xerox* that the relevant activity must be in the course of the winding up.

53. It follows from this that the question of timing is itself not directly relevant. What is relevant is whether the matters addressed in s 564 have occurred "*in the course of the winding up*". It is, of course, difficult to conceive of any situation in which this could occur prior to the appointment of a liquidator.

54. In the present case, any "indemnity" was given prior to the winding up and the relevant funded activity was the s 600A application to set aside the DOCA which

occurred prior to the winding up. These activities were not in the course of the winding up.

55. A further important aspect of this requirement is that it limits the type of indemnified activity that may properly be the subject of a claim under s 564. The permissible activity is activity that might properly be brought in a winding up, such as a claim brought by the liquidator, or a permissible claim by a creditor. As such, there is an appropriate constraint on the matters that could be subject to an application under s 564 to vary the priority of creditors and thus to displace certain creditors. For example, as noted above in the passage from *Brown*, a liquidator is an officer of the court under a duty and responsibility to get in and maximize the assets of the company for the benefit of creditors. A liquidator is well-placed to make decisions in the interest of creditors as to whether to accept funding from a litigation funder to pursue proceedings. In the present case, as explained by the Liquidators in their reports, a decision was taken to settle potential proceedings at an early stage rather than enter into an arrangement with a funder that would require a significant percentage of the proceeds to be paid out of the hands of creditors.[10]

Risk

56. An order under s 564 must be made "***with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.***"

57. It follows from the structure of the section that a creditor who has not assumed any risk cannot be the subject of an order under s 564.

58. The risk in question is the risk assumed at the time that any payment is made or any indemnity is given, although later events may be taken into account in assessing what risk would reasonably have been perceived at that earlier time: *Brown* at [94] per Hodgson JA.

59. In the present case, the funded creditors did not assume any risk. They accepted a commercial deal with a funder on a no win no fee basis.

60. The plaintiff submits that the risk assumed by the IMF funded creditors was that, as a consequence of entering into the IMF funding agreement, they would receive less from the ultimate proceedings of any chose in action than creditors who chose not to engage IMF: plaintiff's subs at [20]. That submission should not be accepted. It seeks to convert a commission or conventional contractual

[10] Hedge, 23.12.14, page 349 (Section 5).

payment into a "risk". The ordinary meaning of a "risk" is "*(exposure to) the possibility of loss, injury, or other adverse or unwelcome circumstance*" (Oxford English Dictionary online). By entering into the IMF funding agreement, the IMF funded creditors were, as the information pack stated, not exposed to any risk. They would only be liable to pay anything to IMF in the event that there was a recovery, and only from the proceeds of that recovery. The fact that they would thereby recover less than non-IMF funded creditors was not a "risk" in the relevant sense.

Conclusion on power of the Court to make an order

61. For the reasons set out above, the present application does not fall within s 564.

Whether it would be "just" to make the orders sought

62. IMF's own lawyers have described the present application as "novel".[11] That is certainly true.

63. In a conventional case, an application of the present type would be brought in circumstances where:

    (a) a liquidator had been appointed;

    (b) that liquidator, as an officer of the Court and acting in the interests of all creditors, had determined that it was in creditors' interests for one or more claims to be pursued;

    (c) that liquidator did not have sufficient funds to pursue a claim and approached creditors for funding; and

    (d) some, but not all, creditors had agreed to provide funding to the liquidator, thereby assuming a measure of litigation risk in the event that the claims contemplated by the liquidator proved unsuccessful.

64. The policy of the section as set out above is to encourage funding to the liquidator in those circumstances.

65. The plaintiff seeks to use s 564 for quite a different purpose. IMF wrote to creditors at an early stage prior to the appointment of liquidators, seeking to put in place an agreement which, it appears IMF now contends, entitle it to a percentage of any funds received by those creditors from the winding up of RAPL, regardless of whether or not IMF has played any part in prosecuting the claims the subject of recoveries in the liquidation. Some creditors, having agreed

[11] Letter to creditors dated 4 September 2014 (Exh SMK-1, Tab 7, at 453).

to this arrangement, now seek orders from the court which would relieve them from most of the impact of the bargain they struck with IMF.

66. TNW agrees with the plaintiff that the considerations taken into account by a court in determining what is "just" are conveniently summarised in the decision of Brownie J in *Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd* (1995) 18 ACSR 294 at 296-297, set out on p. 5 of the plaintiff's submissions.

67. In a conventional case where a creditor funds investigations or litigation which results in recoveries in the liquidation, an application for an order under s 564 will require consideration of matters such as the quantum of costs and expenses met by the creditor (as funder), the risk run by the creditor, whether the same result could have been achieved by another means, and an appropriate amount to reward the funder in all of the circumstances.

68. These matters would be assessed bearing in mind that:

(a) it is necessary to have regard to the statutory scheme of which s 564 is a part, which establishes a prima facie equality of treatment of unsecured creditors. Section 564 operates as an exception to that prima facie equality, and thus the onus on proving the facts which ground any departure from equal treatment and of persuading the court of the extent to which any such departure is just, lies on the creditor who seeks the exercise of the power under s 564;[12] and

(b) even in cases where there would have been no additional recoveries without funding:

> this type of 'but for' reasoning cannot be taken too far. It can equally be said that without [the company], and the liquidator, having the causes of action which they had, there would have been no recovery at all. The causes of action, held for the benefits of the creditors generally, were a necessary causal precondition of the recovery being made, and so was the provision of funding for the litigation. Neither should be regarded as the causally dominant factor.[13]

69. The usual position, where sufficient funds are available, would be to award the funding creditor with a return of any funds advanced, plus an uplift referable to the degree of risk assumed. In *Re Carico Pty Ltd* (1994) 14 ACSR 357 at 358, Young J, after surveying the authorities, stated:

> [U]p to the 1940s courts took the view that where the risk was relatively nominal the court often considered it fair to give to the funding creditors 25%

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[12] *Jarbin Pty Ltd v Clutha Ltd (in liq)* (2004) 208 ALR 242 at [68] per Campbell J
[13] *Jarbin Pty Ltd v Clutha Ltd (in liq)* (2004) 208 ALR 242 at [87] per Campbell J

> of the value of their debt over and above their normal dividend. In more recent cases courts have adopted a more liberal attitude in favour of creditors giving indemnity and are not as influenced by the risk factor. Courts tend to be more liberal towards creditors who, had they not intervened, would have left the officers of the company who were guilty of misfeasance to enjoy their ill-gotten gains.

70. Justice Young's reference to a "more liberal approach" in favour of creditors in recent years has, however, been doubted by Campbell J in his decision in *Jarbin v Clutha* (2004) 208 ALR 242 at [69]. In that decision, his Honour referred to a range of authorities over the years, both where the discretion had been exercised to give indemnifying creditors the whole of the net proceeds of recovery (at [69]) and where it had been exercised to give the indemnifying creditor less, and sometimes significantly less, than the full amount recovered (at [70]).

71. Other cases similarly have awarded an uplift by reference to the amount of funds put at risk by the funding creditor. In *Power Demolitians v Tosich Constructions Pty Ltd (in liq)* (1998) 26 ACSR 22, Branson J awarded the funding creditors an amount equal to three times the funds provided. In those proceedings the amount advanced was relatively small ($25,000). In *Re Kyra Nominees Pty Ltd (in liq)* (1987) 11 ACLR 767, where again the amounts spent were relatively small (about $8,000 in total), a similar approach was adopted (albeit slightly modified to take account of the fact that some creditors had funded two different liquidator's actions while others had funded only one).

72. A relevant consideration in some cases is the proportion of funds recovered to the outlay of the funding creditor. In *State Bank of NSW v Brown* [2001] NSWCA 223, the majority (Hodgson JA, with whom Handley JA agreed) upheld the trial judge's decision to award the whole sum recovered to two funding creditors. Each creditor had risked a substantial proportion (about 2/3) of the amount recovered. Hodgson JA also found it appropriate to allow for interest which the funding creditors had foregone on the sums lent to the liquidator (at [110]). Spigelman CJ would have allowed the funding creditors a lesser recovery, but still found the proportion of funds expended to the ultimate recovery to be of significance (at [33], [38]). His Honour described the risk undertaken by the funding creditors as "*substantial*", the litigation being complex and turning of issues of fact: at [39]

73. The common thread in all of these cases is the exercise of the Court's discretion and judgment to determine a "just" recovery for a funding creditor, taking into

account, among other factors, the degree of risk assumed, the amount put at risk, and the proportion of sums recovered compared to the funds put at risk. The orders sought by the plaintiff in the present application would wholly remove that exercise of discretion and judgment from the hands of the Court and leave the amount to be determined *ab initio* by the terms, however onerous, that had been agreed to between the IMF funded creditors and IMF.

74. The Liquidators currently propose to distribute $17 million by way of an interim distribution.[14] Of that amount, in addition to the legal costs of the s 600A proceedings (which have already been paid to IMF), the evidence[15] suggests that IMF may claim:

(a) an additional $434,386.84 of Project Costs;

(b) a Project Management Fee of $211,903.38;

(c) 20% of the Funded Creditors' share of the $12.5 million recovery under s 588M of the Act;

(d) 35% of the Funded Creditors' share of other amounts to be distributed;

(e) an additional 5% of the Funded Creditors' share of all amounts payable, being an "Appeal Fee"; and

(f) GST on most of these amounts.

If this approach is adopted, the actual amount payable will depend on the proportion of Funded Creditors as a percentage of total creditors. Based on the information available to them at present, the Liquidators calculate that the total amount payable to IMF in addition to the legal costs already recovered will be in the range of $1.625 million - $1.968 million.[16] This is so notwithstanding that IMF did not fund the activities of the Liquidators which have given rise to the recoveries to be distributed.

75. Particular comment should be made on the amount referred to in paragraph 74(e) above. TNW understands from the affidavit of Mr Strawbridge dated 27 February 2015 that IMF has represented to the Liquidators that it is entitled to 35% of the Funded Creditors' share of the balance ($4.5 million) of the $17 million interim dividend to be paid over and above the insolvent trading settlement figure of $12.5 million. That is apparent from the calculation of the

[14] Strawbridge, 27.2.15, at [60]
[15] Strawbridge, 27.2.15, at [63]
[16] Strawbridge, 27.2.15, at [64]

figures in paragraph 64 of Mr Strawbridge's affidavit. The plaintiff appears to have adopted those figures in its submissions at [7].

76. No doubt if this understanding is incorrect, this will be addressed in the plaintiff's reply submissions.

77. If this understanding is correct, it suggests that IMF considers that it is entitled to share of any dividend distributed to the Funded Creditors, irrespective of whether that dividend is referable to any recovery by the Liquidators contemplated in the IMF funding agreements.

78. In the present case, the $17 million interim distribution is simply an amount the Liquidators have chosen to distribute from the net funds available to them. Those net funds total (as at 16 February 2015) $20,371,707.93, after deducting the expenses of the liquidation.[17] The summary of receipts and payments[18] shows that the amount includes:

(a) cash at bank at the commencement of the liquidation (approximately ($1.2 million);

(b) settlement of preference claims that are apparently unrelated to the claims against Ms Cameron and her related parties (about $4.5 million); and

(c) bank interest and various other refunds including GST amounts.

79. How IMF claims to be entitled to be paid a proportion in respect of these funds is entirely unclear.

80. More generally, the amounts claimed by IMF set out above are based on the Liquidators' "understanding". The plaintiff has not adduced any proper evidence of how much would be claimed by IMF or the basis of these claims. The plaintiff has not exposed these matters to scrutiny by the Court. The Court is therefore not apprised of the facts which would allow it to determine:

(a) the ultimate impact on the non-IMF creditors if the orders are made; or

(b) whether the amounts claimed are properly payable.

In effect, the plaintiff is seeking orders that would amount to a blank cheque.

81. By letter sent on 23 March 2015 from the solicitors for TNW to the solicitors for the plaintiff, TNW put the plaintiff on notice that TNW would submit that it would be inappropriate to make the orders sought in the absence of proper evidence as to the amounts spent by IMF (including their components) and the

[17] Exh VNS-1, Tab 8
[18] Exh VNS-1, Tab 8

amounts claimed by IMF to be payable under the IMF Funding Agreement (including each component of that claim).

82. The "blank cheque" character of the orders is significant in circumstances where:

(a) the non-IMF creditors are not parties to the IMF Funding Agreement and therefore have no say in what is payable pursuant to that agreement;

(b) if the orders sought by the plaintiff are made, the lion's share of the liability to IMF will be borne by the non-IMF creditors. Based on the Liquidators' best estimates of the total creditor pool,[19] the Funded Creditors will represent approximately 21.5% to 26% of the total creditors pool, and the non-IMF creditors will therefore bear approximately 74% to 78.5% of the liability; and

(c) there may well be issues as to whether the amounts apparently claimed by IMF are in fact payable under the IMF Funding Agreement.

83. As to (c), a key definition in the IMF Funding Agreement[20] is the definition of "Claims", which are "the claims the Applicant has or may have against some or all of the Respondents under section 588M(3) of the Corporations Act for loss and damage caused to the Applicant arising out of the supply by the Applicant of goods and/or services to Retail Adventures worth at least $10,000". That definition is central to many other definitions and to the operation of the agreement. For example, under clause 12.1.1, the "Project Costs" payable are project costs paid by IMF "in relation to the Claims". It is not apparent that IMF has paid any project costs in relation to any Claims. IMF has not funded any "Claims" or pursued any "Claims". It is therefore not apparent how any Project Costs are payable. It is likewise not clear whether IMF will calculate the success fee payable to it only on the basis of the settlement that has been reached in relation to insolvent trading claims ($12.5 million) or whether it will also calculate its success fee on the basis of the related party preference claims ($1.34 million). The evidence of Mr Strawbridge suggests IMF may claim on both amounts. If it does, its entitlement to a percentage of the preference claims is unclear when the funding agreement seems to limit "Claims" to insolvent trading claims.

84. However, in circumstances where approximately three quarters of the payments to IMF will be funded by the non-IMF creditors, if the orders sought are made

[19] Strawbridge, 27.2.15, at [64]
[20] Rainford, 18.12.14, page 76

the Funded Creditors may not have sufficient incentive to seek to resist any IMF demand for payment.

85. In the circumstances of the present case, the orders sought by the plaintiff would not be "*just … with a view to giving those creditors an advantage over others in consideration of the risk assumed by them*", for the following reasons:

(a) No risk was assumed by the Funded Creditors – the IMF Funding Agreement proceeded on a "no win no fee" basis;

(b) The IMF Funding Agreement is a commercial arrangement undertaken by the Funded Creditors, but not undertaken by the non-IMF creditors. The effect of the orders would be that creditors who did not agree to the terms of the IMF Funding Agreement would be in exactly the same position as creditors who did. The plaintiff now, in effect, seeks to treat the non-IMF funded creditors as if they had signed up with IMF. The inappropriateness of such a result may be illustrated by considering what such a precedent would mean in future cases: funders could induce some creditors to enter into funding agreements on the footing that the commissions payable would be shared with all creditors by way of an order under s 564, whether they desired funding from litigation funding businesses or not. That would also tend to weaken any natural constraint on the percentage commission sought by any funder.

(c) There is no evidence that the proceedings funded by IMF would have been unable to be brought in the absence of such funding. In light of the statements in the Administrators' report, there is no basis for the Court to infer that this is so. Contrary to the position implicit in [27h] of the plaintiff's submissions, the plaintiff bears the onus in this regard.

(d) Creditors agreed to settle the potential claims for less than the maximum possible amount in part because this would avoid the need for litigation funding and a funder taking a percentage of the recoveries. That rationale behind that decision would be partially frustrated by the orders sought by the plaintiff.

(e) The plaintiff has not brought forward evidence of the calculation of the amounts claimed by IMF or the basis of those claims. This means that the Court is not able properly to assess the consequence of the orders sought, and the non-IMF creditors are not able to test the claims, in

circumstances where most of the burden of the liability to IMF will be borne by creditors who are not parties to the IMF Funding Agreements.

(f) Further, the form of orders does not permit the Court to assess the extent to which the amounts claimed by IMF, and sought to be passed on by the Funded Creditors to the non-IMF creditors, are appropriate having regard to the risk undertaken and the benefits produced (including in circumstances where the legal costs of the only proceedings undertaken by IMF (the s 600A proceedings) have been paid. Based on the Liquidator's calculations, the amount sought to be paid in priority to Funded Creditors is approximately 300% of the legal costs of the s 600A proceedings (where those costs have already been recouped), which would appear to be excessive on any view, having regard to the approach adopted in the authorities on s 564 and its antecedents.

(g) In all of these circumstances, the suggestion that it is "just" for all creditors to share equally disguises more complex and nuanced considerations.

Plaintiff's alternative claim – equitable lien

86. The plaintiff submits in the alternative that by reason of the effect of the IMF funding agreement, the IMF funded creditors are entitled to an equitable lien over the proceeds of settlement: plaintiff's subs at [31]. Other than a reference to *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 307 ALR 562; [2014] HCA 15 (***Stewart***), the submission is not the subject of elaboration.

87. The facts of *Stewart* were unusual. Atco was the parent company of a subsidiary, Newtronics. Just before it was wound up, Newtronics was indebted to Atco in the amount of $19 million. Atco appointed receivers who sold the business of Newtronics to another Atco subsidiary for $13 million. Newtronics was then wound up with no assets or funds.

88. A judgment creditor of Newtronics, Seeley, funded the liquidator to conduct investigations. Funded by Seeley, Newtronics brought proceedings against Atco and the receivers, seeking to set aside Atco's security and claiming damages.

89. Newtronics was successful against Atco but not against the receivers. On appeal, the receivers settled on the day of the appeal hearing. Atco was subsequently successful on appeal and its security was held to be valid.

90. Prior to the appeal decision being handed down, the Newtronics liquidator paid the proceeds of the settlement with the receivers to Seeley as reimbursement of the costs and expenses it had paid of the litigation. Once Atco had succeeded on appeal, it demanded payment of the settlement sum from the liquidator pursuant to its security.

91. The liquidator declined, on the basis that it was entitled to an equitable lien over the settlement sum.

92. The High Court upheld this position. At [22] it explained the general principle as follows:

> [A] secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor.

93. That principle has no application to the present case. As the Court explained at [23], it is a principle that applies when there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund.

94. The plaintiff presumably intends to seek to rely upon the more general principles underlying the equitable lien which are expounded in the authorities referred to at [13]-[21] of the High Court's judgment. That general principle as stated by Lindley LJ in *Gay v Churchill* (1887) 35 Ch D 489 at 492, referred to in *Stewart* at [16], is that "*[i]t is right that they who get the benefit of the recovery of money should bear the expense of recovering it.*" This is said to be "*part of a scheme of equitable adjustment of mutual rights and obligations*": *Stewart* at [14], citing the remarks of Isaacs J in *Davies v Litteljohn* (1923) 34 CLR 174 at 185.

95. That principle has no application to the present case, for four reasons.

96. First, the principle is not one of general application in the abstract. Rather, as the High Court recognised in *Stewart* at [15], "*equity has been able to develop and state a principle to be applied in or with respect to particular circumstances or relationships.*" A litigation funder having expended funds in the present case for which it is to be reimbursed by some creditors is not one of the recognised circumstances or relationships in which an equitable lien attaches.

97. Secondly, there is no reason why the principle underlying the imposition of an equitable lien should be extended to the case of a litigation funder or a creditor with whom they enter into a litigation funding agreement. A litigation funder is in the business of taking risks with the prospect of substantial reward in the form of a significant percentage of the proceeds of the litigation. Its position is protected by its commercial calculus of the risks and rewards involved and the contracts which it enters into to give effect to that calculus.

98. Likewise, a creditor who enters a litigation funding agreement has elected to enter into a commercial arrangement whereby he or she undertakes an obligation to pay certain sums to the funder, on a "no win no fee" basis, in return for an increased prospect of realising some recovery. In circumstances where the parties have provided at law for an allocation of risk and reward between them, there is no scope for a "*scheme of equitable adjustment of mutual rights and obligations.*"

99. Thirdly, in the present case what is sought to be adjusted is the percentage of the burden of the litigation funding as between those creditors who entered into agreements with IMF and those that did not. Those creditors who did not enter into any agreement with IMF should not have to bear the burden of IMF's costs in circumstances where they did not ask IMF to undertake any work. That is because they have no relationship with IMF. A stranger who carries out work or services, or otherwise confers a benefit on another, without a request, actual or implied, to do so, is not entitled to payment or compensation: *Stewart* at [47]; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635; *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234.

100. Fourthly, and in any event, even if an equitable lien was imposed in a situation such as the present, it could only extend to the reasonable costs of prosecuting the s 600A proceedings. Here those costs have been fully paid, and in part have been borne by all creditors as costs of the liquidation.

2 April 2015

C. A. Moore

A. Hochroth

Schedule – Factual Summary

1. The present Liquidators were appointed administrators of RAPL on 26 October 2012.[21] On the same date, the Administrators entered into a licence agreement pursuant to which DSG Holdings Australia Pty Ltd (**DSG**) would operate RAPL's business.[22] DSG owned all the shares in Retail Adventures Holdings Pty Ltd (**RAHPL**), which in turn owned all the shares in RAPL.

2. On 14 November 2012, the date for the second creditors' meeting of RAPL was extended to 26 February 2013 to allow the business to trade over Christmas and to allow the Administrators to continue their efforts to sell the business as a going concern: *Re Strawbridge* [2012] FCA 1286.

3. In late 2012, IMF was approached by a creditor of RAPL.[23] It appears IMF began incurring costs in relation to RAPL in November 2012.[24]

4. On 11 February 2013 the Administrators caused RAPL to enter into a sale agreement with DSG, under which RAPL sold its business as a going concern. The sale price was to be applied against RAPL's secured debt to DSG. At the time it appeared to the Administrators that part of DSG's secured debt might be voidable. It was agreed that if that occurred, DSG would have to pay RAPL $13.8 million.[25]

5. The sale agreement was contingent upon the date for the second meeting of creditors being extended by the Court for at least a further 180 days. On 20 February 2013, over the opposition of IMF funded creditors, the date for the second meeting of creditors was extended until 26 August 2013. No order was made for payment of the IMF funded creditors' costs: *Strawbridge v Retail Adventures Pty Ltd* [2013] FCA 151.[26]

6. Between 18 and 23 March 2013, IMF emailed or mailed an information pack to a number of creditors of RAPL.[27] The information pack noted that IMF was offering to fund the investigation into the trading of RAPL and the circumstances of its demise that led to the losses incurred by unsecured creditors.

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[21] *Helenic Pty Ltd v Retail Adventures Pty Ltd (administrators appted)* [2013] NSWSC 1973 (**Section 600A judgment**) at [15] (Exh SGH-1 at 166).
[22] Section 600A judgment at [17] (Exh SGH-1 at 167).
[23] Rainford 8.12.14 at [5].
[24] See Khouri 27.2.15 at [16].
[25] Section 600A judgment at [18]-[24] (Exh SGH-1 at 167-169).
[26] That IMF funded the defence to this application is made clear from its *pro forma* letter to creditors dated 27 February 2013 (Exh SGH-1 at 17).
[27] Rainford 8.12.14 at [8]-[9].

The information pack made a number of statements to creditors which are referred to in TNW's submissions.

7. On 7 August 2013, Bicheno Pty Ltd (**Bicheno**), which owned all the shares in DSG, proposed a Deed of Company Arrangement (**DOCA**) to the Administrators. The DOCA provided for the Administrators to be appointed Deed Administrators and to establish a fund, to comprise of the cash held by the Administrators plus a sum of $5.5 million to be contributed by DSG, Bicheno, Jan Cameron (the director of RAPL) and other related creditors. The related creditors would not participate in the fund. On payment of the contribution, claims against the related creditors would be extinguished.[28]

8. On 14 August 2013, IMF advised the Administrators that if RAPL was placed into liquidation, IMF was prepared to fund examinations and an insolvent trading claim against Ms Cameron and others.[29]

9. On 19 August 2013, the Administrators in a report to creditors advised that it was not in creditors' interests to enter into the draft DOCA.[30]

10. On 2 September 2013, at the second meeting of creditors, creditors resolved to enter into the draft DOCA. The resolution would not have been carried without the support of Bicheno, DSG and other creditors who gave them their proxy.[31]

11. The day after the meeting, on 3 September 2013, IMF's lawyers wrote to the Administrators' lawyers, stating that they were instructed to commence proceedings pursuant to s 600A of the Act and asking that the Administrators undertake not to take any action on the DOCA without notice.[32] They had already made a similar request by email prior to the meeting, on the morning of 2 September 2013.[33]

12. On 11 September 2013, the IMF funded creditors commenced the threatened application to set aside the resolution to enter into the DOCA pursuant to s 600A of the Act: *Helenic Pty Ltd v Retail Adventures Pty Ltd (administrators appted)* [2013] NSWSC 1973. The application was successful and on 23 December 2013, Robb J ordered that the creditors' resolution of 2 September 2013 be set aside and that RAPL be wound up. The winding up order was stayed to 5pm on

[28] Section 600A judgment at [29] (Exh SGH-1 at 170-172).
[29] Section 600A judgment at [102] (Exh SGH-1 at 193).
[30] Section 600A judgment at [65], [83] (Exh SGH-1 at 183,188); Report to Creditors Exh SGH-1 at 1-84.
[31] Section 600A judgment at [130]*ff* (Exh SGH-1 at 201).
[32] Strawbridge 27.3.15, page 21.
[33] Strawbridge 27.3.15, page 22.

3 February 2014 allow DSG to file an appeal. DSG subsequently appealed but did not pursue a further stay.[34]

13. Pursuant to the orders of Robb J, the Administrators were appointed Liquidators on 3 February 2014.[35]

14. On 7 March 2014, an appeal against the decision of Robb J was dismissed: *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* (2014) 99 ACSR 121; [2014] NSWCA 96.

15. On 1 April 2014, the Liquidators sought leave to proceed in relation to a s 588FE voidable transaction claim against RAHPL. Leave was granted on 10 April 2014 and a Statement of Claim was filed the same day.[36] On 14 April 2014, the Liquidators applied for orders for production and examination summonses pursuant to ss 596A and 596B of the Act. Orders were issued against various persons and entities including Jan Cameron, DSG and Bicheno.[37]

16. On 11 June 2014, the Liquidators reached a settlement of the s 588FE voidable transaction claim. Under the settlement, *inter alia*:

    (a) there was a payment of $3.95 million to the liquidators was made;

    (b) DSG, Jan Cameron and Bicheno withdrew all proofs of debt and released RAPL from claims as creditors;

    (c) the Liquidators agreed not to pursue Bicheno and DSG for insolvent trading but could still pursue directors of RAPL for insolvent trading; and

    (d) Bicheno also agreed to pay $1.05 million to the Liquidators and IMF funded creditors in relation to costs of the Section 600A proceedings.[38]

17. The payment of $1.05 million referred to comprised payments of $600,000 to the Liquidators and $450,000 to IMF in satisfaction of costs orders relation to the section 600A application and appeal.[39] IMF was paid the amount of $450,000 and also recovered a further $153,687.50 from the Liquidators treated as expenses in the winding up.[40] This amounted to full payment of IMF's costs of the section 600A application and appeal, aside from an amount of $11,582 which the Liquidators were not satisfied were sufficiently connected to the s 600A

[34] Section 600A judgment, p. 1 (Exh SGH-1 at 161); Liquidators' Circular to Creditors dated 4 February 2014 (Exh SGH-1 at 235).
[35] Hedge 23.12.14 at [10].
[36] Report to Creditors dated 1 July 2014 (Exh SGH-1 at 348).
[37] Report to Creditors dated 1 July 2014 (Exh SGH-1 at 348).
[38] Report to Creditors dated 1 July 2014 (Exh SGH-1 at 349).
[39] Minutes of the Third Meeting of the Committee of Inspection dated 11 June 2014 (Exh SGH-1 at 345).
[40] Khouri 27.2.15 at [18].

proceedings.[41] Narratives for those costs are in evidence and show them to be costs relating to press releases and other media enquiries, non-billable time that was mistakenly billed, costs relating to the separate liquidation of RAHPL which was occurring concurrently, and other issues.[42]

18. On 4 August 2014, the day that examinations by the Liquidators were scheduled to commence, the Liquidators reached a settlement with Jan Cameron for $13.84 million, of which $12.5 million was in respect of an insolvent trading claim and $1.34 million was for related party preference claims.[43] The Liquidators' report to creditors on the settlement included the following among the reasons for accepting the settlement:

> Costs – running litigation is expensive and may have required funding from a litigation funder. If successful a significant portion of any recovery would be taken by the funder as a fee, estimated in this case to be 35%.

[41] Strawbridge 27.3.15 at [7].
[42] Strawbridge 27.3.15, pages 9 – 18.
[43] Report to Creditors dated 4 August 2014 (Exh SGH-1 at 362-363).