

BETWEEN:

EQUUSCORP PTY LTD  
(FORMERLY EQUUS FINANCIAL SERVICES LTD)  
(ACN 006 012 344)  
Appellant

and

IAN ALEXANDER HAXTON  
Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

PART I:

1. Equuscorp<sup>1</sup> certifies that these submissions in reply are in a form suitable for publication on the internet.

PART II:

20 Facts (Respondents' Submissions<sup>2</sup> [7] – [13])

2. Equuscorp accepts that the Respondents made no concession about the quantum of any tax benefit. Equuscorp's point is that when the VSCA said there was no evidence that the Respondents obtained a tax benefit<sup>3</sup>, it was referring to the lack of evidence of quantum (which was to be determined at the subsequent hearing) and not to a lack of evidence about the Respondents claiming a deduction.

Illegality and Restitution (Respondents' Submissions [16] – [37])

3. The Respondents' reliance<sup>4</sup> on the *in pari delicto* rule is misplaced as the rule was abandoned in **Nelson**<sup>5</sup> and **Leonhardt**<sup>6</sup> for a less rigid approach anchored in the construction of the statute concerned (thereby identifying the contract or conduct which is proscribed and the type<sup>7</sup> of statutory proscription) and, in the absence of  
30 statutory preclusion of the right claimed, in public policy as dictated by the statute<sup>8</sup>. In

<sup>1</sup> Equuscorp adopts the definitions used in its submissions.

<sup>2</sup> The principal submissions of the Respondents are in proceeding M129 and these are referred to herein as the **Respondents' Submissions**.

<sup>3</sup> ALR at 340[8], 346[39] and 386[272].

<sup>4</sup> Respondents' Submissions at [18]-[21] and [25].

<sup>5</sup> **Nelson v. Nelson** (1995) 184 CLR 538.

<sup>6</sup> **Fitzgerald v. FJ Leonhardt Pty Ltd** (1997) 189 CLR 215.

<sup>7</sup> Of the four identified in **Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd** (1978) 139 CLR 410 at 429-430 and 432-433 and recognized in **Nelson** at 532 and 613 and **Leonhardt** at 218-219, 226-227 and 242-245.

<sup>8</sup> **Nelson** at 552 and 613; **Leonhardt** at 229-230 and 249-250.

this regard the Respondents' Submissions misunderstand<sup>9</sup> Equuscorp's submission. Equuscorp deals with illegality at a threshold stage so that if, on the statute's proper construction, a claim for restitution is precluded, that is the end of the enquiry<sup>10</sup> and the identification of a vitiating factor is unnecessary. If restitution is not precluded, a conventional analysis must then proceed.

4. The Respondents' reliance on what Deane J. said in **Muschinski**<sup>11</sup> suffers from the conflation of parties and transactions located throughout their submissions<sup>12</sup>. The offering of the prescribed interest in the absence of the required prospectus and deed was the conduct proscribed by the Code. Rural did not engage in this conduct. The Loan Agreements were found by Byrne J. to be "*unenforceable*"<sup>13</sup> because they were "*associated with or in furtherance of illegal purposes*"<sup>14</sup>. No such finding was made with respect to the claims for restitution – indeed, Byrne J. ordered restitution in two of the proceedings under appeal. Any "*attributable blame*" was not that of Rural. Even if it were, **Nelson** and **Leonhardt** establish principles for determining whether a claim is nonetheless maintainable.
5. Despite pleading that they obtained their interests in the Schemes "*with funds provided ... under the Loan Agreement*"<sup>15</sup>, the unstated proposition underlying the Respondents' conflation of parties and transactions is that since all Scheme contracts are unenforceable, their terms can be ignored for the purposes of considering restitutionary claims because to consider them would be a triumph of form over substance<sup>16</sup>. The contracts are only unenforceable. They govern rights and obligations for other purposes (e.g. for taxation purposes such as Cunningham claiming interest on the three loans to it as a tax deduction). In considering restitution, the contracts are relevant<sup>17</sup>. The proposition in **Glengallan**<sup>18</sup> is that in the absence of an allegation of sham or of some vitiating factor, the parties are bound by their written contract. The

<sup>9</sup> Respondents' Submissions at [19].

<sup>10</sup> See the explanation of **Kasuma v. Baba-Egbe** [1956] AC 539 given in **Nelson** at 563. More recently the House of Lords has confirmed that restitution cannot be used to by-pass a statutory prohibition: **Dimond v. Lovell** [2002] 1 AC 384 at 397F-398B and **Wilson v. First Country Trust Ltd (No 2)** [2004] 1 AC 816 at [119]-[121] and [172].

<sup>11</sup> **Muschinski v. Dodds** (1985) 160 CLR 583 at 620, relied upon in the Respondents' Submission at [22]-[23].  
<sup>12</sup> Respondents' Submission at [23],[25],[31],[35] and [37].

<sup>13</sup> **Equuscorp Pty Ltd v Bassat** (2007) 216 FLR 1 (FLR) at [112]-[113].

<sup>14</sup> **Yango** at 432 per Jacobs J.

<sup>15</sup> See AB 21[35] and 22[42], AB 73[37] and 74[44], AB 121[280] and 122[34], AB 172[36] and 173[43] and AB 220[33] and 221[39].

<sup>16</sup> Respondents' Submission at [26],[25],[31],[35] and [37].

<sup>17</sup> **Pavey & Matthews Pty Ltd v. Paul** (1986) 162 CLR 221 at 227-228 and 257.

<sup>18</sup> **Equuscorp Pty Ltd v. Glengallan Investments Pty Ltd** (2004) 218 CLR 471.

Respondents never alleged sham or a vitiating factor. The Respondents' criticism<sup>19</sup> of Equuscorp's reliance on **Glengallan** is misplaced.

6. The Respondents' "round robin" or "no actual money" analyses<sup>20</sup> suffer from the error identified in the preceding paragraph. Apart from implying that only currency, and not a cheque, must "change hands" before a restitutionary claim arises, the analyses are inconsistent with the advance of funds pleaded (and necessary to sustain the illegality defence). Byrne J. was right to reject these analyses<sup>21</sup>.
7. The facts that the purchase price paid by Equuscorp to Rural's receivers was supposedly small<sup>22</sup> and that Equuscorp hoped to make a profit from the purchase (as to which see **Fostif**<sup>23</sup>) are irrelevant to the analysis of whether it is "not unjust" for the Investors to make restitution of the benefit conferred by Rural (in respect of which the PLA entitles Equuscorp to sue).

#### **Restitutionary Rights are Assignable (Respondents' Submissions [38] – [43])**

8. The Respondents' Submission must be rejected for four alternative reasons.
9. First, even were there merely an assignment of a chose in action by Rural to Equuscorp (as to which see paragraph 13 below), it was lawful for Rural to make such an assignment. The Deed was made by Rural by its receivers<sup>24</sup>. The receivers had power under the Corporations Law<sup>25</sup> to "do all things necessary or convenient to be done for ... the attainment of the objectives for which [they] were appointed", including the powers to "dispose of property of [Rural]" and to "convert the property of [Rural] into money"<sup>26</sup>. The definition of "property" includes "a thing in action"<sup>27</sup>.
10. Because of the duties of a trustee in bankruptcy, the broad definition of "property" in bankruptcy legislation and of the trustee's statutory power of sale, it has been held lawful for a trustee to assign a bare chose in action when to do so would otherwise have been ineffective due to rules of maintenance and champerty<sup>28</sup>. Applying the

<sup>19</sup> Respondents' Submission at [29 fn62].

<sup>20</sup> Respondents' Submission at [26], [27],[35] and [37].

<sup>21</sup> FLR at [129].

<sup>22</sup> Respondents' Submission at [27].

<sup>23</sup> **Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd** (2006) 229 CLR 386 at [88] (per Gummow, Hayne and Crennan JJ).

<sup>24</sup> Agreed Fact 14 at AB 255.

<sup>25</sup> Relevant extracts are in Appendix A.

<sup>26</sup> Sub-sections 420(1) and 420(2)(c) and (g) of the Corporations Law.

<sup>27</sup> Section 9 of the Corporations Law.

<sup>28</sup> **Kitson v. Hardwick** (1872) LR 7 CP 473; **Seear v. Lawson** (1880) LR 15 Ch D 426; **Guy v. Churchill** (1888) 40 Ch D 481; **Ramsey v. Hartley** [1977] 1 WLR 686 (CA); **Stein v. Blake** [1996] AC 243; **Cotterill**

reasoning underpinning the bankruptcy exception to corporate insolvencies, it has been decided that a liquidator<sup>29</sup> and a receiver<sup>30</sup> can lawfully cause the company to assign its cause of action. In **Fostif** the existence of the “*exception*” for a trustee in bankruptcy<sup>31</sup> and for a liquidator<sup>32</sup> was recognised by some justices in this Court.

11. Secondly, the considered dicta in **Poulton**<sup>33</sup> that a cause of action in conversion is incapable of assignment recognise<sup>34</sup> that if the assignment of the bare right is incidental and subsidiary to a conveyance, then the principles of maintenance and champerty do not proscribe the assignment. Here, the assignment of the cause of action for money had and received was an incident of the assignment by the Deed of the benefits under the loan agreements and debts.
12. Thirdly, there is nothing in **Poulton** preventing this Court accepting the principle stated in **Trendtex**<sup>35</sup> that an assignment of a bare chose in action will not be ineffectual if the assignee has a genuine commercial interest in taking the assignment and enforcing it in its own name. Two justices in **Fostif** recognised this principle<sup>36</sup>. Here, some six years prior to the assignment by the Deed, Rural gave the Rural Charge to Equuscorp. By taking the assignment, Equuscorp could recover part of the assets which the Rural Charge gave it as security.
13. Fourthly, **Poulton** was founded upon the then prevailing view that maintenance and champerty were self-evidently undesirable<sup>37</sup>. The public policy foundations for that view were found to be lacking by a majority in **Fostif**<sup>38</sup>. Though **Fostif** concerned a funding agreement and not an assignment, the position of Firmstones therein is similar to that of Equuscorp in that Equuscorp controls the litigation from which it hopes to profit. These factors were found by the majority in **Fostif** not to be contrary to public

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v. **Bank of Singapore (Australia) Ltd** (1995) 37 NSWLR 238; **Citicorp Australia Ltd v. Official Trustee in Bankruptcy** (1996) 71 FCR 550 (FC).

<sup>29</sup> The current power of sale is in sub-section 477(1)(c) of the *Corporations Act* 2001 (Cth). The authorities include **Re Park Gate Wagon Works Company** (1881) 17 Ch D 234; **UTSA Pty Ltd (in liq) v. Ultra Tune Australia Pty Ltd** (1996) 21 ACSR 457 (VSCA), **Carob Industries Pty Ltd (in liq) v. Simto Pty Ltd** (2000) 23 WAR 515 (WASCA). The statutory reversal of the common law rule was recognised in **Fostif** at [253] fn 322 (per Callinan and Heydon JJ).

The current power of sale is in sub-sections 420(1) and 420(2)(c) and (g) of the *Corporations Act* 2001 (Cth). The authority is **Re Daniel Efrat Consulting Services Pty Ltd (rec apptd) (in liq)**; ex parte **Hawke** (1999) 91 FCR 154.

<sup>31</sup> **Fostif** at [75] (per Gummow, Hayne and Crennan JJ).

<sup>32</sup> **Fostif** at [253] fn 396 (per Callinan and Heydon JJ).

<sup>33</sup> **Poulton v. the Commonwealth** (1953) 89 CLR 540 at 571 (per Fullagar J) and at 602 (on appeal).

<sup>34</sup> By approving the passage from **Dawson v. Great Northern & City Railway Co.** [1905] 1 KB 260 at 270-271. See also **Fostif** at [258] (per Callinan and Heydon JJ).

<sup>35</sup> **Trendtex Trading Corporation v Credit Suisse** [1982] AC 679 at 703.

<sup>36</sup> **Fostif** at [258] (per Callinan and Heydon JJ).

<sup>37</sup> This is to be inferred from the two authorities cited.

<sup>38</sup> **Fostif** at [68] – [95] (per Gummow, Hayne and Crennan JJ), with which Gleeson CJ agreed at [21].

policy<sup>39</sup>. The public policy analysis of the majority in **Fostif** applies in the case of an assignment. If necessary, Equuscorp seeks leave to argue the correctness of **Poulton**.

**Construing the Deed (Respondents' Submissions [44] – [50])**

14. Equuscorp is not forced to rely upon clause 2(b) of the Deed<sup>40</sup> as the “*legal and other remedies*” were given to it by statute (i.e. s.199(1) of the PLA) irrespective of the Deed. Further, the Respondents misconstrue clause 2(b). The “*matters in the preceding sub-paragraph (a)*” referred to in clause 2(b) are the “*debts, interests under the guarant[ees] and ...*”, not the “*legal right to such debts, interests under the guarant[ees] and ...*”.
- 10 15. The Respondents' approach to construing clause 2(b)<sup>41</sup> takes as its premise that Rural and Equuscorp had the knowledge of the history of the common law that was necessary to enable this Court to identify the foundations of claims of quantum meruit and valebat in order to determine whether the statute in question in **Pavey** precluded such claims. From that premise it is said to follow (i.e. “*Accordingly*”) that Rural and Equuscorp intended to assign only remedies “*in debt for the debt*”. This approach is contrary to this Court's principles which require the starting point to be the language of the Deed in the context of its making.

**Respondent's Additional Submission in M128 and M130**

16. Sub-s.14(1)(a) of the *Limitation Act* 1969 (NSW) does not apply to defeat the claim in restitution. The Respondents elected<sup>42</sup> by their pleadings to avoid the Scheme contracts whereupon the Loan Agreements were rendered unenforceable. Justice between the parties does not require the imposition of a limitation defence by false analogy.
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<sup>39</sup> Fostif at [88].

<sup>40</sup> Paragraph 47 of the Respondents' Submissions.

<sup>41</sup> Paragraph 48 of the Respondents' Submissions.

<sup>42</sup> **Commonwealth Homes and Investment Company Ltd v. Smith** (1937) 59 CLR 443 at 460-462 (per Dixon J) and 465-466 (per Evatt J).



# The Corporations Law

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## Volume 1

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(c) in relation to 2 or more such entities, or in relation to an economic entity, within the meaning of Parts 3.6 and 3.7, constituted by 2 or more such entities—the profit or loss resulting from operations of those entities;

**“promoter”**, in relation to a prospectus issued by or in connection with a body corporate, means a promoter of the body who was a party to the preparation of the prospectus or of any relevant portion of the prospectus, but does not include a person merely because of the person acting in the proper performance of the functions attaching to the person’s professional capacity or to the person’s business relationship with a promoter of the body;

**“proper authority”** has:

- (a) in relation to a futures licensee—the meaning given by subsection 87 (1); and
- (b) in relation to a securities licensee—the meaning given by subsection 88 (1);

**“proper SCH transfer”** means:

- (a) an SCH-regulated transfer of a quoted security or quoted right effected in accordance with the SCH business rules; or
- (b) a transfer that is taken by section 1097D to be a proper SCH transfer;

**“property”** means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action;

**“proprietary company”** has the meaning given by subsection 45A(1);

**“prospectus”**, in relation to securities of a body corporate, means a written notice or other instrument:

- (a) inviting applications or offers to subscribe for the securities; or
- (b) offering the securities for subscription;

Note 1: A written notice or instrument issued by the securities clearing house will not generally constitute a prospectus—see subsection 779J (1).

Note 2: Some references to a prospectus include a supplementary prospectus (see subsection 1024A (4)) and an application form (see subsection 1024G (6)). A replacement prospectus is a prospectus in its own right (see subsection 1024D (3)).

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- (b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the corporation or anyone else.
- (6) For the purposes of subsection (5), the controller does not exercise, or purport to exercise, a right as mentioned in paragraph (5) (b) merely because the controller continues to be in possession, or to have control, of the third party property, unless the controller:
  - (a) also uses the property; or
  - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in so far as a court, by order, excuses the controller from liability, but an order does not affect a liability of the corporation.
- (8) The controller 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).

**420 Powers of receiver**

- (1) Subject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.
- (2) Without limiting the generality of subsection (1), but subject to any provision of the court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver's powers in any way, a receiver of property of a corporation has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power, for the purpose of attaining the objectives for which the receiver was appointed:
  - (a) to enter into possession and take control of property of the corporation in accordance with the terms of that order or instrument;

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- (b) to lease, let on hire or dispose of property of the corporation;
- (c) to grant options over property of the corporation on such conditions as the receiver thinks fit;
- (d) to borrow money on the security of property of the corporation;
- (e) to insure property of the corporation;
- (f) to repair, renew or enlarge property of the corporation;
- (g) to convert property of the corporation into money;
- (h) to carry on any business of the corporation;
- (j) to take on lease or on hire, or to acquire, any property necessary or convenient in connection with the carrying on of a business of the corporation;
- (k) to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the corporation;
- (m) to draw, accept, make and indorse a bill of exchange or promissory note;
- (n) to use a seal of the corporation;
- (o) to engage or discharge employees on behalf of the corporation;
- (p) to appoint a solicitor, accountant or other professionally qualified person to assist the receiver;
- (q) to appoint an agent to do any business that the receiver is unable to do, or that it is unreasonable to expect the receiver to do, in person;
- (r) where a debt or liability is owed to the corporation—to prove the debt or liability in a bankruptcy, insolvency or winding up and, in connection therewith, to receive dividends and to assent to a proposal for a composition or a scheme of arrangement;
- (s) where the receiver was appointed under an instrument that created a charge on uncalled capital or uncalled premiums of the corporation:
  - (i) in the name of the corporation, to make a call in respect of money unpaid on shares in the corporation (whether on account of the nominal value of the shares or by way of premium); or

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- (ii) upon the giving of a proper indemnity to a liquidator of the corporation—in the name of the liquidator, to make a call in respect of money unpaid on account of the nominal value of shares in the corporation;
  - (t) to enforce payment of any call that is due and unpaid, whether the calls were made by the receiver or otherwise;
  - (u) to make or defend an application for the winding up of the corporation; and
  - (w) to refer to arbitration any question affecting the corporation.
- (3) The conferring by this section on a receiver of powers in relation to property of a corporation does not affect any rights in relation to that property of any other person other than the corporation.
- (4) In this section, a reference, in relation to a receiver, to property of a corporation is, unless the contrary intention appears, a reference to the property of the corporation in relation to which the receiver was appointed.

### **420A Controller's duty of care in exercising power of sale**

- (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
- (a) if, when it is sold, it has a market value—not less than that market value; or
  - (b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- (2) Nothing in subsection (1) limits the generality of anything in section 232.

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- (6) Where the remuneration of a liquidator is determined in the manner specified in subparagraph (3) (b) (i) the Court may, on the application of the liquidator or of a member or members referred to in subsection (5), review the liquidator's remuneration and may confirm, increase or reduce that remuneration.
- (7) A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court.
- (8) If more than one liquidator is appointed by the Court, the Court shall declare whether anything that is required or authorised by this Law to be done by the liquidator is to be done by all or any one or more of the persons appointed.
- (9) Subject to this Law, the acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification.

### **474 Custody and vesting of company's property**

- (1) If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator shall take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and, if there is no liquidator, all the property of the company shall be in the custody of the Court.
- (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.
- (3) Where an order is made under this section, the liquidator of the company to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.

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### 476 Preliminary report by liquidator

A liquidator of a company shall, within 2 months, or such longer period (if any) as the Commission allows, after receiving a report referred to in subsection 475 (1) or (2), lodge a preliminary report:

- (a) in the case of a company having a share capital—as to the amount of capital issued, subscribed and paid up;
- (b) as to the estimated amounts of assets and liabilities of the company;
- (c) if the company has failed—as to the causes of the failure; and
- (d) as to whether, in his or her opinion, further inquiry is desirable with respect to a matter relating to the promotion, formation or insolvency of the company or the conduct of the business of the company.

### 477 Powers of liquidator

- (1) Subject to this section, a liquidator of a company may:
  - (a) carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business;
  - (b) subject to the provisions of section 556, pay any class of creditors in full;
  - (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable; and
  - (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding up of the company, on such terms as are agreed, and take any

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security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.

- (2) Subject to this section, a liquidator of a company may:
- (a) bring or defend any legal proceeding in the name and on behalf of the company;
  - (b) appoint a solicitor to assist him or her in his or her duties;
  - (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company;
  - (ca) exercise the Court's powers under subsection 483 (3) (except paragraph 483 (3) (b)) in relation to calls on contributories;
  - (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's common or official seal;
  - (e) subject to the *Bankruptcy Act 1966*, prove in the bankruptcy of any contributory or debtor of the company or under any deed executed under that Act;
  - (f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company;
  - (g) obtain credit, whether on the security of the property of the company or otherwise;
  - (h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company;
  - (k) appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do, in person; and

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- (m) do all such other things as are necessary for winding up the affairs of the company and distributing its property.
- (2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:
  - (a) if an amount greater than \$20,000 is prescribed—the prescribed amount; or
  - (b) otherwise—\$20,000.
- (2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a charge) if:
  - (a) without limiting paragraph (b), the term of the agreement may end; or
  - (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;  
more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.
- (3) A liquidator of a company is entitled to inspect at any reasonable time any books of the company and a person who refuses or fails to allow the liquidator to inspect such books at such a time is guilty of an offence.
- (5) For the purpose of enabling the liquidator to take out letters of administration or recover money as mentioned in paragraph (2) (h), the money due shall be deemed to be due to the liquidator.
- (6) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory, or the Commission, may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

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### 478 Application of property; list of contributories

- (1) As soon as practicable after the Court orders that a company be wound up, the liquidator must:
  - (a) cause the company's property to be collected and applied in discharging the company's liabilities; and
  - (b) consider whether subsection (1A) requires him or her to settle a list of contributories.
- (1A) A liquidator of a company that is being wound up in insolvency or by the Court must settle a list of contributories if it appears to him or her likely that:
  - (a) either:
    - (i) there are persons liable as members or past members to contribute to the company's property on the winding up; or
    - (ii) there will be a surplus available for distribution; and
  - (b) it will be necessary:
    - (i) to make calls on contributories; or
    - (ii) to adjust the rights of the contributories among themselves.
- (1B) A liquidator of such a company may rectify the register of members so far as required under this Part.
- (3) In settling the list of contributories the liquidator shall distinguish between persons who are contributories in their own right and persons who are contributories by virtue of representing, or being liable for the debts of, other persons.
- (4) The list of contributories, when settled in accordance with the regulations, is *prima facie* evidence of the liabilities of the persons named in the list as contributories.