



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

Case: S ECI 2020 01581
SECI-2020-01581 2020 09:36 PM

IN THE MATTER OF AUS STREAMING LIMITED (IN LIQUIDATION)
ACN 600 577 348

BETWEEN

Petrus Caspardus Stephanus Helberg

Plaintiff

and

Ronald John Dean-Willcocks and others

Defendants

Plaintiff's Outline of Submissions

Date of document:	19 May 2020	
Filed on behalf of:	plaintiff	Solicitor's code: 40411
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Application

1. The application is dated 30 March 2020. Currently, the only issue is whether Mr Craig Crosbie and Mr Daniel Walley of PricewaterhouseCoopers (**PwC**) should be appointed as special purpose liquidators (**SPLs**) of Aus Streaming Limited (in liq) (**Aus Streaming**), as well as the purpose and terms of such appointment, pursuant to section 90-15 read with section 90-20 of the Insolvency Practice Schedule (**IPS**), Schedule 2 to the *Corporations Act 2001 (Cth)* (**Act**).

Affidavits filed in support of application

2. The application is supported by:
 - a. an affidavit by Mr Helberg sworn 30 March 2020 (**Helberg Affidavit**);
 - b. an affidavit by John Ivan Sestan (a director on behalf of Salamander Business Services Pty Ltd (**Salamander**), a creditor of Aus Streaming)¹ sworn 31 March 2020 (**Sestan Affidavit**). As creditor, Salamander supports the application;

¹ See the Sestan Affidavit at [9].

- c. an affidavit by Ruhan van Zyl (a director on behalf of RKZL Pty Ltd (**RKZL**), a creditor of Aus Streaming)² sworn 3 April 2020 (**Van Zyl Affidavit**). As creditor, RKZL supports the application;
- d. affidavits by Paul Philipus Jacobus Buitendag (the solicitor for Mr Helberg) sworn 3 April 2020 (**Buitendag Affidavit**), and 6 May 2020 (**Second Buitendag Affidavit**); and
- e. an affidavit by Craig Crosbie, one of the proposed SPLs, sworn 19 May 2020 (**Crosbie Affidavit**).

Background to the application

Aus Streaming – administration, deed administration, and liquidation

- 3. Aus Streaming was incorporated on 8 July 2014 as an unlisted public company to be used as a special purpose vehicle to focus on critical metals to facilitate ASAF Critical Metals Ltd's (**ASAF**) entry into the metal streaming business.³
- 4. On 5 January 2018, a statutory demand for \$85,250.00 was served by Salamander on Aus Streaming.⁴
- 5. The then directors of Aus Streaming, Messrs Every and Sutton, passed a resolution to put Aus Streaming into voluntary administration and appointed the current liquidators as administrators on 3 February 2018.⁵
- 6. On 5 June 2018, a deed of company arrangement (**DOCA**) was recommended and executed by the administrators who were appointed as deed administrators.⁶ Control and stewardship of Aus Streaming reverted to its directors upon the execution of the DOCA.
- 7. The DOCA was varied in March 2019 and May 2019, because there were material breaches of the DOCA by reason of the failure to pay the unsecured creditors' claims as provided for in the DOCA.⁷
- 8. On 3 February 2020, exactly two years after Aus Streaming was put into voluntary administration and about a month after payment of the unsecured creditors' claims was due, the directors of Aus Streaming sought a further variation of the DOCA.⁸
- 9. On 3 March 2020, the directors of Aus Streaming indicated that a variation of the DOCA was no longer sought, but rather a creditors' voluntary winding up with the deed administrators to be appointed as liquidators, which occurred on 4 March 2020.

Aus Streaming's assets

- 10. It appears that Aus Streaming's only assets consist of the following investments (**Investments**) in the following companies (**Investment Companies**):

² See the Van Zyl Affidavit at [3] and [4].

³ See the Helberg Affidavit at [27] and [46(a)] and Exhibit **PCSH-1**, pages 278 and 315.

⁴ See the Helberg Affidavit at [19] and the Sestan Affidavit at [6] to [9].

⁵ See the Helberg Affidavit at [20]. See also the affidavit by Ronald John Dean-Willcocks sworn 29 April 2020 (**Dean-Willcocks Affidavit**) at [5].

⁶ See the Helberg Affidavit at [21] and the Dean-Willcocks Affidavit at [5].

⁷ See the Helberg Affidavit at [22] and Exhibit **PCSH-1**, page 124, and [23] and Exhibit **PCSH-1**, page 154.

⁸ See Exhibit **PCSH-1**, page 170, to the Helberg Affidavit.

- a. 7,500,000 shares in Frontier Mining Value Ltd (**Frontier**), a company located in Singapore,⁹ valued at \$1.54 per share totalling \$11,550,000;¹⁰
 - b. 27,328,571 shares in Indus Infrastructure Partners Ltd (**Indus**), a company apparently located in Canada,¹¹ valued at \$0.90 per share totalling \$24,595,713.90;¹²
 - c. 2,000,000 shares in OTH Mineral Streaming Ltd (**OTH**), a company apparently located in Canada but with contact details in Ireland,¹³ valued at \$3.20 per share totalling \$6,400,000.00, a company which apparently has at least two directors and an address in common with ASAF,¹⁴ an unlisted public company incorporated in British Columbia (Canada) and holding company of Aus Streaming;¹⁵
 - d. 47,500,000 shares in TOR Mining Capital Limited (**TOR**), a company apparently located in Ireland with contact details in Gibraltar, the name and registration number of which refer to a company incorporated in the British Virgin Islands (**BVI**), and which was "*struck off*" on 16 September 2018,¹⁶ valued at \$1.40 per share totalling \$66,500,000.00.¹⁷ Importantly, TOR is the company, the listing of which has been linked with the deed fund (**Deed Fund**) and the payment under the DOCA as varied, and the realisation of its assets was supposed to provide funds for the Deed Fund to pay the unsecured creditors in full; and
 - e. 400,000 shares in AGB Resource Capital Ltd (**AGB Resource**), a company apparently located in Singapore but with contact details in the BVI,¹⁸ valued at \$20.91 per share totalling \$8,364,000.00.¹⁹
11. The total of the Investments amounts to \$117,409,714.00 as at 18 January 2018. However, according to the projections recently provided to Mr Helberg, the totals of the Investments would have been US\$339m in 2018, US\$455m in 2019, and would be US\$1,331b in 2020.²⁰ However, to date there has been no evidence, let alone independent evidence, provided in respect of the existence and value of the Investments.

The existence and value of Investments

12. Mr Helberg, a vastly experienced chartered accountant who was the Executive Chairman (for about a year) and a director (for about a month) of Aus Streaming,²¹ realised that he could not verify the

⁹ See the Helberg Affidavit at [85].

¹⁰ See the Helberg Affidavit at Exhibit **PCSH-1**, page 689.

¹¹ See the Helberg Affidavit at [90].

¹² See the Helberg Affidavit at Exhibit **PCSH-1**, page 767.

¹³ See the Helberg Affidavit at [85].

¹⁴ See the Helberg Affidavit at Exhibit **PCSH-1**, page 841.

¹⁵ See the Helberg Affidavit at [25].

¹⁶ See the Helberg Affidavit at [85] and [88], and Exhibit **PCSH-1**, pages 1107 to 1109.

¹⁷ See the Helberg Affidavit at Exhibit **PCSH-1**, page 922.

¹⁸ See the Helberg Affidavit at [85].

¹⁹ See the Helberg Affidavit at Exhibit **PCSH-1**, page 995.

²⁰ See the Helberg Affidavit at [67(g)] and [85]. See the so-called "*shareholder and value confirmation letters*" and the Investment Company projections in respect of the Investments dated 18 January 2018 and provided to Mr Helberg on 20 February 2020 – see the Helberg Affidavit at [66] and [67].

²¹ See the Helberg Affidavit at [32] to [42].

existence and value of the Investments, as well as the assets underlying the Investments, caused him to be concerned and resulted in his resignation.²²

13. Mr Helberg tried to verify the existence and value of the Investments, for example, by:²³
 - a. reviewing the audited financial statements of Aus Streaming. The last financial statements for Aus Streaming are those for the financial YE 2016;
 - b. making inquiries from Aus Streaming's external auditors, Nexia Perth, about, among other things, their audit working papers and the documentation used to substantiate the existence and value of the Investments; and
 - c. making inquiries from the directors of Aus Streaming and Mr Turner, asking for documents supporting the existence and value of the Investments, the bank statements, share certificates, transfer forms, and financial statements relating to the Investments or the Investment Companies,

but to no avail.
14. Mr Helberg continued to seek substantiation of the existence and value of the Investments from the administrators, deed administrators, and liquidators, but no substantiation was forthcoming.²⁴ He also made inquiries through his solicitors, Johnson Winter & Slattery (**JWS**)²⁵ from the liquidators, Messrs Every and Sutton,²⁶ and Nexia Perth.²⁷ It is pertinent to notice that:
 - a. pursuant to a letter from JWS, Mr Sutton stated that he had passed on the letter to "*representatives of the company who reside overseas*" and that they indicated that a response would be provided by 29 February 2020. No response was received – instead, the directors of Aus Streaming sought the winding up of Aus Streaming;
 - b. on 4 March 2020, after they were given notice that an application would be made for their removal, the liquidators sought books and records from ASAAF and its directors, Messrs Every, Sutton, and Turner.²⁸ To date neither Mr Helberg nor JWS have been informed as to whether the requested books and records have been provided; and
 - c. Nexia Perth has no records about any work being done for Aus Streaming after 30 September 2016 when the audited financial statements were done for the YE 2016, despite it still being cited as Aus Streaming's external auditors.
15. Mr Helberg also conducted internet searches in respect of the Investment Companies which resulted in confusing information.²⁹

Concerns about Investments and Investment Companies

²² See the Helberg Affidavit at [17], [52] and [54].

²³ See the Helberg Affidavit at [55], [57] and [58].

²⁴ See the Helberg Affidavit at [58] and [59].

²⁵ See the Helberg Affidavit at [61] to [74].

²⁶ See the Helberg Affidavit at [75] to [77].

²⁷ See the Helberg Affidavit at [78] to [82].

²⁸ See the Helberg Affidavit at [67(i)] and [67(k)].

²⁹ See the Helberg Affidavit at [83] to [85], and **Exhibit PCSH-1**, pages 1081 to 1102.

16. In light of the foregoing, Mr Helberg has had and has various concerns, shared by Messrs Sestan and Van Zyl, which he wants to be investigated so that the winding up of Aus Streaming could be conducted in a proper and efficient manner and to the benefit of Aus Streaming's creditors as a whole. His concerns relate to, among other things, the existence and value of the Investments, whether there has been misconduct by Aus Streaming's directors, Messrs Every and Sutton, and Mr Turner (a person who has been intimately involved in the management and administration of Aus Streaming personally and through a related company Hamirah Holdings Ltd,³⁰ as well as being involved with the valuation of the Investments through related entities, Avalon Pacific Capital Pty Ltd and/or Dayton Way Financial Pty Ltd),³¹ in connection with the Investments, and their failure to ensure that Aus Streaming take steps to crystallise and monetise the Investments to pay Aus Streaming's creditors.³² In this regard, it should be noticed that:

- a. the DOCA was based on the monetising of the Investments, particularly the TOR Investment, by the Aus Streaming directors, but despite a lapse of about two years nothing has happened; and
- b. the liquidators stated on 4 March 2020 that they would await a report from ASAF's directors, which would have been provided within 45 days, regarding the monetising of the Investments and steps to raise funds to pay creditors before convening a meeting of creditors.³³ Neither Mr Helberg nor JWS is aware of such report.

Money for investigating the Investments

17. In the event of the appointment of the SPLs, there will be money available to them for the purposes as set out in the Schedule to the minutes of proposed orders (**Proposed Orders**), Attachment A hereto. The provision of the money will be as follows:³⁴

- a. Mr Helberg and Helberg Holdings Pty Ltd (**Helberg**) have entered into an agreement (**Agreement**) pursuant to which Harbour Fund IV LP (**Harbour**) will make available an amount of \$150,000 to Helberg for purposes of engaging the SPLs to conduct investigations into the Investments and to formulate a view as to potential claims which could be pursued on behalf of Aus Streaming for the benefit of Aus Streaming's liquidation and its creditors as a whole.³⁵ This Agreement is nothing more than to put Helberg into funds for him, as creditor of Aus Streaming, to pay the SPLs to conduct the investigations into the Investments, and to determine as a result of the investigations whether there are claims that could be pursued by

³⁰ See the Helberg Affidavit at Exhibit PCSH-1, page 20.

³¹ See the Helberg Affidavit at [67(d)].

³² See the Helberg Affidavit at [107], [118] to [120].

³³ See the Helberg Affidavit at [108(e)].

³⁴ See the Buitendag Affidavit at [20] to [22], the Second Buitendag Affidavit at [15], the Crosbie Affidavit at [8] to [18].

³⁵ The agreement, referred to as the Funding Agreement (see the Buitendag Affidavit at [21]), a redacted version of which is at pages 14 to 18 of Exhibit **PPJB-2** to the Second Buitendag Affidavit is dated 2 April 2020. A redacted copy of the new agreement between the parties, referred to as the New LFA is exhibited to the Crosbie Affidavit. The Funding Agreement has been superseded by the New LFA – see paragraph 3 of the New LFA.

the SPLs on behalf of Aus Streaming for the benefit of the latter's winding up and its creditors as a whole. The Agreement is not a funding agreement involving the SPLs.

- b. Messrs Crosbie and Walley (whether as such or as SPLs) are not parties to this Agreement. The Agreement between Helberg and Harbour does not place any restrictions on the SPLs as to the investigations into the Investments or claims they may determine could be pursued at the conclusion of the investigations on behalf of Aus Streaming to the benefit of its winding up and its creditors as a whole. The Agreement is not a funding agreement or otherwise which requires approval pursuant to section 477(2B) of the Act, because it is not an agreement between the SPLs and Harbour or Helberg. In any event, section 477(2B) of the Act only applies after the appointment of the SPLs.
- c. The money which will be made available pursuant to the Agreement as said in sub-paragraph (a) above would be made available upon JWS providing invoices to Harbour in respect of the costs and disbursements incurred for the purposes of conducting the investigations envisaged in the Schedule to the Proposed Orders.³⁶ This ensures that the money made available is used for the investigations into the Investments by the SPLs.
- d. Messrs Crosbie and Walley were provided with the Originating Process and supporting affidavits in this proceeding, as well as the Proposed Orders, and considered the sum of \$150,000 to be sufficient to cover their fees and expenses to conduct the investigation into the Investments as set out in the Schedule to the Proposed Orders should they be appointed as SPLs.³⁷ Messrs Crosbie and Walley have provisionally scoped such investigations as including as set out in their scoping.³⁸ It should be noticed that PWC has representation in all the jurisdictions where the Investments or Investment Companies are allegedly located, and that would facilitate the proper and efficient investigations.³⁹
- e. As a result, JWS agreed with Messrs Crosbie and Walley (not as SPLs) that if they were appointed SPLs and conduct the investigations into the Investments, JWS will not use any of the \$150,000 made available by Harbour to Helberg in respect of their fees, costs, and expenses so that the full amount will be available to the SPLs for the investigation into the Investments and the formulation of potential claims which could be pursued on behalf of Aus Streaming to the benefit of its winding up and its creditors as a whole.⁴⁰ This arrangement between Messrs Crosbie and Walley and JWS is not an agreement which requires approval pursuant to section 477(2B) of the Act, because it is not an agreement entered by SPLs on behalf of Aus Streaming and it is not a funding agreement. In any event, section 477(2B) of the Act only applies after the appointment of the SPLs. The creditors of Aus Streaming are not

³⁶ See the Crosbie Affidavit at [17].

³⁷ See the Crosbie Affidavit at [8] to [10].

³⁸ See the Crosbie Affidavit at [22] to [25].

³⁹ See the Buitendag Affidavit at [9] and [10].

⁴⁰ See the Crosbie Affidavit at [17].

affected or prejudiced in any way. The arrangement is merely to ensure that the totality of the \$150,000 is made available for the investigations into the Investments which the SPLs are to conduct pursuant to their appointment. JWS does not receive any commission or benefit under its arrangement with Messrs Crosbie and Walley.

- f. If, after the investigations into the Investments, the SPLs conclude that there are potential claims in connection with the Investments that they want to pursue on behalf of Aus Streaming and for the benefit of Aus Streaming's liquidation and creditors as a whole, then it is for them as SPLs, if necessary, to seek funding from a third party or litigation funder and approach the court for approval of such funding agreement under section 477(2B) of the Act.⁴¹ The SPLs are not obliged to enter into a funding agreement with Harbour or anyone at all.⁴² In this regard, however, if the SPLs determine to enter into a funding agreement, Harbour merely has a *spes*, in light of the money it makes available to Helberg for the latter to engage the SPLs, that the SPLs will grant it a right of first refusal to enter into a funding agreement with the SPLs to pursue claims the SPLs determine are available for the benefit of Aus Streaming's winding up and its creditors as a whole.⁴³ Harbour is not receiving any commission or other benefit in respect of the money it will be making available pursuant to its agreement with Helberg from anyone, including Aus Streaming and the SPLs.
- g. If the SPLs wish to enter into a funding agreement after their appointment, then, pursuant to section 477(2B) of the Act, they will have to obtain the approval of the court on the terms of engagement of any third party funder or litigation funder who may become involved. This is not, however, something that requires to be determined now.⁴⁴

18. The creditors of Aus Streaming are in no way prejudiced by Helberg's funding, with the assistance of Harbour, of the investigations into the Investments by Messrs Crosbie and Walley as SPLs and their determining whether there are claims which could be pursued for the benefit of the winding up of Aus Streaming and its creditors as a whole.

Applicable principles

Standing to make application

19. Orders for the appointment of SPLs are made under section 90-15(1) of the IPS in a creditors' voluntary winding up.⁴⁵

⁴¹ See the Crosbie Affidavit at [26].

⁴² See the Crosbie Affidavit at [27].

⁴³ See the Crosbie Affidavit at [27].

⁴⁴ See the Crosbie Affidavit at [27].

⁴⁵ See *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liquidation) v Boka Beverages Pty Ltd (in liquidation)* [2019] FCA 1184 (**Melhelm**) at [49]; *GDK Projects Pty Ltd v Umberto Pty Ltd (in liq)* [2018] FCA 541 (**GDK Projects**) at [32]; *In the matter of ACN 152 546 453 Pty Ltd (formerly Hemisphere Technologies Pty Ltd (in liq))* [2018] NSWSC 1002 (**Hemisphere**) at [15] to [18]; *Reidy as Trustee for the PR Mining Superannuation Fund v Contained Gold Pty Ltd (in liq)* [2020] FCA 268 (**Reidy**) at [31]; *William & Kersten Pty Ltd v Walton Construction (Qld) Pty Ltd (in liq), in the matter of Walton Construction (Qld) Pty Ltd (in liq)* [2019] FCA 1201 (**Walton Construction**) at [18].

20. Mr Helberg, as creditor of Aus Streaming,⁴⁶ has standing to bring the application under section 90-20(1)(a) of the IPS, being "a person with a financial interest in the external administration" of Aus Streaming and having regard to sections 5-30(a)(ii) and 5-15(c) of the IPS.

21. The liquidators support the appointment of the SPLs.⁴⁷

Court's powers under section 90-15 of the IPS

22. The court has unconstrained power under section 90-15 of the IPS, and may, either on its own initiative or on application under section 90-20 of the IPS, make such orders as it thinks fit in relation to the external administration of a company.⁴⁸ However, the cases under the old provisions provide useful guidance, and it is difficult to envisage circumstances where the power would be exercised if the court could not be satisfied that it would be *just and unless the applicant for the appointment has demonstrated sufficient utility to the external administration*.⁴⁹

Threshold issue for appointment of SPLs

23. The threshold issue for the appointment of a SPL is whether such appointment would be "*both just, and of sufficient utility to the external administration*" of the company in liquidation.⁵⁰

24. The investigation of matters which warrant investigation, and the recovery of funds for the benefit of creditors, are important aims of the statutory winding up regime.⁵¹ In the present matter, the appointment of the SPLs will help to achieve the first of those aims and holds out at least some prospect of achieving the second. The Investments, totalling millions of dollars, are not only the only assets of Aus Streaming, but their existence and value are substantial and serious issues which stand between the unsecured creditors and significant losses. The appointment of the SPLs will not expose unsecured creditors to any additional risk or liability. In fact, the appointment of the SPLs would enable the unsecured creditors to obtain a "*second opinion*" about the existence and value of the Investments, and the viability of any proceedings which might be brought in connection with the Investments. The "*second opinion*" would involve the SPLs, their legal advisers and those who fund the proposed proceedings.

Other considerations regarding the appointment of SPLs

25. It is appropriate to appoint a SPL in the following circumstances:

- a. *If there are matters that require investigation by a liquidator with a view to possible recovery for creditors.*⁵² It is, however, neither necessary nor appropriate for the court to reach a conclusion as to the prospects of success of any prospective litigation.⁵³ What has to be shown is that

⁴⁶ Mr Helberg is owed \$230,000.00 and his claim has been admitted. Helberg Holdings Pty Ltd is a shareholder of Aus Streaming – see the Helberg Affidavit at [6] and [7], and Exhibit **PCSH-1**, pages 2 to 6.

⁴⁷ See, for example, the minutes of proposed orders provided to the court and JWS by the liquidators' solicitors, Brown Wright Stein Lawyers on 7 May 2020 at 4:51pm, and their counsel's statement at the mention on 8 May 2020 at Transcript, page 7, lines 23 to 27.

⁴⁸ See *Reidy* at [29].

⁴⁹ See *Melhelm* at [51] and [52]; *GDK Projects* at [33]; *Reidy* at [32]; *Hemisphere* at [19].

⁵⁰ See *GDK Projects* at [20]; *Hemisphere* at [15] and [19]; *Walton Construction* at [20] and [22].

⁵¹ See *Reidy* at [46] referring to *New Cap Reinsurance Holdings Ltd (ARBN 076 137 249) [2001] NSWSC 835* at [15].

⁵² See *Melhelm* at [57(1)]; *Reidy* at [33].

⁵³ See *Melhelm* at [59]; *GDK Projects* at [36].

there is a reasonable basis for the view that the matters identified regarding the purpose of the SPLs' appointment warrant investigation and that there is sufficient evidence to support the possibility of an action being brought against someone.⁵⁴ In the present matter, the facts point to a need for investigation into the Investments and it is likely to be open to the SPLs to at least consider pursuing potential claims in the interest and to the benefit of Aus Streaming's winding up and creditors as a whole.

- b. *If the liquidators have insufficient funds and insufficient prospects of obtaining funding to pursue an investigation.*⁵⁵ It is not necessary for the court to make a finding of a failure on the part of the liquidators a pre-requisite to the appointment of SPLs.⁵⁶ In the present matter, the liquidators are effectively unfunded, they do not intend (in the absence of funding) to take any further action to investigate the Investments, there is no suggestion that any creditor other than Mr Helberg is prepared to fund such investigations by the SPLs, and the only chance of the creditors receiving a distribution will be if the SPLs are appointed and they are able to achieve recoveries for Aus Streaming.
 - c. *If a creditor is prepared to fund investigations and recovery actions but only on the condition that another liquidator be appointed.*⁵⁷ Mr Helberg is, by way of the money he obtained from Harbour as set out in [17(a)] above, willing to fund the investigations by the SPLs into the Investments and the identification of potential claims. If the SPLs have satisfied themselves, with the assistance of their legal representatives, that there are potential claims in connection with the Investments, then it will be up to them whether to seek funding to pursue such claims for the benefit of the winding up of Aus Streaming and Aus Streaming's creditors as a whole.
 - d. *If such appointment would be beneficial to the winding up and the creditors as a whole.*⁵⁸ This requirement is satisfied for the reasons set out in [31] and [32] below.
26. A court would be reluctant to appoint a SPL if there is any prospect that the costs and expenses involved in the investigations of the SPL would diminish the return to unsecured creditors.⁵⁹ In the present matter, there is no chance of that, because of the funding of the investigations as set out in [17] above and the undertaking which the SPLs are prepared to give to the court as set out in [50] and [51] below. In any event, in circumstances where Aus Streaming has no assets other than the Investments as set out in [10] above, the unsecured creditors could not be left worse off.
27. There should be some failure on the part of the liquidator to attend to his or her duties before an order is made.⁶⁰ Although the liquidator's lack of funding usually plays a part in the court's decision to appoint a SPL, it appears that, having regard to the threshold issue, a SPL would be appointed if he or she could

⁵⁴ See *Walton Construction* at [21], [26], and [27].

⁵⁵ See *Melhelm* at [57(2)]; *Reidy* at [33].

⁵⁶ See *Melhelm* at [105].

⁵⁷ See *Melhelm* at [57(3)]; *Reidy* at [33].

⁵⁸ See *Melhelm* at [57(4)]; *Reidy* at [33].

⁵⁹ See *Reidy* at [43].

⁶⁰ See *Melhelm* at [54].

do something which the liquidator could not do, whether or not it is due to a lack of funds.⁶¹ In the present matter, there is no doubt that Messrs Crosbie and Walley would be able to conduct the investigations as envisaged in their appointment as SPLs.

28. Even if there is a degree of duplication of the work done by the liquidators to investigate recoveries, it will not be unreasonable where it is evident that the liquidators' investigations were limited by their access to funding.⁶² In the present matter, there is no reasonable likelihood of duplications because the liquidators have indicated that they are hampered by a lack of funding and have not conducted investigations into the Investments or otherwise.

Specificity of purpose

29. As to the matters that require investigation, it is necessary to identify with specificity the "*special purposes*" or powers for which the appointment of the SPL is sought.⁶³ In the present matter, the special purposes are identified with specificity as set out in the Schedule to the Proposed Orders.

Possible recoveries

30. The DOCA was entered into about two years ago on the basis that the claims of the unsecured creditors of Aus Streaming would be paid in full. That has not materialised and there have been material breaches of the DOCA. In fact, about two years after Aus Streaming was put into administration, the deed administration ended, and Aus Streaming was put into a creditors' voluntary liquidation at the instigation of the creditors represented by and related to Messrs Every, Sutton, and Turner.
31. Unless the SPLs conduct the aforesaid investigations, there is a possibility that the unsecured creditors will not receive anything, and that the winding up of Aus Streaming will not be performed in a proper and beneficial manner to the benefit of the creditors as a whole.
32. The only assets of Aus Streaming are the Investments, and, accordingly, there will only be any recoveries at all if the SPLs are appointed – the reality is that there will be no dividend to creditors if the SPLs are not appointed and at least the possibility of a dividend if they are appointed. If the investigations do not result in any recoveries, then the SPLs will recover their fees from the money provided through Mr Helberg as set out in [17] above, or pursuant to a funding agreement they may enter into, or not at all. Accordingly, there is little, or no, prospect of any "*fruitless proceedings*" being brought in connection with the Investments or the detriment of the creditors.
33. In the circumstances and for the reasons set out above, it is submitted that it is just, and that Mr Helberg has demonstrated sufficient utility to the winding up of Aus Streaming, so that it will be beneficial to the winding up of Aus Streaming and to its creditors as a whole, for the court to appoint Messrs Crosbie and Walley as SPLs. It is submitted that the plaintiff has satisfied the threshold issue.

Proposed orders

Paragraph 1

⁶¹ See *Melhelm* at [54].

⁶² See *Melhelm* at [104].

⁶³ See *Melhelm* at [58].

34. Proposed order 1(a) to (d) is essentially the same as the orders made in other cases dealing with the appointment of SPLs, for example, *Walton Construction* at [10]; *Melhelm* at [114]; *Reidy* at [2] and [4]; *GDK Projects* at [2]; *Hemisphere* at [37], subsequently amended in the proceeding to include further purposes *nunc pro tunc* [2020] NSWSC 270.
35. The differences relate to the purpose for which the SPLs were appointed. As mentioned in [29] above, it is necessary to identify with specificity the "*special purposes*" (or powers) for which the appointment of the SPLs are sought. The special purposes or powers are encapsulated in the Schedule to the Proposed Orders.
36. Proposed order 1(a)(ii) is the same as the orders made in other cases dealing with the appointment of SPLs.⁶⁴ Needless to say, if the SPLs wish to conduct public examinations, then they will have to seek court consent as required by sections 596A and 596B of the Act, and it is thus not necessary to specify that in the order.
37. Proposed order 1(b) and (c) makes it clear that the commencement and prosecution of any claims and the taking of steps are confined to the special purposes for which the SPLs are appointed.
38. Proposed order 1(d) is the same as the order in made *Walton Construction* (order 1(d)). In *Hemisphere* (order 1(e)), a similar order was qualified by the words "*except for the powers contained in ss 477(1)(a) – (c) and 477(2)(f) and (g) of the Act*", while in *Reidy* (order 2(d)) and *GDK Projects* (order 2(d)) it was qualified by the words "*except for the powers contained in s 477(1)(a) of the Act*". It is submitted that the proposed order 1(d) need not be qualified and that the format used in *Walton Constructions* is appropriate.

Proposed order 2

39. Proposed order 2 is essentially the same as the orders made in *Walton Construction* (order 2) at [12] and *Hemisphere* (order 2(5)). The proposed order is different in that in the present matter provision is made for the fact that the Investments and Investment Companies are located in different jurisdictions (as per proposed order 2(a)(ii) and (iii) and (b)).

Proposed order 3

40. Proposed order 3 is essentially the same as the orders in *Hemisphere* (order 2(a)) at [37(2)(a)], but it should be noted that there is no similar order made in *Walton Construction*.

Proposed order 4

41. Proposed order 4 is essentially the same as the orders made in *Hemisphere* (order 3) at [37(3)] and *Walton Construction* (order 3) at [12(3)], but in the latter decision the court stated at [30(b)] that the order should give greater detail of the matters upon which the SPLs are required to report to the liquidators and unsecured creditors. It is submitted that it is not necessary to provide such detail in the orders, because the SPLs will, pursuant to their investigations, report on their findings. Having regard to

⁶⁴ See *Walton Construction* (order 1(a)(ii) and (iii)), *Hemisphere* (order 1(a)(v) and (vi)), and *GDK Projects* (order 2(a)), *Reidy* (order 2(a)(ii) and (iii)).

the purposes set out in the Schedule to the Proposed Orders, it is apparent on what issues the SPLs will be reporting.

42. Proposed order 4 provides protection to the general body of the unsecured creditors of Aus Streaming because they will be kept informed of the activities of the SPLs.

Proposed order 5

43. Proposed order 5 is the same as the orders made in *Reidy* (order 9) and *Walton Construction* (order 5) at [12(5)]. In *Reidy*, order 10 was to the effect that the liquidators' costs be costs in the liquidation. In *GDK Projects* at [59], being order 5, the court ordered that the costs of the proceeding of both the plaintiff and the liquidator be costs in the liquidation of the company in question.
44. In the present matter, Mr Helberg has incurred significant legal costs and expenses in making the application which was necessary for the appointment of the SPLs. The liquidators were not going to conduct any investigations, and, as a matter of fact, they have not done so in their capacities as administrators and deed administrators for about two years. It is pertinent to notice that the application was initially much broader, but the parties co-operated to narrow the issues. The indemnity provided by Harbour only covers any adverse costs orders made against Mr Helberg.⁶⁵
45. Mr Helberg is also likely to incur costs and expenses in respect of the SPLs performing their tasks, and, if so, he will apply to court for an order under section 564 of the Act, which could then be assessed on its merits.⁶⁶

Proposed order 6

46. Proposed order 6 is similar to the order made in *Melhelm* (order 4). In *In the matter of 77738930144 Pty Ltd (in liq) (formerly Commercial Indemnity Pty Ltd)* [2017] NSWSC 452 (**Commercial Indemnity**), Gleeson JA dealt with the issues of who could apply for funding of SPLs to perform their tasks and how such application could be made at [22] to [25], before concluding at [26]:

*"Ordinarily, the additional liquidator once appointed would make any relevant application for s 477(2B) approvals. That can be achieved in the present case in a single proceeding by the procedure adopted here; a separate application by the proposed special purpose liquidator returnable instanter in the proceeding in which he is appointed".*⁶⁷

47. As a result of this procedure adopted in *Commercial Indemnity*, it is not necessary for the SPLs to be made parties to the current application. However, it would be necessary for the SPLs to file an interlocutory application seeking approval to enter into a funding agreement (or any other agreement to which section 477(2B) of the Act applies) if they wish or need to do so.⁶⁸ It appears from *Hemisphere* [2018] NSWSC 1224, dealing with the SPL's application for approval of a funding agreement, that such interlocutory application was made by the SPL, with the plaintiff being a respondent together with the liquidators, and that notice had been given to the creditors (at [3]) and to ASIC (at [4]). The approval was given *nunc pro tunc*. Also, it appears from *Hemisphere* [2020] NSWSC 270, dealing with the

⁶⁵ See the New LFA at paragraph 1(a)(i).

⁶⁶ See *Hemisphere* at [35].

⁶⁷ *Commercial Indemnity* was followed in *Melhelm* at [108], *Reidy* at [53], and *GDK Projects* at [28].

⁶⁸ See *GDK Projects* at [29].

interlocutory application to extend the SPL's powers and amend the approval of the funding agreement, that the SPL was the applicant and the other parties to original application for the appointment of the SPL remained the same.

48. In the present matter, as set out in [17] above, it is clear that the current "*funding*" of Mr Helberg and his company by Harbour is not funding of the SPLs, and as such no approval pursuant of section 477(2B) of the Act is required. Indeed, it is not possible to seek approval of a funding agreement between Messrs Crosbie and Walley, on the one hand, and a funder or a third party, on the other hand, at a time before they are appointed as SPLs. Approval of a funding agreement could only occur when the SPLs had been appointed, as mentioned in [46] above, and sought to enter into such agreement which requires approval.⁶⁹
49. Proposed order 6 merely highlights the type of interlocutory applications which would be allowed to be made in the current proceeding.

Proposed order 7

50. Proposed order 7 is the same as the order made in *Melhelm* at [114(5)]. This proposed order merely facilitates the practical issues relating to the interlocutory applications envisaged in proposed order 6, and if the matter is to remain in his Honour Justice Connock's list.

Proposed order 8

51. Proposed order 8 refers to the undertaking by the SPLs regarding the recovery of their costs.⁷⁰
52. This undertaking is similar to the undertaking the court accepted in *Hemisphere* (order 4). This undertaking is self-explanatory and ensures that the costs and expenses of the SPLs will not prejudice the payment of the unsecured creditors' claims, and will ensure that the activities and consequences of the liquidators and the SPLs will be kept separate.⁷¹ In other words, the activities of the SPLs would not cut across any actions of the liquidators and would not diminish the property of Aus Streaming.⁷²
53. In *Walton Construction* there was no undertaking, but the court made an order to that effect at [12(4)]. If the court is minded to make an order rather than accepting an undertaking from the SPLs, then the order could be similar to the one made in *Walton Construction*:

"Any costs or expenses incurred by, or approved remuneration payable to, the Special Purpose Liquidators:

- (a) is not to be paid from any property of Aus Streaming except that which the Special Purpose Liquidators recover as a consequence of the actions they have specifically been appointed to undertake pursuant to these orders, but*
- (b) may be paid from any other funding which the Special Purpose Liquidators may obtain, including from a litigation funder."*

Conclusion

54. In light of the foregoing and for the reasons stated, the court is asked to grant the plaintiff the relief sought as set out in the attached Proposed Orders.

⁶⁹ See *Commercial Indemnity* at [20] to [28]; *GDK Projects* at [28]; *In the matter of AT Air Group Pty Limited (in liq)* [2012] NSWSC 1508 at [22].

⁷⁰ See the Crosbie Affidavit at [19] to [21].

⁷¹ See *Hemisphere* at [34].

⁷² See *Walton Construction* at [29].

55. ASIC considered that the current application is properly left for the determination of the court and confirmed that it does not propose to intervene in the application or seek leave to appear.⁷³

Dated: 19 May 2020

Anton Trichardt
Counsel for the plaintiff

Johnson Winter & Slattery
Solicitors for the plaintiff

⁷³ See the letter from ASIC to JWS dated 30 April 2020.

Attachment A

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

No. S ECI 2020 01581

IN THE MATTER OF AUS STREAMING LIMITED (IN LIQUIDATION) ACN 600 577 348

BETWEEN

Petrus Caspardus Stephanus Helberg

Plaintiff

and

Ronald John Dean-Willcocks (and the others in the attached Schedule)

Defendants

MINUTE OF PROPOSED ORDERS

1. Pursuant to section 90-15(1) of the Insolvency Practice Schedule (**IPS**), Schedule 2 to the *Corporations Act 2001 (Cth)* (**Corporations Act**), Mr Craig Crosbie and Mr Daniel Walley of PricewaterhouseCoopers be appointed as special purpose liquidators (**Special Purpose Liquidators**) of Aus Streaming Limited (in liq) (**Aus Streaming**), for the purpose of:
 - a. conducting investigations into any of the matters set out in the Schedule to these Orders, including by:
 - i. inspecting the books and records of Aus Streaming;
 - ii. if they consider necessary and appropriate, applying to the court for orders to allow them to conduct public examinations pursuant to sections 596A or 596B of the *Corporations Act 2001 (Cth)* (**Corporations Act**) and/or applying to the court for orders to allow them to obtain production pursuant to section 597(9) of the *Corporations Act* or the relevant provisions of the *Supreme Court Rules 2015*; and
 - iii. requiring statements to be provided pursuant to section 475(2) of the *Corporations Act*;
 - b. commencing and prosecuting any claims in respect of the matters set out in the Schedule to these Orders, including commencing any legal proceedings, that may be available to Aus Streaming or to them, including obtaining and considering legal advice in respect of

- pursuing any such claim, that they may determine should be pursued for the benefit of the winding up of Aus Streaming and Aus Streaming's creditors as a whole;
- c. taking any steps in relation to any matters relating to the matters set out in the Schedule to these Orders, including by commencing legal proceedings, to preserve or to protect the Investments of Aus Streaming, or Investments to which Aus Streaming or the Special Purpose Liquidators claim to be entitled;
 - d. exercising any powers conferred on liquidators by sections 477 and 506(1)(b) of the Corporations Act, including the power to seek relief under section 1317H of the Corporations Act, in relation to any matters set out in the Schedule to these Orders.
2. In addition to the order set out in 1 above:
- a. Mr Dean-Willcocks and Mr Gray (**General Purpose Liquidators**) or any liquidators of Aus Streaming from time to time (other than the Special Purpose Liquidators) use their reasonable endeavours to assist the Special Purpose Liquidators to exercise the powers given to them in order 1, including by:
 - i. providing any documents or information previously prepared or obtained by the General Purpose Liquidators (including during the period the General Purpose Liquidators were the Administrators and the Deed Administrators of Aus Streaming) in investigating the Investments or any claims in respect of the Investments;
 - ii. consenting to and assisting with these orders being entered in other foreign jurisdictions as may be required under the relevant cross-border insolvency legislation; and
 - iii. consenting to and assisting with commencing and prosecuting of any legal proceedings in other foreign jurisdictions;provided that the Special Purpose Liquidators shall pay any reasonable costs or expenses incurred by, or remuneration payable to, the General Purpose Liquidators in respect of the assistance referred to in this order; and
 - b. the Special Purpose Liquidators may engage legal practitioners to assist them in the exercise of the powers given to them.
3. Pursuant to section 90-15 of the IPS the General Purpose Liquidators, as liquidators of Aus Streaming must refrain from exercising any of the powers of the Special Purpose Liquidators in order 1 above, except with prior written consent of the Special Purpose Liquidators (such consent not to be unreasonably withheld) or by leave of the Court.
4. Pursuant to section 90-15 of the IPS, the Special Purpose Liquidators shall, in accordance with the provisions of the Corporations Act, report to creditors of Aus Streaming and the General Purpose Liquidators on the terms of their appointment as soon as practicable after their appointment and at least once every three months during the course of their appointment.
5. The plaintiff's costs of the proceeding are costs in the liquidation of Aus Streaming.

6. Leave be granted to:
 - a. the plaintiff in the event of him applying to court for an order under section 564 of the Corporations Act for his costs and expenses incurred in respect of his making available money to the SPLs for them to perform their tasks as set out in the Schedule hereto; and
 - b. the Special Purpose Liquidators to apply in this proceeding to extend the purposes for which the Special Purpose Liquidators are appointed or the powers that the Special Purpose Liquidators are entitled to exercise, to apply for approval of litigation funding pursuant to section 477(2B) of the Corporations Act, and otherwise generally.
7. Leave be granted to the parties to approach the associate of the Honourable Justice Connock to obtain a hearing date for a further hearing in relation to the application for approval of a funding agreement, and in relation to costs.
8. Note the undertaking given by Messrs Crosbie and Walley as Special Purpose Liquidators that they will not seek to recover their fees and expenses out of the funds or the property of Aus Streaming other than (a) in accordance with the terms of the funding agreement to be entered into with a third party, including a litigation funder, or (b) otherwise out of the assets of or for the benefit of Aus Streaming that they recover or obtain during the course of their appointment as Special Purpose Liquidators.

Schedule

1. The existence, valuation, and the basis, of the investments (**Investments**) Aus Streaming made by taking shares in the following foreign unlisted energy and resource companies (**Investment Companies**):
 - a. 400,000 shares at a book value of \$10,371.360 in AGB Resource Capital Ltd (**AGB Resource**);
 - b. 7,500,000 shares at a book value of \$14,322,000 in Frontier Mining Value Ltd (**Frontier**);
 - c. 27,328,571 shares at a book value of \$30,498,685.24 in Indus Infrastructure Partners Ltd (**Indus**);
 - d. 2,000,000 shares at a book value of \$7.936,000 in OTH Mineral Streaming Ltd (**OTH**); and
 - e. 47,500,000 shares at a book value of \$82, 460,000 in TOR Mining Capital Limited (**TOR**).
2. The existence, status, and assets of the Investment Companies and their relationship with ASAF Critical Metals Ltd (**ASAF**) and Aus Streaming.
3. The steps taken to crystallise and monetise the Investments.
4. Whether any transactions between Aus Streaming and ASAF, and Aus Streaming and any one or more of the Investment Companies in connection with the Investments give rise to any claim in law or in equity or under statute.
5. The conduct (including any breach of duty whether statutory, at common law or in equity, and any misleading or deceptive conduct whether statutory or at common law) of Aus Streaming's directors and Mr Andrew Turner (**Mr Turner**), in connection with the Investments.
6. The conduct (including any misleading or deceptive conduct whether statutory or at common law) of Avalon Pacific Capital Pty Ltd (**Avalon**), Dayton Way Financial Pty Ltd (**Dayton**), and Hamirah Holdings Ltd (**Hamirah**), companies related to Mr Turner, in connection with the Investments.
7. The conduct (including any breach of duty whether statutory or at common law, and any misleading or deceptive conduct whether statutory or at common law) of Aus Streaming's external auditors, Nexia Perth, in connection with the Investments.
8. Any and all claims that Aus Streaming and/or the creditors of Aus Streaming and/or the shareholders of Aus Streaming may have (or may have had) in connection with the Investments, including, but not limited to, claims against the following individuals and/or entities:
 - a. the directors of Aus Streaming;
 - b. Mr Turner;
 - c. Avalon;
 - d. Dayton;
 - e. Hamirah;
 - f. ASAF;
 - g. AGB Resource;

- h. Frontier;
- i. Indus;
- j. OTH;
- k. TOR; and
- l. Nexia Perth.

SCHEDULE OF PARTIES

Petrus Caspardus Stephanus Helberg

Plaintiff

Ronald John Dean-Willcocks

First Defendant

Cameron Hamish Gray

Second Defendant

Aus Streaming Limited (In Liquidation) ACN 600 577 348

Third Defendant