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Sia Lagos

Registrar

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**In the matter of The Forum Group of Companies Pty Limited
Federal Court of Australia Proceedings No. NSD 747 of 2021**

**OUTLINE OF SUBMISSIONS OF
THE RECEIVERS AND LIQUIDATORS**

A. INTRODUCTION

1. There are two interlocutory applications before the Court.
 - (a) The first is an application brought by the liquidators of two trustee companies for their appointment as receivers and managers of trust assets in circumstances where the trustee automatically retired upon entering liquidation.¹ The applicant liquidators are Jason Ireland and Jason Preston of McGrathNicol (*Liquidators*); and
 - (b) The second is an application for the approval of past and future remuneration of the receivers and managers of assets of different trusts (where the trustees were placed into liquidation).² The applicant receivers are Jason Ireland and Jason Preston of McGrathNicol (*Receivers*).
2. Both applications concern the external administration of entities related to the Forum Group the subject of these proceedings and other proceedings in this Court.³
3. **Enclosed** with these submissions is a consolidated set of proposed short minutes relating to each application. Each application is addressed in turn below.

B. APPOINTMENT OF RECEIVERS AND MANAGERS

4. This application is made under s 57 of the *Federal Court of Australia Act 1976* (Cth). The Liquidators rely upon the affidavit of Jason Ireland affirmed on 9 December 2022 (*Receivership Affidavit*), and exhibit JI-7, on this application.

¹ Amended Interlocutory Application dated 14 December 2022.

² Interlocutory Application dated 9 December 2022.

³ NSD616/2021, NSD642/2021 and NSD 681 of 2021

5. On 2 November 2022, the Liquidators were appointed to 64-66 Berkeley St Hawthorn Pty Ltd (in liquidation) (**Berkeley St**) and 9 Gregory Street Ouyen Pty Ltd (in liquidation) (**9 Gregory**) by orders made by Judicial Registrar Allaway.⁴
6. Berkeley St and 9 Gregory are trustees of two different trusts.⁵
7. As to Berkeley St:
 - (a) The beneficiaries of the Berkeley St trust are: Tesoriero Investment Group Pty Ltd (in liquidation) and Eros Management Pty Ltd (in liquidation). The Liquidators are also liquidators of both of these entities.⁶
 - (b) The Berkeley St trust deed relevantly provides at clause 25.1 that *'If the Trustee goes into liquidation, or ceases to carry on business or a receiver or administrator is appointed, the Trustee is deemed to have retired and the Unitholders may appoint a new trustee'*;⁷ and
 - (c) Berkeley St as trustee of the Berkeley St trust is the registered proprietor of the property at 64-66 Berkeley Street Hawthorn, Victoria (**Berkeley St Property**).⁸
8. As to 9 Gregory:
 - (a) The beneficiary of the 9 Gregory trust appears to be BV Holdings OY Pty Ltd in its capacity as trustee of the BV Holdings OY Unit Trust.⁹ However, BV Holdings OY Pty Ltd was deregistered on 30 October 2022. It is not presently known by the Liquidators whether the units in the 9 Gregory trust were transferred from BV Holdings OY Pty Ltd;¹⁰
 - (b) The 9 Gregory trust deed similarly provides at clause 25.1 that *'If the Trustee goes into liquidation, or ceases to carry on business, or a receiver or administrator is appointed, then the Trustee is deemed to have retired and the Unitholders may appoint a new trustee'*;¹¹ and

⁴ Exhibit JI-7, p 1-2.

⁵ Receivership Affidavit at [10] and [18].

⁶ Receivership Affidavit at [13].

⁷ Receivership Affidavit at [25] and Exhibit JI-7, p 18.

⁸ Receivership Affidavit at [14].

⁹ Receivership Affidavit at [21].

¹⁰ Receivership Affidavit at [28] and [29].

¹¹ Receivership Affidavit at [25] and Exhibit JI-7, p 53.

- (c) It appears that 9 Gregory as trustee of the 9 Gregory trust is the registered proprietor of the property at 9 Gregory Street Ouyen, Victoria (**9 Gregory Property**).¹²

B.1 Joinder of Berkeley St and 9 Gregory

9. The Liquidators seek to join Berkeley St and 9 Gregory to these proceedings so as to permit the receivership orders to be made. This approach has been adopted in these proceedings previously with the joinder of various other entities connected with the Forum Group proceedings, so as to enable orders to be made in respect of those entities.¹³

B.2 Applicable principles

10. By reason of liquidation, a corporate trustee becomes a bare trustee of the property the subject of the trust, whose powers are limited to holding and protecting trust assets. A corporate trustee in external administration therefore does not have a power of sale.¹⁴
11. However, the trustee retains its right of indemnity or exoneration out of the trust assets, secured by an equitable lien over the trust assets, in respect of debts or liabilities incurred by the trustee in the course of acting as trustee. The equitable lien does not confer a power of sale. In such circumstances, if a sale is necessary, the external administrator of the corporate trustee must apply to the Court for either an order that they be appointed as a receiver of the property, or alternatively for an order to sell the property.¹⁵
12. It has been held that there is no ‘bright line’ as to which option (receivership or power of sale) is to be preferred.¹⁶ However, in *Cremin, in the matter of Brimson Pty Ltd (in liq)* [2019] FCA 1023 at [50], Moshinsky J held that the ‘more common course’ is for the liquidator of a former corporate trustee to apply to be appointed a receiver for the purpose of selling trust assets and distributing the proceeds among trust creditors.

¹² Receivership Affidavit at [22] and [23].

¹³ For example, orders made on 27 August 2021 relating to joinder for the purpose of s 477(2B) funding relief.

¹⁴ *Re Hughes (in their capacity as joint and several liquidators of Substar holdings Pty Ltd (in liq) and another* (2020) 149 ACSR 185 at [26]-[27] (McKerracher J); *Amirbeaggi, in the matter of Simpkins Pty Ltd (in liq)* [2018] FCA 2121 at [27] (Markovic J).

¹⁵ *Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil and Concrete Contractors Pty Ltd (in liq)* (2018) 354 ALR 436 at [44]; [2018] FCAFC 40 at [44] per Allsop CJ.

¹⁶ *Deppeler, in the matter of Old Port Road Pty Ltd (in liq)* [2021] FCA 980 at [17].

13. The appointment of a liquidator as a trustee also promotes the efficient conduct of the liquidation of the trustee itself. In *Re Brereton, MyHouse (Aust) Pty Ltd (Admin Apptd)* [2020] FCA 610, Farrell J, referring to the relevant authorities, held (at [31]) as follows:

In Re Mecfab Holdings Pty Ltd [2015] NSWSC 46 ... at [9] (Brereton J); *Griffiths (Administrator) v The Trustee for Chrisamanda Trust (t/as Chrisamanda Trust)* [2017] FCA 1222 ... at [11] (Gleeson J); and *Derrington J in Trenfield, Re Crusaders Managers Pty Ltd (admins apptd)* [2018] FCA 876 ...at [16] (Derrington J) the Court found that appointing the administrator/s of a corporate trustee as receiver/s of a trust's assets facilitates and simplifies the administration of the corporate trustee by providing for the trust's business and assets to be under the same control as the corporate trustee while it is in administration, and that aids in the vindication of the trustee company's right of indemnity out of the trust's assets.

B.3 The Liquidators should be appointed as receivers

14. Having regard to the above, the Liquidators make the following submissions in favour of their appointment as receivers of the Berkeley St Property and 9 Gregory Property.
15. *First*, Mr Ireland gives evidence that in his experience the appointment of the Liquidators as receivers of the properties would enable the timely and cost effective recovery of properties, at arms-length, for the benefit of creditors.¹⁷ Without such orders, the liquidations of Berkeley St and 9 Gregory will be stymied.
16. *Second*, there is evidence that the insolvent trustees cannot meet their obligations to service the loans payable to mortgagees.¹⁸ For that reason it is appropriate that the properties be sold and the proceeds realised.
17. *Third*, should such a sale occur, prayer 4(i) of the Amended Interlocutory Process contemplates a mechanism by which the surplus sale proceeds are paid into the trust account of the solicitors for the Liquidators. The purpose for seeking such an order is to secure the surplus proceeds to be dealt with later, there being competing claims to those proceeds.¹⁹
18. *Fourth*, finally, the appointment of the Liquidators as receivers is consistent with the course previously adopted in relation to other trustees in liquidation connected with the related Forum Group proceedings.²⁰

¹⁷ Receivership Affidavit at [31].

¹⁸ Receivership Affidavit at [31(c)].

¹⁹ Receivership Affidavit at [31(d)].

²⁰ Orders 3.9.2021 (Lee J) in these proceedings.

C. APPROVAL OF REMUNERATION OF RECEIVERS AND MANAGERS

19. The Receivers seek orders under r 14.24 of the *Federal Court Rules 2011* for their past and future remuneration to be fixed, and that they be justified in applying assets of the trusts in payment of that remuneration.²¹
20. The Receivers rely upon an affidavit of Jason Ireland affirmed 9 December 2022 (*Remuneration Affidavit*), and exhibit JI-6, which contains detailed explanations of the work undertaken and remuneration reports for each entity the subject of the application.

C.1 Applicable principles

21. It is submitted that it is appropriate for the Receivers to set out in some detail the work undertaken by them in relation to each of the assets over which they are appointed, on an entity by entity basis, in order to provide sufficient foundation for the proposition that their fees are fair and reasonable (and proportionate).
22. The Receivers are officers of the court and are required to obtain approval for the payment of their remuneration: *Cape v Redarb Pty Limited (Receiver and Manager appointed)* (1991) 32 FCR 407 at 417 (Gallop, Ryan and von Doussa JJ). The Court should only allow remuneration which is fair and reasonable: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 3)* (2020) 142 ACSR 193 at [7] (Derrington J). In conducting that assessment, the question of proportionality is important: *Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545 at [32]-[34], [54] (Besanko, Middleton and Beach JJ).
23. In *In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396, Brereton J set out (at [6]) the following matters relevant to applications of this kind:
 - (1) A receiver is entitled to the costs, charges and expenses properly incurred in the discharge of the receiver's ordinary duties, or in the performance of extraordinary services that have been sanctioned by the Court.
 - (2) The ultimate question is what amount of remuneration is 'reasonable', and this involves considering whether the work in respect of which remuneration is claimed was reasonably undertaken in the due course of the receivership, and whether the amount claimed for it is a fair and reasonable reward for it. The objective is to award a sum or devise a formula which will reasonably and fairly compensate the receiver for the time and trouble expended in the execution of his or her duties and the responsibility he or she has assumed.
 - (3) The receiver bears the onus of justifying the reasonableness and prudence of the tasks undertaken for which remuneration is sought, and the reasonableness of the remuneration claimed for them.

²¹ Interlocutory Application dated 9 December 2022.

- (4) Remuneration may be allowed on the basis of a fixed salary, a commission on receipts, or a quantum meruit having regard to the time, trouble and responsibility involved. It is a matter for the Court to determine what basis is appropriate in the particular case, having regard to the principle that the remuneration must be reasonable.
- (5) If a time-based approach is adopted, the Court is guided by professional scales of charges, with emphasis on the broad average or general rate charged by persons of the relevant status and qualifications who carry out the relevant type of work. The Court will usually act on time sheets created in the receiver's office, provided that they do significantly more than merely detail the total number of hours spent by the receiver and officers of particular grades on his or her staff.
- (6) By analogy, the task involves consideration of the matters referred to in Corporations Act, s 425(8), which applies to receivers appointed under an instrument, namely:
 - (a) the extent to which the work performed by the receiver was reasonably necessary;
 - (b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
 - (c) the period during which the work was, or is likely to be, performed by the receiver;
 - (d) the quality of the work performed, or likely to be performed, by the receiver;
 - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
 - (f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
 - (g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
 - (h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
 - (i) whether the receiver was, or is likely to be, required to deal with:
 - (i) one or more other receivers; or
 - (ii) one or more receivers and managers; or
 - (iii) one or more liquidators; or
 - (iv) one or more administrators; or
 - (v) one or more administrators of deeds of company arrangement;
 - (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
 - (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and
 - (ii) whether the total remuneration payable to the receiver is capped;
 - (l) any other relevant matters.

24. These principles, albeit related to the provisions of the UCPR, have been cited with approval in this Court in relation to applications of this kind: *Australian Securities and Investments Commission v A One Multi Services Pty Ltd (No 2)* [2022] FCA 1100 at [18] (Downes J); *In the matter of Ardenberg Pty Ltd (in liq) (Administrators Appointed)* (No 2) [2020] FCA 1424 at [17] (Yates J); *Griffiths (Receiver and manager, and liquidator)*

of *Samandac Pty Ltd (in liq) v Trustee for Chrisamanda Trust (No 2)* [2018] FCA 1832 at [13] (Gleeson J).

25. As Downes J held in *A One Multi Services* at [21], citing Jackson J in *Park v Whyte (No 2)* [2018] 2 Qd R 413; [2017] QSC 229 at [163]-[164], the function of the Court is not to hypercritically assess the day by day activities or tasks undertaken in a complex administration over a lengthy period of time with the benefit of hindsight. A detailed affidavit setting out extensive support for the remuneration is itself an extensive and costly exercise.
26. Downes J also observed, at [22], that a receiver will not be disentitled to remuneration for work done which does not lead to augmentation of the funds in the receivership (for example, to meet statutory obligations), or involving an attempt to recover assets provided the work was reasonable to be carried out: citing, *Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459 at [12], [57]-[58] (Bathurst CJ with whom Beazley P, Gleeson JA, Barrett AJA and Beach AJA agreed).
27. The power to fix remuneration also relevantly includes the power to fix future remuneration: *A One Multi Services* at [24]; *Lucantonio v Benscrape Pty Ltd (No 2)* [2020] NSWSC 1114; *HN QCV Bottle Tree Village Pty Ltd v QCV Bottle Tree Village Pty Ltd (No 2)* [2019] NSWSC 433; *Macquarie Bank Ltd v Two Eagles Pty Ltd* [2014] NSWSC 367. Such an approach may be appropriate where the work done by the receiver to date was undertaken in a reasonable and proper manner, the receiver has identified the future tasks needed to be undertaken with reasonable specificity, estimates for those costs are given, and the likely duration of the remainder of the receivership is identified. The amount of prospective remuneration will be capped: *A One Multi Services* at [26].

C.2 Appointment of receivers

28. On 3 September 2021, the Receivers were appointed by the Court pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth) over the following assets:
 - (a) Nine real properties held by **14 James Street Pty Ltd** (in liquidation) (receivers and managers appointed) as trustee of the 14 James Street Unit Trust (***James St Properties***);

- (b) Real property held by **26 Edmonstone Road Pty Ltd** (in liquidation) (receivers and managers appointed) as trustee of the 26 Edmonstone Road Unit Trust (*Edmonstone Rd*);
- (c) Real property held by **5 Bulkara Street Pty Ltd** (in liquidation) (receivers and managers appointed) as trustee of the 5 Bulkara Street Unit Trust (*5 Bulkara St*);
- (d) Real property held by **6 Bulkara Street Pty Ltd** (in liquidation) (receivers and managers appointed) as trustee of the 6 Bulkara Street Unit Trust (*6 Bulkara St*);
and
- (e) A motor yacht known as the "XOXO" motor yacht formerly owned by Intrashield Pty Ltd (in liquidation) (*XOXO Yacht*).²²

29. The real properties were subject to various encumbrances including a registered mortgage in favour of NAB (in relation to the James St Properties, 5 Bulkara St and 6 Bulkara St), a caveat lodged by Aksara Holdings Pty Ltd against the James St Properties and 5 Bulkara, and a caveat lodged by Westpac in relation to its proprietary claims in related Forum proceedings.²³
30. In relation to each receivership, the Receivers seek approval of past remuneration for a period of approximately 1 year between 3 September 2021 to 30 September 2022, and 'future' remuneration from 1 October 2022 to the finalisation of the receivership. A schedule of hourly rates charged by the Receivers and their staff has been annexed to the Receivers' remuneration reports.²⁴ That schedule of rates is the same for each receivership.

C.3 James St receivership

31. The professional fees sought to be approved in the period from 3 September 2021 to 30 September 2022 in relation to the James St receivership are **\$246,471 (plus GST)**.
- (a) Approximately 85% of the remuneration sought (\$211,036) relates to steps taken to realise the nine real properties owned by 14 James Street Pty Ltd (including

²² Remuneration Affidavit at [6].

²³ Remuneration Affidavit at [8], [11].

²⁴ Remuneration Affidavit at p 17-18, 27-28, 38-39, 49-50, 60-61.

dealing with tenancy issues and obstructions to access to the premises on those properties); and

(b) The remaining approximately 15% of the remuneration sought (\$35,435) relates to fees concerning the Receivers' statutory requirements, legal proceedings and administration costs, as well as reporting to secured creditors and their representatives regarding the sale and ongoing reporting to major creditors Westpac and SMBC.²⁵

32. The James St Properties were sold for a total sum of \$6.84 million on or about 23 August 2022 following a sales and marketing campaign.²⁶ This campaign included obtaining in excess of 120 individual requests for copies of the information memorandum, 35 requests for the contracts for sale, and 14 parties showing what Mr Ireland describes as a high level of interest.²⁷
33. Prior to December 2021, eight of the nine James St Properties were leased by tenants, requiring the Receivers to contact the tenants and arrange monthly rent, take steps to agree to reduce rent having regard to COVID-19 relief measures where appropriate, and review the lease terms with each tenant.²⁸ The leases remained on foot between September 2021 and late December 2021, during which time the Receivers undertook OHS reviews.²⁹ In late December 2021, notices to vacate were issued to two tenants (being the tenants of 14A James Street and 16 James Street) on the basis that those leases were on uncommercial terms (the 16 James Street lease was also not documented).³⁰
34. Over and above the work relating to the sales process and the tenancy arrangements, Mr Ireland also gives evidence that his staff were obstructed in accessing some of the premises located on the James St Properties where timber planks had been moved in front of the access points to the warehouse on 14A and 16 James Street.³¹ Once these obstructions were removed following correspondence being sent, pallets of bricks and assorted timber were subsequently placed in front of the entrance to 14A James Street.³² The Receivers were also required to remove abandoned items from the warehouse, once

²⁵ Exhibit JI-6 p 13-14

²⁶ Exhibit JI-6 p 19.

²⁷ Remuneration Affidavit at [16(f)].

²⁸ Remuneration Affidavit at [14(a)].

²⁹ Remuneration Affidavit at [14(b)].

³⁰ Remuneration Affidavit at [14(d)].

³¹ Remuneration Affidavit at [17]-[22].

³² Remuneration Affidavit at [19].

they gained access, and return them to the owner.³³ These issues created additional streams of work for the Receivers.³⁴

35. Following the sale of the nine properties, and after taking into account additional receipts and expenses, the bank balance held by the Receivers as at 30 September 2022 was approximately \$5.791 million.³⁵
36. For the following reasons, the Receivers submit that the remuneration sought is fair and reasonable:
- (a) *First*, the receivership itself had some unusual aspects to it. In particular the marketing campaign was for the sale of nine properties (compared to one) and the Receivers had to manage being obstructed from accessing the premises and removing abandoned items once access was gained. In respect of the latter, Mr Ireland gives evidence that the interactions required to gain access resulted in considerably more work than ordinarily would be required to secure, clear and sell property such as 14A James Street.³⁶
 - (b) *Second*, Mr Ireland sets out in the James St remuneration report that approximately 73% (\$180,000) of the total remuneration of \$246,471 were fees charged by ‘Manager’ and ‘Assistant Manager’ positions, who are in the middle of the range of rates charged by relevant employees of McGrathNicol.³⁷ The Receivers submit this indicates that the work was not conducted, in the main, by those with rates at the higher end of the scale, but rather by those with lower rates wherever possible. It is also submitted that a reasonable inference can be drawn that it is less likely that unnecessary work was conducted by more junior members of the team who undertook those tasks (albeit at lower rates).
 - (c) *Third*, the fees charged in respect of the work relating to the assets held by James St in the amount of approximately \$211,000 represents approximately 3% of the value of the total sale price obtained for the nine properties (\$6.84 million). And, overall, the total remuneration claimed (including future remuneration) of \$271,741 represents approximately 4% of the remaining bank balance as at 30

³³ Remuneration Affidavit at [21].

³⁴ Remuneration Affidavit at [20], [22].

³⁵ Exhibit JI-6 p 19.

³⁶ Remuneration Affidavit at [22].

³⁷ Exhibit JI-6 p 15.

September 2022 after receiverships receipts and expenses are taken into account.³⁸
 In that respect it is submitted the remuneration sought is proportionate to the overall conduct of the receivership.

(d) *Fourth*, Mr Ireland has reviewed the work undertaken and has written off \$9,508.³⁹

37. The Receivers also seek **\$25,000 plus GST** for future remuneration. The work which is foreshadowed in relation to future remuneration includes: \$6,000 for the final expenses associated with the sales of the real properties; \$4,000 for confirming repayments to secured creditors and releases of associated guarantees (because the James St Properties are subject to registered securities and caveats), as well as ongoing reporting to Westpac and SMBC; and \$15,000 for statutory and administrative tasks including preparation of business activity statements, liaising with the ATO, and making an application to the Court in relation to the distribution of the proceeds of sale pending the determination of the various Forum related proceedings.⁴⁰ It is submitted that those costs are modest, reasonable and proportionate, noting that the considerable majority of work in relation to the receivership has already been completed and what is left to do is essentially to wind down and complete the receivership process in order to give effect to the sale process undertaken by the Receivers.

C.4 Edmonstone Rd receivership

38. The professional fees sought to be approved in the period from 3 September 2021 to 30 September 2022 in relation to the Edmonstone Rd receivership are **\$64,891 (plus GST)**.
- (a) Approximately 65% (\$42,686) of the remuneration relates to the sales process undertaken by the Receivers and otherwise relating to the real property the subject of the receivership; and
- (b) Approximately 35% (\$22,205) relates to liaising with secured creditors, updating Westpac and SMBC, and statutory and administration tasks.⁴¹
39. The Edmonstone Rd property was sold for approximately \$4.757 million on or about 31 January 2022,⁴² following a public marketing campaign which ran from about November

³⁸ Exhibit JI-6 p 19.

³⁹ Remuneration Affidavit at [29].

⁴⁰ Exhibit JI-6 p 16.

⁴¹ Exhibit JI-6 p 24.

⁴² Remuneration Affidavit at [33(j)]; Exhibit JI-6 p 29.

2021 to December 2021.⁴³ The public marketing campaign involved retaining Jones Lang LaSalle as the preferred selling agent, and regularly updating key stakeholders as to the process and responding to their queries.⁴⁴ In addition, the work relating to the sale involved preparing and issuing correspondence to valuers, liaising with interested parties, engagement with contractors to remove abandoned assets from premises, and completing a general clean ahead of the auction (amongst various other things referred to by Mr Ireland in his remuneration reports for Edmonstone Rd).⁴⁵

40. The bank balance in relation to the receivership as at 30 September 2022 was \$2.366 million, which arises by reason of \$4.785 million total receipts (including the proceeds of the sale of Edmonstone Rd), less various payments including a payment to a secured creditor in the order of \$2.25 million.⁴⁶
41. For the following reasons the Receivers submit the remuneration sought is fair and reasonable:
- (a) *First*, approximately \$55,000 of the total \$64,891 claimed by the Receivers was undertaken by ‘Manager’ and ‘Assistant Manager’ members of staff within the mid-range of the rates scale, from which the Court can draw the same inference as was submitted in relation to James St referred to above at paragraph 36(b).
 - (b) *Second*, the quantum of fees charged in the period following the sale of the property in January 2022 dropped substantially. At Remuneration Affidavit [40], Mr Ireland gives evidence that the fees from September 2021 to January 2022 came to a total of approximately \$52,000, and the fees from February 2022 to September 2022 were approximately \$12,500. It is submitted this spread of costs supports the proposition that the fees are fair and reasonable, in that the majority of work done by the Receivers would have been prior to and during the sales process, following which the fees should have reduced substantially (and Mr Ireland gives evidence that they did).
 - (c) *Third*, the fees of \$46,686 which relate to the sale of the property represent approximately 1% of the total sale proceeds of that property (\$4.757 million). It is

⁴³ Remuneration Affidavit at [33(g)].

⁴⁴ Remuneration Affidavit at [33(g), (k)].

⁴⁵ Exhibit JI-6 p 24.

⁴⁶ Exhibit JI-6 p 29.

submitted this indicates that the fees charged for the sale of Edmonstone Rd are proportionate to the value obtained by the Receivership by reason of that sale.

42. The Receivers also seek **\$13,000 (plus GST)** for future remuneration until the end of the receivership. \$3,000 of this projected remuneration relates to creditor reporting and \$10,000 relates to statutory tasks and administration, including an application to the Court in relation to the appropriate distribution of the receivership proceeds.⁴⁷ It is submitted these costs are fair and reasonable in circumstances where they represent a modest sum and relate to tasks required to be undertaken so as to finalise and give effect to the receivership.

C.5 5 Bulkara St receivership

43. The professional fees sought to be approved in the period from 3 September 2021 to 30 September 2022 in relation to the 5 Bulkara St receivership are **\$180,371 (plus GST)**, comprising:
- (a) Approximately 75% (\$133,981) of the work claimed relates to the asset itself; and
 - (b) Approximately 25% (\$46,391) of the work claimed relates to secured creditor engagement and statutory and administration tasks.⁴⁸
44. The receivership of 5 Bulkara St was complex, and unlike the other receiverships the asset itself was ultimately sold by NAB, through its appointed agent, as mortgagee in possession rather than by the Receivers.⁴⁹
45. As indicated above, 5 Bulkara St was encumbered by a mortgage to NAB, and a caveat securing the interest of Aksara, the second ranking unregistered mortgagee (as well as a caveat registered in Westpac's name in relation to its proprietary claims in relation to the Forum group).⁵⁰
46. Mr Ireland gives evidence that the Receivers undertook a detailed review of the security arrangements to analyse the pathways which would enable the sale of 5 Bulkara St, and engaged in negotiations with the parties with registered encumbrances on title so as to try to effect a sale.⁵¹ This included the preparation of an advanced and substantially

⁴⁷ Exhibit JI-6 p 26.

⁴⁸ Exhibit JI-6 p 34.

⁴⁹ Remuneration Affidavit at [49].

⁵⁰ Remuneration Affidavit at [8]-[11].

⁵¹ Remuneration Affidavit at [47].

agreed term sheet outlining the Receivers' proposal. However, after approximately 3 months' of negotiation, the evidence of Mr Ireland is that Aksara was unwilling to agree with the terms of the Receivers' proposal.⁵²

47. The remuneration report records work undertaken by 'Appointee', 'Partner', 'Director' and 'Senior Manager' levels with the Receivers' firm. Of the \$180,371 fees sought in relation to this receivership, approximately \$144,314 of the fees were charged by members of McGrathNicol at those particular levels.
48. In addition, the Receivers also undertook work relating to removal of abandoned assets which remained in the property.⁵³
49. For the following reasons, it is submitted that the Receivers' remuneration is fair and reasonable:
 - (a) *First*, even though work undertaken by receivers does not result in an augmentation of the balance sheet of the receivership, that does not of itself inhibit the Court finding that the work undertaken was reasonable. In relation to liquidator's remuneration, in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459, Bathurst CJ (with whom Beazley P, Gleeson and Barrett JJA, and Beach AJA, agreed) held as follows (at [57]):

[57] I would add two matters. First, the mere fact that the work performed does not lead to augmentation of the funds available for distribution does not mean the liquidator is not entitled to be remunerated for it. The most obvious example is work done by a liquidator in complying with his or her statutory obligations. As Farrell J pointed out in *Warner, Re GTL Tradeup Pty Ltd* at [71] it is relevant to consider whether the work was necessary to be done. If it was, there is no reason the liquidator should not be remunerated for it.

[58] Secondly, there are commonly cases where work is undertaken in an unsuccessful attempt to recover assets whether at the request of creditors or otherwise. Provided it was reasonable to carry out the work and the amount charged for it was reasonable, there is no reason a liquidator should not recover remuneration for undertaking the work. Indeed, as was pointed out in *Hall v Poolman* (2009) 75 NSWLR 99; [2009] NSWCA 64 at [128]–[129] there is a public interest in liquidators bringing recovery proceedings such as proceedings against directors for breach of duty or insolvent trading and proceedings for recovery of unfair preferences. However, the liquidator is obliged to make any decision to bring such proceedings with care, and negligence in the exercise of the power to bring proceedings may lead to a liquidator being deprived of costs: *Hall v Poolman* at [144]–[145].

⁵² Remuneration Affidavit at [48].

⁵³ Remuneration Affidavit at [52].

- (b) *Second*, there were multiple secured creditors claiming an interest in 5 Bulkara (NAB and Aksara) and without the agreement of both the property could not be realised. The steps taken by the Receivers to obtain that agreement were well advanced, and according to Mr Ireland almost finalised, such that a realisation of the asset would have been on terms suitable to both primary creditors. Although the proposal did not proceed, there is no reason to impugn the work undertaken by the Receivers in order to get the sales process to where it got it.
- (c) *Third*, the work in relation to this receivership was undertaken by partners and employees of the Receivers at higher levels than the other receiverships referred to above. It is submitted that was appropriate having regard to the complexity of the interrelated security arrangements and the requirement to engage extensively with third party secured creditors.

50. The Receivers also seek **\$15,000 (plus GST)** in future remuneration comprising: \$5,000 relating to liaising with the secured creditors regarding receipt of funds, and realising abandoned property (amongst other things); and \$10,000 relating to statutory administration costs including making an application to the Court in relation to the appropriate distribution of the sale proceeds. It is submitted these costs are fair and reasonable to bring the receivership to a close.

C.6 6 Bulkara St receivership

51. The professional fees sought to be approved in the period from 3 September 2021 to 30 September 2022 in relation to the 6 Bulkara St receivership are **\$100,000 (plus GST)**, comprising:

- (a) Approximately 77% (\$77,834) relating to the sale of the property at 6 Bulkara; and
- (b) Approximately 23% (\$22,116) relating to secured creditor reporting and statutory and administration tasks.

52. 6 Bulkara St was sold by the Receivers for \$16.2 million on or about 11 February 2022.⁵⁴ Prior to the day of close of the public marketing campaign, Vincenzo Tesoriero applied to the Court for orders that the Receivers not be authorised to sell the properties the

⁵⁴ Remuneration Affidavit at [64(j)]; Exhibit JI-6 at p 51.

subject of receivership until proceedings NSD 616 of 2021 (being Westpac's claim) had been completed. That proceeding was ultimately dismissed.⁵⁵

53. After payment of approximately \$6.5 million in relation to the secured creditor's claim, plus other expenses, the balance remaining in the receivership bank account is \$9.808 million.⁵⁶
54. For the following reasons the Receivers submit the remuneration sought is fair and reasonable:
- (a) *First*, about \$70,000 of the fees sought were charged at 'Manager' and 'Assistant Manager' level,⁵⁷ from which the Court can draw the same inference as was submitted in relation to James St referred to above at paragraph 36(b).
 - (b) *Second*, after the sale of the 6 Bulkara in February 2022, the fees dropped substantially between March 2022 to September 2022.⁵⁸ It is submitted that this evidence supports the proposition that the fees were reasonable because it reflects that the fees charged are appropriately commensurate with busy periods of the receivership.
 - (c) *Third*, the remuneration report records \$77,834 in fees charged in relation to the sale of 6 Bulkara.⁵⁹ This represents less than 1% of the total sale proceeds of the land sold, such that the fees in respect of this aspect of the receivership are proportionate.
55. The Receivers also seek **\$15,000 (plus GST)** in relation to future remuneration in order to bring the receivership to a close. This is comprised of \$2,000 in relation finalising expenses and distributing proceeds of sale; \$2,000 in relation to reporting to creditors; and \$10,000 for final statutory and other administrative tasks.⁶⁰ For the same reasons as submitted above in relation to the other receiverships, it is submitted this future remuneration is fair and reasonable to bring the receivership to an end.

⁵⁵ Remuneration Affidavit at [65]-[67].

⁵⁶ Exhibit JI-6 p 51.

⁵⁷ Exhibit JI-6 p 47.

⁵⁸ Remuneration Affidavit at [75].

⁵⁹ Exhibit JI-6 p 45.

⁶⁰ Exhibit JI-6 p 48.

C.7 XOXO Yacht

56. The professional fees sought to be approved in the period from 3 September 2021 to 30 September 2022 in relation to the receivership of the XOXO Yacht are **\$68,461 (plus GST)**, comprising:
- (a) Approximately 84% (\$57,875) relating to preserving and realising the yacht; and
 - (b) Approximately 16% (\$10,585) relating to reporting to creditors and statutory and administration costs.⁶¹
57. The Receivers sold the XOXO Yacht on 9 March 2022, following a marketing campaign and sales process,⁶² for \$956,000.⁶³ During the course of the receivership there were various different claims for maritime liens asserted over the yacht, and the Receivers needed to liaise with those persons located in Miami, Florida.⁶⁴ Following the payment of expenses, the current bank balance as at 30 September 2022 is \$616,283.⁶⁵
58. It is submitted that the fees charged by the Receivers are fair and reasonable for the following reasons:
- (a) *First*, as above, the work was undertaken predominately by ‘Manager’ and ‘Assistant ‘Manager’ staff, and as such it is submitted the same inference can be drawn as was submitted in relation to James St referred to above at paragraph 36(b).
 - (b) *Second*, the fees dropped substantially after the sale of the yacht, which gives further support to the proposition that the fees were reasonable given they align with the periods of intense work compared to period of less intense work.
 - (c) *Third*, the fees of \$57,875 are approximately 6% of the sale proceeds realised for the yacht. Having regard to the complexities surrounding liaising with persons with maritime claims, it is submitted that is proportionate to the benefits obtained.
59. The Receivers also seek **\$13,000 (plus GST)** in respect of future remuneration until the end of the receivership. This is comprised of \$1,500 in relation to the remaining tasks

⁶¹ Exhibit JI-6 p 56.

⁶² Remuneration Affidavit at [80(c)].

⁶³ Exhibit JI-6 p 62.

⁶⁴ Remuneration Affidavit at [81].

⁶⁵ Exhibit JI-6 p 62.

concerning the yacht itself, \$1,500 concerning creditor reporting and \$10,000 concerning statutory report and administration. For the same reasons as submitted above in relation to the other receiverships, it is submitted these costs are reasonable.

D. CONCLUSION

60. For those reasons, the Liquidators and Receivers respectfully seek the orders in the **enclosed** short minutes of order.

R JAMESON
Banco Chambers
(02) 9376 0683

Counsel for the Liquidators and Receivers

14 December 2022

Short Minutes of Order

No. NSD747/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED ACN 151 964 626
(IN LIQUIDATION)
(ACN 151 964 626)**

Jason Ireland and Jason Preston in their capacity as joint and several liquidators of 64-66 Berkeley St Hawthorn Pty Ltd (in liquidation) ACN 643 838 662 and another named in the Schedule

Jason Ireland and Jason Preston in their capacity as receivers and managers of the properties listed in Annexure B

Applicants

Judge: JUSTICE CHEESEMAN

Date of order: 15 December 2022

Where made: Sydney

THE COURT ORDERS THAT:

Receivership

1. Pursuant to rule 9.05 of the *Federal Court Rules 2011* (Cth), the following be joined as parties to this proceeding:
 - (a) 64-66 Berkeley Street Hawthorn Pty Ltd (In Liquidation) ACN 643 838 662 as the Twenty-Ninth Plaintiff; and
 - (b) 9 Gregory Street Ouyen Pty Ltd (In Liquidation) ACN 641 392 707 as the Thirtieth Plaintiff.

Property

2. Pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth), Jason Ireland and Jason Preston of McGrathNicol, Level 12, 20 Martin Place Sydney in the State of New South Wales be appointed as receivers and managers (**Receivers**) of the properties listed in items 1 and 2 of Annexure A to these Orders (**Properties**) and any sale proceeds or income of those Properties.
3. The Receivers be authorised to take possession of, preserve, maintain and sell the Properties.
4. The Receivers have all the powers that a receiver has in respect of a business and properties of a company under s 420 of the *Corporations Act 2001* (Cth) (other than in ss 420(2)(s), (t), (u) and (w)) as if reference in that section to 'property of the corporation' or 'the corporation' (as applicable) were a reference to each of the Properties, including without limitation, the power to do all things necessary or convenient to:
 - (a) Enter into possession of, preserve, maintain and sell the Properties;
 - (b) To dispose of the Properties;
 - (c) To insure the Properties;
 - (d) To appoint a solicitor or other professionally qualified person to assist the Receivers in connection with their appointment in respect of the Properties;
 - (e) To appoint an agent to conduct the sale and do any business that the Receivers are unable to do or that it is unreasonable to expect the Receivers to do personally in respect of the Properties;
 - (f) Pay any outgoings or collect any rent in connection with the Properties;
 - (g) Sign any documents on behalf of the Company in furtherance of the objective set out in Order 3;
 - (h) Pay the costs, expenses and remuneration of the Receivers in acting as Receivers of the assets be paid from the sale proceeds or income of the Properties referable to those costs; and
 - (i) Pay the balance into a controlled monies account held by Allens.
5. The need for the Receivers to file a guarantee under r 14.21 and r 14.22 of the *Federal Court Rules 2011* (Cth) in respect of their appointment under Order 2 be dispensed with.

Miscellaneous

6. The Receivers' costs of this application be paid out of the sale proceeds or income of the Properties.
7. If the identity of the unitholders of the 9 Gregory Street Ouyen Unit Trust becomes known to the Receivers, the Receivers take all reasonable steps to notify the unit holders of these orders as soon as reasonably practicable.
8. Liberty be granted to any person affected by these orders, including any creditor of the entities or trusts referred to in Annexure A, or any beneficiary of those trusts, to apply to vary or set aside these orders on 7 business days' notice to the Receivers and to the Court by sending an email to associate.cheesman@fedcourt.gov.au.
9. Liberty be granted to the Receivers to apply to the Court for orders discharging and releasing the Receivers on 7 business days' notice by sending an email to associate.cheesemanj@fedcourt.gov.au.
10. Any other orders as the Court deems fit.

Remuneration

14 James Street

11. Jason Ireland and Jason Preston in their capacity as receivers and managers of the Properties at item 1 of Annexure A held by 14 James Street Pty Limited (In Liquidation) (Receivers and Managers Appointed) (**James Street PL**) as trustee of the 14 James Street Unit Trust (**James St Receivers**) are justified in applying the assets held by James Street PL as trustee of the 14 James Street Unit Trust in payment of their remuneration incurred as receivers of those assets as approved by these orders.
12. Pursuant to rule 14.24 of the *Federal Court Rules 2011*, the remuneration of the James St Receivers for the period:
 - (a) 3 September 2021 to 30 September 2022 be fixed in the amount of \$246,471 (plus GST); and
 - (b) 1 October 2022 to the finalisation of the receivership be fixed in the amount of \$25,000 (plus GST).

26 Edmonstone Road

13. Jason Ireland and Jason Preston in their capacity as receivers and managers of the Property at item 2 of Annexure A held by 26 Edmonstone Road Pty Limited (In Liquidation) (Receivers and Managers Appointed) (**Edmonstone Road PL**) as trustee of the 26 Edmonstone Road Unit Trust (**Edmonstone Road Receivers**) are justified in applying the assets held by Edmonstone Road PL as trustee of the 26 Edmonstone Road Unit Trust in payment of their remuneration incurred as receivers of those assets as approved by these orders.
14. Pursuant to rule 14.24 of the *Federal Court Rules 2011*, the remuneration of the Edmonstone Road Receivers for the period:
 - (a) 3 September 2021 to 30 September 2022 be fixed in the amount of \$64,891 (plus GST); and
 - (b) 1 October 2022 to the finalisation of the receivership be fixed in the amount of \$13,000 (plus GST).

5 Bulkara Street

15. Jason Ireland and Jason Preston in their capacity as receivers and managers of the Property at item 3 of Annexure A held by 5 Bulkara Street Pty Limited (In Liquidation) (Receivers and Managers Appointed) (**5 Bulkara St PL**) as trustee of the 5 Bulkara Street Unit Trust (**5 Bulkara St Receivers**) are justified in applying the assets held by 5 Bulkara Street PL as trustee of the 5 Bulkara Unit Trust in payment of their remuneration incurred as receivers of those assets as approved by these orders.
16. Pursuant to rule 14.24 of the *Federal Court Rules 2011*, the remuneration of the 5 Bulkara St Receivers for the period:
 - (a) 3 September 2021 to 30 September 2022 be fixed in the amount of \$180,371 (plus GST); and
 - (b) 1 October 2022 to the finalisation of the receivership be fixed in the amount of \$15,000 (plus GST).

6 Bulkara Street

17. Jason Ireland and Jason Preston in their capacity as receivers and managers of the Properties at item 4 of Annexure A held by 6 Bulkara Street Pty Limited (In Liquidation) (Receivers and Managers Appointed) (**6 Bulkara St PL**) as trustee of the 6 Bulkara Street Unit Trust (**6 Bulkara St Receivers**) are justified in applying the assets held by 6

Bulkara St PL as trustee of the 6 Bulkara Unit Trust in payment of their remuneration incurred as receivers of those assets as approved by these orders.

18. Pursuant to rule 14.24 of the *Federal Court Rules 2011*, the remuneration of the 6 Bulkara St Receivers for the period:
 - (a) 3 September 2021 to 30 September 2022 be fixed in the amount of \$100,000 (plus GST); and
 - (b) 1 October 2022 to the finalisation of the receivership be fixed in the amount of \$15,000 (plus GST).

XOXO Yacht

19. Jason Ireland and Jason Preston in their capacity as receivers and managers of the Property at item 5 of Annexure A formerly held by Intrashield Pty Limited (In Liquidation) are justified in applying the assets formerly held by Intrashield Pty Limited (In Liquidation) (Receivers and Managers Appointed) in payment of their remuneration incurred as receivers of those assets as approved by these orders.
20. Pursuant to rule 14.24 of the *Federal Court Rules 2011*, the remuneration of Jason Ireland and Jason Preston in their capacity as receivers and managers of the Property at item 5 of Annexure A formerly owned held by Intrashield Pty Limited (In Liquidation) for the period:
 - (a) 3 September 2021 to 30 September 2022 be fixed in the amount of \$68,461 (plus GST); and
 - (b) 1 October 2022 to the finalisation of the receivership be fixed in the amount of \$13,000 (plus GST).

Annexure A

Item	Party	Property (including the contents of that property to the extent it is owned by the 'Party' included in the second column)
1	Property held by 64-66 Berkeley Street Hawthorn Pty Ltd (In Liquidation) ACN 643 838 662 as trustee of the 64-66 Berkeley St Hawthorn Unit Trust	64-66 Berkeley Street Hawthorn Victoria 3122 Vol: 12160 Folio: 016
2	Property held by 9 Gregory Street Ouyen Pty Ltd (In Liquidation) ACN 641 392 707 as trustee of the 9 Gregory Street Ouyen Unit Trust	9 Gregory Street Ouyen Victoria 3490 Vol: 06684 Folio: 757

Annexure B

Item	Party	Property (including the contents of that property to the extent it is owned by the 'Party' included in the second column)
1	Properties held by 14 James Street Pty Limited (In Liquidation) (Receivers and Managers Appointed) as trustee of the 14 James Street Unit Trust	<p>16 James St Clayton South VIC 3169 Vol: 12170 Folio: 467</p> <p>Warehouse 1, 9 Parsons St, Clayton South VIC 3169 Vol: 12170 Folio: 465</p> <p>Warehouse 2, 9 Parsons St, Clayton South VIC 3169 Vol: 12170 Folio: 468</p> <p>Warehouse 3, 9 Parsons St, Clayton South VIC 3169 Vol: 12170 Folio: 479</p> <p>10 James Street, Clayton South, VIC 3169 Vol: 12170 Folio: 472</p> <p>12 James Street, Clayton South VIC 3169 Vol: 12170 Folio: 471</p> <p>14 James Street, Clayton South VIC 3169 Vol: 12170 Folio: 470</p> <p>18 James Street, Clayton South VIC 3169 Vol: 12170 Folio: 466</p> <p>8 Olive Street, Clayton South VIC 3169 Vol: 12170 Folio: 474</p>
2	Property held by 26 Edmonstone Road Pty Ltd (In Liquidation) (Receivers and Managers Appointed) as trustee of the 26 Edmonstone Road Unit Trust	<p>26 Edmonstone Road, Bowen Hills QLD 4006 Title Ref: 12134186</p>
3	Property held by 5 Bulkara Street Pty Ltd (In Liquidation) (Receivers and Managers Appointed) as trustee of the 5 Bulkara Street Unit Trust	<p>5 Bulkara Street Wagstaffe NSW 2257 Folio: 2/1141260</p>
4	Property held by 6 Bulkara Street Pty Ltd (In Liquidation) (Receivers and Managers Appointed) as trustee of the 6 Bulkara Street Unit Trust	<p>6 Bulkara Street Wagstaffe, NSW 2257 Folio: 3/1141260</p>
5	Property formerly owned by Intrashield Pty Limited (In Liquidation) (Receivers and Managers Appointed)	<p>"XOXO" Motor Yacht Cayman Islands Official Number 734587</p>

Schedule

No. NSD 747 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

**IN THE MATTER OF THE FORUM GROUP OF COMPANIES PTY LIMITED ACN 151 964 626
(IN LIQUIDATION)
(ACN 151 964 626)**

Jason Ireland and Jason Preston in their capacity as joint and several liquidators of 64-66 Berkeley St Hawthorn Pty Ltd (in liquidation) ACN 643 838 662 and another named in the Schedule

Applicants

First Applicant:	Jason Preston and Jason Ireland in their capacity as joint and several liquidators of 64-66 Berkeley St Hawthorn Pty Ltd (in liquidation) ACN 643 838 662
Second Applicant	Jason Preston and Jason Ireland in their capacity as joint and several liquidators of 9 Gregory Street Ouyen Pty Ltd (in liquidation) ACN 641 392 707