

# FEDERAL COURT OF AUSTRALIA

## **Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed) [2020] FCA 542**

File number(s): NSD 439 of 2020

Judge: **FARRELL J**

Date of judgment: 17 April 2020

Date of publication of reasons: 23 April 2020

Catchwords: **CORPORATIONS** – application to modify requirements of Part 5.3A of the *Corporations Act 2001* (Cth), the *Insolvency Practice Schedule (Corporations)* and the *Insolvency Practice Rules Corporations 2016* (Cth) to permit administrators to give notice of creditors’ meetings and other notifications to or communications by creditors with the administrators to be given by electronic means and to permit creditors’ meetings and any future meetings of committees of inspection to be conducted exclusively by audio-visual or telephone conference – where state and federal governments imposed limits on gatherings of people to suppress the spread of the COVID-19 virus – where orders for notice of meeting and notifications between administrators and creditors promotes quick and cheap communications, conserving the limited assets of the companies for the benefit of creditors – where provision made for affected persons to apply to the Court for variation of the orders – application granted.

**CORPORATIONS** – application to extend the period for administrators to give notice under s 443B of the *Corporations Act 2001* (Cth) where time during which notices may be given has expired – where extension is in the best interests of creditors generally – where administrators delayed by government-imposed physical distancing requirements designed to stop the spread of the COVID-19 virus – where provision made for affected persons to apply to the Court for variation of the orders – application granted.

**COSTS** – application for costs by asset lessor granted leave under r 2.13 of the *Federal Court (Corporations) Rules 2000* (Cth) – where no reason to depart from usual rule – application refused.

Legislation: *Corporations Act 2001* (Cth) ss 435A, 443A, 443B, 447A, 1322  
*Corporations Act 2001* (Cth) Sch 2, *Insolvency Practice Schedule (Corporations)* ss 90-15, 90-20  
*Corporations Regulations 2001* (Cth) Pt 5.3A  
*Federal Court (Corporations) Rules 2000* (Cth) r 2.13  
*Insolvency Practice Rules (Corporations) 2016* (Cth) rr 75-15, 75-30, 75-35, 75-40, 75-75, 75-225, 80-5

Cases cited: *Australasian Memory Pty Limited v Brien* [2000] HCA 30; (2000) 200 CLR 270  
*Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Ltd (Administrators Appointed)* [2020] FCA 422  
*Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486  
*In the matter of BBY Ltd* [2015] NSWSC 974  
*In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263  
*Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed)* [2019] FCA 1446  
*Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed)* [2018] FCA 1891  
*Silvia v FEA Carbon Pty Ltd* [2010] FCA 515; (2010) 185 FCR 301  
*Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472

Date of hearing: 17 April 2020

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 46

Counsel for the Plaintiffs: Mr D Krochmalik

Solicitor for the Plaintiffs: Clayton Utz

## ORDERS

NSD 439 of 2020

**IN THE MATTER OF TECHFRONT AUSTRALIA PTY LIMITED  
(ADMINISTRATORS APPOINTED) ACN 157 983 303 & ORS**

**BETWEEN: RYAN REGINALD EAGLE AND GAYLE DICKERSON, IN  
THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY  
ADMINISTRATORS OF EACH OF TECHFRONT  
AUSTRALIA PTY LIMITED (ADMINISTRATORS  
APPOINTED) ACN 157 983 303 SCREENCORP PTY  
LIMITED (ADMINISTRATORS APPOINTED) ACN 069 599  
300 AND TECHFRONT INFRASTRUCTURE SOLUTIONS  
PTY LIMITED (ADMINISTRATORS APPOINTED) ACN 623  
442 820**  
First Plaintiff

**TECHFRONT AUSTRALIA PTY LIMITED  
(ADMINISTRATORS APPOINTED) ACN 157 983 303**  
Second Plaintiff

**SCREENCORP PTY LIMITED (ADMINISTRATORS  
APPOINTED) ACN 069 599 300**  
Third Plaintiff

**TECHFRONT INFRASTRUCTURE SOLUTIONS PTY  
LIMITED (ADMINISTRATORS APPOINTED) ACN 623 442  
820**  
Fourth Plaintiff

**JUDGE: FARRELL J**

**DATE OF ORDER: 17 APRIL 2020**

### **THE COURT ORDERS THAT:**

1. The Originating Process filed on 17 April 2020 be made returnable before Farrell J at 2.15pm on 17 April 2020.
2. Pursuant to s 447A(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***), Part 5.3A of the *Corporations Act* is to operate in relation to each of the second plaintiff, third plaintiff and fourth plaintiff as if any notice (**Notice**) required to be given pursuant to rr 75-225(1) and 75-15 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (***Insolvency Practice Rules***) will be validly given to creditors of the second plaintiff, third plaintiff or fourth plaintiff by reason of the following steps

having been taken at least five business days prior to the date of the proposed meeting:

- (a) where the first plaintiffs:
  - (i) have an email address for a creditor, by sending the Notice by email to each such creditor;
  - (ii) where the first plaintiffs do not have an email address for a creditor but have a postal address for the creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by sending the Notice by posting a copy of it to the postal address for each such creditor;
- (b) by causing the Notice to be published on the Australian Securities and Investments Commission (ASIC) published notices website at <https://insolvencynotices.asic.gov.au/>; and
- (c) by publishing the Notice on the website maintained by the first plaintiffs at <https://home.kpmg/au/en/home/services/advisory/deal-advisory/services/restructuring/creditors-shareholders/techfront-australia.html>.

3. Pursuant to s 447A(1) of the *Corporations Act*, and further or alternatively s 90-15 of the *Insolvency Practice Schedule (Corporations)* (being Schedule 2 to the *Corporations Act*) (***Insolvency Practice Schedule***) if pursuant to any provision in any of Part 5.3A of the *Corporations Act*, Part 5.3A of the *Corporations Regulations 2001* (Cth), the *Insolvency Practice Schedule* or the *Insolvency Practice Rules*, the first plaintiffs are required to provide any other notification to creditors during the administration of each of the second plaintiff, third plaintiff or fourth plaintiff, the applicable notice requirements will be satisfied by reason of the following steps having been taken:

- (a) where the first plaintiffs:
  - (i) have an email address for a creditor, by notifying each such creditor of the relevant matter via email;
  - (ii) do not have an email address for a creditor but have a postal address for that creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by notifying each such creditor in writing of the relevant matter via post;

- (b) by publishing notice of the relevant matter on the website maintained by the first plaintiffs at <https://home.kpmg/au/en/home/services/advisory/deal-advisory/services/restructuring/creditors-shareholders/techfront-australia.html>; and
  - (c) to the extent the matter relates to a meeting that is the subject of r 75-40(4) of the *Insolvency Practice Rules*, by causing notice of the meeting to be published on the ASIC published notices website at <https://insolvencynotices.asic.gov.au/>.
- 4. Pursuant to s 447A(1) of the *Corporations Act*, and further or alternatively s 90-15 of the *Insolvency Practice Schedule*, to the extent not permitted specifically by rr 75-30, 75-35 and 75-75 of the *Insolvency Practice Rules*, the first plaintiff be permitted to hold meetings of creditors during the administration of each of the second plaintiff, third plaintiff or fourth plaintiff by telephone or audio-visual conference (only, and in place of a physical meeting) with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors.
- 5. Pursuant to s 447A(1) of the *Corporations Act*, and further or alternatively s 90-15 of the *Insolvency Practice Schedule*, if a committee of inspection is formed for any of the second plaintiff, third plaintiff or fourth plaintiff, then to the extent not permitted specifically by r 80-5(3) of the *Insolvency Practice Rules*:
  - (a) a meeting of such committee of inspection may be convened by electronic notice sent to an email address specified by each of the members of the committee of inspection; and
  - (b) a meeting may be permitted to be held by telephone or audio-visual conference (only, and in place of a physical meeting) with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to, or by, the members of the committee of inspection.
- 6. Pursuant to s 443B(8) and/or s 447A(1) of the *Corporations Act*, Part 5.3A of the *Corporations Act* is to operate in relation to each of the second plaintiff, third plaintiff or fourth plaintiff, with respect only to any leases entered into by any of the second plaintiff, third plaintiff or fourth plaintiff with the lessors specified in Items 1 and 3 to 9 of Schedule 2 of these Orders, as if:

- (a) the first plaintiffs' personal liability under ss 443A(1)(c) and 443B(2) of the *Corporations Act* begins on 1 May 2020, such that the first plaintiffs are not personally liable for any liability with respect to the property leased, used or occupied by any of the second plaintiff, third plaintiff or fourth plaintiff (including amounts payable pursuant to any leases entered into by any of the second plaintiff, third plaintiff or fourth plaintiff) from the lessors specified in Items 1 and 3 to 9 of Schedule 2 of these Orders, in the period from 17 April 2020 to 1 May 2020 inclusive; and
  - (b) the words "within five business days after the beginning of the administration" in s 443B(3) of the *Corporations Act* instead read "by 1 May 2020".
- 7. Pursuant to s 443B(8) and/or s 447A(1) of the *Corporations Act*, Part 5.3A of the *Corporations Act* is to operate in relation to each of the second plaintiff, third plaintiff or fourth plaintiff, with respect only to any leases entered into by any of the second plaintiff, third plaintiff or fourth plaintiff with the lessor specified in Item 2 of Schedule 2 of these Orders, as if:
  - (a) the first plaintiffs' personal liability under ss 443A(1)(c) and 443B(2) of the *Corporations Act* begins on 24 April 2020, such that the first plaintiffs are not personally liable for any liability with respect to the property leased, used or occupied by any of the second plaintiff, third plaintiff or fourth plaintiff (including amounts payable pursuant to any leases entered into by any of the second plaintiff, third plaintiff or fourth plaintiff) from the lessor specified in Item 2 of Schedule 2 of these Orders, in the period from 17 April 2020 to 24 April 2020 inclusive; and
  - (b) the words "within five business days after the beginning of the administration" in s 443B(3) of the *Corporations Act* instead read "by 24 April 2020".
- 8. The first plaintiffs must take all reasonable steps to cause notice of these orders to be given, within two (2) business days of the making of these orders, to:
  - (a) the creditors (including persons or entities claiming to be creditors) of each of the second plaintiff, third plaintiff and fourth plaintiff, in the following manner:
    - (i) Where the first plaintiffs have an email address for a creditor, by notifying each such creditor, via email, of the making of the orders and

providing a link to a website where the creditor may download the orders and the Originating Process;

- (ii) where the first plaintiffs do not have an email address for a creditor but have a postal address for that creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by notifying each such creditor, via post, of the making of the orders and providing a link to a website where the creditor may download the orders and the Originating Process; and
- (iii) by placing scanned, sealed copies of the Originating Process and the orders on the website maintained by the first plaintiffs at <https://home.kpmg/au/en/home/services/advisory/deal-advisory/services/restructuring/creditors-shareholders/techfront-australia.html>; and

(b) ASIC.

9. Any person who can demonstrate a sufficient interest has liberty to apply to vary or discharge Orders 2 to 8 above, on 3 business days' written notice being given to the plaintiffs and to the Court.
10. The plaintiffs have liberty to apply on 3 business days' written notice to the Court in relation to any variation of these orders or any other matter generally arising in the administrations of any or all of the second plaintiff, third plaintiff and fourth plaintiff.
11. The plaintiffs' costs of the application are to be treated as costs in the administrations of each of the second plaintiff, third plaintiff and the fourth plaintiff, jointly and severally.
12. These orders be entered forthwith.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

**FARRELL J:**

### INTRODCUTION

- 1 The first plaintiffs, Ryan Reginald Eagle and Gayle Dickerson of KPMG, were appointed as joint and several voluntary **administrators** of the other plaintiffs, Techfront Australia Pty Ltd (administrators appointed) (**Tf Australia**), **Screencorp** Pty Ltd (administrators appointed) and Techfront Infrastructure Solutions Pty Ltd (administrators appointed) (**Tf Infrastructure Solutions**) (together **Companies**), pursuant to s 436A of the *Corporations Act 2001* (Cth) by resolution of the directors of each of the Companies on 7 April 2020.
- 2 Each of the Companies is a proprietary company, incorporated and operating in Australia. They are part of a corporate group comprised of other companies incorporated and operating in Australia, New Zealand, Singapore and the United Arab Emirates known as the Global Sports Commerce group of companies (**Group**).
- 3 The only entities in the Group to enter external administration are the Companies. Screencorp is a wholly owned subsidiary of Tf Australia. Tf Infrastructure Solutions is also a subsidiary of Tf Australia, but it is not a wholly owned subsidiary; the other shares in Tf Infrastructure Solutions are held by **Strategic Communications Management** Pty Ltd. The shareholders of Tf Australia are Techfront International FZE (incorporated in the United Arab Emirates), Clive Potter and Clive Potter Marketing Pty Ltd ACN 002 558 296. Tf Australia's ultimate holding company is Technology Frontiers (India) Pvt. Ltd (incorporated in India).
- 4 By an originating process filed on 17 April 2020, the administrators and each of the Companies sought orders pursuant to s 447A(1) of the *Corporations Act* and s 90-15 of the *Insolvency Practice Schedule (Corporations)* being Sch 2 to the *Corporations Act*, directed to enabling them to carry out the administration of the Companies having regard to the exigencies in the administration caused by measures taken by State and Federal Governments to suppress the COVID-19 virus. For instance, on 24 March 2020, the Prime Minister announced the shutdown of non-essential services, including indoor entertainment, sporting events and religious venues. On 29 March 2020, the National Cabinet agreed to limit indoor and outdoor gatherings to two persons only (with limited exceptions). It is not yet clear for what period those restrictions will remain in place.

5 By the originating process, the plaintiffs sought orders of an administrative kind:

- (1) Permitting meetings of the Companies' creditors, including the first meeting of creditors scheduled for 21 April 2020, to be conducted exclusively by audio-visual or telephone conference (and not in person);
- (2) Permitting notices to be sent by email to those creditors for whom the administrators have email addresses; and
- (3) With respect to any committee of inspection formed for any of the Companies, permitting meetings to be held exclusively by audio-visual or telephone conference (and not in person) and also permitting members of any such committee to send and receive notices by email.

6 The plaintiffs also sought a two week extension of the time during which the administrators may give notice under s 443B of the Corporations Act to lessors of certain equipment and motor vehicle leases about whether they would retain or give up possession of that property, having regard to the administrators' personal liability for repayment obligations in the absence of an extension of time.

7 These are the reasons for making the orders sought by the plaintiffs.

8 The hearing of the application was conducted electronically and with regard to the Special Measures in Response to COVID-19 information note (**SMIN-1**) issued by Allsop CJ as at 31 March 2020.

9 Shortly before the hearing was due to start, Mr J Burke of Lark Lawyers indicated that he sought to appear on behalf of **Bigstone** Lending Pty Ltd, a lessor of certain equipment to Tf Australia. Mr Burke appeared at the hearing electronically and leave to be heard was granted to Bigstone under r 2.13 of the *Federal Court (Corporations) Rules 2000* (Cth). Mr Burke initially opposed the Court making orders extending time for the administrators to issue notices under s 443B. After Mr Burke had been provided with a copy of the plaintiffs' written submissions and there had been an opportunity to confer, Mr Burke indicated that his client would not oppose an order being made in relation to his client, providing the extension was for seven days. No other creditors sought to be heard at the hearing.

10 Factual matters relating to the Companies and the administration referred to in these reasons rely on:

- (1) Mr Eagle's affidavit dated 17 April 2020 and exhibit RRE-1;
- (2) The affidavit of Kassandra Suzann Adams, a solicitor employed by Clayton Utz (the solicitors to the plaintiffs), dated 17 April 2020. Ms Adams affidavit relates to letters sent by Mr Eagle to the holders of security interests in equipment and motor vehicle leases of which Tf Australia and Screencorp are lessees (**Asset Leases**), the response received from Bigstone (but no other lessor) and service of notice of these proceedings by emails sent to those creditors shortly after 11.00 am on 17 April 2020.

The Court notes that neither affidavit has been executed having regard to procedures adopted by the Court in accordance with SMIN-1. Mr Krochmalik, counsel for the plaintiffs, undertook that the affidavits would be sworn and filed as soon as circumstances permitted.

11 The plaintiffs filed written submissions on the morning of the hearing.

## **BACKGROUND**

12 From the initial investigations of the administrators it appears that:

- (1) The Group is an international media technology provider.
- (2) Tf Australia is the main operating and employing entity within the Group in Australia.
- (3) Tf Australia specialises in providing technology for sporting arenas including digital display systems, interactive spectator management solutions, customised sports programming solutions and augmented reality solutions for sports codes such as Soccer, Cricket, Rugby, Tennis, Golf and Motor Racing. Tf Australia also produces and supplies digital display systems to various other industries such as road transport, building facades, outdoor and indoor signage, outdoor and indoor events, entertainment and media (collectively, the **Business**). It has 172 creditors (including 41 employees).
- (4) Screencorp operated indoor and outdoor light-emitting diode (LED) screens, digital signage and production services. These operations have been transferred to Tf Australia. It has two creditors of which one is an employee.
- (5) Tf Infrastructure Solutions is not a trading entity and it has no creditors or employees. It was intended that Tf Infrastructure Solutions provide shared service operations between another company in the group, Cellular Asset Management Limited ACN 154 756 439, and Tf Australia, but this did not occur.

- (6) As at 7 April 2020, landlords of the Companies were owed approximately \$149,864.87 and suppliers and other creditors (including employees) were owed approximately \$3,707,115.48.
  - (7) The administrators have email addresses for 159 of the 172 known creditors of Tf Australia, and postal addresses for the remaining 13 creditors. They have email addresses for Screencorp's two creditors.
- 13 Since their appointment, the administrators have sought to continue to trade the Business on a "business as usual" basis, subject to the restrictions resulting from COVID-19, while assessing viable options to continue to keep the Business operating.
- 14 The COVID-19 pandemic and the steps taken by the State and Federal Governments to respond to it have delayed the administrators' conduct of the administration. The administrators' staff at KPMG have been required to operate remotely with limitations on persons being able to work in close proximity to each other with the consequential impact that:
- (1) All discussions and liaison with team members must be done by phone or email, which delays information becoming available.
  - (2) All discussions and liaison with officers and employees of the Companies must be done by phone or email, which has caused delays and incomplete information being obtained regarding the Business.
  - (3) Limited numbers of KPMG staff are able to access the Companies' head office in Gladesville, New South Wales. At present, only two staff members are able to attend the office, with the result that review and assessment of the Companies' books and records is taking substantially longer than would usually be the case.
  - (4) There are logistical difficulties arising from the inability to access secretarial support and office equipment (for instance printing), preventing the issuance of physical mail in a timely manner.
- 15 As at 7 April 2020:
- (1) The Companies had entered into 16 real property leases (**RP Leases**).
  - (2) Tf Australia had entered into Asset Leases in relation to (among other things) equipment and motor vehicles with Australian Telecommunications Pty Ltd, Bigstone, Canon Finance Australia Pty Ltd, De Lage Landen Pty Ltd, Ingram Micro

Pty Ltd, Strategic Communications Management and World's Best Technology Distributors Pty Ltd. Screencorp had entered into similar asset leases with Westpac Banking Corporation and Capital Finance Australia Ltd. The lessors of the Asset Leases will together be referred to as the **Asset Lessors**.

16 There were complexities attached to eight of the RP Leases because, while they were leased by Screencorp, the premises were occupied by **Visibilis** Pty Ltd which is not in voluntary administration and still requires the leases.

17 Mr Eagle subsequently determined that only four of the RP Leases are integral to operating the Business. Accordingly, on 15 April 2020, Mr Eagle issued letters to each of the landlords of the remaining twelve RP Leases stating that those leases were “disclaimed”, effective on that day, in accordance with s 443B of the *Corporations Act*. In the case of the eight premises occupied by Visibilis, Mr Eagle stated that the landlord should negotiate a new lease with Visibilis.

18 Due to the complexities associated with the occupation of eight premises by Visibilis, the quantum and liabilities associated with the RP Leases and practical issues faced as a result of the COVID-19 pandemic, reaching a determination as to the utility of each of the RP Leases was one of the most pressing requirements in the early part of the administrations.

19 The administrators sought to investigate the particular goods that are the subject of the Asset Leases and, in particular, ascertain whether these goods are an essential part of the Business (such that they need to be retained as part of the continued operation of the Business). It is not clear to the administrators on the information currently available to them to what all of the Asset Leases relate. Some of the leased goods appear to include office fit-out, handsets and printers.

20 The administrators issued letters to each of the Asset Lessors on 8 April 2020. Attached to each of the letters was a “Security Interest Questionnaire”. The letters included the following:

In respect of each security interest, would you please complete the attached questionnaire and return it to this office with the required supporting documentation.

We draw your attention to the Personal Property Securities Act 2009 (PPSA), specifically Section 277 of the PPSA, which requires you to provide a response within ten business days.

...

If no response is received within ten business days we will submit an Amendment Statement to the PPSR Registrar for a determination that, pursuant to Section 178 of the PPSA, the registration is to be amended to end the effective registration (including an amendment to remove the registration) on the basis that no details have been provided to indicate the registration secures any obligation (including a payment) owed by the Company to you as the secured party.

21 Ten business days had not elapsed at the date of the hearing. Only Bigstone had provided a response by that time and the administrators are still considering its response which was provided on 15 April 2020.

22 It is Mr Eagle's evidence that:

- (1) As the administrators have not received a response from the majority of the counterparties to the Asset Leases, they are unable to make a determination at this stage about whether the property the subject of the Asset Leases is required to be used for the continuation of the Business.
- (2) The administrators' inability to make that determination has also resulted from delays in their investigations caused by the practical and logistical difficulties arising from the measures taken to suppress the COVID-19 virus which are described above.
- (3) The administrators wish to retain all essential goods or other equipment used by the Business in an effort to preserve the value of the Business and thereby maximise any possible sale price of the Business in the interests of the Companies' creditors. At the same time, they do not want to burden the Companies or take on personal liability with respect to obligations to make lease repayments to Asset Lessors if they are not necessary for the Business to be carried on successfully or if they are not otherwise an integral part of the Business.
- (4) While the final amount owing in respect of the Asset Leases is yet to be determined because of the administrators' ongoing enquiries, they are able to confirm that outstanding rental payments total approximately \$710,000.
- (5) As at 16 April 2019, the Companies together had approximately \$969,000 cash at bank in administration bank accounts. As restrictions relating to COVID-19 have made a significant impact on the Companies' revenue, and those restrictions will be in place for an indeterminate time, the administrators are conscious of preserving as much cash as possible in the administration of the Companies.
- (6) Unless an extension is granted, pursuant to s 443B, the administrators will be personally liable for rent and other amounts payable under the Asset Leases after

16 April 2020. The extension of time is required for the administrators to ascertain the exact subject of the Asset Leases in order to reach a commercial decision about whether those leases are required in the ongoing trading of the Business and to determine costs under those leases so that the administrators may determine for what they may ultimately be liable. Based on his experience, and given the additional impact of COVID-19 suppression measures, Mr Eagle estimates that a further two weeks are required.

- (7) The administrators wish to be in a position to inform creditors of any orders made as a result of these proceedings at the first meeting of creditors to be held on 21 April 2020. It is likely to promote ongoing interest in the Business from creditors, related parties of the Companies or other potential purchasers if the administrators have sufficient time to consider the Asset Leases properly and determine what property is subject to those Leases.
- (8) The administrators accept that Asset Lessors and other interested parties should have the right to make an application to vary or set aside any orders that are made that affect them.

**SECTION 447A OF THE *CORPORATIONS ACT* AND S 95-15 OF THE *INSOLVENCY PRACTICE SCHEDULE***

23 Section 447A of the *Corporations Act* and s 90-15 of the *Insolvency Practice Schedule* contain general powers with respect to the modification of provisions of Part 5.3A of the *Corporations Act*. The courts have interpreted these provisions as having broad application where to make orders would serve the object of Part 5.3A as set out in s 435A of the *Corporations Act*. Section 435A of the *Corporations Act* provides as follows:

**435A Object of Part**

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence— results in a better return for the company’s creditors and members than would result from an immediate winding up of the company.

Note: Schedule 2 contains additional rules about companies under external administration.

24 Section 447A of the *Corporations Act* provides as follows:

**447A General power to make orders**

- (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
- (2) For example, if the Court is satisfied that the administration of a company should end:
  - (a) because the company is solvent; or
  - (b) because provisions of this Part are being abused; or
  - (c) for some other reason;the Court may order under subsection (1) that the administration is to end.
- (3) An order may be made subject to conditions.
- (4) An order may be made on the application of:
  - ...
  - (c) in the case of a company under administration—the administrator of the company; ...

25 Section 90-15 of the *Insolvency Practice Schedule* provides as follows:

**90-15 Court may make orders in relation to external administration**

*Court may make orders*

- (1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

*Orders on own initiative or on application*

- (2) The Court may exercise the power under subsection (1):
  - (a) on its own initiative, during proceedings before the Court; or
  - (b) on application under section 90-20.

...

*Section does not limit Court's powers*

- (7) This section does not limit the Court's powers under any other provision of this Act, or under any other law.

26 Section 90-20 of the *Insolvency Practice Schedule* sets out those persons who may apply for orders under s 90-15 as follows:

**90-20 Application for Court order**

- (1) Each of the following persons may apply for an order under section 90-15:
  - (a) a person with a financial interest in the external administration of the company;

...

(d) an officer of the company;

(2) Paragraph (1)(d) has effect despite section 198G.

Note: Section 198G deals with powers of officers etc. while a company is under external administration.

27 Section 5-30(a)(iii) of the *Insolvency Practice Schedule* defines persons with a “financial interest” in the external administration of a company to include an external administrator of the company. Section 5-20(a) of the *Insolvency Practice Schedule* defines an “external administrator” of a company as the administrator of the company. Section 5-25 of the *Insolvency Practice Schedule* states that a reference in the Schedule to the external administrator of a company is to be read as a reference to all external administrators. Section 9 of the *Corporations Act* defines an officer of a company to include an administrator.

#### **ORDERS RELATING TO ELECTRONIC COMMUNICATIONS WITH CREDITORS AND HOLDING MEETINGS BY ELECTRONIC MEANS**

28 As noted in the submissions, most of the orders sought are of an administrative kind designed to facilitate communications with and meetings of creditors of the Companies. This is against the background of public health orders restricting public gatherings designed to reduce the spread of the COVID-19 virus. The duration of such public health orders is uncertain. Nothing has been drawn to the Court’s attention which would suggest that the making of such orders is not authorised by either s 447A of the *Corporations Act* or s 90-15 of the *Insolvency Practice Schedule* and it is clearly desirable that such orders be made to facilitate the voluntary administration of the Companies. As Perram J said in *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 at [5], it is apparent that public institutions such as the Court must do all they can to facilitate the continuation of the economy.

29 The first meetings of creditors of the Companies are to be held concurrently on Tuesday, 21 April 2020. The administrators seek orders enabling this meeting and any subsequent meetings of creditors (including meetings of the committee of inspection if one is formed) to be convened by email and conducted solely by audio-visual or telephone conference rather than in person.

30 The *Insolvency Practice Rules (Corporations) 2016* (Cth) provides for the manner in which meetings of creditors are to be convened and held, and consequential notifications given to ASIC, as follows.

- (1) Section 75-15:

**Division 75 Meetings**

**Subdivision B Convening meetings**

**75-15 How notice of meetings to be given**

- (1) Notice of a meeting must:
- (a) specify the date, time and place of the meeting; and
  - (b) specify the purpose for which the meeting is being convened; and
  - (c) state the effect of section 75-85 (entitlement to vote as creditor at meetings of creditors); and
  - (d) be in the approved form.

- (2) Section 75-30:

**75-30 Time and place of meetings**

- (1) The convenor of a meeting must convene the meeting at the time and place that the convenor thinks are most convenient for the majority of persons entitled to receive notice of the meeting.
- (2) Subsection (1) does not prevent a meeting from taking place at separate venues provided that technology is available at the venues to give all persons attending the meeting a reasonable opportunity to participate.

- (3) Section 75-35:

**75-35 Notice of electronic facilities for meetings**

- (1) This section applies if:
- (a) facilities for participating in meetings by electronic means are expected to be available at the place where a meeting is to be held; and
  - (b) the convenor of the meeting considers that, having regard to all the circumstances, it will be appropriate to use those facilities.
- (2) The notice of the meeting must:
- (a) set out the arrangements for using the facilities

...

- (4) Section 75-40:

**75-40 Notification of meetings on ASIC website**

- (1) The convenor of a meeting must lodge a notice of a meeting with ASIC. The notice must be in accordance with subregulation 5.6.75(4) of the regulations.

Note: Subregulation 5.6.75(4) provides for notices to be electronically lodged and published on a website maintained by ASIC.

- (2) The notice must state at least the following information:

- (a) the name of the company;
  - (b) the ACN of the company;
  - (c) the purpose for which the meeting is being convened;
  - (d) the time, date and place for the meeting;
  - (e) the time and date by which proofs of debt, and proxies for the meeting, are to be submitted;
  - (f) the name and contact details of the convenor of the meeting.
- (3) The notice must be lodged:
- (a) if the notice is of a meeting covered by subparagraphs (4) (a)-(c) – at least 5 business days before the meeting is held;
  - (b) if the notice is of a meeting covered by subparagraph (4)(d) – at least 5 business days before the meeting is held, or, if that is not practicable, as soon as practicable; .
  - (c) in any other case – at least 10 business days before the meeting is held.
- (4) The meetings covered by this subsection are:
- (a) a meeting of creditors under section 436E or 439A, or subsection 449C(4), of the Act;
  - (b) a meeting of eligible employee creditors under section 444DA of the Act;
  - (c) a meeting of the eligible unsecured creditors of each of the companies in a pooled group required to be convened under subsection 577(1A) of the Act;
  - (d) a meeting of a committee of inspection.
- (5) Section 75-75:

**Subdivision C Procedures at meetings**

**75 75 Participating in meetings by electronic means**

- (1) This section applies if:
- (a) facilities for participating in a meeting of creditors by electronic means will be available for the meeting; and
  - (b) a person, or a person’s proxy or attorney, has given the convenor of the meeting a statement in accordance with paragraph 75-35(2)(b).
- (2) The convenor of the meeting must take all reasonable steps to ensure that the facilities are available and operating during the meeting.
- (3) The person, or the person’s proxy or attorney, is responsible for accessing the facilities during the meeting.
- (4) A person who, or whose proxy or attorney, participates in the meeting using the facilities is taken to be present in person at the meeting.

(6) Section 75-225:

**75-225 Companies under administration—how certain meetings are convened**

(1) The administrator of a company under administration must convene a meeting under:

- (a) section 439A of the Act (meeting to decide future of company under administration); or
- (b) subsection 449C(4) of the Act (vacancy in office of administrator);

by written notice given to as many of the company's creditors as reasonably practicable.

Note: Notice of the meeting must be lodged with ASIC—see section 75-40.

(2) The notice must:

- (a) be given at least 5 business days before the meeting; and
- (b) contain the following information:
  - (i) the name of the company;
  - (ii) any business name of the company;
  - (iii) the ACN of the company;
  - (iv) the fact that notice is being given under this section;
  - (v) the time, date and place for the meeting;
  - (vi) the purpose for which the meeting is being convened;
  - (vii) the time and date by which proofs of debt, and proxies for the meeting, are to be submitted;
  - (viii) the name and contact details of the administrator.

(3) If the meeting is convened under section 439A of the Act, the notice must also be accompanied by:

- (a) a report by the external administrator about the company's business, property, affairs and financial circumstances; and
- (b) a statement setting out the following:

...

(4) A copy of the following must be lodged with ASIC within 2 business days of the notice being sent to creditors:

- (a) the notice;
- (b) if subsection (3) applies—the report and the statement.

(7) Section 80-5:

**Division 80 Committees of inspection etc.**

**80-5 Eligibility and procedures**

...

*Procedures*

(3) A committee of inspection must meet at such times and places as its members from time to time appoint.

(4) If a committee of inspection is appointed as a result of a determination of the creditors of the company under section 80-10 of the Insolvency Practice Schedule (Corporations), the external administrator or a member of the committee may convene a meeting of the committee.

...

**Notices of meetings of creditors**

31 There are many decisions in which the courts have made orders permitting notice of creditors' meetings to be given by electronic means to those for whom e-mail addresses are available and otherwise by notice, for example on an administrator's website or by newspaper advertisement. This saves costs and time and so conserves limited assets for the benefit of creditors: see *In the matter of BBY Ltd* [2015] NSWSC 974 at [7] (Brereton J) and the cases there cited; see also *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed)* [2018] FCA 1891 at [12]-[14] (Yates J) and *Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed)* [2019] FCA 1446 at [23] (Gleeson J).

32 Mr Eagle's evidence demonstrates that he has an email address for a substantial majority of creditors presently identified (159 of 172 known creditors of Tf Australia and both Screencorp creditors). In the context of restrictions on gatherings imposed in relation to limiting the spread of the COVID-19 virus, Mr Eagle has said that his staff will face practical difficulties arranging notices to be printed and posted.

33 Making the order with respect to issuing notices of creditors' meetings by email and publishing the notice on KPMG's website and the website for notices operated by the Australian Securities & Investments Commission (ASIC) will fulfil the objective of notifying as many creditors of the Companies as quickly and cheaply as possible thereby allowing the administration to be effected in a way which is more straightforward and cheaper for the administrators, a benefit which will ultimately accrue to creditors of the Companies. Further, in this case, it facilitates the efficient continuation of the administration of the Companies at a

time when limits have been imposed on gatherings of people designed to suppress the spread of the COVID-19 virus to protect the health and welfare of the Australian community.

34 Accordingly, it is appropriate to make the orders sought with respect to notices convening the creditors' meetings which must be convened under rr 75-15 and 75-225 of the *Insolvency Practice Rules* and any other notification which the administrators are required to give creditors during the administration of the Companies under any provision in Part 5.3A of the *Corporations Act*, Part 5.3A of the *Corporations Regulations 2001* (Cth), the *Insolvency Practice Schedule* or the *Insolvency Practice Rules*.

### **Meetings of creditors**

35 The Court accepts the administrators' submission that, while r 75-75 of the *Insolvency Practice Rules* clearly authorises participation in meetings of creditors by electronic means, the requirements of rr 75-15(1)(a), 75-30 and 75-35 suggest that meetings will be conducted at a "place", such that it is not clear that meetings may be held only by electronic means. It might be said that these requirements are met because the "place" of the meeting is where the administrator is located (even if participants are unable to attend there), however that may be a strained construction of the provisions. The administrator (and the creditors) should not be left in doubt as to whether a meeting has been validly convened and held. To allow doubt opens up avenues of dispute about the validity of resolutions and may necessitate further applications for validation under s 1322(4) of the *Corporations Act*.

36 The Court also accepts Mr Eagle's evidence that he has previously conducted meetings of creditors that have provided a telephone conference service for creditors and, in his experience, the use of telephone conference facilities works well. The administrators have suitable technology in place to conduct a meeting in this manner. Mr Eagle does not consider that there is any practical impediment to conducting meetings only by means of telephone.

37 Accordingly, it is appropriate that the Court make orders that, to the extent that it is not specifically permitted by rr 75-30, 75-35 and 75-75 of the *Insolvency Practice Rules*, the administrators be permitted to hold meetings of creditors during the administration of each of the Companies by telephone or audio-visual conference facilities only and in place of physical meetings, with details of such arrangements to be included in the notices issued to creditors.

### **Committee of inspection**

38 The administrators sought similar orders with respect to notices to members of a committee of inspection, should one be formed for the Companies, and for the manner in which those meetings might be held.

39 The administrators concede that such orders may not be necessary given the terms of r 80-5(3) of the *Insolvency Practice Rules*. However, there is nothing in that rule which specifically permits meetings to be held only by audio-visual or telephone conference facilities, nor does it specifically permit notice to be given to, or by, members of the committee solely by email. The administrators submit, and the Court accepts, that the administrators and members of any committee should not be left in any doubt as to the validity of any resolution passed at meetings convened and held in that manner. The Court is also of the view that it is appropriate to make the order even though no such committee currently exists, since it would involve further time and cost to approach the Court for such an order if the committee is constituted, and that time and cost can sensibly be avoided by making the order now.

### **EXTENSION OF THE PERIOD FOR THE ADMINISTRATORS TO GIVE NOTICE UNDER S 443B TO ASSET LESSORS**

40 Sections 443A and 443B of the *Corporations Act* appear in Part 5.3A of the *Corporations Act* and they provide as follows:

#### **443A General debts**

- (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
  - (a) services rendered; or
  - (b) goods bought; or
  - (c) property hired, leased, used or occupied, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods; or
  - (d) the repayment of money borrowed; or
  - (e) interest in respect of money borrowed; or
  - (f) borrowing costs.
- (2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

**443B Payments for property used or occupied by, or in the possession of, the company**

*Scope*

- (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods.

*General rule*

- (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
  - (a) that begins more than 5 business days after the administration began; and
  - (b) throughout which:
    - (i) the company continues to use or occupy, or to be in possession of, the property; and
    - (ii) the administration continues.
- (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that:
  - (a) specifies the property; and
  - (b) states that the company does not propose to exercise rights in relation to the property; and
  - (c) if the administrator:
    - (i) knows the location of the property; or
    - (ii) could, by the exercise of reasonable diligence, know the location of the property;specifies the location of the property.
- (4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.
- (5) A notice under subsection (3) ceases to have effect if:
  - (a) the administrator revokes it by writing given to the owner or lessor; or
  - (b) the company exercises, or purports to exercise, a right in relation to the property.
- (6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the

company:

- (a) also uses the property; or
- (b) asserts a right, as against the owner or lessor, so to continue.

*Restrictions on general rule*

- (7) Subsection (2) does not apply in relation to so much of a period as elapses after:
  - (a) a receiver of the property is appointed; or
  - (b) under an agreement or instrument under which a security interest in the property is created or arises:
    - (i) the secured party appoints an agent to enter into possession, or to assume control, of the property; or
    - (ii) the secured party takes possession, or assumes control, of the property;

but this subsection does not affect a liability of the company.
- (8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.
- (9) The administrator is not taken because of subsection (2):
  - (a) to have adopted the agreement; or
  - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

41 Although the originating process sought relief in relation to the operation of s 443B, during the course of the hearing counsel for the administrators also sought relief under s 443A(1)(c), along the lines of orders made by Markovic J in *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472 (***Strawbridge, CBCH Group***).

42 In *Strawbridge, CBCH Group* at [39], Markovic J made the following remarks which the Court respectfully adopts: Section 447A(1) of the *Corporations Act* gives the Court ample power to alter the operation of s 443B(2) and (3) of the *Corporations Act*: see *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263 (***Mothercare Australia***) at [6]. Alternatively, s 443B(8) gives the Court an additional power to alter the operation of s 443B(2) and (3): see *Silvia v FEA Carbon Pty Ltd* [2010] FCA 515; (2010) 185 FCR 301 (***Silvia v FEA***) at [13]. The usual rationale behind the extension of the five business day period in s 443B(2) and (3) or the exercise of the power in s 443B(8) is because the administrator has had insufficient time to conduct the necessary investigations to decide

whether he or she thinks it best to retain or give up possession of leased property: see *Silvia v FEA* at [12]-[13]. Further it seems that s 443B(8) allows the Court to excuse the administrator from liability to pay rent even after the five business day period has passed (see *Silvia v FEA* at [13]-[14]) and that s 447A enables a Court to amend the operation of Pt 5.3A of the Act retrospectively: see *Australasian Memory Pty Limited v Brien* [2000] HCA 30; (2000) 200 CLR 270 at [26].

43 In deciding that the orders sought should be made, the Court took into account the following matters:

- (1) The time for notice to be given under s 443B expired on the day before the hearing.
- (2) Mr Eagle's curriculum vitae, which is set out in tab 1 of RRE-1, indicates that he is an experienced administrator and registered liquidator. He has given evidence that the administrators consider that they require further time to consider the ongoing value to the Companies of the goods that are the subject of the Asset Leases and such an extension is in the best interests of creditors generally as it is designed to assist in retaining assets that may be necessary to preserve and enhance the value of the Business.
- (3) The administrators acted promptly in communicating with the Asset Lessors to obtain from them information concerning the nature of the equipment and motor vehicles the subject of the Asset Leases. To date, only Bigstone has responded, albeit that the time for response has not yet passed. The administrators have therefore worked diligently to obtain relevant information in relation to the Asset Leases, but they do not presently have all of the information required to determine the importance of the leased equipment with a view to reaching a conclusion on whether the continued use of those chattels in the Business should be sought. An extension of time will permit them to make that assessment and rational decisions in relation to the Asset Leases. That will enhance the prospect of preserving the Business (either in whole or in part) with a view to its sale or restructure as a going concern, which serves the object of Part 5.3A of the *Corporations Act* and maintains the prospect of obtaining the greatest possible return for creditors of the Companies as a whole.
- (4) The administrators have been delayed in the process of ascertaining what property is subject to the Asset Leases and the importance of that property to the continuity of the Business by the physical distancing requirements designed to prevent the spread of

the COVID-19 virus. Mr Eagle's evidence is that there have been difficulties in attending the various premises occupied by the Companies to see the chattels the subject of the Asset Leases and speak to relevant employees of the Companies in order to make an assessment of the continued usefulness in the Business. The administrators note that, in *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Ltd (Administrators Appointed)* [2020] FCA 422 at [35(4)], Gleeson J observed that it was reasonable to assume that the current circumstances of the COVID-19 pandemic would affect the timely progress of the administration to some extent.

- (5) The length of the extension sought (two weeks) is a shorter period than has been granted in some other cases. For instance, in *Mothercare Australia* the extension was for one month.
- (6) To the extent to which the Asset Lessors may be adversely affected, the orders sought make provision for the Asset Lessors to apply to the Court for them to be varied.

44 The Court concluded that it was appropriate to make the orders sought by the administrators so as to provide, in general, for an extension until 1 May 2020 during which to make a determination whether or not to disclaim any of the Asset Leases and to relieve the administrators of personal liability during the period. In relation to Bigstone, however, the Court accepted that it was appropriate to provide an extension of only seven days until 24 April 2020. The Court accepted that it was appropriate to make the shorter order in relation to Bigstone because it has already provided the information required by the administrators and the administrators accepted that that was sufficient time for them to make the required assessment of the Asset Leases to which Bigstone is a party.

## **COSTS**

45 The Court did not accept that it was appropriate to make a costs order in Bigstone's favour on the basis that it had sought and been granted leave to be heard pursuant to r 2.13 of the *Federal Court (Corporations) Rules*. In such cases, costs orders are not typically made either for or against such a person. The Court saw no reason to depart from the usual rule in this case.

46 The plaintiffs' application was properly made and the Court accepted that it was appropriate to make the order that the plaintiffs' costs be treated as costs in the administration of each of the Companies jointly and severally. Bigstone did not seek to oppose that order.



I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell.

Associate:

Dated: 23 April 2020