

19 July 2017

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**

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

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

The purpose of this circular is to provide creditors with an update on the Liquidator's Application to the Federal Court of Australia (**FCA**):

- to determine whether the secured creditor, Westpac Banking Corporation (**Westpac**) has a priority in the Liquidators' recovery to the extent of the amounts paid to the employees by the Administrators and Liquidators during the course of the voluntary administration and liquidation periods;
- for 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 Liquidators and the Company as the trustee of the Trust;
- for an order that the Company through its Liquidators be permitted to realise the assets of the Trust; and
- to determine whether the assets realised by the Liquidators can be applied according to the priority afforded by sections 555, 556, 560 and 561 of the Corporations Act (**the Act**) (e.g. employee claims) as opposed to being distributed *pari passu* amongst all creditors.

This Circular should be read in conjunction with our previous circular/report to creditors on 16 May 2016, 19 July 2016, 9 September 2016 and 8 March 2017. Copies of these reports are available on the Ferrier Hodgson website at www.ferrierhodgson.com.

Background

By way of background, the Liquidators had recovered an unfair preference claim of \$4.5M from the Australian Taxation Office in January 2016. Following this, on 12 May 2016 we made an application to the FCA to determine whether Westpac has a priority in the Liquidators' recovery to the extent of the amounts paid to the employees by the Administrators and Liquidators during the course of the voluntary administration and liquidation periods from the proceeds of unfair preference recovery. Additionally, we sought clarification of the Liquidators' ability to realise the

assets of the Trust without the appointment of Receivers and Managers by a Court or, without any further intervention by a Court.

On 8 July 2016, our application was amended to include (amongst other things) orders clarifying the Company's ability and Liquidator's power to realise the assets of the Trust, including directions from the Court regarding whether the money available for distribution to creditors should be applied in accordance with the priority rules of sections 556 of the Act. This was the result of a series of decisions made in the New South Wales Supreme Court, involving the winding up of companies which are (or were) trustee companies and the claims of creditors whose debts were incurred by the company, in its capacity as trustee of those trusts.

Current Status

The matter was heard on 9 December 2016 whereby the FCA:

- reserved its decision in relation to the trust issues; and
- adjourned the hearing of the subrogation issue to after the trust issues had been determined.

Subsequent to the above hearing, additional decisions from various courts on the position of the distribution of assets of a trust were handed down.

As a result of the above, the FCA:

- determined that the matter was of such importance that the "trust" issues be determined by the Full Court of the FCA (comprising three judges);
- made the Department of Employment a party to the proceeding (they have a priority claim in the form of funds advanced by the Fair Entitlements Guarantee to the Company to pay certain outstanding employee entitlements); and
- formed the view that it would be of assistance to the Court for an unsecured creditor of the Company to be joined to the action to act as a contradictor in relation to the questions of law around the "trust" issues. As a result, Matrix Partners Pty Ltd (**Matrix**), an unsecured creditor, was joined as a defendant (contradictor) to the proceeding. To facilitate this, and because it was in the interests of creditors to do so, the Liquidators agreed to indemnify Matrix's legal costs and any adverse costs order(s) in relation to them taking part in the proceedings.

Currently, the questions in relation to the trust issues have been fixed for hearing on **10 and 11 August 2017** at 10.15am AWST. Should creditors require any further details in relation to the proceeding, please contact Nirav Shah (Nirav.Shah@fh.com.au) or Yvonne Liew (Yvonne.Liew@fh.com.au) of this office on (08) 9214 1444.

In the event that any of the creditors wishes to be heard on the matter or has any objection to the orders 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) as soon as possible. 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 Liquidator.

Further queries

If you have any further queries in relation to this matter or the conduct of the liquidation generally, please contact either Nirav Shah (Nirav.Shah@fh.com.au) or Yvonne Liew (Yvonne.Liew@fh.com.au) of this office on (08) 9214 1444.

Yours faithfully

Killarnee Civil & Concrete Contractors Pty Ltd



Martin Jones

Joint and Several Liquidator