SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0008

NOM DE PLUME NOMINEES PTY LTD (ACN 006 750 090) (and others according to the attached schedule)	Applicants
v	
ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 092 643 939) (and others according to the attached schedule) [No 2]	Respondents

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JUDGES:	McLEISH, NIALL and HARGRAVE JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	6 March 2020
DATE OF JUDGMENT:	27 March 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 70
JUDGMENT APPEALED FROM:	[2019] VSC 794 (Riordan J)

PRACTICE AND PROCEDURE – Permanent stay – Abuse of process – Agreement for substantial creditor to fund proceeding brought by liquidator – Applications for court approval of previous funding agreements rejected – Operative funding agreement approved by creditors without court application – Whether abuse of process to litigate on basis of funding agreement after court approval of earlier agreements refused – Whether funding agreement compromised liquidator's independence – Provisions requiring funder consent to proceedings and entitling funder to terminate agreement – Liquidator's independence not compromised – Degree of funder control unexceptional and not improper – *Clairs Keeley v Treacy* (2004) 29 WAR 479, considered – Appeal dismissed.

PRACTICE AND PROCEDURE – Permanent stay – Delay – Whether delay attributable to liquidator's lack of funding and failure to secure court approval of funding agreements – Delay not sole responsibility of liquidator – No actual prejudice – *Civil Procedure Act 2010* ss 7, 8, 25.

CORPORATIONS – Liquidation – Litigation funding agreement – *Corporations Act 2001* (Cth) s 477(2B) – Whether necessary to seek court approval of agreement after approval refused for two prior agreements – Unnecessary to seek court approval of agreement approved by creditors – No abuse of process in circumstances.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr B Walker SC with Mr B Gibson and Mr D Porteous	SBA Law
For the Respondents	Mr P Cawthorn QC with Ms R Zambelli	Piper Alderman

McLEISH JA
NIALL JA
HARGRAVE JA:

1 The applicants, Nom de Plume Nominees Pty Ltd ('Nom de Plume') and Richard Leggo, seek leave to appeal from a decision of a judge of the Trial Division[1] so as to reinstate a decision of an associate judge permanently staying a proceeding brought against them by the respondents.[2] They also sought a stay of that proceeding pending the Court's determination of the application for leave to appeal.

2 At the conclusion of oral argument, the Court reserved its decision on the application for leave to appeal and ordered that the application for a stay pending appeal be dismissed for reasons to be given subsequently. For the reasons that follow, leave to appeal will be granted but the appeal will be dismissed. Our reasons for refusing a stay pending appeal are set out at the end of these reasons for judgment.

Factual background

3 In around 2000, Mr Leggo, John Crozier, Anthony Melville and Geoffrey Turner decided to undertake a joint venture to acquire and develop a property in Ascot Vale.

4 The joint venture was conducted through the medium of a unit trust. The first respondent, Ascot Vale Self Storage Centre Pty Ltd ('AVSS') was incorporated as a special purpose vehicle and appointed trustee of the unit trust.

5 In 2000, AVSS became the registered proprietor of the land situated at 8–11 Burrowes Street, Ascot Vale. The property was initially developed as a self-storage facility. In 2003, a decision was made to convert it into a residential apartment complex.

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1 *Ascot Vale Self Storage Pty Ltd (in liq) v Nom De Plume Pty Ltd* [2019] VSC 794 ('Reasons').

2 *Ascot Vale Self Storage Pty Ltd (in liq) v Nom De Plume Pty Ltd [No 2]* [2019] VSC 285 ('Associate Judge's Reasons').

6 When the property was purchased, the units in the trust were held by a company controlled by Mr Crozier, as to 60 per cent, and by companies controlled by Mr Turner and Mr Melville, each as to 20 per cent. It is convenient to refer to Messrs Crozier, Turner and Melville, and the companies controlled by them, as the 'Melville interests'.

7 In December 2001, after the making of various loans, there was a redistribution of Mr Crozier's initial share. Mr Crozier's share reduced to 35 per cent, and Mr Leggo and Robert McNab acquired 15 per cent and 10 per cent shares respectively. Mr Turner and Mr Melville, through their respective companies, still held 20 per cent each.

8 There were four sources of funding for the development project.

9 First, Suncorp-Metway Ltd provided a first mortgage facility of $14,031,091, secured by a first ranking registered mortgage over the property and a first ranking registered mortgage debenture over the assets and undertaking of AVSS.

10 Secondly, DBR Corporation Pty Ltd provided a second mortgage facility of $1,620,000, secured by a second ranking registered mortgage over the property and a fixed and floating charge over the assets and undertaking of AVSS. That mortgage and charge were later assigned to Nom de Plume.[3]

11 Thirdly, the unitholders or persons or entities associated with them made loans totalling $1,396,538 during the period 1 November 2000 to 1 September 2007, comprising the following amounts:

(a) Mr Crozier $500,000;

(b) Mr Turner $312,788;

(c) Mr Melville $228,000;

(d) Mr Leggo $212,750; and

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[3] See [16] below.

(e) Mr McNab $143,000.

12 Finally, there were a series of loans totalling $500,000 to AVSS from a group of lenders from Albury. The total amount invested by the unitholders and the Albury investors was $1,896,538.

13 Mr Melville was initially the sole director of AVSS. He was shortly replaced as sole director by Mr Crozier in November 2000. Mr Crozier remained the manager and sole director of AVSS until Mr Leggo was appointed as a second director in April 2008. After Mr Crozier resigned as director on 1 June 2009, Mr Leggo remained as sole director.

14 On 5 October 2007, a loan agreement and debenture charge was executed by AVSS and Fingal Developments Pty Ltd ('Fingal'). At that time, Mr Crozier was the sole director of both Fingal and AVSS and he executed the loan agreement and charge on behalf of each of them. By the loan agreement and charge, Fingal purported to advance funds to AVSS on behalf of the unitholders and the Albury investors, and to take a third-ranking security over the assets and undertaking of AVSS.

15 The Melville interests were aware of AVSS's entry into the Fingal loan and charge but Mr Leggo, Mr McNab and the Albury investors were not. The effect and operation of the Fingal loan and charge has been the subject of a longstanding and ongoing dispute between the parties.

16 In July 2008, Nom de Plume (which Mr Leggo effectively owned, and of which he was director) took a novation of the DBR facility and assignment of its second-ranking mortgage and charge. Nom de Plume and Mr Leggo, being the present applicants, are conveniently referred to as the 'Leggo interests'.

17 The development struggled, and disputes arose between the unitholders. A deed of settlement was entered into on 23 March 2009. The parties to the deed of settlement were AVSS, Nom de Plume and Fingal, as well as the unitholders.

Relevantly for present purposes, because it forms part of the basis of the proceeding sought to be stayed, cl 3.1 of the deed recorded that the Leggo interests had agreed to advance further funds to or for the benefit of AVSS as and when required to meet the costs of building the apartments.

18 On 16 June 2010, AVSS satisfied its debt to Suncorp, and Suncorp's security was discharged.

19 On 21 June 2010, Fingal appointed receivers and managers to AVSS pursuant to its charge. The next day, Nom de Plume appointed a receiver and manager to AVSS pursuant to its own mortgage and charge.

20 Between October and December 2010, the receiver appointed by Nom de Plume repaid Nom de Plume all but around $16,000 of the amount which Nom de Plume said it was owed under its mortgage and charge. On 14 December 2010, the Nom de Plume mortgage and charge were redeemed by Fingal for the sum of $16,000.74.

21 On 26 November 2010, the developer of the property, Galvin Constructions Pty Ltd ('Galvin Constructions') applied to wind up AVSS. On 2 February 2011, AVSS was ordered to be wound up in insolvency. The second respondent, Simon Wallace-Smith, was appointed as liquidator.

22 On 8 March 2012, Fingal commenced a proceeding against Nom de Plume ('the Fingal proceeding'). In broad terms, the proceeding raised issues including the validity of the Fingal charge, the amount secured by the Nom de Plume charge, whether Nom de Plume had over-recovered at Fingal's expense, and whether Fingal had standing to recover from Nom de Plume any amount over-recovered.

23 On 15 April 2013, the liquidator conducted a public examination of Mr Leggo, funded by the Melville interests. As a result of these investigations, the liquidator deposed that he had identified claims against Mr Leggo and Nom de Plume.

24 On 1 August 2013, AVSS and the liquidator commenced a proceeding against

Mr Leggo and Nom de Plume ('the Nom de Plume proceeding'), and filed an affidavit in support. The affidavit exhibited a 31 July 2013 'Insolvency Report' prepared by the liquidator and a draft statement of claim.

25 In the draft statement of claim, AVSS and the liquidator claimed an amount not exceeding $6,246,821 from Nom de Plume and Mr Leggo as either a debt under, or damages for breach of, the settlement deed, and a further amount not exceeding $2,711,090 from Mr Leggo for insolvent trading contrary to s 588G of the *Corporations Act 2001* (Cth).

First funding agreement

26 Two days before the Nom de Plume proceeding commenced, the liquidator, AVSS, Fingal as guarantor, and Ryeland Nominees Pty Ltd ('Ryeland') as funder, had entered into a funding agreement. Messrs Melville and Crozier were directors of Ryeland. By that agreement, Ryeland agreed to fund the Nom de Plume proceeding. The following aspects of the agreement are relevant.

27 Clause 3 contained indemnities in favour of the liquidator. It relevantly provided:

> 3.1 The Funder indemnifies, and will keep indemnified, the Liquidator and the Company and each of them against all damages, charges, costs, expenses and other sums whatsoever for which the Liquidator and/or the Company may be liable or become liable, pay, incur or sustain in respect of, or arising out of, or in connection with any Action Costs.

28 'Action Costs' were relevantly defined in cl 1 as:

> all legal costs, expenses and disbursements reasonably incurred by the Liquidator, the Company or their lawyers (inclusive of GST), after the date of this Deed in the institution and prosecution of the Actions and the enforcement of any judgment and orders arising from the Actions.

29 'Actions' were defined in the same clause as any legal proceedings issued by the liquidator and/or AVSS to which Ryeland has consented, as well as appeals from interlocutory decisions delivered in the conduct of those proceedings.

30 Clause 4 provided that Ryeland could terminate the parties' rights and obligations under the agreement on 28 days' written notice to the liquidator. In the event that Ryeland exercised its right of termination, it would remain liable to pay all amounts it was liable to pay up to the date of termination, and it would be for the liquidator to determine whether or not to continue or discontinue the proceedings.

31 Clause 5 concerned the control and conduct of the proceedings. It relevantly provided:

> 5.1 The Liquidator will retain the Lawyers to act on his behalf and that of the Company in the prosecution of the Actions.
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> 5.2 The parties acknowledge and agree that:
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> (a) the Liquidator may, in his absolute discretion, confer with the Funder in relation to any aspect of the Actions, and must confer with the Funder in relation to any significant issues arising in, or in relation to, the conduct of the Actions, and must have due regard to Funder's advice or wishes but will not be bound to follow their advice or wishes;
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> (b) the Liquidator will be solely responsible for providing all instructions to the Lawyers in relation to the Actions;
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> (c) the Liquidator will provide to the Funder, or instruct the Lawyers to provide, such reports and updates on the conduct of the Actions as may be reasonably required or that the Funder reasonably requests; and
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> …

32 Clause 6 concerned offers of settlement in the proceedings. It relevantly provided:

> 6.1 The Liquidator and Company will not make, accept or reject any offer of settlement in the Actions without first providing prior written notice to the Funder of their intention to do so.
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> …
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> 6.3 The Funder may, prior to the expiration of the notice period contained within the notice referred to in clause 6.1, either approve or oppose the Liquidator and/or the Company making, accepting or rejecting such offer. Such approval or opposition must be by notice in writing given to the Liquidator prior to the expiration of the notice period contained within the notice referred to in clause 6.1.

> 6.4 If the Liquidator receives notice from the Funder in accordance with clause 6.3 that it opposes the Liquidator making, accepting or rejecting the offer then, subject to clause 6.5, the Liquidator will refrain from making, accepting or rejecting such offer.
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> 6.5 If the Funder provides a written response in accordance with clause 6.4 stating that it does not agree to the course of action proposed by the Liquidator or Company then the Liquidator will engage senior counsel nominated by the Lawyers to provide a written advice to the Liquidator and the Funder regarding the prospects of success, quantum and reasonableness of the relevant proposed course of action. If within 14 days following receipt of such advice the Liquidator and the Funder cannot agree mutually acceptable terms on which to proceed forward in the prosecution of the Actions the Liquidator will be free to determine whether to make, accept or reject any such offer as he may in his absolute discretion determine.

33 Clause 9 provided that Ryeland was entitled, from any sum received by AVSS or the liquidator pursuant to any settlement, judgment or order in the proceedings, to (a) its costs in the proceedings, as a first priority and (b) a funding fee of 40 per cent of the net proceeds, being the amount received by AVSS or the liquidator less the costs of the proceedings.

34 By cl 11, Fingal guaranteed the due and proper performance of Ryeland's obligations pursuant to the agreement, including as to the payment of any money.

35 Clause 12 concerned the Fingal charge. It relevantly provided:

> 12.1 The Liquidator undertakes in favour of Fingal not to make, bring or support any application or proceeding to set aside, avoid or otherwise challenge the enforceability of the Fingal Charge.
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> 12 .2 In the event a court of relevant jurisdiction determines the Fingal Charge is void or otherwise unenforceable as against the Company the Liquidator will not oppose any application by Fingal for an order in its favour under section 564 of the [*Corporations Act*].

36 As will be seen, some (although not all) of the above provisions were retained, in substantially the same form, in later funding agreements.

37 Returning to the relevant background events, on 19 August 2013, the liquidator applied for court approval to enter into the first funding agreement under s 477(2B) of the *Corporations Act.*

38 Section 477(2B) of the *Corporations Act* provides:

> 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 an agreement under which a security interest arises or is created) if:
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> (a) without limiting paragraph (b), the term of the agreement may end; or
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> (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;
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> 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.

39 On 30 September 2013, the agreement was approved by an associate judge.[4]

40 On 25 November 2013, Robson J heard an appeal against the decision of the associate judge. On 11 March 2014, he allowed the appeal and set aside the orders of the associate judge.[5]

41 An important basis of the judge's decision was the presence of cl 12 of the agreement, by which Ryeland undertook not to challenge the enforceability of the Fingal charge.[6] The judge considered that it was not in the interests of creditors for the liquidator to surrender the opportunity to challenge the Fingal charge.[7] The judge stated:

> The liquidator is to act for the benefit of all creditors without fear or favour. In this case, the joint venture parties have fallen out. The Fingal proceeding involves a claim by a company associated with Mr Melville (Fingal) against a company associated with Mr Leggo (NDP). Mr Melville, through his company, seeks to finance the liquidator of AVSS to pursue a claim against Mr Leggo and NDP for the primary benefit of Fingal, as Fingal will have priority rights as a secured creditor to any moneys recovered. A term of that finance is that the liquidator will not challenge the Fingal charge despite the

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4 See *Ascot Vale Self Storage Centre Pty Ltd v Wallace–Smith* [2013] VSC 519.

5 See *Re Ascot Vale Self–Storage Centre Pty Ltd (in liq)* (2014) 98 ACSR 243; [2014] VSC 75 ('First Agreement Reasons').

6 See [35] above.

7 First Agreement Reasons 268 [146].

> possibility that AVSS was insolvent when the charge was created, and the possibility that the charge was created to defeat the interests of the unsecured creditors. Thus, Mr Melville (and those joint venturers siding with him) have been able to sue NDP directly in the Fingal proceeding, and put pressure on NDP and Mr Leggo through the liquidator suing them in the AVSS proceeding, while at the same time preventing an attack by the liquidator on the Fingal transactions which are the very securities that support the Fingal proceeding.[8]

42 Shortly afterwards, on 11 June 2014, Nom de Plume and Mr Leggo sought orders in the Nom de Plume proceeding that AVSS provide security for their costs. On 19 June 2014, consent orders were made that AVSS provide security for costs, with the quantum of such costs to be agreed by the parties by July 2014 or, failing agreement, fixed by the Court. The proceeding was stayed pending the provision of security.

Second funding agreement

43 On 8 August 2014, the liquidator applied for court approval of a second funding agreement. The parties to the second funding agreement were the same as the parties to the first funding agreement: the liquidator, AVSS, Fingal as guarantor, and Ryeland as funder.

44 The terms of the second funding agreement were substantially the same as the first funding agreement, with one relevant exception: the second funding agreement did not include the liquidator's undertaking not to challenge the enforceability of the Fingal charge contained in cl 12 of the first agreement.

45 The application for court approval of the second funding agreement was adjourned a number of times to allow time for the Fingal proceeding to be heard by a judge in the Trial Division, and for judgment in that proceeding to be delivered. The trial of the Fingal proceeding was heard by Sifris J in September and October 2014. The judge delivered his reasons on 20 February 2015, making final orders on 23 April 2015. The judge declared the Fingal charge valid and enforceable and ordered

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8 Ibid 270 [156].

Nom de Plume to pay Fingal amounts it had received in excess of the amounts secured by Nom de Plume's charge, as well as amounts that Nom de Plume caused to be wasted or not paid according to priority.[9]

46 The decision was appealed. The appeal was heard by this Court on 8 and 9 October 2015. After this Court had reserved its decision in the appeal but before it had delivered judgment, the application for approval of the second funding agreement was heard by a judge in the Trial Division (Judd J).

47 On 22 December 2015, the application for approval of the second funding agreement was dismissed.[10] Judd J considered that the removal of the liquidator's undertaking not to challenge the enforceability of the Fingal charge did not eliminate the fundamental problem with the first funding agreement: the agreement was not in the interests of creditors.[11] That problem persisted in the second funding agreement because, like the first agreement, it (a) required that Ryeland consent to proceedings and (b) afforded Ryeland a right to terminate the agreement (which it would almost certainly exercise if the liquidator challenged the Fingal charge). The judge termed these common elements of the two funding agreements the powers of 'approval and termination'. The continued presence of those powers meant that the Melville interests remained in a 'position to control the nature and scope' of the litigation, thus compromising the liquidator's duty to the company and unsecured creditors.[12] The judge stated that he would refuse the application for approval on this basis alone.

48 Nonetheless, the judge also identified other reasons for refusing the application, including that:

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9 See *Fingal Developments Pty Ltd v Nom De Plume Nominees Pty Ltd* [2015] VSC 44, [219] (Sifris J).

10 *Ascot Vale Self Storage Centre Pty Ltd* [2015] VSC 751 ('Second Agreement Reasons').

11 Ibid [10].

12 Ibid [11], [40].

(a) the application was premature, as this Court had yet to deliver its decision in the appeal in the Fingal proceeding;[13]

(b) the 40 per cent funding fee was unusually high and, since the Melville interests and Fingal were interested in the proceeding, the funding agreement was not an arm's length commercial arrangement;[14] and

(c) there was uncertainty about the potential return to creditors under the agreement given the limited information provided by the liquidator, and, in any event, there were doubts about the prospect of any recovery for arm's length unsecured creditors under the agreement.[15]

Third funding agreement

49 On 14 July 2016, this Court delivered judgment in the appeal in the Fingal proceeding, allowing the appeal in part.[16] Final orders were made on 6 October 2016. In brief, the Court found the Fingal charge enforceable but significantly reduced the amount payable by Nom de Plume to Fingal.

50 On 2 December 2016, the liquidator issued a report to creditors, seeking approval to enter into a third funding agreement, this time with Fingal as funder. The liquidator stated that he had unsuccessfully sought an arm's length funding offer following the decisions rejecting the applications for court approval of the earlier funding agreements.[17]

51 On 19 December 2016, there was a meeting of creditors, comprising the Australian Taxation Office, Galvin Constructions and Fingal. The creditors passed a resolution permitting the liquidator to enter into a third funding agreement on

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13 Ibid [38].

14 Ibid [12], [37].

15 Ibid [38]–[39].

16 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* (2016) 337 ALR 303; [2016] VSCA 159.

17 Reasons [54].

behalf of AVSS 'with such creditors or other parties' in relation to the Nom de Plume proceeding and 'such other claims' as the liquidator may determine are in the interests of AVSS.[18]

52 On 8 May 2017, the liquidator entered into the third funding agreement. The parties to the third funding agreement were the liquidator, AVSS, Fingal as funder in place of Ryeland, and Messrs Melville and Crozier as guarantors of the new funder's obligations.

53 Again, apart from the differences in parties, the terms of the third funding agreement largely mirrored those of the previous funding agreements. For example, as in the previous funding agreements, the liquidator's indemnity was confined to liabilities connected with costs in proceedings to which the funder consented.[19] Similarly, as in the previous funding agreements, the funder enjoyed a right to terminate the agreement on 28 days' written notice.[20] Further, as in the previous funding agreements, there was a clause which provided that the liquidator would (a) retain and be solely responsible for instructing lawyers and (b) be entitled, at his absolute discretion, to confer with the funder in relation to the proceedings, but (c) not be bound to follow the funder's advice or wishes.[21]

54 However, there were three respects in which the third funding agreement differed from the previous funding agreements: (a) there was no provision for a funding fee; (b) the liquidator's remuneration was fixed only until mediation; and (c) the liquidator would consent to any application by the funder under s 564 of the

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18 Reasons [55].

19 However, 'Actions' were defined slightly differently in the third funding agreement than in the previous agreements, so as to mean: (a) the Nom De Plume proceeding; (b) the two previous applications for funding approval; (c) legal proceedings issued by the liquidator or AVSS to which Fingal has consented; and (d) all appeals from interlocutory decisions delivered in the conduct of the proceedings. Subsections (a) and (b) were unique to the third funding agreement. However, the overall effect was unchanged: the liquidator's indemnity continued to be confined to costs in proceedings to which Fingal had already consented, or would consent. See [27]–[29], [44] above.

20 See [30] above.

21 See [31] above.

Corporations Act that would give Fingal an advantage over other creditors, subject to Fingal complying with an agreed order of priority of payment in respect of Action Costs and other disbursements.[22]

55 The liquidator did not make an application for court approval of the third funding agreement.

Associate judge's decision

56 On 1 March 2018, the liquidator and AVSS made an application to lift the stay of the Nom de Plume proceeding on the provision of security. On 9 March 2018, Nom de Plume and Mr Leggo made an application of their own seeking a permanent stay of the proceeding on the basis that the proceeding was an abuse of process.

57 On 10 and 11 May 2018, an associate judge heard the two applications. On 3 May 2019, the associate judge delivered his reasons, and on 9 May 2018 he made orders permanently staying the proceeding on the basis that it was an abuse of process. The associate judge identified the following reasons why the proceeding should be permanently stayed.

58 First, the associate judge considered the Nom de Plume proceeding not to be undertaken for the benefit of the general body of AVSS's creditors, but rather for the sole benefit of the Melville interests. The Nom de Plume proceeding was said to constitute 'litigation by proxy' by the Melville interests, and a 'quest to recover for their interests the claims that they were unsuccessful in recovering' in the Fingal proceeding.[23]

59 Secondly, the associate judge considered that that the third funding agreement continued to contain elements identified as unacceptable in the decisions rejecting court approval of the earlier agreements.[24] Broadly, he considered that the

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22 Reasons [56].

23 Associate Judge's Reasons [221]–[222].

24 Ibid [223].

terms of the third funding agreement would give the Melville interests 'de facto control' of both the AVSS liquidation and the Nom de Plume proceeding. Primarily, this was because the power of termination allowed the Melville interests to 'withdraw funding at quite short notice' if not satisfied with the liquidator's conduct. Thus, the power of termination operated as a practical disincentive to the liquidator taking steps adverse to the Melville interests, including in relation to the Fingal charge.[25] Should the liquidator take such steps, it was highly likely that the power of termination would be exercised.

60 Thirdly, the associate judge considered that the rejection of the applications for court approval of the earlier funding agreements made it more compelling that court approval be again sought in respect of the third funding agreement. The associate judge regarded the liquidator's explanation for failing to seek approval of the third agreement to be 'quite disingenuous and most unconvincing'.[26]

61 Fourthly, the associate judge discounted the resolution approving the third funding agreement on the basis that it was enabled, 'in large part' by the Melville interests' effective control over creditors' meetings. That control was said to have been achieved by the Melville interests obtaining the assignment of debts owed to significant unsecured creditors for non-commercial sums.[27]

62 Fifthly, the associate judge considered that 'extraordinary sums' had been incurred by AVSS and the liquidator in the Nom de Plume proceeding, and in the two unsuccessful applications for court approval of the funding agreements. The costs incurred were, in his estimation, disproportionate to the limited progress in the proceeding, likely to reduce the amount of recovery by creditors, and such as to 'bring the court's procedures into disrepute'.[28]

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25 Ibid [225]–[226].

26 Ibid [223].

27 Ibid [224].

28 Ibid [227]–[228].

63 Sixthly, the associate judge considered that, absent a permanent stay, Nom de Plume and Mr Leggo would suffer prejudice. This was because there had already been significant delay in the proceeding, attributable, he considered, to the liquidator twice unsuccessfully seeking court approval for the earlier funding agreements.[29] The proceeding remained at an early stage, and if it continued, Nom de Plume and Mr Leggo would suffer prejudice flowing from the stressful and resource-intensive nature of litigation.[30]

Trial judge's decision

64 On 28 and 29 August 2019, an appeal against the decision of the associate judge was heard by a judge of the Trial Division. The judge allowed the appeal and lifted the stay of the proceeding on the provision of security for costs.

65 The judge first set out the factual background, the reasons of the associate judge, the seventeen grounds of appeal, and the submissions of the parties. The judge then set out the principles applicable to abuse of process. He then proceeded to identify the following seven errors in the associate judge's reasons.[31]

66 First, the associate judge erred in finding that the Nom de Plume proceeding was not for the benefit of the general body of creditors of AVSS, but rather for the sole benefit of the Melville interests.[32] In the proceeding, AVSS claims a significant total sum: the principal claim under cl 3.1 of the settlement deed is for an amount not exceeding $6,246,821, and the claim for insolvent trading is for a sum not exceeding $2,711,090. The total potential recovery, including interest, exceeds $13 million plus costs. There was no suggestion that the claims did not enjoy reasonable prospects of success, and no evidence that recovery would not return a substantial benefit to the general body of creditors, even allowing for full recovery

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29 Ibid [230].

30 Ibid [235].

31 Reasons [115].

32 Ibid [116].

under the Fingal charge. Indeed, the liquidator's uncontested evidence was that recovery for unsecured creditors depended on the proceeding succeeding. Further, entry into the third funding agreement was approved by creditors, who included, in addition to Fingal, the Australian Taxation Office and Galvin Constructions. Those creditors can be presumed, by that resolution, to have assessed the proceeding to be in their commercial interests.[33] In any event, it did not follow from the fact that Fingal was likely to be the principal beneficiary of the Nom de Plume proceeding that the proceeding was solely for the benefit of Fingal, nor that Fingal acting as funder constituted an abuse. Rather, the trial judge considered it unexceptional and consistent with the objectives of the *Corporations Act* that substantial creditors fund liquidators to bring proceedings, even in circumstances where they stand to recover much, and even all, of the proceeds of those proceedings.[34]

67 Secondly, the associate judge erred in finding that the proceeding was 'fashioned by the Melville interests' to recover claims they were unsuccessful in recovering in the Fingal proceeding.[35] This was because neither of the claims in the Nom de Plume proceeding was brought in the Fingal proceeding, each of the claims in the Nom de Plume proceeding was genuine, viable and brought by the liquidator for the benefit of creditors, and the Nom de Plume proceeding was filed before the substantial failure of the claims in the Fingal proceeding in this Court.[36]

68 Thirdly, the associate judge erred in finding that the Melville interests had gained effective control over the creditors' meeting approving the third funding agreement by reason of the assignment of debts to the Melville interests by two unsecured creditors. This was because one of the assignments occurred after the relevant meeting, and the other could not have affected the vote in favour of the

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33 Ibid [117].

34 Ibid [118]–[119]. Reference was made to, amongst other authorities, *State Bank of New South Wales v Brown* (2001) 38 ACSR 715, 728 [91]–[92] (Hodgson JA, Handley JA agreeing at 722 [45]).

35 Reasons [120]–[124].

36 See [24] and [49] above.

funding agreement.[37]

69 Fourthly, the associate judge erred in finding that the rejection of the two earlier funding agreements made it 'compelling' for the liquidator to again seek court approval of the third funding agreement. That finding rested on two flawed findings: first, that the liquidator's explanation for not again seeking court approval was 'disingenuous and unconvincing'; and secondly, that the third funding agreement contained substantially the same features which prevented court approval of the predecessor agreements. In relation to the first finding, the judge considered that the liquidator could have been subject to criticism if he had unnecessarily sought court approval after having already received creditor approval.[38] In relation to the second finding, the judge considered that it was not open because the third funding agreement differed from the first and second funding agreements in two significant respects:

(a) it did not include the provision in the first funding agreement preventing the liquidator from challenging the validity of the Fingal charge;[39] and

(b) it did not include (as had the first and second funding agreements) provision for a funder's fee.[40]

These two differences were sufficient to conclude that the third funding agreement was not substantially similar to the first and second funding agreements.[41]

70 Fifthly, the associate judge erred by finding that, because of the power of termination, the Melville interests had de facto control of the Nom de Plume

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37 Reasons [124]–[125].

38 Ibid [130].

39 See [35] above.

40 See [48(b)] above.

41 Reasons [131]–[133]. In respect of the powers of 'approval and termination', the judge observed that any effect on a liquidator's independence caused by the presence of such powers is less relevant in an application for a permanent stay of a proceeding than it may be in an application for court approval of a funding agreement.

proceeding.[42] Whilst Fingal, as funder, enjoyed a measure of control under the third funding agreement, that control was both appropriate and less than total.[43] The power of termination was a 'commercially reasonable and appropriate term' given the expense of litigation and the fluidity of proceedings, the funder's ongoing liability for obligations accrued prior to termination, and the liquidator's capacity to seek alternative funding arrangements in the event of termination. Further, the associate judge erred in presuming that the liquidator would, by reason of Fingal's power of termination, be completely or permanently deterred from making inquiries in relation to the Fingal charge since any inquiries in relation to the Fingal charge could conceivably occur after the Nom de Plume proceeding had concluded.[44]

71 Sixthly, the associate judge erred in treating the quantum of fees and costs as supportive of an allegation of abuse of process. Primarily, this was because the associate judge's reasons did not disclose the basis on which he concluded the fees and costs to be extraordinary in the circumstances.[45]

72 Seventhly, the associate judge erred in finding that the delay in the proceeding had been solely the responsibility of the liquidator. This was because a substantial cause of the delay was the parties' joint decision to await determination of the question of the validity of the Fingal charge.[46]

73 Next, the judge rejected seven submissions advanced by Mr Leggo and Nom de Plume as to why the appeal should be dismissed, and the permanent stay maintained.

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42 Reasons [136].

43 The judge referred to various authorities recognising the propriety of similar provisions of funding agreements. See, in relation to termination powers, *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 ('*Spatialinfo*'); *Kelly, Re Australian Institute of Professional Education Pty Ltd (in liq)* [2018] FCA 642 ('*Kelly*'). See, generally, *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479 ('*Clairs Keeley*'); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 ('*Campbells*').

44 Reasons [148].

45 Ibid [154]–[155].

46 Ibid [170].

74 First, he rejected the submission that it was an abuse of process for the liquidator to commence the proceeding without funds in place to conduct the trial to its conclusion.[47] In part, this was because at the time the liquidator commenced the proceeding, the first funding agreement was in place, and the liquidator could reasonably have expected then that the agreement would either be approved in some similar form by the Court, or by creditors. In any event, no authority was identified for the proposition that to commence and/or maintain a proceeding without funds in place to conduct that proceeding to its conclusion constituted an abuse of process.

75 Secondly, he rejected, for the same reasons, the submissions that it was an abuse of process for the liquidator to maintain the proceeding without funds in place to conduct the trial to its conclusion, and that the liquidator should have therefore discontinued the proceeding during the period in which there was no funding.[48]

76 Thirdly, he rejected, on the basis that it was premised on the preceding submissions, the submission that had the liquidator properly waited until November 2017 (when he had the requisite funds in place) to commence the proceeding, the claim of insolvent trading against Mr Leggo would have been statute-barred.[49]

77 Fourthly, he rejected the submission that the liquidator continued to lack the funding to conduct the trial promptly and efficiently, or to its conclusion, because funding under the third funding agreement depended on the approval of the Melville interests and was vulnerable to termination.[50] This was because the term providing for termination was reasonable, and, despite it, the liquidator enjoyed a significant degree of control in the conduct of the proceeding. The liquidator was solely responsible for retaining and instructing lawyers, was obliged to confer with the funder only on 'significant issues', and was not bound to follow the funder's

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47 Ibid [173].

48 Ibid [174].

49 Ibid [178].

50 Ibid [179].

advice. Likewise, the liquidator was free to determine, 'in his absolute discretion' whether to make, accept or reject an offer, subject only to an obligation to notify the funder. Further, there was no evidence as to why the arrangements for the progressive funding of the proceeding — in which the funding provided at each stage of the proceeding was to be determined by agreement between the funder and liquidator, or, failing agreement, an independent costs assessor — would impact on the prompt and efficient conduct of the proceeding.

78 Fifthly, the judge rejected the submission that it was necessary to stay the proceeding to safeguard the 'administration of justice', given the time which had elapsed since the events the subject of the proceeding.[51] This was because both parties had been on notice of the claims for some time, and procedural steps in the proceeding could be completed on an expedited basis. In any event, the delay was neither inordinate, nor the sole responsibility of the liquidator and AVSS.

79 Sixthly, the judge rejected the submission that lifting the stay in circumstances in which court approval of the third funding agreement had neither been sought nor given would bring the interests of justice into disrepute. This was because the liquidator was entitled (even without court approval) to act on the basis of the creditors' resolution approving the agreement, and the third funding agreement was sufficiently different to the previous two agreements.[52]

80 Finally, the judge rejected a related submission that the Court should not lift the stay on the provision of security obtained from the Melville interests on the terms of the third funding agreement since it would give the imprimatur of the Court to funding arrangements which have been twice rejected. Again, this was because the third funding agreement was sufficiently different to the previous two agreements, such that it neither compromised the liquidator's independence nor was contrary to

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51 Ibid [180].

52 Ibid [181].

the interests of creditors.[53]

Proposed grounds of appeal

81 Nom de Plume advances three proposed grounds of appeal:

1. The judge erred in finding that it was not an abuse of process for the second respondent (liquidator) to prosecute the proceeding with funding from the Melville interests on terms materially similar to and with the same effect as those that the Court had twice ruled compromised the liquidator's independence, without seeking the Court's approval.

2. The judge erred in finding it was not a breach of ss 7 and 25 of the *Civil Procedure Act* or an abuse of process that warranted a stay, for a liquidator, who was unfunded and had no other means in place to prosecute the proceeding, to bring a 'holding' proceeding and to maintain that proceeding, for more than six years, including beyond an applicable limitation period, in the hope of obtaining funding.

3. The judge erred in finding that the liquidator's delay in prosecuting the proceeding, of over four years, whilst funding was sought, was not inordinate and did not warrant the proceeding being stayed as an abuse of process.

82 The grounds of appeal were accompanied, inappropriately, by prolix attacks, running to some 16 pages, on 'specific findings' of the primary judge. It is unnecessary to refer to this material. The grounds are sufficiently stated as set out above.

Applicants' submissions

83 The submissions of the applicants implicitly accepted that the judge was entitled to re-exercise the discretion, having identified relevant errors on the part of the associate judge. In these circumstances, attention was focussed on the way in which the judge re-exercised the discretion, and we proceed on that basis. The applicants accepted that they needed to identify *House v The King*[54] error on the part of the judge.

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53 Ibid [182].

54 (1936) 55 CLR 499.

84 As the argument proceeded, there were two bases on which it was said that the proceeding ought to have been stayed. First, the applicants submitted that the proceeding was an abuse of process by reason of the fact that the liquidator was funded to pursue it by an arrangement which had the same vices as the two earlier funding agreements which the Court had refused to approve. It was contended that the gravamen of the earlier decisions had been that the liquidator's independence had been unacceptably diminished by virtue of the Melville interests having an inappropriate degree of control over the litigation, taking the case outside the ordinary situation of a creditor funding a liquidator to pursue claims which may ultimately be to that creditor's benefit. That level of control was said to be found in the agreements' provisions for the funder to approve or consent to proceedings and by the ability of the funder to terminate the agreement for any reason.

85 The applicants submitted that the obtaining of consent from the body of creditors as a whole did not ameliorate the problems with the agreement. It was said that, when a court is asked to give its approval to a contract to which a liquidator is a party, considerations arise beyond the interests of creditors, who are permitted to act entirely according to their own self-interest. In particular, the court is concerned with the propriety of the liquidator's conduct and the role of the liquidator in identifying delinquencies in the management of the company. In a case involving litigation funding, matters may arise relevant to the administration of justice, in the context of the anticipated litigation. As such, the fact that the Court twice refused approval on the basis of identified vices in the agreements meant that those vices had to be addressed and removed, rather than being approved by creditors acting in their own interests.

86 The applicants submitted that the primary judge erred in finding that the third funding agreement was significantly different to the first two, and holding that it was not open to the associate judge to hold that they were substantially similar.[55]

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[55] Reasons [131]–[132].

It was further contended that the judge erred in distinguishing the decision of Judd J on the basis that Judd J had regarded the application for approval as premature while the Fingal litigation was pending, and on the further basis that the nature of the application before Judd J was very different from an application for a permanent stay.[56]

87 The second asserted basis for a stay concerned the question of delay. The applicants submitted that the period that had elapsed since the proceeding was commenced on 1 August 2013 gave rise to inherent prejudice.[57] There was also said to be actual prejudice, revealed by the extent to which the liquidator had been unable to point to sufficient particulars in his pleading, as well as the stresses of litigation caused to Mr Leggo. The applicants submitted that it was no explanation that the liquidator was seeking funding or that the proceeding was stayed while that happened. Even though the Fingal proceeding was resolved on 14 July 2016, the liquidator did not enter into the third funding agreement until 8 May 2017. He had not sought to have the stay lifted until January 2018. The applicants submitted that the primary judge was in error in regarding the obtaining of funding as a reason for the delay, or as a satisfactory explanation.[58]

88 It was submitted that, especially since the liquidator was an officer of the Court, this delay was inexcusable and contrary to the overarching purpose in the *Civil Procedure Act 2010* and the specific duty in s 25 of that Act to use reasonable endeavours to act promptly and minimise delay. The Court has powers to act in the interests of the administration of justice to curtail the rights of those who breach their obligations under the Act.[59]

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56 Ibid [133], [181]–[182].

57 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 552–3 (McHugh J) ('*Brisbane South*').

58 Reasons [173]–[174].

59 *Kuek v Devflan Pty Ltd* [2012] VSC 571, [78]–[79] (Kyrou J).

Leave to appeal

89 In our opinion, the arguments sought to be advanced by the applicants reveal that the proposed appeal has prospects of success that are real, in the sense of not being fanciful.[60] The respondents contended that leave to appeal should be refused even if the Court came to that conclusion, on the basis that the matter was fixed for trial in June and if any prejudice had been occasioned to the applicants, it could be addressed at trial. It was submitted that the applicants had long been on notice of the claims against them and that justice was best served by an imminent trial on the merits. In other words, refusing leave would occasion no substantial injustice and the Court should therefore take that course.[61]

90 The applicants submitted that, if the proceeding constitutes an abuse of process, it simply should not be allowed to continue. It was submitted that the opportunity to advance that argument is lost once the proceeding has been heard. Whether or not that is strictly so in the present case may be doubted, at least to the extent that any suggested prejudice may be able to be ameliorated in the course of a trial. But we accept that, if there is a real prospect of establishing that a proceeding is an abuse of process, it would generally be unjust to require the party making that allegation to prepare for and conduct the trial of the proceeding in question before making the argument. Such a course may lead to a trial being conducted which ought not to have proceeded. We therefore decline to exercise the discretion which the Court has to refuse leave in a case having real prospects of success.

91 Leave to appeal will be granted.

Abuse of process — funding agreement (ground 1)

92 It was an essential part of the applicants' argument in respect of abuse of

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60 *Kennedy v Shire of Campaspe* [2015] VSCA 47, [12]–[13] (Whelan and Ferguson JJA).

61 Ibid [14]; *PCCEF Pty Ltd v Geelong Football Club Ltd [No 2]* [2019] VSCA 148, [40] (Whelan, McLeish and Emerton JJA).

process arising by virtue of the funding agreement that the agreement contained the same vice as had been found to lie in its two predecessors, leading to the Court refusing to give its approval to them under s 477(2B) of the *Corporations Act*. It is convenient therefore to identify the matters which led Robson J and Judd J, respectively, to refuse approval.

93 Robson J held that there was evidentiary support for the argument that the Fingal charge and loan may have been entered into for the purpose of defeating, delaying or interfering with the rights of any or all of AVSS's creditors, within the meaning of s 588FE(5) of the *Corporations Act*.[62] He held that a successful challenge to those transactions would be of considerable benefit to creditors and that Fingal would probably be required to disgorge over $1 million for the benefit of unsecured creditors (or unpaid secured creditors).[63] Robson J went on to observe that the practical effect of the first funding agreement was that the current liquidator had deprived himself of the right to take such action. Even though a future liquidator might not be similarly impeded, from a commercial point of view there was a large impediment to the statutory rights ever being invoked against Fingal.[64] Moreover, if the Fingal charge and loan were held to be void or voidable, there may be consequences for the solvency of AVSS and therefore on the insolvent trading claim against Mr Leggo.[65]

94 These considerations led Robson J to conclude that he was not satisfied that it was in the interests of creditors generally for the liquidator to surrender the opportunity to challenge the Fingal charge and loan.[66]

95 The judge set out a further relevant factor, which was related, namely the fact

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62 Fist Agreement Reasons 268–7 [139]–[142].

63 Ibid 266 [131].

64 Ibid 268 [143].

65 Ibid 268 [144].

66 Ibid 268 [146].

that the Melville interests had sued Nom de Plume in the Fingal proceeding and the funding agreement facilitated the present proceeding, which put pressure on Nom de Plume and Leggo while simultaneously preventing the liquidator from challenging the transactions which underpinned the Fingal proceeding.[67] That was because cl 12 of the first funding agreement prevented an attack on the Fingal charge and loan.[68]

96 While the nature of the 'vice' in the first funding agreement can be described, at a high level of generality, as a diminution of the independence of the liquidator and the surrender of an inappropriate degree of control to the funder (representing the Melville interests), in substance the principal problem identified by Robson J was that the agreement interfered with the liquidator's independence in a very specific manner that led to an outcome not in the interests of the body of creditors as a whole. That interference was principally caused by cl 12, which bound the liquidator not to make, bring or support any proceeding to set aside or otherwise challenge the enforceability of the Fingal charge. The applicants submit that this result was brought about, in effect, even without that specific provision. It is convenient to return to this argument in the context of the second and third funding agreements.

97 The second funding agreement lacked the former cl 12. However, Judd J regarded the ability or inclination of the liquidator to challenge the Fingal charge as 'only one aspect of the vice identified by Robson J'.[69] He observed, at the same time, that as a result of the intervening decision of Sifris J in the Fingal proceeding, any further opportunity on the part of the liquidator to challenge the Fingal charge 'must be limited'.[70] Judd J went on to point to other considerations that led him to refuse approval.

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67 Ibid 270 [156].

68 See [35] above.

69 Second Agreement Reasons [10], [28], [40].

70 Ibid [11].

98 First, he held that the funding agreement gave the Melville interests the ability to control the litigation and that this compromised the liquidator's duty to the company and unsecured creditors.[71] He also noted the 'unusually high' profit allowed to the funder, the provision requiring the funder's consent in the definition of 'Action' and the funder's entitlement to terminate the agreement on 28 days' notice.[72] Next, he stated that 'any application for litigation funding' for the proceeding should await the outcome of the appeal in the Fingal proceeding, which was then pending.[73] He also referred to the state of the evidence as to the likely return to unsecured creditors.

99 The applicants submit that Judd J identified and relied on a compromising of the liquidator's independence which emerged from provisions of the second funding agreement which remain present in the third agreement. Even so, a significant difference in context between the second and third agreements cannot be overlooked, namely the determination of the appeal in the Fingal proceeding following Judd J's decision. Moreover, the third agreement does not contain the funder's fee. Some of the matters that were of concern to Judd J have therefore ceased to apply. Similarly, the determination of the Fingal proceeding means that the concern of Robson J about the Leggo interests being pressured in that proceeding as a result of the funding agreement could no longer arise.

100 It is then necessary to consider the question of the effect of the funding agreement on the liquidator's independence. It may be accepted, as Judd J held and the applicants submitted, that the requirement that the funder consent to proceedings in order for them to fall within the definition of 'Action' (and therefore cause relevant costs to constitute 'Action Costs'), together with the funder's right of termination for any reason, gave the Melville interests (through the funder) a measure of influence over the liquidator's conduct of the proceeding which detracted

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71 Ibid.

72 Ibid [12]–[14].

73 Ibid [36], [38].

from his independence. That influence was not significantly diminished by the different drafting of the definition of 'Action' in the third agreement, by which the present proceeding is within the definition irrespective of the funder's consent.[74] By reason of the affecting of the liquidator's independence in this manner, Judd J was 'not persuaded that the proposed funding agreement [was] for the benefit of unsecured creditors' and so approval was refused.[75]

101 This was the same vice as Robson J had identified in the first agreement, when he stated that the liquidator 'is to act for the benefit of all creditors without fear or favour'.[76] Both judgments reflect application of the authorities governing applications for court approval under s 477(2B). As Judd J pointed out, by reference to authority, an overriding duty of a liquidator is to serve the interests of creditors as a whole. In that context, approval under s 477(2B) is not an endorsement of a proposed agreement, but permission for the liquidator to exercise his or her own commercial judgment by entering into that agreement.[77] Judd J cited with approval Austin J's articulation of factors relevant to the exercise of the Court's discretion to approve a funding agreement, in *Leigh re King Bros*.[78] Those factors include the prospects of success in the litigation, the interests of creditors other than the proposed defendant, the possibility of oppression in bringing the proceedings, the nature and complexity of the cause of action, the possibility of other funding options, the premium payable to the funder, the liquidator's consultations with creditors and the risks involved (including in respect of costs).

102 It would be open to a court to decline approval under s 477(2B) on the basis that pursuit of the litigation contemplated by the proposed funding agreement would constitute an abuse of process. The reference to the possibility of oppression

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74 See [44] and n 19 above.

75 Second Agreement Reasons [41].

76 First Agreement Reasons 270 [156]; see also 271 [159].

77 Second Agreement Reasons [25].

78 [2006] NSWSC 315, [25].

in a proceeding in the list compiled by Austin J indicates as much. If approval were to be declined on that basis, it may very well constitute an abuse of process for the liquidator to proceed with the litigation after receiving permission to do so by one of the other means for which s 477(2B) provides. But that is not this case. As has been seen, Judd J declined approval, not because the conduct of the proceeding would constitute an abuse of process or otherwise be oppressive to the Leggo interests, but because the liquidator, by entering into the agreement, would inappropriately diminish his independence and, in particular, his ability to act independently in the interests of unsecured creditors.

103 In this way, the decision of Judd J turned on the obligation of the liquidator to act in the interests of the creditors as a whole, especially so as to accommodate unsecured creditors. Section 477(2B) recognises, however, that questions of balance among creditors are able to be addressed by means of a meeting of creditors. The applicants point out, correctly, that at such a meeting creditors are entitled to act entirely in their own self-interest, leaving out of account matters to which a court will have regard in deciding whether to grant approval. But that is a result which the legislature has plainly contemplated and condoned. It would be perverse if a meeting of creditors under the section could not grant approval simply because a court has not been satisfied that the creditors as a whole would benefit from the arrangement. To the contrary, it has often been noted by courts exercising the power under s 477(2B) that creditors are the best judges of what is in their own interests.[79]

104 It follows that nothing in the reasons of Judd J precluded the liquidator from pursuing the litigation after obtaining approval of the third funding agreement from creditors rather than the Court. That approval, in effect, addressed the matters which Judd J had relied upon in declining approval.

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79 *Re McDermott* [2019] VSCA 23, [93] (Whelan AP, McLeish and Hargrave JJA); *Re One.Tel Ltd* (2014) 99 ACSR 247, 254–5 [30] (Brereton J); [2014] NSWSC 457. See also *Re English, Scottish & Australian Chartered Bank* (1893) 3 Ch 385, 409 (Lindley LJ).

105 Accordingly, the primary judge was correct to conclude that the liquidator could have been subject to criticism if he had sought Court approval after receiving the approval of the creditors.[80] Such approval would have been redundant. The judge was also correct to observe that the application before Judd J was very different to the application for a permanent stay. In particular, the stay application raised issues about the administration of justice which did not feature in the reasoning of Judd J. To the extent that the stay application depended on notions of a liquidator's independence, there was an overlap, but as already explained that matter was addressed by the resolution of creditors.

106 The applicants were at pains to make clear that they accepted that a creditor may fund a liquidator to pursue litigation against another creditor. So much is made plain by s 564 of the *Corporations Act*, which permits a funding creditor to seek orders conferring an advantage upon them by reason of the risk assumed.[81] But once that is accepted, and the creditors as a whole have addressed, by resolution, judicial concerns about the liquidator not acting in their collective interests, the provisions of the third funding agreement upon which the applicants rely can be seen as no more than the protections which any funder of litigation would be entitled to expect.

107 First, the fact that the funder is required to consent to further proceedings if the funder's money is to be spent on such proceedings is entirely unsurprising. Secondly, the fact that funding can be withdrawn at the funder's discretion enables the funder to have a measure of influence over the litigation. But it goes no further than enabling funding to be stopped. It does not permit the recovery of funds already advanced or the avoidance of liabilities incurred. Nor does it prevent the liquidator from obtaining other funding, or from continuing the proceeding with such funds as remain available under the agreement. A liquidator cannot expect a

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80 Reasons [130].

81 See also *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612, 644 [136] (Austin J); [2003] NSWSC 467.

blank cheque to pursue whatever litigation he or she wishes, and the present liquidator is not prevented from seeking other means of pursuing litigation to which the funder does not consent.

108 The primary judge reached conclusions consistent with this analysis. In doing so, he was amply supported by authority, to which only brief reference is necessary.

109 In *Clairs Keeley v Treacy*,[82] Steytler, Templeman and McKechnie JJ held that it was acceptable for a litigation funder to have a degree of control over the litigation, provided that the interests of the funded party are not made subservient to those of the funder and the party is acting in its own interests on the advice of independent solicitors. The Court described a degree of control, within these parameters, as 'inevitable', lest the risk be too great for the funder to undertake.[83] In particular, a right on the part of a funder to terminate the agreement has been accepted and described as 'almost unavoidable'.[84]

110 The applicants submitted that these authorities relate to private litigants and are 'readily distinguishable' by virtue of the liquidator's status as an officer of the Court with duties to act independently and in the interests of all creditors and because of the status of the funder as a protagonist not at arm's length from the litigation. We reject that submission. As the applicants accept, a liquidator may accept funding from a creditor with an interest in the proceeding. It follows that, despite the differences identified, a funding creditor may act to protect its interests and that principles as to that matter in the context of arm's length funding are relevant.

111 For these reasons, the applicants have not established error on the part of the

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82 *Clairs Keeley* (2004) 29 WAR 479, 489 [55], 493 [71].

83 Ibid 502 [124]; see also *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 235 [137] (Mason P, Sheller JA agreeing at 261 [293], Hodgson JA agreeing at 261 [294]); *Campbells* (2006) 229 CLR 386, 434 [89] (Gummow, Hayne and Crennan JJ).

84 *Spatialinfo* [2005] FCA 455 [33] (Sundberg J); see also *Clairs Keeley* (2004) 29 WAR 479, 503 [130]; *Kelly* [2018] FCA 642 [26(8)], [30] (Gleeson J).

primary judge. We reject the first ground of appeal.

Delay (grounds 2 and 3)

112 The second and third grounds of appeal concern the delay in the proceeding. The principal argument of the applicants is that the primary judge erred in treating the fact that the liquidator lacked funds as an acceptable explanation for the delay. It is also submitted that the judge erred in making the related finding that the principal cause of delay was awaiting the outcome of the Fingal proceeding.

113 The causes of the delay in the proceeding have been several. As the respondents pointed out, they had funding in place when the proceeding was commenced, on a three month agreement that was capable of being extended by court approval under s 477(2B). The liquidator was initially successful in obtaining that approval.[85] After the decision of Robson J, a stay was in place pending provision of security. It was evidently necessary for steps to be taken to obtain funding to have that stay lifted, and for the requisite approval to be obtained. The parties put the matter effectively on hold while awaiting the outcome of the Fingal proceeding, but during this period the second funding agreement was negotiated and executed and court approval was sought and denied. The liquidator then took the matter of funding to creditors and the third agreement was entered into some seven months after this Court's orders in the Fingal proceeding. There was then significant delay in having the stay lifted, while the parties were in dispute as to the provision of security and the lifting of the stay.[86]

114 The Fingal proceeding had already commenced when the present proceeding started on 1 August 2013. The Fingal proceeding was determined by this Court on 14 July 2016 and final orders were made after further submissions on 6 October 2016. The application to lift the stay was made on 1 March 2018, after entry into the third

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85 See [39] above.

86 Reasons [169].

funding agreement on 8 May 2017. That application was, of course, contested. The period of delay between the resolution of the Fingal proceeding and the liquidator's formal attempt to have the stay lifted was about 19 months.

115 In our view, it has not been shown that the primary judge was wrong to find that it was not open to the associate judge to attribute responsibility for the delay simply to the liquidator or to find that the Fingal proceeding was the principal cause of delay.[87] The evidence reveals that, while the liquidator's lack of funds was responsible for the stay that was in place, both parties took steps that had the effect of extending the period of that stay pending the final determination of the Fingal proceeding. Moreover, the liquidator was taking active steps, while the Fingal proceeding was pending, to obtain funding so as to have the stay lifted. Contrary to the applicants' arguments, to note these matters is not to treat a want of funds as an acceptable reason for delay in litigation. It is simply to recognise that the length of the delay caused by that circumstance was not solely the responsibility of the liquidator.

116 Further, and in any event, the applicants do not point to actual prejudice. While the fact of presumptive prejudice must be acknowledged,[88] the applicants were on notice of the claims against them from an early stage and the parties have been able to plead their cases. Notwithstanding the criticism that may be directed at the liquidator for the 19 month period mentioned above, active steps were taken during that time both to secure funding and to have the stay lifted by consent. It has not been shown that the trial fixed to commence in June will not be capable of achieving the just, efficient, timely and cost-effective resolution of the real issues in dispute, as required by ss 7 and 8 of the *Civil Procedure Act 2010*, or that the respondents have breached their obligation under s 25 to use reasonable endeavours to minimise delay in the proceeding. In other words, the interests of justice do not

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87 Reasons [85], [170].

88 *Brisbane South* (1996) 186 CLR 541, 552–3 (McHugh J).

demand a stay of the proceeding despite the time that has elapsed since its commencement.[89]

117 Grounds 2 and 3 are therefore rejected.

Conclusion and stay application

118 It follows that the appeal is dismissed.

119 We record that we refused the applicants' request to stay the proceeding pending the outcome of this appeal, because the decision of this Court was expected to be handed down well before the trial and the applicants were, in any event, protected in respect of the costs of ongoing preparation by the security which the respondents have provided.

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[89] *Rozenblit v Vainer* (2018) 262 CLR 478, 484 [10], 488 [25] (Kiefel CJ and Bell J), 497–9 [63]–[68], 501 [76], 507 [111] (Gordon and Edelman JJ).

SCHEDULE OF PARTIES

NOM DE PLUME NOMINEES PTY LTD (ACN 006 750 090)	First Applicant
RICHARD JOHN LEGGO	Second Applicant
and	
ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 092 643 939)	First Respondent
SIMON WALLACE-SMITH (IN HIS CAPACITY AS LIQUIDATOR OF ASCOT VALE SELF STORAGE CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION))	Second Respondent