

9 September 2016

TO CREDITORS

Dear Sir/Madam

**Killarnee Civil & Concrete Contractors Pty Ltd (In Liquidation)
ACN 085 230 486 (the Company)
ATF for the Thompson Family Trust**

We refer to our appointment as Liquidators of the Company on 9 December 2014.

This Circular should be read in conjunction with our Annual Report to Creditors and Members dated 16 May 2016 and Circular to Creditors 19 July 2016 which are both available on the Ferrier Hodgson website (www.ferrierhodgson.com)

We provide the following updates under the relevant sub-headings:

Liquidator's Application to the Federal Court of Australia (FCA) (WAD 181/2016)

By way of background, we advise that:

1. We had initially made an application to the Federal Court of Australia (FCA) on 12 May 2016 for directions to determine if the Bank, as secured creditor has a priority entitlement to proceeds recovered from the Liquidator's preference claim, to the extent of the amounts paid to the employees by the Administrators / Liquidators during the course of our appointment from the Company's funds.

We had notified creditors of our application in our Annual Report to Creditors and Members dated 16 May 2016 and requested that if there were any objections to the Orders sought, they notify us by 6 June 2016. There was no objection from the creditors.

2. On 8 July 2016, we filed an interlocutory application to amend the original application to seek additional Orders ratifying the Company's ability and Liquidators' power to realise the assets of the Thompson Family Trust (**the Trust**). Creditors were notified of our amended application on 19 July 2016 and were requested to notify us of any objections on or before 9 August 2016. Again, there were no objections received.

At the Federal Court hearing on 30 August 2016, Justice Gilmour made an Order which granted us leave to re-amend the originating application of 12 May 2016.

The requirement to seek the re-amended order is as a result of the recent Supreme Court of New South Wales decision in Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (in liquidation) (**ICS**) (No 2) [2016] NSWSC 106 (**ICS case**) which had considered the issues of priority to be afforded to creditors in the distribution of trust assets, where ICS was an entity whose sole activity was to act as trustee of the Independent Contractor Services Trust.

In the ICS Case, Brereton J held that the waterfall of priority payments of debts and claims set out in section 556 of the Corporations Act 2001 (Cth) (**the Act**) does not apply to the distribution of trust assets. Meaning that in the event that there are insufficient to pay all trust creditors in full, they will share in the distribution *pari passu* (equally), without intervention of the statutory priority.

The ICS Case is analogous to the Company, as its sole activity was to act as trustee of the Trust, who held all the assets used in its business operations. The assets of the trust have mostly been realised and now the question to be determined is whether the priorities afforded under section 556 of the Act apply, i.e. if priority creditors (employee entitlements) are to be afforded a priority ahead of ordinary unsecured creditors in the distribution of the trust assets realised.

The issue of whether or not section 556 of the Act applies in the distribution of trust assets remains unclear as in a subsequent decision (*Freelance Global v Bensted [2016] VSC 181*), the Victorian Supreme Court came to a different conclusion and held that trust assets can be applied to meet claims in accordance with section 556 of the Act. This decision unfortunately did not refer to the ICS case and its reasons.

The conflicting authorities gives rise to conflicting outcomes. In this regard, we set out below a side-by-side comparison of the estimated return to creditors under the different scenarios which are relevant to the Company:

Statement of Position as at 7 September 2016	Westpac entitled to subrogation	Westpac not entitled to subrogation	Trust assets distributed on a <i>pari passu</i> basis
Liquidators' ERV			
Assets available			
Cash at Bank	171,899	171,899	171,899
Cash at Term Deposit	3,913,306	3,913,306	3,913,306
Total Assets available	4,085,205	4,085,205	4,085,205
Less: Cost of Liquidation			
Outstanding Liquidators' fee to 31 August 2016	(26,438)	(26,438)	(26,438)
Estimated future Liquidators' fees (1 Sept 2016 to completion)	(200,000)	(200,000)	(200,000)
Estimated future Liquidators' disbursements	(10,000)	(10,000)	(10,000)

Statement of Position as at 7 September 2016	Westpac entitled to subrogation	Westpac not entitled to subrogation	Trust assets distributed on a <i>pari passu</i> basis
	Liquidators' ERV		
Legal cost and contingencies	(50,000)	(50,000)	(50,000)
Total estimated cost of Liquidation	(286,438)	(286,438)	(286,438)
Total Funds available	3,798,767	3,798,767	3,798,767
Less: Priority Creditors (employee entitlements)			
Amount owed to Westpac as at 23 August 2016	(2,872,561)	N/A	N/A
Add: Estimated net proceeds from sale of Lot 5 Exploration Drive and Lot 1031 Mardie Road ("the Karratha Properties")	1,310,000	N/A	N/A
Pre-appointment employee entitlements	(2,005,000)	(2,005,000)	N/A
Total Priority Creditors	(3,567,561)	(2,005,000)	N/A
Surplus / (Deficit) after Priority Creditors	231,207	1,793,768	3,798,767
Estimated further voidable transactions and other recoveries (net of costs)	1,200,000	1,200,000	1,200,000
Total Voidable Transactions and funds available for Unsecured Creditors	1,431,207	2,993,768	4,998,767
Total Funds Available to meet Ordinary Unsecured Creditors' Claims	1,431,207	2,993,768	4,998,767
Less: Unsecured Creditors			
Trade & Other Creditors	(25,307,934)	(25,307,934)	(25,307,934)
Pre-appointment employee entitlements	N/A	N/A	(2,005,000)
Secured Creditor's estimated claim (net of the Karratha Properties)	N/A	(1,562,561)	(1,562,561)
Total Unsecured Creditors' Claims	(25,307,934)	(26,870,495)	(28,875,495)
Estimated Surplus / (Deficiency)	(23,876,728)	(23,876,728)	(23,876,728)
Estimated Dividend Rate to unsecured creditors (cents in \$)	5.66	11.14	17.31

Based upon the analysis outlined, we make the following additional comments:

- In the event Westpac is entitled to be subrogated to the position of the employees, the estimated dividend rate will be approximately 5.66 cents in the dollar.
- Conversely, in the event Westpac is not entitled to subrogation, the estimated dividend rate will be approximately 11.14 cents in the dollar.
- Alternatively, in the event the Court is of the view that the trust assets are to be distributed *pari passu* to all creditors after providing for the costs of administration (including the Administrators and Liquidation remuneration and expenses), the estimated dividend rate will be approximately 17.31 cents in the dollar.

- Creditors should also note that the final dividend rate will ultimately be dependent on the funds available (including further future preference recoveries) and adjudication of claims received.

For completeness, we also enclose at **Annexure A**, our Notice to Creditors of the re-amended application for court directions. In summary, we have approached the FCA to determine the following:

1. Directions as to whether the secured creditor, Westpac Banking Corporation has a priority in the preference claim recovery to the extent of the amounts paid to the employees by the Administrators / Liquidators.
2. An order that any sale of the assets of the Trust which have already taken place be deemed to be a sale within the power of the Liquidator and the Company as the trustee of the Trust.
3. An order that the Company through its liquidator be permitted to realise all assets of the Trust.
4. Directions that the Trust assets (including sale proceeds of any Trust assets) be dealt with by the Liquidator as assets of the Company and accounted for accordingly.
5. In the alternative of 4 above, directions be given to distribute the Trust assets to unsecured creditors of the Trust, *pari passu*, after providing for the cost of administration (including the Administrators and Liquidation remuneration and expenses) only.

Creditors who have any objection to the Orders sought by the Liquidators in the Re-Amended Originating Process, are advised to inform us in writing and provide the ground(s) of your objection (including any relevant supporting documents, where applicable) **on or before 5:00 pm (AWST) on Friday, 30 September 2016**. Alternatively, if you wish to be heard, you must file a notice of appearance, in the prescribed form, with the Federal Court Registrar and serve a copy of it on the Liquidators.

Sale of property at Lot 5, Exploration Drive, Karratha

The Exploration Drive property was owed by the Director, Mr Paul Thompson in his capacity as trustee for the Killarnee Investment Trust and was mortgaged to Westpac as security for the Company's borrowings.

Following the Liquidation of the Company, on 11 May 2015, Westpac appointed agents to realise the property. The sale of the Exploration Drive property settled on 6 September 2016 and its agents are finalising their accounting from the sale and the net proceeds from the sale will be paid to Westpac in due course.

Further queries

Should you require any further information regarding the above, please do not hesitate to contact either Nirav Shah or Yvonne Liew of this office on (08) 9214 1444.

Yours faithfully

Killarnee Civil & Concrete Contractors Pty Ltd



Martin Jones

Joint and Several Liquidator

Encl.

Annexure A

Notice to Liquidator's application for court directions

Killarnee Civil & Concrete Contractors Pty Ltd (In Liquidation) ACN 085 230 486 (the Company)

NOTICE IS GIVEN that pursuant to an order of the Federal Court of Australia dated 30 August 2016 (No. WAD181/2016), the Court has granted leave for the Company to re-amend the Originating Process dated 12 May 2016. The re-amended Originating Process was filed with the Court on 31 August 2016 seeking:

1. Directions as to whether the secured creditor, Westpac Banking Corporation has a priority in the preference claim recovery to the extent of the amounts paid to the employees by the Administrators / Liquidators.
2. An order that any sale of the assets of the Thompson Family Trust ("Trust") which have already taken place be deemed to be a sale within the power of the Liquidator and the Company as the trustee of the Trust.
3. An order that the Company through its liquidator be permitted to realise all assets of the Trust.
4. Direction that the Trust assets (including sale proceeds of any Trust assets) be dealt with by the Liquidator as assets of the Company.
5. In the alternative to order 4, a direction that the Trust assets (including sale proceeds of any Trust assets) be distributed to unsecured creditors of the Trust *pari passu*, after providing for the costs of administration.

A copy each of the following are attached:

- a. Sealed Court Order dated 30 August 2016; and
- b. Re-Amended Ex parte Originating Process.

Should creditors have any objection to the order sought by the Liquidator, you are advised to inform the Liquidator in writing and provide the ground(s) of your objection (including any relevant supporting documents, where applicable) **no later than Friday, 30 September 2016**. Alternatively, if you wish to be heard, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the Liquidator.

Dated this 9th day of September 2016.



Martin Jones

Joint and Several Liquidator
Killarnee Civil and Concrete Contractors Pty Ltd

Ferrier Hodgson
GPO Box 2537
PERTH WA 6001
Tel: (08) 9214 1444
Fax: (08) 9214 1400



Form 2
Rule 2.2 and 15A.3

Re-Amended Originating Process
Pursuant to the Order of Justice Gilmour on 30 August 2016

No. 181 of 2016

Federal Court of Australia
District Registry: Perth
Division: General

IN THE MATTER OF KILLARNEE CIVIL & CONCRETE CONTRACTORS PTY LTD (IN LIQUIDATION)
ACN: 085 230 486

EXPARTE

MARTIN BRUCE JONES IN HIS CAPACITY AS THE LIQUIDATOR OF KILLARNEE CIVIL & CONCRETE PTY LTD (IN LIQUIDATION)

Plaintiff

A. DETAILS OF APPLICATION

This application is made under Section 511 of the *Corporations Act* and s.89 of the *Trustees Act 1962 (WA)* for determination of a question arising in the winding up of Killarnee Civil & Concrete Contractors Pty Ltd (In Liquidation) ACN 085 230 586 (**Company**).

On the facts stated in the supporting affidavit, the plaintiff seeks:

1. Directions on the following questions:

~~1.(a)~~ Whether it would be proper for the Plaintiff to pay the debt of Westpac Banking Corporation ACN 007 467 141 (**Westpac**) (or some of it) from the Company's monies within the Plaintiff's control in priority to the ordinary unsecured creditors of the Company.


~~2.(b)~~ If the above direction is yes, how much is Westpac entitled to be paid in priority.

Filed on behalf of (name & role of party)	Applicant		
Prepared by (name of person/lawyer)	Fei Fei Xue		
Law firm (if applicable)	Gadens		
Tel	08 9323 0999	Fax	08 9323 0900
Email	feifei.xue@gadens.com		
Address for service (include state and postcode)	Level 7, 150 St Georges Terrace, Perth WA 6000		
.Reference: 27105146.1			



2. An order pursuant to section 89(1) of the *Trustees Act 1962 (WA)* that any sale of the assets of the Thompson Family Trust (Trust) which have already taken place be deemed to be a sale within the power of Martin Bruce Jones as the liquidator of the Company (Liquidator) and the Company as the trustee of the Trust.
3. An order pursuant to section 89(1) of the *Trustees Act 1962 (WA)* and section 511 of the *Corporations Act 2001* that the Company through its Liquidator be permitted to realise all assets of the Trust.
- 3-4. Direction pursuant to section 511 of the *Corporations Act 2001* that the Trust assets (including the proceeds of sale of any Trust assets) be dealt with by the Liquidator as assets in the winding up of the Company and accounted for accordingly.
5. In the alternative to order 4, a direction be given that the Plaintiff to distribute the Trust assets (including the proceeds of sale of any Trust assets) to unsecured creditors of the Trust *pari passu* after providing for the costs of administration (including the Administrators and Liquidators remuneration and expenses) only.
- 5-6. The costs of the application be costs of the winding up of the Company and paid from the Trust's assets.

Date: 31 August 2016


Signed by Gadens
Lawyer for the Applicant

This application will be heard by
Australia at _____ am/pm on

at 1 Victoria Avenue, Perth, Western

B. NOTICE TO DEFENDANT(S) (IF ANY)

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;



- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

Note Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

Date of filing:

Registrar

This originating process is filed by Gadens for the plaintiff.

D. SERVICE

The plaintiff's address for service is [address of plaintiff's legal practitioner or of plaintiff].

It is intended to serve a copy of this originating process on each defendant and on any person listed below:

Westpac Banking Corporation
109 St Georges Terrace
PERTH WA 6000

Attention: Mark Curran

Australian Securities and Investments Commission
Level 1
11 Mounts Bay Road
PERTH WA 6000



Federal Court of Australia
District Registry: Western Australia
Division: General

No: WAD181/2016

**MARTIN BRUCE JONES IN HIS CAPACITY AS THE LIQUIDATOR OF
KILLARNEE CIVIL & CONCRETE PTY LTD (IN LIQUIDATION)**
Plaintiff

ORDER

JUDGE: JUSTICE GILMOUR

DATE OF ORDER: 30 August 2016

WHERE MADE: Perth

THE COURT ORDERS THAT:

1. Leave be granted for the Plaintiff to re-amend the Originating Process dated 12 May 2016 in terms of the Minute of Re-Amended Originating Process attached hereto.
2. By 31 August 2016, the Plaintiff to file the Re-Amended Originating Process.
3. By 9 September 2016, the Plaintiff to give notice of the Amended Originating Process to the creditors of Killarnee Civil & Concrete Pty Ltd (In Liquidation) and the Thompson Family Trust.
4. By 30 September 2016, any creditors who wish to object to the orders sought in the Re-Amended Originating Process to provide to the Plaintiff their grounds of opposition.
5. By 7 October 2016, the Plaintiff file and serve a further affidavit attaching any opposition received from creditors.
6. The Originating Process be listed for hearing for half a day on 22 November 2016 at 10:15am.
7. The cost be in the Cause.



Date that entry is stamped:

Warrick Soden
Registrar