

DIVISION: EQUITY

LIST: CORPORATIONS LIST

REGISTRY: SYDNEY

SHAUN ROBERT FRASER

First Plaintiff

ANTHONY GREGORY McGRATH

Second Plaintiff

PRIMESPACE PROPERTY INVESTMENT LTD (IN LIQ)

Third Plaintiff

IQIT'S OUTLINE OF SUBMISSIONS

A Introduction

1. These submissions have been prepared on behalf of IQIT Nominees Pty Ltd, ACN 605 588 921, in its capacity as trustee for the IQ Investment Trust, in accordance with the orders made by the Court on 25 August 2016.
2. For convenience, these submissions will adopt the definitions contained in the affidavits of the first plaintiff, Mr Fraser.

B. IQIT's investment

3. IQIT was established on 21 December 2012 as a unit trust¹. IQIT was established for the purpose of raising monies to assist with the development of the IQ Smart Apartments².
4. At the same time, the constitution for PSNT was amended³. The effect of those amendments was to create two classes of units in PSNT, being Preference Units and

¹ See the *IQIT Constitution*.

² See the *IQIT Information memorandum which appears at tab 17 of exhibit "SF1"*.

Ordinary Units. Preference Unit Holders are entitled to receive distributions in priority to Ordinary Unit Holders⁴. Further, on the Conversion Date, the Preference Units are converted into Loan Notes, both attracting interest at 25% per annum⁵.

5. PSNT has issued \$4.07 million Preference Units to IQIT⁶ and \$10.46 million Ordinary Units to POPF⁷, which is wholly owned by PAPF⁸.
6. On 8 July 2015, IQIT's Preference Units in PSNT were converted into Loan Notes.⁹

C. The recoverability of IQIT's investment

The IQJV interest:

7. PSNT's only asset is its 38.74% interest in the IQJV, which is concerned with the development and construction of the IQ Smart Apartments¹⁰. That development achieved practical completion in April 2015¹¹. The IQ Smart Apartments was comprised of:
 - (a) 230 residential units, which as at the date of the appointment of the Liquidators as Administrators, 23 April 2015 (**the Appointment Date**) and had an estimated value of \$108 million; and
 - (b) 15 commercial units, which at the same time had an estimated value of \$7.8 million.¹²

³ See clause 12.2 (1) of the amended PSNT Constitution which appears at tab 5 of exhibit "SF1".

⁴ See Supplemental Deed No which appears at tab 5 of exhibit "SF1".

⁵ See clause 12.2 (2) (b) of the amended PSNT Constitution which appears at tab 5 of exhibit "SF1".

⁶ See the PNSNT Register of Holders at tab 7 of exhibit "SF1".

⁷ See the PNSNT Register of Holders at tab 6 of exhibit "SF1".

⁸ See the PNSNT Register of Holders at tab 7 of exhibit "SF1".

⁹ In the matter of PrimeSpace Property Investment Limited (in liquidation) [2016] NSWSC 1113 at [12]. Paragraph 20 of Mr Fraser's first affidavit.

¹⁰ See paragraph 17 of Mr Fraser's second affidavit.

¹¹ See paragraph 19 of Mr Fraser's first affidavit.

¹² See paragraph 79(a)(ii) of Mr Powderly's Affidavit and page 217 of Exhibit PP-1.

8. When PPIL was placed into administration:
 - (a) 190 of the residential units had been pre-sold; and
 - (b) 8 of the commercial units had been pre-sold.¹³

9. PPIL was the project manager of the IQJV, however its role was terminated by the partners to the IQJV on 19 May 2015.¹⁴ Since then the IQJV has been managed by another party appointed by the other partners in the IQJV¹⁵. The ‘titling’ of the IQ Smart Apartments took place on 26 May 2015.¹⁶ From that date the completion of the sale of the IQ Smart Apartments was possible. Accordingly, the Liquidators are not, and have not been, responsible for the sale of the IQ Smart Apartments.

10. Between 27 August 2015 and 26 October 2015, the Liquidators received cash distributions from the IQJV totalling approximately \$6.85 million¹⁷.

11. As at 29 June 2016, there were 19 apartments which had not been sold or had been sold but not yet settled¹⁸. As at 28 August 2016, there were 11 residential apartments which had not been sold or had been sold but not yet settled.

Estimated returns:

12. As at 21 May 2015, the Liquidators were of the view¹⁹ that:
 - (a) PSNT would receive between \$14 to \$15 million from the IQJV;
 - (b) all creditors including IQIT (who rank equally) would be paid in full; and

¹³ See paragraph 79(a)(iii) of Mr Powderly's Affidavit and page 217 of Exhibit PP-1.

¹⁴ See paragraph 22 of Mr Powderly's Affidavit and pages 133 to 136 of Exhibit PP-1.

¹⁵ See the liquidators' letter dated 26 August 2015 at tab 4 of exhibit "SF1".

¹⁶ See paragraph 19 of Mr Fraser's first affidavit.

¹⁷ See paragraphs 29, 33 and 35 of Mr Powderly's Affidavit and page 217 of Exhibit PP-1.

¹⁸ See paragraph 21 of Mr Fraser's second affidavit.

¹⁹ See page 30 of the Section 439A Report at tab 2 of exhibit "SF1".

- (c) PSNT would then have a surplus of between approximately \$3.1 to \$8 million, which would be available to POPF/PAPF.
13. As at 12 July 2016, the Liquidators were of the view²⁰ that:
- (a) PSNT would still receive between \$14 to \$15 million from the IQJV;
 - (b) all creditors including IQIT (who rank equally) would now receive between 95% to 100% of their debts; and
 - (c) PSNT would either have no surplus or a surplus of up to \$4.1 million.
14. Therefore between 21 May 2015 and 12 July 2016, whilst the expected return from the IQJV has remained the same, the recovery position of IQIT has moved from one where it was to receive all of its capital and interest, with a substantial surplus remaining, to one where it may only receive 95% of its entitlement.
15. Further, it has now been suggested by the Liquidators that rather than ranking equally with other creditors, IQIT's debt might be subordinated to the debts of the other creditors of PSNT, being²¹:
- (a) CFG for \$3,355,000;
 - (b) PAPF (alleged and undocumented loan²²) for \$1,700,000; and
 - (c) Other creditors for \$6,300.

²⁰ See tab 2 of exhibit "SF2".

²¹ See paragraph 38 of Mr Fraser's second affidavit.

²² See paragraph 18 of Mr Fraser's first affidavit where no mention is made of this amount being a loan and/or having creditor status compared to the treatment of this amount in the table to Tab 2 of Exhibit SF-2.

16. Further still, it would seem that some additional disbursements have not been included in the current evidence, including outstanding legal fees of \$219,122 and unbilled legal fees of \$73,272.²³

C. The CFG Proceedings

17. Through paragraph 1 of the Interlocutory Process, the Liquidators seek approval from the Court that in relation to the CFG Proceedings, they would be justified in conducting examinations, obtaining counsel's advice and then taking action in those proceedings in accordance with that advice.

18. IQIT have five concerns about the directions sought. First, if the Liquidators do not defend the CFG Proceedings, IQIT and the other creditors of PSNT are likely to be repaid in full in the immediate future. Consequently, the party that will benefit from the successful defence of the CFG Proceedings is the Ordinary Unit Holder, POPF/PAPF.

19. Second, assuming for present purposes that all creditors of PSNT (including IQIT) rank equally, then even though IQIT may receive a hypothetical speculative benefit in the form of an ongoing 25% return on their investment, creditors of PSNT (including IQIT) will not otherwise benefit from a successful defence of the CFG Proceedings, IQIT and the other creditors of PSNT will have to:

- (a) fund the defence and cross claim until the CFG Proceedings are determined;
and
- (b) otherwise bear all of the costs of the proceedings (including CFG's costs) in the event that the Liquidators are unsuccessful,

out of the monies that they would ordinarily receive from PSNT.

²³ See email from Mr Johnson of McGrath Nicol to Stephen Brennan of IQIT dated 10 August 2016; pages 180 to 182A of Exhibit PP-1.

20. Further, if IQIT's debt is subordinated to the debts of the other creditors of PSNT, then IQIT will be the only entity funding the Liquidators and bearing the costs arising from an unsuccessful defence.
21. Third, the Liquidators have not included in their "high / low scenarios" provided on 12 July 2016²⁴ nor put any evidence before the Court as to the likely remuneration and legal costs arising from the defence of the CFG Proceedings in accordance with the terms of paragraphs 1 (a) (iii) and (iv) of the interlocutory process. This is of concern especially as PSNT appears to have already incurred total legal fees of \$737,571.44²⁵ (seemingly up to 10 August 2016).²⁶
22. Fourth, a defence of the CFG Proceedings is likely to significantly delay the (imminent) distribution of funds from PSNT to IQIT and its other creditors. In this regard, it is to be noted that in the timetable²⁷ set out in the Section 439A Report, the Liquidators suggested that distributions to IQIT and the other creditors of PSNT would occur in September 2015.
23. Fifth, although perhaps of lesser significance, the Liquidators do not explain why the public examinations were not carried out earlier, particularly in circumstances where:
 - (a) the Liquidators have been made aware of allegations in respect of the CFG Transaction on 24 April 2015²⁸ and have been investigating the CFG transaction since at least May 2015²⁹;
 - (b) the Liquidators have already incurred legal fees of more than \$737,000 on behalf of PSNT; and

²⁴ Tab 2 of Exhibit SF-2 to Mr Fraser's second affidavit.

²⁵ Calculated as \$445,177.44 (paragraph 44 of Mr Fraser's second affidavit) plus \$219,122 plus \$73,372 (both from email from Mr Johnson of McGrath Nicol to Stephen Brennan of IQIT dated 10 August 2016; pages 180 to 182A of Exhibit PP-1.)

²⁶ See email from Mr Johnson of McGrath Nicol to Stephen Brennan of IQIT dated 10 August 2016; pages 180 to 182A of Exhibit PP-1.

²⁷ See page 28 of the Section 439A Report at tab 2 of exhibit "SF1".

²⁸ Para 20 of Mr Powderly's Affidavit; Pages 56 to 127 of Exhibit PP-1

²⁹ See note 3 on page 30 of the Section 439A Report at Tab 2 of exhibit "SF1".

- (c) interest has accrued on the CFG and the IQIT advances from the Appointment Date until 31 August 2016 in the amount of \$2,177,643³⁰, and continues to accrue at the rate of \$4,390.41 per day.

24. Consequently, from IQIT's perspective, the following issues emerge for consideration:

- (a) should POPF/PAPF be solely responsible for funding the Liquidators actions in the CFG Proceedings;
- (b) should the Court's advice be limited, at this stage, to the conduct of the examinations and the obtaining of advice, as referred to in paragraph 1 (a) (i) and (ii) of the interlocutory process;
- (c) should the Liquidators be required to make an immediate interim distribution from the \$6.26 million currently held by them, on behalf of PSNT, to all creditors and IQIT, save for CFG, whose entitlement should be preserved pending the determination of CFG Proceedings; and
- (d) should the Liquidators be required to pay out (or make further interim distributions) to all creditors and IQIT, once the balance of the monies are received from the IQJV, again save that CFG's entitlement should be preserved pending the determination of CFG Proceedings.

D. The Liquidators remuneration

The relief sought:

25. Through paragraph 3 of the Interlocutory Process, the Liquidators seek approval from the Court to pay themselves a total of \$236,498.50 for the period from 23 April 2015 to 28 May 2015, which contained 26 business days. Of this sum \$214,037.65 (or

³⁰ Paragraph 76 of Mr Powderly's Affidavit.

90.5% of the total remuneration sought) is sought against PSNT, with \$178,468.51 having already been paid to the Liquidators³¹.

26. Through paragraph 4 of the Interlocutory Process, the Liquidators seek approval from the Court to pay themselves a total of \$393,659.82 for the 13 month period from 28 May 2015 to 24 June 2016. Of this sum \$318,601.89 (or 80.9% of the total remuneration sought) is sought against PSNT.

The business of PPIL:

27. At the time of the appointment of the Liquidators as administrators, PPIL was the trustee of five (5) entities and the responsible entity for PAPP³².
28. PPIL also appears to have carried on its own business providing project management services, for which it had received substantial income, including \$557,000 for the financial year ending 30 June 2014³³. In their RATA, the directors apparently reported that PPIL had gross personal assets of \$168,000³⁴.
29. Accordingly, this is not a case where PPIL was simply acting as a trustee of a single trading trust. It performed a number of roles including carrying on its own business, acting as a responsible entity of one fund and acting as a trustee of at least five (5) other entities.
30. Consequently, one of the matters which will be of importance to the Court is the way in which the Liquidators have allocated their remuneration (and legal costs) amongst these various entities.

³¹ See paragraph 109 of Mr Fraser's second affidavit.

³² See pages 7 and 8 of the Section 439A Report at tab 2 of exhibit "SF1".

³³ See paragraph 10 of Mr Fraser's second affidavit.

³⁴ See section 4 on page 7 of the Section 439A Report at tab 2 of exhibit "SF1".

The work required of the Liquidators in respect of PSNT:

31. Another matter which will be of importance to the Court is “*the size, importance and complexity of the tasks performed*”³⁵ in relation to PSNT, particularly as that trust is being asked to bear the bulk of the Liquidators’ remuneration.
32. In terms of the assets that need to be collected, as noted above, PSNT has only one asset being its interest in the IQJV. The Liquidators are not involved in the process of selling the IQ Smart Apartments, being the subject matter of the IQJV, and otherwise receive cash distributions from the IQJV managers, which are net of all expenses associated with the sale of those apartments. The Liquidators expect that, in total, between \$14 to \$15 million will be available to creditors, of which approximately \$6.85 million has already been received³⁶.
33. In terms of the creditors/unit holders, PSNT only has five, being³⁷:
 - (a) IQIT – which is owed approximately \$7.8 million;
 - (b) CFG – which is owed approximately \$3.35 million;
 - (c) PAPF – which is owed \$1.7 million;
 - (d) Australian Executor Trustees Ltd – which is owed \$4,637.33; and
 - (e) Tresscox lawyers – which is owed \$1,585.
34. Subject to one qualification, whilst the sums involved are relatively substantial, the process of winding up the PSNT would not appear to be particularly difficult. Of course, the one qualification relates to the need to finalise the CFG Proceedings.

³⁵ See *Thackray v Gunns Plantations* [2011] VSC 380 at [64].

³⁶ See paragraph 44 of Mr Fraser’s second affidavit.

³⁷ See paragraph 38 of Mr Fraser’s second affidavit and paragraph 16 of his third affidavit.

The information required

35. The Liquidators bear the onus of establishing the remuneration sought is “*fair and reasonable*”³⁸.
36. In assessing what is reasonable, the Court has regard to the evidence dealing with remuneration and brings “*an independent mind to bear on*” the question whether that evidence demonstrates that the remuneration sought is fair and reasonable³⁹.
37. A liquidator is required to provide evidence in sufficient detail so that the Court can determine for itself whether the remuneration sought and the disbursements claimed are reasonable⁴⁰.
38. In *Venetian Nominees v Conlan*⁴¹, Kennedy and Ipp JJ said that the Court should be provided with a statement of account in an itemised form, which:
 - (a) sets out the details of the work done;
 - (b) identifies the persons who did the work;
 - (c) identifies the time taken to perform that work;
 - (d) sets out the remuneration claimed for that work; and
 - (e) set out the expenses incurred by the liquidator⁴².
39. The evidence provided should also address the 12 matters identified in section 473 (10) of the *Corporations Act, 2001 (Cth)*⁴³.

³⁸ See *Re Independent Contractors Services (No 2)* [2016] NSWSC 106 at [32].

³⁹ See *Venetian Nominees v Conlan* (1998) 20 WAR 96 at 102.

⁴⁰ See *Venetian Nominees v Conlan* (1998) 20 WAR 96 at 103.

⁴¹ See *Venetian Nominees v Conlan* (1998) 20 WAR 96 at 103.

⁴² See *Venetian Nominees v Conlan* (1998) 20 WAR 96 at 103.

The information provided:

40. In terms of the description of work undertaken, the Liquidators rely on the summary⁴⁴ which appears in the Section 439A Report and the two summaries which appear at tab 24 of exhibit “SF2”. The first two summaries are concerned with the remuneration during the administration period and the third summary is concerned with the remuneration during the liquidation period.
41. The form of those summaries is general in nature and does not allow the Court to determine for itself whether the remuneration charged is reasonable. In particular:
- (a) the description of the work undertaken is rather short and in a number of instances is rather vague;
 - (b) the identified items of works are not allocated to any particular trust – *however, in some cases, one can speculate that the particular categories of work relate to a particular trust*;
 - (c) no time is recorded in respect of each of the identified items of work;
 - (d) no remuneration is recorded against each of the identified items of work; and
 - (e) the persons who undertook those items of works have not been identified.
42. Further, the remuneration charged during the administration period was not allocated to any particular trust because the Liquidators “*did not do any work solely for the benefit of those entities – they were not the focus of the administration or the particular challenges facing the Prime Access Group at the time*”⁴⁵. A similar

⁴³ See *Re Independent Contractors Services (No 2)* [2016] NSWSC 106 at [32].

⁴⁴ See pages 38 to 41 of the Section 439A Report at tab 2 of exhibit “SF1”.

⁴⁵ See paragraph 103 of Mr Fraser’s second affidavit.

problem arises in respect of general works charged as PPIL Time during the liquidation process⁴⁶.

43. In relation the remuneration sought in respect of the administration, the Liquidators seek to address these difficulties by using “*the relevant percentage for each entity from the time direct spent on each entity in the period from [23 April 2015] to 23 October 2015*”⁴⁷ which has resulted in the following percentages:

- (a) PAPF (*being the ultimate holder of the Ordinary Units in PSNT*) being responsible for 0% of that remuneration:
- (b) PSNT being responsible for 81% of that remuneration – *of course, the remuneration now being sought against PSNT in paragraph 114 of Mr Fraser's second affidavit represents 90.5% of the total remuneration claimed;*
- (c) PSPT3 being responsible for 16%; and
- (d) IQIT being responsible for 3%.

44. In relation to the PPIL Time, a similar regime termed the Time Base Method is used. Under that method, the charges are calculated “*in the same proportion as the amount of time spent directly administering each entity*”⁴⁸ and that has resulted in the following percentages⁴⁹:

- (a) PAPF (*being the ultimate holder of the Ordinary Units in PSNT*) being responsible for 2.8% of that remuneration:
- (b) PSNT being responsible for 80.3% of that remuneration;

⁴⁶ See paragraph 93 of Mr Fraser's second affidavit.

⁴⁷ See paragraph 105 of Mr Fraser's second affidavit.

⁴⁸ See paragraph 98 of Mr Fraser's second affidavit.

⁴⁹ See paragraph 122 of Mr Fraser's second affidavit.

- (c) PSPT3 being responsible for 15.2%; and
 - (d) IQIT being responsible for 1.76%.
45. One difficulty with these percentage calculations is that apart from giving a general explanation of the approach taken and identifying the relevant percentages, the Liquidators do not disclose how these percentages were actually determined. Consequently, the Court is unable to determine for itself whether the percentages that have been applied are reasonable.
46. Another difficulty arises from the fact that the Liquidators have not exhibited the tax invoices that have been issued by their lawyers, who have billed \$664,299.44 and have \$73,272 unbilled. This is particularly relevant not only because it represents the largest disbursement paid/payable⁵⁰, but also because it can be relevant to the question whether the retainer of those lawyers resulted in a “*transfer of risk and responsibility away from the liquidators*” which is relevant to the determination of what remuneration is reasonably payable⁵¹. It is also relevant because those legal fees have been incurred in circumstances where the cash distributions which PSNT receives from IQJV are net of the costs of realising IQ Smart Apartments.⁵²
47. Consequently, whilst readily accepting that the Liquidators are entitled to remuneration, IQIT is concerned that the Court has not been given sufficient information to enable it to determine for itself whether the \$630,158.32 sought for remuneration is fair and reasonable and, in particular, whether PSNT should be responsible for \$532,639.54 of that remuneration.

E. Costs

48. In paragraph 5 (d) of the interlocutory process, the Liquidators seek orders that IQIT pay 1/6 of the costs of these proceedings. Apart from restating the claim, the

⁵⁰ See paragraph 44 of Mr Fraser's second affidavit.

⁵¹ See *Re Independent Contractor Services (No 2)* [2016] NSWSC 106 at [34].

⁵² See paragraphs 77 to 85 of PP Affidavit; page 234 of Exhibit PP-1].

Liquidators' Submissions do not advance any reason why IQIT should pay any part of the costs of these proceedings and IQIT otherwise resists such a claim.

49. Further, in applications of this kind, the Courts have said that it is desirable to have the assistance of a contradictor and that the costs of the contradictor should be paid out of the relevant fund⁵³.
50. IQIT has offered itself up as a contradictor and, consequently, intends to apply to the Court for an order that its reasonable costs be paid from the assets of the PSNT on an indemnity basis.

David R. Stack,

Blackstone Chambers.

Counsel for IQIT.

Email: stack@blackstone.com.au

Telephone: (02) 9220 9822

Date: 2 September 2016

⁵³ See *Re Independent Contractor services (No 2)* [2016] NSWSC 106 at [56].