

# FEDERAL COURT OF AUSTRALIA

## Ford (Administrator), in the matter of The PAS Group Limited (Subject to Deed of Company Arrangement) [2020] FCA 1873

File number(s): VID 761 of 2020

Judgment of: **O'CALLAGHAN J**

Date of judgment: 18 December 2020

Date of publication of reasons: 23 December 2020

Catchwords: **CORPORATIONS** – deeds of company arrangement – application for leave to transfer shares pursuant to s 444GA of the *Corporations Act 2001* (Cth) – leave granted

Legislation: *Corporations Act 2001* (Cth) Pt 5.3A, ss 435A, 444GA

Cases cited: *Weaver v Noble Resources Ltd* (2010) 41 WAR 301

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 25

Date of hearing: 18 December 2020

Counsel for the Plaintiffs: Mr BA McLachlan

Solicitor for the Plaintiffs: Arnold Bloch Leibler

# ORDERS

VID761 of 2020

**IN THE MATTER OF THE PAS GROUP LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 169 477 463**

**MARTIN FRANCIS FORD, STEPHEN GRAHAM LONGLEY AND DAVID LAURENCE MCEVOY, IN THEIR CAPACITY AS JOINT AND SEVERAL DEED ADMINISTRATORS OF THE PAS GROUP LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 169 477 463 AND EACH OF THE COMPANIES NAMED IN THE SCHEDULE**  
Plaintiffs

**ORDER MADE BY: O'CALLAGHAN J**  
**DATE OF ORDER: 18 DECEMBER 2020**

## **THE COURT ORDERS THAT:**

1. The Plaintiffs, in their capacity as joint and several deed administrators of The PAS Group Limited (Subject to Deed of Company Arrangement) ACN 169 477 463 (**PAS Group**), be granted leave pursuant to section 444GA(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to transfer all of the issued shares in PAS Group from the members (as defined by the Corporations Act) (**Members**) to PAS Group International Pty Ltd ACN 645 134 247 (**PAS Group International**), in accordance with the terms of the Implementation Deed executed on 23 October 2020 by PAS Group International, Larry Kestelman, Designworks International Pty Ltd ACN 644 545 193, The PAS Group Distribution Company Pty Ltd (Subject to Deed of Company Arrangement) ACN 620 985 864, other named entities and the Plaintiffs.
2. Pursuant to section 447A(1) of the Corporations Act and/or section 90-15(1) of the Insolvency Practice Schedule (Corporations) (being Schedule 2 to the Corporations Act), any of the Plaintiffs may jointly or severally:
  - (a) execute on behalf of the Members share transfer forms and any other documents ancillary or incidental to effecting the transfer of PAS Group shares referred to in Order 1; and

- (b) enter or procure the entry of the name of PAS Group International in PAS Group's register of members in respect of all shares transferred to PAS Group International in accordance with Order 1.
3. Pursuant to section 37AF(1)(b) of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**), until further order, the publication or other disclosure of information in:
- (a) the highlighted sections of paragraphs 14(e), 14(g), 27, 29-32, 34, 38, 40-41, 46, 48, 50, 52-54, 58-60, 74-76, 78-81 and 83-84 of the affidavit of Stephen Graham Longley sworn on 14 December 2020 (**Second Longley Affidavit**);
  - (b) paragraphs 49, 51, 55-57, 99-100 and 103 of the Second Longley Affidavit;
  - (c) Exhibit "Confidential SGL-3" to the Second Longley Affidavit; and
  - (d) Exhibit "Confidential ATM-2" to the Affidavit of Anna Therese McLaurin sworn on 14 December 2020
- (together, the **Confidential Material**),
- be prohibited, and that no person other than the Plaintiffs, their legal advisers and the Court be permitted to access the Confidential Material.
4. For the purposes of section 37AG(2) of the Federal Court Act, Order 3 above is made on the ground set out in section 37AG(1)(a) of the Federal Court Act, namely, that it is necessary to prevent prejudice to the proper administration of justice because, in the absence of the order:
- (a) commercially sensitive and confidential information of the Plaintiffs; and
  - (b) confidential information of shareholders, creditors and employees of PAS Group,
- would be revealed to the public.
5. No order as to costs.

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

## REASONS FOR JUDGMENT

**O'CALLAGHAN J:**

### Introduction

1 On 18 December 2020 I made the orders set out above.

2 These are my reasons for making those orders.

3 The plaintiffs, Messrs Martin Ford, Stephen Longley and David McEvoy of PricewaterhouseCoopers Australia (the **Deed Administrators** or **Administrators**) are the Deed Administrators of The PAS Group Limited (Subject to Deed of Company Arrangement) (**PAS Group**) and 18 of its subsidiaries set out in the Schedule to these reasons (together, the **PAS Group Companies**).

4 The PAS Group Companies were placed into voluntary administration on 29 May 2020.

5 At the second meeting of creditors of the PAS Group Companies on 17 August 2020, the creditors resolved to execute Deeds of Company Arrangement (the **PAS DOCAs**), which would confer powers on the Deed Administrators to arrange the PAS Group Companies' assets and liabilities in a way that would optimise a sale transaction.

6 The PAS DOCAs came into effect on 4 September 2020.

7 On 23 October 2020, after an extensive sale campaign, the Deed Administrators entered into binding agreements with entities and persons associated with Queens Lane Capital Pty Ltd (**QLC**) for: (i) the acquisition of two of the PAS Group Companies' businesses (broadly, the wholesale businesses); and (ii) the potential acquisition of the remainder of the PAS Group Companies as a whole, involving the sale and transfer of all of the shares in PAS Group to QLC's nominee, PAS Group International Pty Ltd (the **Purchaser**).

8 That share transfer is contingent on, relevantly, the Deed Administrators obtaining leave under s 444GA of the *Corporations Act 2001* (Cth) (the **Act**) to transfer all of the shares in PAS Group to the Purchaser.

9 Section 444GA of the Act provides as follows:

#### **444GA Transfer of shares**

- (1) The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained:

- (a) the written consent of the owner of the shares; or
  - (b) the leave of the Court.
- (2) A person is not entitled to oppose an application for leave under subsection (1) unless the person is:
- (a) a member of the company; or
  - (b) a creditor of the company; or
  - (c) any other interested person; or
  - (d) ASIC.
- (3) The Court may only give leave under subsection (1) if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company.

### **Background**

10 The plaintiffs rely on the following evidence:

- (a) affidavits of Mr Longley dated 27 November 2020 and 14 December 2020;
- (b) an affidavit of Mr Simon Dalgarno dated 2 December 2020, which exhibits an independent expert's report prepared by Leadenhall Corporate Advisory Pty Ltd (**Leadenhall**) about the value of the equity in PAS Group;
- (c) an affidavit of Mr Ben Mahoney dated 14 December 2020; and
- (d) an affidavit of Ms Anna McLaurin dated 14 December 2020.

11 The PAS Group Companies are an Australian retail fashion group, with retail and wholesale operations, interests overseas and a significant online business.

12 PAS Group is a publicly listed company and the ultimate holding company of each of the other PAS Group Companies.

13 Trading of PAS Group shares on the ASX was suspended upon the appointment of the Administrators on 29 May 2020. As at that date, PAS Group had 136,690,860 ordinary paid shares on issue, held by 461 shareholders.

14 On 23 October 2020, the Deed Administrators and entities and persons associated with QLC entered into the following sale transactions:

- (a) asset sale agreements whereby QLC's nominees would acquire the PAS Group Companies' Designworks and Yarra Trail businesses and the majority of their assets (**Asset Sale Agreements**); and

(b) the “Implementation Deed” which, among other things, provides for the sale of shares in PAS Group to the Purchaser,  
(together, the **QLC Sale Transactions**).

15 The Asset Sale Agreements completed on 1 December 2020.

16 Completion of the share sale in the Implementation Deed is subject to the satisfaction of certain conditions, including:

(a) the Deed Administrators obtaining court approval for the transfer of shares to the Purchaser under s 444GA; and

(b) the Purchaser applying for and obtaining a grant from ASIC of such exemptions or modifications to the operation of Ch 6 of the Act as are required to permit the transfer of shares to the Purchaser pursuant to the Implementation Deed.

17 In a letter dated 17 December 2020, ASIC informed the solicitors for the plaintiffs that it “[did] not propose to seek to appear to make submissions, or to oppose the s 444GA application”. No creditor sought to be heard, either.

18 Had the application under s 444GA not been granted, the Implementation Deed granted the Purchaser, among other things, an option to instruct the Deed Administrators to commence a managed wind down of the PAS Group Companies’ remaining businesses.

19 Mr Longley estimated in his sworn evidence that returns to unsecured creditors of the PAS Group Companies under these two scenarios would be as follows:

(a) completion of the QLC Sale Transactions, including the transfer of PAS Group’s shares to the Purchaser under s 444GA of the Act in accordance with the terms of the Implementation Deed: 60 to 80 cents in the dollar; or

(b) the Asset Sale Agreements complete but the s 444GA application fails and a managed wind down is conducted under the terms of the Implementation Deed: 25 to 35 cents in the dollar.

20 There will be no return for shareholders of PAS Group under either scenario.

21 The Deed Administrators retained Leadenhall to prepare an independent expert report on the value of the equity in PAS Group for the purposes of this application. In short, Leadenhall assesses the value of a PAS Group share to be nil on a liquidation basis, and concludes that “as

the calculated value of the net assets in both the high and low liquidation scenarios is less than zero ... the value of the equity [is] zero in all situations”.

### **Consideration**

22 In *Weaver v Noble Resources Ltd* (2010) 41 WAR 301 at 314 [79], the then Chief Justice of Western Australia observed:

[T]he notion of unfairness [referred to in s 444GA(3)] only arises if prejudice is established. If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair.

23 As counsel submitted, in circumstances where:

- (a) Mr Longley has deposed that:
  - (i) QLC’s “whole of Group” offer was the best alternative of the offers received during the sale campaign;
  - (ii) no subsequent proposal for the sale or recapitalisation of the PAS Group Companies has been received;
  - (iii) if the s 444GA application were unsuccessful, the Implementation Deed grants the Purchaser options to either instruct the Deed Administrators to commence a managed wind down of the PAS Group Companies’ remaining businesses or complete an asset sale agreement for all or parts of the PAS Group Companies’ remaining retail businesses; and
  - (iv) there will in the Deed Administrators’ view be no return for shareholders of PAS Group under any scenario; and
- (b) Leadenhall’s independent expert report has concluded that:
  - (i) the value of the net assets in high and low liquidation scenarios is less than zero with the result that the value of the equity in PAS Group is zero in all situations; and
  - (ii) the value of a PAS Group share is nil on a liquidation basis,

a conclusion ought to be drawn that the proposed transfer of PAS Group shares does not unfairly prejudice its members.

- 24 In addition, the object of Pt 5.3A of the Act (see s 435A) is furthered by the approval of the share transfer, because it will allow for completion of the QLC Sale Transactions with an estimated return to unsecured creditors of 60 to 80 cents in the dollar, compared with 25 to 35 cents in the dollar under a managed wind down scenario. It will also facilitate the company, and as much as possible of its business, continuing in existence.
- 25 For those reasons, the orders set out above were made.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate:



Dated: 23 December 2020



## SCHEDULE

### VID761 of 2020

1. AFG Retail Pty Limited (Subject to Deed of Company Arrangement) ACN 133 613 251
2. Black Pepper Brands Pty Limited (Subject to Deed of Company Arrangement) ACN 112 065 559
3. The PAS Group Distribution Company Pty Ltd (Subject to Deed of Company Arrangement) ACN 620 985 864 (formerly Bondi Bather Pty Limited)
4. Chestnut Apparel Pty Limited (Subject to Deed of Company Arrangement) ACN 112 091 522
5. Designworks Clothing Company Pty Limited (Subject to Deed of Company Arrangement) ACN 117 343 807
6. Designworks Holdings Pty Limited (Subject to Deed of Company Arrangement) ACN 113 900 057
7. Fiorelli Licensing Pty Limited (Subject to Deed of Company Arrangement) ACN 122 295 827
8. JETS Swimwear Pty Limited (Subject to Deed of Company Arrangement) ACN 068 819 581
9. Metpas Pty Ltd (Subject to Deed of Company Arrangement) ACN 127 957 653
10. PAS Finance Pty Ltd (Subject to Deed of Company Arrangement) ACN 169 478 291
11. PASCO Group Pty Ltd (Subject to Deed of Company Arrangement) ACN 117 244 943
12. PASCO Operations Pty Ltd (Subject to Deed of Company Arrangement) ACN 112 078 547
13. Review Australia Pty Limited (Subject to Deed of Company Arrangement) ACN 122 295 836
14. The Capelle Group Pty Limited (Subject to Deed of Company Arrangement) ACN 121 867 641
15. The Hopkins Group Aust Pty Limited (Subject to Deed of Company Arrangement) ACN 119 023 273
16. World Brands Pty Ltd (Subject to Deed of Company Arrangement) ACN 075 219 135

17. Yarra Trail Holdings Pty Limited (Subject to Deed of Company Arrangement)  
ACN 110 901 561
18. Yarra Trail Pty Limited (Subject to Deed of Company Arrangement) ACN  
110 902 102