FEDERAL COURT OF AUSTRALIA

McCallum, in the Matter of Re Holdco Pty Ltd (Administrators Appointed) [2020] FCA 666

File number(s):	VID 285 of 2020
Judge(s):	**O'BRYAN J**
Date of judgment:	1 May 2020
Date of publication of reasons:	19 May 2020
Catchwords:	**CORPORATIONS** – application by administrators for leave under s 44C(2)(c) of the *Corporations Act 2010* (Cth) to dispose of property of the companies under administration that is subject to a security interest and property used or occupied by, or in the possession of, the companies under administration but of which someone else is the owner – where application made urgently because of condition precedent to sale proposed by administrators – whether arrangements made that would adequately protect the interests of the secured parties and owners of the property being sold – ancillary relief granted under s 447A of the *Corporations Act* to ensure that intellectual property rights can be transferred unencumbered by security interests
Legislation:	*Corporations Act 2010* (Cth) ss 442C, 444F, 447A, 447D *Federal Court of Australia Act 1976* (Cth) s 37AF(1)(b) *Personal Property Securities Act 2009* (Cth)
Cases cited:	*Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 *Correa v Whittingham* (2013) 278 FLR 310 *Hamilton and Fiorentino as Administrators of Kisoro Pty Ltd v National Australia Bank Ltd* (1996) 66 FCR 12 *Mentha v GE Capital Ltd* (1997) 27 ACSR 696 *Re Le Meilleur Pty Ltd* (2011) 256 FLR 240 *Re Luxtown Pty Ltd (administrators appointed)* [2019] FCA 1861 *Re Renovation Boys Pty Ltd (administrators appointed)* [2014] NSWSC 340 *Re Rewards Projects Ltd (administrators appointed)* [2010] WASC 394

Date of hearing:	30 April 2020, 1 May 2020
Date of last submissions:	1 May 2020
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Division:	General Division
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Category:	Catchwords
Number of paragraphs:	76
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Solicitor for the Applicant:	Gilbert + Tobin
Counsel for the First and Second Interested Parties:	Mr H Austin QC
Solicitor for the First and Second Interested Parties:	Ashurst
Counsel for the Third and Fourth Interested Parties:	Mr P Crutchfield QC with Mr B McLachlan
Solicitor for the Third and Fourth Interested Parties:	Arnold Bloch Leibler
Counsel for the Fifth Interested Party:	Ms R Zambelli
Solicitor for the Fifth Interested Party:	Clayton Utz
Solicitor for the Sixth Interested Party:	Mr B Watkins of MinterEllison

ORDERS

VID 285 of 2020

IN THE MATTER OF RE HOLDCO PTY LTD (ADMINISTRATORS APPOINTED) (ACN 612 592 471), RSE HOLDCO PTY LTD (ADMINISTRATORS APPOINTED) (ACN 612 586 893), SARGON CT HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) (ACN 628 621 321), SC INTERNATIONAL HOLDINGS 2 PTY LTD (ADMINISTRATORS APPOINTED) (ACN 630 632 343), SARGON SUPERANNUATION HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) (ACN 630 648 225), SARGON SERVICES PTY LTD (ADMINISTRATORS APPOINTED) (ACN 163 522 058) AND SARGON SUPERANNUATION HOLDINGS SPV PTY LTD (ADMINISTRATORS APPOINTED) (ACN 633 509 494)

BETWEEN:	**STEWART MCCALLUM and ADAM NIKITINS IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF RE HOLDCO PTY LTD (ADMINISTRATORS APPOINTED) (ACN 612 592 471), RSE HOLDCO PTY LTD (ADMINISTRATORS APPOINTED) (ACN 612 586 893), SARGON CT HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) (ACN 628 621 321), SC INTERNATIONAL HOLDINGS 2 PTY LTD (ADMINISTRATORS APPOINTED) (ACN 630 632 343), SARGON SUPERANNUATION HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) (ACN 630 648 225), SARGON SERVICES PTY LTD (ADMINISTRATORS APPOINTED) (ACN 163 522 058) AND SARGON SUPERANNUATION HOLDINGS SPV PTY LTD (ADMINISTRATORS APPOINTED) (ACN 633 509 494)** Plaintiffs
JUDGE:	**O'BRYAN J**
DATE OF ORDER:	**1 MAY 2020**

In these orders, **Sargon VA Entities** means Re Holdco Pty Ltd (Administrators Appointed) (ACN 612 592 471), RSE Holdco Pty Ltd (Administrators Appointed) (ACN 612 586 893), Sargon CT Holdings Pty Ltd (Administrators Appointed) (ACN 628 621 321), SC International Holdings 2 Pty Ltd (Administrators Appointed) (ACN 630 632 343), Sargon Superannuation Holdings Pty Ltd (Administrators Appointed) (ACN 630 648 225) (**Sargon Holdings**), Sargon Services Pty Ltd (Administrators Appointed) (ACN 163 522 058) (**Sargon Services**) and Sargon Superannuation Holdings SPV Pty Ltd (Administrators Appointed) (ACN 633 509 494) (**Sargon SPV**).

THE COURT ORDERS THAT:

1. Pursuant to s 442C(2)(c) of the Corporations Act 2001 (Cth), the plaintiffs have leave (to the extent that such leave is required) to dispose of:

(a) all intellectual property used or in the possession of Sargon Services (including, but not limited to, intellectual property in relation to the software systems known as "Arcadia", "Sentinel", "Metropolis", "API Impact", and "Sargon Pay" and in relation to the trademarks and domain names set out in the Annexure to originating process dated 30 April 2020), including any such intellectual property that is:

(i) owned by Sargon Capital Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (ACN 608 799 873) (**Sargon Capital**);

(ii) subject to any security interest of Taiping Trustees Limited (**Taiping**); and/or

(iii) owned by GrowthOps Services Pty Ltd (ACN 626 208 777) (**GrowthOps**),

but excluding any "GrowthOps Background IP" as that term is defined in the GrowthOps Technology Services Master Agreement with a commencement date of 1 July 2019 and the GrowthOps Master Services Agreement (Creative, Marketing, Coaching & Leadership) with a commencement date of 2 September 2019, (**Sale IP**); and

(b) such property of the Sargon VA Entities as is (or may be) subject to a security interest (including under the *Personal Property Securities Act 2009* (Cth)), including:

(i) all security interests of Westpac in or over the property of the Sargon VA entities; and

(ii) any equitable lien or other security interest of Diversa Pty Ltd (ACN 079 201 835) and/or OneVue Holdings Limited (ACN 108 221 870) (together, **OneVue**) over the shares held by Sargon Holdings and Sargon SPV in Diversa Trustees Limited and CCSL Limited,

in connection with and as part of the sale of the property of the Sargon VA Entities pursuant to the "Cloverhill Sale" (as described in the affidavit of Stewart Alexander McCallum dated 30 April 2020) (**Cloverhill Sale**).

2. Upon the completion of the Cloverhill Sale, all proceeds of the Cloverhill Sale excluding the sum of $400,000 representing consideration for the sale of ancillary assets belonging the "Decimal Entities" (as described in the affidavit of Stewart Alexander

McCallum dated 30 April 2020) (**Retained Proceeds**) are to be deposited into a separate controlled, interest-bearing monies account opened and to be maintained by the Plaintiffs.

3. The Retained Proceeds are to be retained for the purpose of meeting claims that any party has in respect of the property of the Sargon VA Entities and its subsidiaries and/or the Sale IP directly or indirectly sold pursuant to the Cloverhill Sale including (but not limited to):

   (a) any claim by the Plaintiffs to recover from the Retained Proceeds amounts in respect of remuneration, fees and expenses properly incurred in their capacity as voluntary administrators of the Sargon VA Entities;

   (b) claims of Westpac, including its rights under security interests registered on the Personal Property Securities Register prior to completion of the Cloverhill Sale;

   (c) any claim that Sargon Capital, Taiping and/or GrowthOps may have to recover from the Retained Proceeds amounts by reference to a claimed interest in, or in respect of, the Sale IP; and

   (d) any claim that OneVue may have pursuant to any equitable lien or other security interest over the shares held by Sargon Holdings and Sargon SPV in Diversa Trustees Limited and CCSL Limited,

   and may only be accessed or disbursed by the Plaintiffs in accordance with an order or direction of the Court.

4. Pursuant to s 447A of the Act, Part 5.3A of the Act is to operate in relation to the Sargon VA Entities and, in particular, the Sale IP, as if s 442C(7)(b) of the Act referred to the "property of the company or property used by or in the possession of the company is subject to a security interest".

5. Pursuant to s 447A of the Act, Part 5.3A of the Act is to operate in relation to the Sargon VA Entities as if, notwithstanding the operation of s 442C(7) of the Act, the rights of:

   (a) any secured creditors of the Sargon VA Entities; and

   (b) any parties which, prior to the sale of the Sale IP, claimed to own or have security over the Sale IP,

   are preserved, including as between one another and the Sargon VA Entities, for the purpose of determining claims made upon the Retained Proceeds and, further, any

security interest of Westpac that applies to assets that are not being sold as part of the Cloverhill Sale will continue to apply to such assets.

6. Westpac's rights as against the Retained Proceeds are additionally preserved in relation to any guarantee provided by Mammatus Pty Ltd (ACN 101 393 435) (**Mammatus**) and in relation to security over the assets of Mammatus of which a release may be required to facilitate the Cloverhill Sale.

7. The Plaintiffs are to serve these orders on each of:

   (a) Westpac;

   (b) Sargon Capital;

   (c) Taiping;

   (d) GrowthOps;

   (e) OneVue; and

   (f) such other persons, who have prior to the date of this order, notified the Plaintiffs of an interest in any of the Retained Proceeds,

   on or before 4:00pm on **4 May 2020**.

8. The Plaintiffs and each of the entities referred to in paragraphs 7(a) to (f) file any notice of claim in respect of the Retained Proceeds on or before 4:00pm on **15 May 2020** and serve the notice of claim on each other by the same time. Any such notice of claim must identify the nature of the claim, the assets sold pursuant to the Cloverhill Sale in respect of which the claim is made and the amount claimed.

9. The Plaintiffs must file and serve any material in relation to the notices of claim on or before 4:00pm on **29 May 2020**.

10. Any person (other than the Plaintiffs) who has filed a notice of claim must file and serve any material in relation to the claim on or before 4:00pm on **12 June 2020**.

11. The proceeding is listed for a case management hearing at 9 am on **15 June 2020**.

12. The Plaintiffs shall not release any funds from the Retained Proceeds without further order of the Court.

13. Leave to apply be granted to the parties for the purpose of these orders and to seek further directions under s 447D of the Act.

14. Leave be granted to any person, with sufficient interest, to move the Court to vary or discharge these orders on 24 hours' notice.

15. Pursuant to s 37AF(1)(b) of the *Federal Court of Australia Act 1976* (Cth), the documents comprising annexure "SAM-2" to the affidavit of Stewart Alexander McCallum dated 30 April 2020 be marked "confidential" on the electronic court file and not be published or accessed, except pursuant to an order of the Court or the written agreement of the plaintiffs.

16. The Plaintiffs' costs of this proceeding are costs properly incurred in the administration of the Sargon VA Entities.

17. Costs are otherwise reserved.

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

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

1 The plaintiffs, Stewart McCallum and Adam Nikitin of Ernst & Young, are the joint and several voluntary administrators of the following companies within the Sargon group of companies: Re Holdco Pty Ltd, RSE Holdco Pty Ltd, Sargon CT Holdings Pty Ltd, SC International Holdings 2 Pty Ltd, Sargon Services Pty Ltd (**Sargon Services**), Sargon Superannuation Holdings Pty Ltd (**Sargon Holdings**) and Sargon Superannuation Holdings SPV Pty Ltd (**Sargon SPV**) (collectively referred to herein as the **Sargon VA entities**).

2 By originating process filed on 30 April 2020, the plaintiffs sought urgent relief under ss 442C and 447A of the *Corporations Act 2010* (Cth) (**Act**). Specifically, under s 442C(2)(c), the plaintiffs sought leave of the Court to dispose of:

(a) all intellectual property used or in the possession of Sargon Services (including, but not limited to, intellectual property in relation to the software systems known as "Arcadia", "Sentinel", "Metropolis", "API Impact" and "Sargon Pay", and in relation to the trademarks and domain names set out in the annexure to the originating process); and

(b) such property of the Sargon VA entities as is (or may be) subject to a security interest (including under the *Personal Property Securities Act 2009* (Cth)),

in connection with, and as part of, the sale of the property of the Sargon VA entities pursuant to a sale that had been negotiated by the plaintiffs and referred to in the evidence as the "Cloverhill Sale". The plaintiffs also sought orders as to the treatment of the proceeds of the sale for the purposes of satisfying the requirement in s 442C(3) to make arrangements for the adequate protection of the interests of the owners of the intellectual property and the security interest holders. Under s 447A of the Act, the plaintiffs sought orders as to how Part 5.3A of the Act is to operate in relation to sale and the proceeds of sale so as to preserve the rights of the owners of the intellectual property and the security interest holders as between themselves.

3 The originating process was supported by affidavits of Mr McCallum dated 30 April 2020 and 1 May 2020. Written submissions were also filed and served on behalf of the plaintiffs.

4 Subject to revisions to the form of orders sought by the plaintiffs, the application was ultimately supported by the following entities which had an interest in the application, either by reason of

a claim to ownership of part or all of the intellectual property proposed to be sold or by reason of a claim to a security interest over part of the property of the Sargon VA entities: Westpac Banking Corporation; GrowthOps Services Pty Ltd (**GrowthOps**); and Diversa Pty Ltd (**Diversa**) and its parent company OneVue Holdings Limited (**OneVue**). The application was opposed by the parent company of the Sargon group of companies, Sargon Capital Pty Ltd (**Sargon Capital**), which claimed ownership of part or all of the intellectual property proposed to be sold, and by the secured creditor of Sargon Capital, Taiping Trustees Limited (**Taiping**), which had appointed receivers and managers to Sargon Capital.

5 As discussed further below, the application was urgent because, without the grant of leave under s 442C(2)(c) of the Act by 1 May 2020, a condition precedent to the Cloverhill Sale could not be satisfied and the Cloverhill Sale was likely to fail. In turn, that was likely to cause prejudice to the Sargon VA entities and their creditors.

6 The application was filed on 30 April 2020 and came on for hearing before me as duty judge that afternoon. At that hearing, Senior Counsel for Sargon Capital and Taiping, Mr Austin QC, sought an adjournment until Wednesday 6 May 2020 to give Sargon Capital and Taiping the opportunity to prepare evidence in response to the application. During argument on 30 April 2020, possible revisions to the orders sought by the plaintiffs were considered. I adjourned the hearing until 1 May 2020 so that the plaintiffs and the interested parties could consider the possible revisions.

7 On 1 May 2020, Sargon Capital and Taiping filed and served written submissions in opposition to the application. At the commencement of the hearing that day, Mr Austin QC informed the Court that, conscious of the evidence showing the urgency of the application, he was in a position to address the application. On that basis, and having regard to the urgency of the application and the likely prejudice to the Sargon VA entities and its creditors from delay, I heard the application on 1 May 2020.

8 At the conclusion of the hearing, I made orders under s 442C(2)(c) and 447A of the Act largely in the form sought by the plaintiffs, but with certain revisions to protect better the interests of the owners of the intellectual property and the security interest holders. These are my reasons for making those orders.

Factual Background

Group structure

9 At all relevant times, the Sargon group of companies has comprised Sargon Capital and its direct and indirect subsidiaries. The direct subsidiaries comprised:

(a) the Sargon VA entities;

(b) SC Australian Holdings 1 Pty Ltd (**SCAH**); and

(c) Decimal Software Pty Ltd (**Decimal**).

10 The Sargon group owns and operates businesses in the financial planning, corporate trustee, responsible entity, superannuation and related financial services sectors. The respective businesses and senior management hold responsible superannuation entity, Australian financial services licences and credit licences to enable the provision of such services. Generally, the Sargon businesses are conducted through the indirect subsidiaries of Sargon Capital, with the direct subsidiaries being holding companies. I will refer to the indirect subsidiaries as the operating subsidiaries.

External administration of the Sargon group

11 On 29 January 2020, Mr Shaun Fraser and Mr Jason Preston of McGrathNicol were appointed as joint and several receivers and managers of Sargon Capital by secured creditor Taiping. On 4 March 2020, Joseph Hayes and Andrew McCabe of Wexted Advisors were appointed as joint and several voluntary administrators of Sargon Capital. On 8 April 2020, at the second meeting of creditors of Sargon Capital, it was resolved that Sargon Capital be wound up. Joseph Hayes and Andrew McCabe were then appointed joint and several liquidators of Sargon Capital.

12 On 3 February 2020, the plaintiffs were appointed as joint and several voluntary administrators of the Sargon VA entities and SCAH.

13 On 4 February 2020, Mr Daniel Walley and Mr Christopher Hill of PwC were appointed as joint and several receivers and managers of SCAH by secured creditor Diversa. Following their appointment, any recapitalisation or asset sale of SCAH became the responsibility of the receivers and managers and, accordingly, the plaintiffs have not included SCAH as part of the assets proposed to be sold pursuant to the Cloverhill Sale.

14 On 3 and 4 February 2020, Mr Matthew Byrnes and Mr David Hodgson of Grant Thornton were appointed as joint and several voluntary administrators of Decimal and its subsidiaries

Decimal Technology and Systems Pty Ltd, Decimal Pty Ltd and Simpla Pty Ltd (collectively, the **Decimal entities**). On 10 March 2020, they were appointed as liquidators of the Decimal entities.

Financial position of the Sargon VA entities

15 The plaintiffs prepared an analysis of the financial position of the Sargon VA entities based on management accounts as at 31 December 2019. Other than Sargon Services, the Sargon VA entities generated very minimal income and incurred minimal expenses. Sargon Services generated income of approximately $4.4 million in FY19 and approximately $1.9 million of income in HY20. Sargon Services' expenses totalled approximately $11.7 million in FY19 and $8.5 million in HY20. Sargon Services' most significant expense was staff wages and associated expenses, which totalled approximately $9.4 million in FY19 and $7 million in HY20. Sargon Services incurred a loss of approximately $14 million between 1 July 2018 and 31 December 2019. The majority of assets listed in the Sargon VA entities' management accounts relate to capitalised goodwill on acquisition of subsidiaries, capitalised customer contracts, pre-acquisition retained earnings and intercompany loan receivables. The majority of liabilities listed in the Sargon VA entities' management accounts relate to intercompany loans payable (including to Sargon Capital), secured debts and, in the case of Sargon Services, employment and tax-related liabilities.

16 Mr McCallum gave evidence that, based on the plaintiffs' investigations during the voluntary administration period, he considered the following factors contributed to their appointment as administrators to the Sargon VA entities:

(a) The first factor was the appointment of receivers and managers to Sargon Capital. Sargon Capital appears to have funded working capital for Sargon Services from time to time and the appointment had the effect of freezing the flow of such funds. The media attention caused uncertainty in respect of the Sargon brand and resulted in certain clients terminating services. Certain insurances for the Sargon group, including professional indemnity and directors and officers insurances required by the operating subsidiaries which were held by Sargon Capital were placed in run-off due to certain insolvency exclusions contained in the policies.

(b) The second factor was the trading losses and cash flow deficiencies in the operating subsidiaries in circumstances where the Sargon VA entities were reliant on funding sources, mainly dividends being paid out of the operating subsidiaries. Based on FY19

and HY20 profit and loss statements for the Sargon VA entities, there are negligible investment income amounts received by the Sargon VA entities.

(c) The third factor was Sargon Capital's acquisition strategy. The Sargon group acquired seven businesses between 2016 and 2019 for a combined cash consideration of approximately $111.6 million. The plaintiffs' preliminary investigations indicate that the valuations of such acquisitions may have been overestimated.

17 Based on claims advised by creditors to the plaintiffs to date, the claims of unsecured creditors of the Sargon VA entities total approximately $120 million. Approximately $65.5 million is owed to Sargon Capital and approximately $31 million is owed to Diversa. The amount claimed by Diversa relates to unpaid amounts in connection with the purchase, by Sargon Holdings and Sargon SPV, of the shares in CCSL Limited (**CCSL**) and Diversa Trustees Limited (**Diversa Trustees**) from Diversa.

18 Relevantly, Westpac has first ranking all assets security registered on the Personal Property Securities Register (**PPSR**) against RE Holdco Pty Ltd, RSE Holdco Pty Ltd, Sargon CT Holdings Pty Ltd and Sargon Services. Westpac has submitted proofs of debt in the administrations of the Sargon VA entities totalling approximately $32 million.

Plaintiffs' actions since appointment

19 Mr McCallum deposed that, upon their appointment as administrators, the plaintiffs prepared a cash flow model and forecast to assess the Sargon VA entities' ability to continue operating during the voluntary administration. This assessment was especially relevant to Sargon Services which employs numerous staff and provides various services to the operating subsidiaries. From this assessment, the plaintiffs formed the view that the Sargon VA entities could continue to operate on a day-to-day basis while various options were considered, one of which included recapitalising the Sargon VA entities. The cash flow model and forecast indicated that Sargon Services would require funding to continue providing services and funding requests were made of each of the operating subsidiaries.

20 To ensure the Sargon VA entities could continue to operate and to allow a sale or recapitalisation, the plaintiffs have been in dialogue with various financial services regulatory bodies including the Australian Prudential Regulatory Authority (**APRA**) and the Australian Securities and Investments Commission (**ASIC**).

21 Following their appointment, the plaintiffs commenced a sale process in respect of the potential sale of the shares and assets of the Sargon VA entities. The sale process included advertising in the Australian Financial Review, establishing a data room and entering into non-disclosure agreements with interested parties. All interested parties were provided with a process letter inviting non-binding indicative offers by 26 February 2020.

The proposed Cloverhill Sale

22 On or around 18 February 2020, the plaintiffs received a letter of offer from the Cloverhill Group (**Cloverhill**) for the purchase of all of the assets of each of the Sargon VA entities, including the share capital in the following operating subsidiaries:

(a) CCSL, a subsidiary of Sargon Holdings;

(b) Diversa Trustees, owned by Sargon Holdings and Sargon SPV in a 63:37 ratio;

(c) Mammatus Pty Ltd (**Mammatus**), a subsidiary of Sargon Services;

(d) Responsible Entity Partners Limited, a subsidiary of Re Holdco Pty Ltd;

(e) Sargon CT (NSW) Pty Ltd, a subsidiary of Sargon CT Holdings Pty Ltd;

(f) Sargon CT Pty Ltd, a subsidiary of Sargon CT Holdings Pty Ltd;

(g) Sargon (NZ) Ltd, a subsidiary of Sargon International Holdings 2 Pty Ltd; and

(h) Tidswell Financial Services Ltd (**Tidswell**), a subsidiary of RSE Holdco Pty Ltd,

(**Cloverhill Sale**). In subsequent negotiations, Cloverhill agreed to increase the purchase price offered with a final agreement recorded in a letter dated 4 March 2020. The agreement was subject to numerous conditions precedent, including a due diligence review, all necessary approvals from ASIC and APRA, that the businesses being sold continue to operate as going concerns, and all necessary court approvals.

23 The terms of the Cloverhill Sale are confidential. I will therefore refrain from referring to the terms unless necessary for the purposes of explaining my reasons for making the orders on 1 May 2020. At the hearing, it was necessary for the plaintiffs to refer to that amount of the financial contribution to be paid by Cloverhill for the assets being acquired which would be available for creditors of the Sargon VA entities, being $30 million. That is not the full extent of the financial contributions being made by Cloverhill as part of the sale, but it is not necessary to refer to those other contributions. As discussed further below, the orders made on 1 May 2020 provide for those sale proceeds, less an amount of $400,000 to be paid to the Decimal

entities, to be retained by the plaintiffs to satisfy various claims of secured and unsecured creditors of the Sargon VA entities.

24 Mr McCallum deposed that there were a number of reasons why the plaintiffs agreed to the Cloverhill Sale. Those reasons included:

(a) the offer price was the highest offer received;

(b) the offer included a form of insurance coverage for the operating subsidiaries (whereas such insurance coverage otherwise terminated when receivers and managers were appointed to Sargon Capital);

(c) both APRA and ASIC confirmed that they were prepared to work with Cloverhill regarding any licensing requirements;

(d) the independent boards of the operating subsidiaries advised that they believed Cloverhill was an appropriate buyer; and

(e) Cloverhill was able to effect completion of the sale agreement quickly (in the circumstances).

25 Relevantly, the Cloverhill Sale was subject to the following conditions:

(a) first, the plaintiffs were obligated to sell "all of the assets and undertakings of each of the [applicable Sargon entities]…and ensure a continuation of the underlying registered superannuation businesses";

(b) second, the plaintiffs were required to procure that the secured creditors release their security over the assets to be sold prior to closing; and

(c) third, the plaintiffs were required to procure that the Decimal entities, or their key assets, were included as part of the sale.

26 In relation to condition (a), Mr McCallum explained in his evidence that Sargon Capital and GrowthOps have asserted claims in respect of the ownership of certain intellectual property used in the businesses proposed to be sold in the Cloverhill Sale. The claims and the intellectual property the subject of the claims are described in more detail below. Mr McCallum deposed that he does not believe that those claims could be resolved in such a way that the rights of any one of the claiming parties could be severed from the rights of the others so as to permit a sale of the intellectual property by one but not all of the claiming parties. As outlined in further detail below, there were negotiations between Cloverhill, Sargon Capital, GrowthOps and Sargon Services to facilitate an assignment by each party of all their rights to the intellectual

property required for the Cloverhill Sale to be completed. On 28 April 2020, the receivers to Sargon Capital advised that it may no longer be possible to secure the release of Taiping's security interest, and that the receivers were no longer prepared to agree to an assignment of the interests in the intellectual property that may be held by Sargon Capital.

27 In relation to condition (b), Westpac reached agreement with the plaintiffs to release its security over certain of the assets to be sold pursuant to the Cloverhill Sale in return for a payment of $12 million out of the sale proceeds and subject to satisfaction as to the orders to be made by the Court in this application.

28 In relation to condition (c), an in-principle agreement was reached between Cloverhill and the liquidators appointed to Decimal for the purchase of the assets of the Decimal entities for $400,000.

The claims with respect to intellectual property

29 On 15 March 2020, the solicitors for Sargon Capital and Taiping, Ashurst, wrote to the solicitors for the plaintiffs, Gilbert + Tobin, asserting rights of ownership in Sargon branded software and other intellectual property. The letter referred to the Sargon Capital balance sheet as at December 2019 which contained the following intangible asset entries: Sargon Technology (with a book value of $5,431,249.93), Software API 0.1 (with a book value of $150,282.23), Software API 1.0 (with a book value of $215,761.64) and Domain name (with a book value of $237,696.49). The letter also referred to a report prepared by Messrs Kingston and Conroy that valued the "Sargon Cloud (Software)" at $10 million and the "sargon.com" domain name at $237,696.49. The letter sought an undertaking that the plaintiffs would not sell any assets of Sargon Capital without obtaining consent from the receivers and managers to Sargon Capital.

30 Mr McCallum deposed that the plaintiffs hold the following opinions regarding the intangible assets that appear on Sargon Capital's balance sheet:

(a) The "Sargon Cloud (Software)" relates to three specific software products called Arcadia, Sargon Pay and API Impact.

(b) Certain rights in the software may be owned by GrowthOps and amounts in respect of unpaid invoices are owing to GrowthOps.

(c) The book value of the intangible intellectual property in Sargon Capital's balance sheet, which predominantly consists of the software, is $5,892,826 as at 31 December 2019.

(d) Due to the way in which the Sargon group operated pre-administration, there are uncertainties associated with identifying a single owner or the scope of ownership of the software, compounded by ambiguity in the underlying documentation and the fact that the software has continued to be developed over time (for example, the current version of API Impact is reliant on source code originally developed and capitalised by Sargon Services).

(e) The balance sheet of Sargon Services as at 31 December 2019 also includes capitalised costs which are directly attributable to the development of the software.

(f) Certain invoices for the development of the software API 0.1 and API 1.0 which appear in Sargon Capital's balance sheet were paid for by Sargon Services.

(g) Both Sargon Pay and API Impact are immature products requiring significant further development and exist in an environment where alternative off-the-shelf products are available, and the products themselves could be recreated by the existing staff employed by Sargon Services. Therefore, even if Sargon Capital were successful in establishing ownership of the software, the plaintiffs do not expect that Sargon Capital would be able to identify a purchaser willing to pay a material sum for the software (if any sum at all).

(h) The sargon.com domain name is registered in the name of Sargon Services, despite appearing in the Sargon Capital balance sheet.

31 On 24 April 2020, negotiations between the receivers to Sargon Capital and Cloverhill resulted in a proposed agreement by which Sargon Capital would assign any rights that it had in the intellectual property rights used in Sargon Services' business, free of Taiping's security interest, to Cloverhill for a sum of $4 million. Subsequently, the receivers to Sargon Capital advised that it may not be possible to obtain a release of Taiping's security interest prior to the proposed date of completion of the Cloverhill Sale, and the possibility of amending the proposed agreement to provide for a transitional licence from Sargon Capital to Cloverhill pending the release of Taiping's security interest was considered. On 28 April 2020, the receivers to Sargon Capital advised that it may no longer be possible to secure the release of Taiping's security interest and that the receivers were no longer prepared to enter into the proposed agreement. On 29 April 2020, Gilbert + Tobin wrote to Ashurst again seeking agreement to the proposed assignment and advised that, if agreement could not be reached, the present application to the Court would be made. No agreement was reached.

32 Between 12 March and 8 April 2020, Gilbert + Tobin, Ashurst and the solicitors for GrowthOps, Minter Ellison, corresponded about rights claimed by GrowthOps (and Sargon Capital) in software developed by GrowthOps pursuant to a Technology Services Master Agreement between Sargon Capital and GrowthOps having a commencement date of 1 July 2019 and a Master Services Agreement (Creative, Marketing, Coaching & Leadership) between Sargon Capital and GrowthOps with a commencement date of 2 September 2019. In that correspondence, GrowthOps claimed that, pursuant to clause 7.1(a) of the Technology Services Master Agreement, and as a result of unpaid invoices totalling $1.842 million (inclusive of GST, interest and costs), GrowthOps retains ownership of the software developed pursuant to that agreement. The receivers to Sargon Capital have disputed the claims made by GrowthOps, including on the basis that GrowthOps' rights are in the nature of a claim for payment of outstanding invoices only. On 28 March 2020, GrowthOps and the receivers to Sargon Capital reached an in-principle agreement on the transfer of any rights that GrowthOps has in the developed software to Cloverhill, for an amount of $800,000, contingent on the completion of the Cloverhill Sale.

Claim for an equitable lien over CCSL and Diversa Trustees

33 OneVue and its subsidiary, Diversa, have claimed that OneVue and/or Diversa are creditors of Sargon Holdings and Sargon SPV. The claim is for unpaid purchase monies for the sale of CCSL to Sargon Holdings and Diversa Trustees to Sargon Holdings and Sargon SPV. OneVue and/or Diversa claim that they have an equitable lien over the shares in CCSL and Diversa Trustees as security for the amounts owing.

34 Between 13 March and 29 April 2020, Gilbert + Tobin and the solicitors for OneVue and Diversa, Arnold Bloch Leibler, corresponded regarding the claim for an equitable lien and the terms of consent for the Cloverhill Sale to proceed. On 3 April 2020, OneVue and Diversa agreed to an arrangement by which they consented to the disposal of the shares in CCSL and Diversa Trustees on the condition that the plaintiffs would not distribute or deal with the total net proceeds of the sale in which the shares are sold until either an agreement is reached between the plaintiffs, OneVue and Diversa, or the Court makes a determination regarding the entitlement of OneVue and Diversa (if any) to payment from the sale proceeds.

Completion of the Cloverhill Sale

35 In his affidavit dated 30 April 2020, Mr McCallum deposed that completion of the Cloverhill Sale was initially expected to occur in mid-March 2020 but was extended multiple times in

order to satisfy the outstanding conditions precedent. Completion was rescheduled for 1 May 2020.

36 Mr McCallum deposed that, in his view, completion cannot be extended further because there is a need to maintain Sargon Services as a going concern. As the servicing company for each of the operating subsidiaries, Sargon Services must remain viable in order to provide essential services to the operating subsidiaries. The plaintiffs do not have sufficient funding to pay the relevant liabilities which amount to approximately $400,000 per week. Sargon Services has historically received funding for its operations from the operating subsidiaries. However, the boards of the operating subsidiaries have indicated that they are unwilling to provide such funding beyond 1 May 2020. Mr McCallum deposed that there is therefore a material risk and likelihood that if completion did not occur by 1 May 2020, Sargon Services would have no further funding and would need to cease operations and terminate Sargon Services' employees. The likely consequence is that the operating subsidiaries would be unable to provide services to their customers, would be in breach of the relevant licences held by them and would not be able to continue operating and may be forced to either enter a formal insolvency process or cease operations altogether.

37 Based on his discussions with APRA, Mr McCallum deposed that he was concerned that a breach of the licences held by the operating subsidiaries would likely result in APRA suspending or cancelling the licences and transferring the superannuation fund customers of Tidswell, Diversa Trustees and CCSL to another trustee with relevant APRA licences in place. If that were to occur, those companies would be unsaleable and there would be very little likelihood of a return to the creditors of their holding companies, being RSE Holdco Pty Ltd, Sargon SPV and Sargon Holdings. There would also be a level of disruption and uncertainty for the superannuation fund members, associated with any change of trustee.

38 Mr McCallum deposed that the Cloverhill Sale provided an avenue for professional indemnity and directors and officers insurance protection for the boards of the operating subsidiaries, which could not be found elsewhere. In the absence of such insurance cover, the boards of the operating subsidiaries had advised that they would resign. Mr McCallum deposed that it would be very difficult to find replacement boards to the satisfaction of APRA and ASIC, with the likely outcome being a suspension or termination of the relevant licences of Tidswell, Diversa Trustees and CCSL.

39 Having regard to those matters and also the current market and regulatory conditions, Mr McCallum deposed that, in his view, if the Cloverhill Sale did not proceed, the likely value attributable to the assets proposed to be sold would be considerably reduced and potentially reduced to nil.

40 In his affidavit dated 1 May 2020, Mr McCallum exhibited a letter from Pacific Infrastructure Partners Pty Ltd dated 30 April 2020. Mr McCallum deposed that Pacific Infrastructure Partners Pty Ltd was formed for the purpose of acquiring the assets the subject of the proposed Cloverhill Sale. The letter stated that, if the plaintiffs were unable to confirm during the course of 1 May 2020 that they were able to proceed with the Cloverhill Sale, Pacific Infrastructure Partners Pty Ltd anticipated withdrawing from the Cloverhill Sale and the sale process.

41 In that affidavit, Mr McCallum also deposed that the difficulties for the plaintiffs in selling the relevant intellectual property as part of the Cloverhill Sale would also affect any proposed sale of the intellectual property by Sargon Capital. In other words, Sargon Capital would not be able to convey good title to the intellectual property because of the uncertainty regarding its ownership. Mr McCallum also deposed that the intellectual property is bespoke to, and programmed for, the businesses of Sargon Services and the operating subsidiaries and, accordingly, to have any value, the intellectual property must be sold as part of those businesses.

Application under s 442C

42 As stated earlier, on 30 April 2020, the plaintiffs filed an urgent application under s 442C(2)(c) of the Act, seeking leave from the Court to dispose of all intellectual property used or in the possession of Sargon Services (including any such intellectual property that is owned by Sargon Capital, subject to any security interest of Taiping, or owned by GrowthOps) and such property of the Sargon VA entities as is (or may be) subject to a security interest (including under the *Personal Property Securities Act 2009* (Cth)).

43 Relevantly, s 442C provides as follows:

> **When administrator may dispose of encumbered property**
>
> (1) The administrator of a company under administration or of a deed of company arrangement must not dispose of:
>
> (a) property of the company that is subject to a security interest; or
>
> (b) property (other than PPSA retention of title property) that is used or occupied by, or is in the possession of, the company but of which someone

else is the owner or lessor.

Note: PPSA retention of title property is subject to a PPSA security interest, and so is covered by paragraph (a) (see definition of PPSA retention of title property in section 51F).

(2) Subsection (1) does not prevent a disposal:

(a) in the ordinary course of the company's business; or

(b) with the written consent of the secured party, owner or lessor, as the case may be; or

(c) with the leave of the Court.

(3) The Court may only give leave under paragraph (2)(c) if satisfied that arrangements have been made to protect adequately the interests of the secured party, owner or lessor, as the case may be.

…

(7) If:

(a) a company is under administration or is subject to a deed of company arrangement; and

(b) property of the company is subject to a security interest; and

(c) the administrator disposes of the property;

the disposal extinguishes the security interest.

44 A number of matters can be noted about section 442C.

45 First, the section operates to limit the powers of an administrator to dispose of property of the company under administration that is subject to a security interest or property that is used or occupied by, or is in the possession of, the company under administration but of which someone else is the owner or lessor (other than PPSA retention of title property).

46 Second, the section gives the Court power, by the grant of leave under s 442C(2)(c), to authorise an administrator to dispose of such property. That power involves a significant intrusion on third party security interests and property rights, authorising an administrator to dispose of property that is owned by, or encumbered in favour of, a third party. None of the interested parties in this proceeding suggested that the words had a meaning other than their plain meaning. The expression "security interest" is defined in s 51A of the Act as a PPSA security interest or a charge, lien or pledge. The expression "PPSA security interest" is defined in s 51 of the Act as a security interest within the meaning of the *Personal Property Securities Act 2009* (Cth) and to which that Act applies, other than a transitional security interest within the meaning of that Act.

47 Third, the Court's power to grant such leave is subject to the condition that the Court must be satisfied that arrangements have been made to protect adequately the interests of the secured party, owner or lessor, as the case may be. The administrator bears the onus of establishing that condition: *Re Le Meilleur Pty Ltd* (2011) 256 FLR 240 at [365]. Arrangements "to protect adequately the interests of the secured party, owner or lessor" would ordinarily contemplate arrangements seeking to obtain the best available return for the property being disposed of and the payment of such amounts to the security interest holder, owner or lessor in a manner that is consistent with the principles found in Part 5.3A of the Act, recognising the prior interests of the security interest holder, owner or lessor as the case may be. If that cannot be achieved, the Court may not be satisfied that the condition stated in s 442C(3) can be fulfilled. Arrangements of that kind were approved in *Re Rewards Projects Ltd (administrators appointed)* [2010] WASC 394 (see at [16]), *Re Renovation Boys Pty Ltd (administrators appointed)* [2014] NSWSC 340 (see at [42]) and *Re Luxtown Pty Ltd (administrators appointed)* [2019] FCA 1861 (***Luxtown***) (see at [28]).

48 Fourth, if the Court is satisfied that arrangements have been made to protect adequately the interests of the secured party, owner or lessor, the Court's discretion under s 442C(2)(c) is otherwise unconstrained. However, the discretionary power must be exercised judicially by reference to considerations relevant to its exercise, particularly the objects of Part 5.3A. In that regard, s 435A provides that:

> The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

49 Reflecting the objects of Part 5.3A, in *Mentha v GE Capital Ltd* (1997) 27 ACSR 696, Finkelstein J considered that the Court should also consider whether the disposition will prejudice the interests of other creditors or the interests of the company under administration, while recognising that the occasion for such prejudice will not often arise in the case of the disposition of secured property (at 700-701).

50 Mr Austin QC placed reliance on statements of Lehane J in *Hamilton and Fiorentino as Administrators of Kisoro Pty Ltd v National Australia Bank Ltd* (1996) 66 FCR 12 (***Kisoro***) at

32, in respect of a similarly worded power conferred on the Court under s 444F(3) of the Act. In *Kisoro*, Lehane J approved the following principles to guide the exercise of the Court's discretion: a chargee should be permitted to exercise proprietary rights where to do so would not impede the achievement of the purposes for which the administration was commenced; in other cases, the legitimate interests of the chargee must be balanced against the legitimate interests of the other creditors of the company; and, in carrying out the balancing exercise, great weight must be given to the proprietary interests of the chargee and, so far as possible, the administration procedure should not be used to prejudice those who were secured creditors when administration commenced in lieu of liquidation.

51 While those statements of principle have relevance to the exercise of the Court's discretion under s 442C(2)(c), their expression in *Kisoro* derives from the specific statutory language and context of s 444F, which differs from s 442C(2)(c). In particular, s 444F applies where a company has executed a deed of company arrangement and a secured creditor of the company wishes to realise or deal with its security interest, or the owner or lessor of property that is used or occupied by, or is in the possession of, the company wishes to take possession of or recover the property. Under s 444F, the Court may order the secured creditor or owner or lessor of property not to so act if satisfied that so acting would have a material adverse effect on achieving the purposes of the deed and, having regard to the terms of the deed, the terms of the Court's order and any other relevant matter, the interests of the secured creditor, owner or lessor will be adequately protected. Thus, the Court's power under s 444F is to restrain a secured creditor from exercising its security and a property owner from taking possession of or recovering its property in circumstances where a deed of company arrangement has been entered into. The section stipulates that the Court may only restrain the secured creditor or property owner to prevent a material adverse effect on the purposes of the deed of company arrangement. The power in s 442C(2)(c) is more broadly framed. If the Court is satisfied of the condition in s 442C(3), the Court's discretion is enlivened and is to be exercised having regard to the objects of Part 5.3A more broadly.

52 As noted earlier, none of Westpac, GrowthOps or Diversa and OneVue opposed the plaintiff's application. However, the application was opposed by Sargon Capital and its secured creditor Taiping. Thus the dispute was largely focussed on Sargon Capital's claimed ownership of the intellectual property proposed to be sold and whether its interests would be adequately protected by the proposed arrangements. That question necessarily involved consideration of the respective positions of the other interested parties, as well as creditors more generally.

53 The plaintiffs submitted that the Court should grant leave under s 442C(2)(c) for the following reasons:

(a) doubt existed as to the ownership of the intellectual property that was proposed to be sold pursuant to the Cloverhill Sale;

(b) the parties claiming to have interests in the intellectual property had been unable to reach agreement in relation to the proposed sale and allocation of proceeds;

(c) the lack of agreement imperilled the proposed sale, an outcome that would be materially adverse to the interests of all creditors of the Sargon VA entities; and

(d) the orders being sought from the Court would preserve the sale proceeds in order that the claims of all interested parties over the assets to be sold could be subsequently determined.

54 In the originating process filed on 30 April 2020, the plaintiffs proposed that two sums would be immediately paid out of the sale proceeds. The first sum was an amount of $12 million which the plaintiffs had agreed to pay Westpac in return for the release of its security interests to enable the sale to proceed. The second was an amount of $400,000 which Cloverhill had agreed to pay to the Decimal entities for assets being purchased from those entities. The payment of those sums would leave an amount of $13.6 million for payment to the other interested parties, including Sargon Capital, and creditors of the Sargon VA entities, subject to determination of their respective interests in the property to be sold. During the hearing on 30 April 2020, consideration was given to a modification to the orders being sought, such that Westpac would not receive an immediate payment from the sale proceeds but would have its interests determined together with the other interested parties and creditors. Westpac gave its consent to that modification and that became the proposal advanced by the plaintiffs at the resumed hearing on 1 May 2020. The result was that, out of the sale proceeds of $30 million, $29.6 million was proposed to be retained in a fund for payment to the interested parties, including Sargon Capital, and creditors of the Sargon VA entities, subject to determination of their respective interests in the property to be sold. The payment of $400,000 to the Decimal entities would still proceed because that amount reflected a separate agreement between Cloverhill and the Decimal entities for the purchase of specific assets owned by those entities.

55 The orders sought by the plaintiffs contemplated that the sale proceeds (less $400,000) would be deposited into a separate controlled, interest-bearing monies account opened and to be maintained by the plaintiffs, and would only be accessed or disbursed by the plaintiffs in

accordance with an order or direction of the Court. The proceeds would be retained for the purpose of meeting claims that any interested party or creditor had in respect of the property of the Sargon VA entities and its subsidiaries and/or the intellectual property directly or indirectly sold pursuant to the Cloverhill Sale including (but not limited to):

(a) any claim by the plaintiffs to recover amounts in respect of remuneration, fees and expenses properly incurred in their capacity as voluntary administrators of the Sargon VA entities;

(b) claims of Westpac, including its rights under security interests registered on the PPSR prior to completion of the Cloverhill Sale;

(c) any claim that Sargon Capital, Taiping and/or GrowthOps may have to recover amounts by reference to a claimed interest in, or in respect of, the intellectual property; and

(d) any claim that Diversa or OneVue may have pursuant to any equitable lien or other security interest over the shares held by Sargon Holdings and Sargon SPV in Diversa Trustees and CCSL.

56 The orders proposed a timetable for the resolution of competing claims by the Court. In that regard, it was proposed that the plaintiffs and all interested parties and creditors would file and serve any notice of claim in respect of the retained sale proceeds which must identify the nature of the claim, the assets sold pursuant to the Cloverhill Sale in respect of which the claim is made and the amount claimed, and must subsequently file material in support. The adjudication of competing claims would require the fair and equitable allocation and apportionment of the sale proceeds across the assets sold in a manner that would enable the previous security and ownership rights and interests to be valued. Once that was done, it would be necessary to determine competing claims in respect of the same assets, particularly in the case of the intellectual property.

57 The plaintiffs submitted that the above arrangements would adequately protect the interests of secured parties and owners of the property being sold for the following reasons:

(a) There was no apparent prospect of the value of the intellectual property being realised other than via the sale transaction. The plaintiffs' assessment was that the value of the intellectual property, if not sold via the proposed sale transaction, would be negligible.

(b) By preserving the sale proceeds, the interests of parties with claims over the intellectual property would be protected (albeit that the assets over which their claims are made would have a different character, having been converted to a fund).

(c) The quantum of the sale proceeds to be retained will be significant, particularly when compared with the value attributed to the intellectual property in Sargon Capital's balance sheet.

(d) The plaintiffs' assessment was that the date for completion of the sale transaction cannot be extended. Non-completion of the sale transaction was likely to result in the operating subsidiaries ceasing to carry on business, with adverse consequences for all creditors of the Sargon VA entities and the entities claiming interests in the intellectual property that is used in those businesses.

58 Sargon Capital and Taiping submitted that their interests, as owners of the intellectual property, were not adequately protected by the proposed sale and orders. They argued that there had been no formal and separate valuation or expert assessment of value of the intellectual property, taking into account any questions of intermingling of ownership and the like. The intellectual property had not been separately marketed by the plaintiffs and the receivers to Sargon Capital had not received sufficient information to undertake any such exercise themselves. The value of the intellectual property might be more or less than the book value recorded in Sargon Capital's balance sheet as at December 2019. They submitted that it would be a drastic outcome to deprive Sargon Capital and Taiping of their interest in the intellectual property in return for the speculative possibility that they might be able to extract a sum of any significant magnitude from the funds that would be the subject of competing claims. They submitted that because there is no certainty as to the amount that would be received by Sargon Capital from the sale proceeds, the Court was unable to be satisfied that the interests of Sargon Capital and Taiping would be adequately protected.

59 In my view, this is an appropriate case for the Court to give leave to the plaintiffs under s 442C(2)(c) of the Act, largely in the form of the revised orders provided to the Court by the plaintiffs, by which all of the proceeds of the proposed Cloverhill Sale will be retained to meet competing claims of the interested parties, save for an amount of $400,000 to be paid to the Decimal entities.

60 The application was made with urgency, but I am satisfied that the urgency was warranted. The evidence showed that the sale of the Sargon VA businesses was conditional on completion

occurring on 1 May 2020. The parties to the sale could, of course, have extended that deadline by agreement, but the evidence indicated that completion had been deferred previously while negotiations with the third party interest holders occurred and the purchaser was, as at the date of the hearing, unwilling to defer completion any longer. The evidence also indicated that any extension could only be for a very short period in any event because of the parlous financial position of the Sargon VA businesses. On the evidence, granting leave would enable the Cloverhill Sale to proceed whereas any delay was likely to result in that sale not proceeding.

61 I am satisfied on the evidence before me:

(a) first, that a proper sale process had been conducted by the administrators for the Sargon VA businesses;

(b) second, that the administrators had accepted the highest offer for the businesses;

(c) third, that without a sale, the businesses would not be able to continue; and

(d) fourth, that because of the dispute over the ownership of the intellectual property, the sale could not be effected without the orders being sought by the plaintiffs.

62 The orders sought by the plaintiffs were in the nature of final relief and would affect the interests of Sargon Capital and Taiping in a very material way. If and to the extent the relevant intellectual property was owned by Sargon Capital, the orders had the effect of allowing the plaintiffs to sell Sargon Capital's property in the proposed transaction with Cloverhill, rather than allow Sargon Capital to deal with the property as it sees fit.

63 By s 442C(3), the Court may only give leave if satisfied that arrangements have been made to protect adequately the interests of the secured party, owner or lessor as the case may be. That is a precondition to the exercise of the Court's power to grant leave. While it is a precondition, the requirement is evaluative. The Court must evaluate whether the arrangements that are proposed will adequately protect those interests.

64 In the present case, Westpac, as the holder of security interests in certain of the assets proposed to be sold, Diversa and OneVue, also the holder of security interests in assets proposed to be sold, and GrowthOps, as a possible owner of intellectual property proposed to be sold, did not oppose leave being granted by the Court. The grant of leave was opposed by Sargon Capital and Taiping. They argued that the arrangements being proposed by the plaintiffs did not adequately protect their interests. They were concerned that the sale proceeds of approximately $30 million, when apportioned across the assets in respect of which different parties hold

interests or claim to hold interests, would not enable Sargon Capital to recover the full value of its claimed ownership interest in the intellectual property. They were also concerned that the apportionment of the sale proceeds across the assets to be sold would be complex and uncertain, undermining their ability to receive full value for the intellectual property in which they claim interests. They argued that the sale of the intellectual property would deprive them of the opportunity to determine and realise the full value for the intellectual property.

65 Contrary to the arguments advanced by Sargon Capital and Taiping, I am satisfied that the arrangements proposed by the plaintiffs do adequately protect the interests of Sargon Capital and Taiping. That is for two primary reasons.

66 First, the intellectual property largely consists of software systems and domain names used in the businesses of the Sargon VA entities. In my view, selling those assets as part of the sale of the businesses in which the assets are being used was more likely to recover a higher value for the assets in comparison to a separate sale of the assets by Sargon Capital. That is due to the nature of the assets and the comparative circumstances in which they would be sold. Domain names have value in connection with the goodwill of the business in which they are used and typically have little value apart from the goodwill. Software used in businesses such as conducted by Sargon is functional, providing a business platform for the conduct of the business, and again typically has less value outside the business in which it has been deployed. If the Cloverhill Sale did not proceed, the evidence established that the underlying Sargon VA businesses would cease. Sargon Capital would then have to pursue the sale of the intellectual property assets as separate assets, when the underlying businesses in which the intellectual property was used had ceased. Further, any sale by Sargon Capital was likely to be delayed by disputes over the ownership of the intellectual property. I consider that the prospect of Sargon Capital realising a higher value for the intellectual property in those circumstances, in comparison to the plaintiffs' proposal, is remote.

67 The second reason that I am satisfied that the arrangements proposed by the plaintiffs adequately protect the interests of Sargon Capital is that the orders require the whole of the sale proceeds to be retained to meet competing claims, other than the payment of $400,000 to the Decima entities which reflects a separate agreement negotiated by Cloverhill with the Decimal entities relating to separate identified assets. As noted earlier, originally the plaintiffs proposed that only part of the proceeds of the sale would be retained to meet claims, with a payment of $12 million being made to Westpac on completion of the sale. However, it was ultimately

proposed that the whole of the proceeds would be held, save for the Decimal payment. Under the proposed arrangements, the retained sale proceeds would not simply be apportioned across claimants according to the amount of their respective claims. Rather, the retained proceeds would be apportioned across the different asset classes in respect of which parties claim interests by reference to the relative value of each asset class to the sale proceeds. Once that allocation has been done, all persons who have claims in respect of each asset class will have that claim determined and receive their entitlement to the apportioned sale proceeds. The properly incurred expenses of the administrators will be deducted rateably across the asset classes, and the reasonableness of the expenses will also need to be established.

68 In my view, such arrangements adequately protect the interests of Sargon Capital and Taiping, and all other interested parties, by maximising the return on all of the assets owned or used in the Sargon VA businesses and then fairly and equitably apportioning the sale proceeds based on the different categories of interests held.

69 Being satisfied of the precondition in s 442C(3) of the Act, I am also satisfied that exercising my discretion to grant leave promotes the object of Part 5.3A in that it maximises the chances of the Sargon VA businesses continuing in existence, under new ownership, and also results in a better return for creditors and members than would be likely to result from a winding up.

Application for ancillary relief under s 447A

70 The plaintiffs also sought ancillary relief under s 447A of the Act designed to ensure that the purchaser obtains clear title to the intellectual property and that the current rights of parties with claims to ownership of, or security interests in, the intellectual property are preserved for the purpose of the determination of their respective entitlements to the retained sale proceeds.

71 Section 447A(1) of the Act empowers the Court to make such order as it thinks appropriate about how Part 5.3A is to operate in relation to a particular company. The power conferred by s 447A(1) is broad: *Luxtown* at [32]. In *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, the High Court observed that there is nothing on the face of s 447A(1) that suggests that it should be read down and the words of the provision are wide enough to confer power to make orders which will have effect in the future (at [17]). The High Court said that, having regard to the examples given in subsection (2), the section contemplates that orders may be made that go beyond a curial determination of what is the effect of existing provisions of Part 5.3A on a particular company in the circumstances that may be established in a proceeding, and alter how the Part <u>is to</u> operate in relation to a particular company, not how the Part <u>does</u> operate in

relation to that company (at [18]). As explained by Barrett JA in *Correa v Whittingham* (2013) 278 FLR 310 at [4], the power vested in the Court by s 447A may be exercised only for the purpose for which it was granted, which is to be ascertained from the language of the statutory provisions in Part 5.3A, their subject matter and their objects.

72 The first ancillary order sought by the plaintiffs modifies the operation of s 442C(7), which is in the following terms:

> If:
>
> (a) a company is under administration or is subject to a deed of company arrangement; and
>
> (b) property of the company is subject to a security interest; and
>
> (c) the administrator disposes of the property;
>
> the disposal extinguishes the security interest.

73 The plaintiffs submitted that the intent of s 442C(7) was to enable the recipient of property disposed of pursuant to an order made under s 442C to obtain title clear from any security interest. However, s 442C(7)(b) refers to property of the company that is subject to a security interest, which may be a narrower class of property than that referred to in s 442C(1)(b) which includes property used or in the possession of the company but of which someone else is the owner. To the extent that the intellectual property is ultimately determined to be owned by a person other than Sargon Services, the plaintiffs wished to ensure that it is transferred to the purchaser under the sale transaction free of security interests (in the manner provided for by s 442C(7)). To that end, the plaintiffs sought an order under s 447A to the effect that Part 5.3A of the Act is to operate in relation to the Sargon VA entities and, in particular, the intellectual property that is proposed to be sold, as if s 442C(7)(b) of the Act referred to the "property of the company or property used by or in the possession of the company is subject to a security interest". In my view, an order in that form is within power and is appropriate to make, as it gives effect to the evident intent of s 442C(2)(c) which is to authorise the administrators to dispose of the relevant property.

74 The second ancillary order sought by the plaintiffs under s 447A of the Act was to the effect that Part 5.3A of the Act is to operate in relation to the Sargon VA entities as if, notwithstanding the operation of s 442C(7) of the Act, the rights of secured creditors and any parties which, prior to the sale of the intellectual property, claimed to own or have security over the relevant intellectual property are preserved for the purpose of determining claims made upon the

retained sale proceeds and, further, any security interest of Westpac that applies to assets that are not being sold as part of the Cloverhill Sale will continue to apply to such assets.

75 The plaintiffs submitted that such an order was complementary to the first order sought under s 447A. It enabled security interests in respect of the assets that are to be disposed of via the sale transaction to be preserved for those parties claiming ownership, security and/or priority, as between them, for the purpose of any subsequent contest over the retained sale proceeds. A similar order was made in *Luxtown* (see at [33]). In my view, an order in that form is within power and is appropriate to make, as it facilitates the sale transaction for the benefit of all interested parties while protecting the interests of those holding security interests or ownership interests.

Conclusion

76 In conclusion, I granted leave to the plaintiffs under s 442C(2)(c), and made orders under s 447A, in the form of the orders made on 1 May 2020. I also ordered that the plaintiffs' costs of the proceeding are costs properly incurred in the administration of the Sargon VA entities, and otherwise reserved costs.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan.

Associate: 

Dated: 19 May 2020

SCHEDULE OF PARTIES

VID 285 of 2020

First Interested Party	Sargon Capital Pty Ltd (Receivers and Managers Appointed) (in Liquidation) (ACN 608 799 873)
Second Interested Party	Taiping Trustees Limited
Third Interested Party	Diversa Pty Ltd (ACN 079 201 835)
Fourth Interested Party	OneVue Holdings Limited (ACN 108 221 870)
Fifth Interested Party	Westpac Banking Corporation
Sixth Interested Party	GrowthOps Services Pty Ltd (ACN 626 208 777)