

NOTICE OF FILING

Details of Filing

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File Title: IN THE MATTER OF IN THE MATTER OF GREATCELL SOLAR LIMITED (IN LIQUIDATION) ACN 111 723 883 AND GREATCELL SOLAR AUSTRALIA PTY LTD (IN LIQUIDATION) ACN 131 374 064
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Affidavit

No. NSD1481/2023

Federal Court of Australia
District Registry: New South Wales
Division: Corporations

IN THE MATTER OF Greatcell Solar Limited (In Liquidation) ACN 111 723 883 and Greatcell Solar Australia Pty Ltd (In Liquidation) ACN 131 374 064

Peter Krejci and Andrew Cummins in their capacity as joint and several liquidators of Greatcell Solar Limited (In Liquidation) (ACN 111 723 883) and Greatcell Solar Australia Pty Ltd (In Liquidation) (ACN 131 374 064)

Plaintiffs

Affidavit of: **Peter Paul Krejci**
Address: BRI Ferrier, Level 30, 264 George St, Sydney NSW 2000
Occupation: Chartered Accountant and Registered Liquidator
Date: 15 August 2024

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I, Peter Paul Krejci of Level 30, 264 George St, Sydney NSW 2000, Registered Liquidator, say on oath:

A. INTRODUCTION

1. I am a principal with the corporate restructuring, insolvency and business advisory firm BRI Ferrier (NSW). I am a Chartered Accountant and a Registered Liquidator (No. 223004) and

Deponent

Witness

Filed on behalf of (name & role of party) Peter Krejci and Andrew Cummins in their capacity as joint and several liquidators of Greatcell Solar Limited (In Liquidation) (ACN 111 723 883) and Greatcell Solar Australia Pty Ltd (In Liquidation) (ACN 131 374 064), plaintiffs

Prepared by (name of person/lawyer) Stuart McKenzie

Law firm (if applicable) Colin Biggers & Paisley Pty Ltd

Tel (02) 8281 4501 Fax (02) 8281 4567

Email stuart.mckenzie@cbp.com.au and lois.bullen@cbp.com.au

Address for service
(include state and postcode) Colin Biggers & Paisley Lawyers, Level 42, 2 Park Street, Sydney NSW 2000

I have practised for more than 20 years as an accountant specialising in insolvency related matters in Australia.

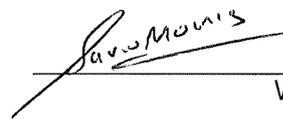
2. I am one of the joint and several liquidators (**Liquidators**) of Greatcell Solar Limited (In Liquidation) (**GSL**) & Greatcell Solar Australia Pty Ltd (In Liquidation) (**GSA**) (together, the **Companies**). Andrew Cummins is my co-appointee. Mr Cummins and I are the plaintiffs in this proceeding.
3. Save where otherwise indicated, I swear this affidavit based on my own knowledge including knowledge that I have obtained from work and investigations that my staff, Mr Cummins and I have undertaken as liquidators of the Companies. Such investigations have included reviewing the books and records of the Companies that are available to me.
4. I make this affidavit in support of the Liquidators' amended originating process filed on 15 August 2024.

B. BACKGROUND

5. The background of the Liquidators' appointment and the Companies' operations are set out in my first affidavit sworn 6 December 2023.
6. As set out in my first affidavit:
 - (a) I consider that the Liquidators have a good claim against the Companies' former directors for insolvent trading (**Insolvent Trading Litigation**);
 - (b) the **Commonwealth** of Australia acting through the Department of Employment and Workplace Relations is a creditor of the Companies and is interested in providing funding to the liquidators to enable them to bring the Insolvent Trading Litigation;
 - (c) the Company which owes the Commonwealth the greater debt (being GSA) is, based on the Liquidators' present estimate, likely to make a smaller recovery than GSL in the Insolvent Trading Litigation (**Funding/Recovery Imbalance**);
 - (d) the Commonwealth indicated, on 10 November 2023, that:
 - (i) the Funding/Recovery Imbalance impacts the commerciality of the Commonwealth funding the Insolvent Trading Litigation;
 - (ii) the Commonwealth was willing to fund the Insolvent Trading Litigation if the Companies were pooled as the commerciality would improve; and

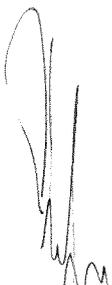


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- (iii) it would otherwise be difficult to obtain delegate support to continue to fund the Insolvent Trading Litigation unless a priority arrangement was put in place (i.e. a requirement that approximately 30% of any recovery from the Litigation be paid to the Commonwealth in addition to repayment of its funding which would be applied by the Commonwealth to the amount owed to it by the Companies thereby reducing the Companies' liability to the Commonwealth (**Funding Priority**)); and
- (e) based on an estimated outcome statement prepared by my staff, and having regard to other factors, the Liquidators considered that the Companies being pooled was in the best interests of the Companies' creditors.
7. On 6 December 2023, the Liquidators commenced this proceeding and sought:
- (a) an order that the Companies be pooled;
- (b) approval for the Liquidators to enter into a proposed pooled funding agreement with the Commonwealth in respect of the funding for the Insolvent Trading Litigation;
- (c) approval for the Liquidators to enter into a costs agreement with our lawyers, Colin Biggers & Paisley Lawyers (**CBP**), in respect of the Insolvent Trading Litigation; and
- (d) confidentiality orders in respect of the confidential exhibit to my first affidavit.
8. On 12 December 2023, the Liquidators issued a circular to the creditors of the Companies providing notice of the relief sought in the Liquidators' originating process. Details of that circular are set out in the affidavit affirmed by my employee, Katherine Madonna La, on 20 December 2023.
9. On 8 February 2024, the proceeding was listed for a case management hearing before the Honourable Justice Halley, at which:
- (a) Karen Petch of counsel appeared for three directors of the Companies: Ian Neal, Richard Caldwell and Gordon Thompson;
- (b) Ms Petch informed the court that the directors intended to oppose the pooling of the Companies; and
- (c) Justice Halley made orders for the directors to file material and submissions and listed the Liquidators' application for hearing on 3 April 2024.



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10. Despite repeated requests by CBP to the directors' solicitors between 8 February and 13 March 2024 that the directors identify the bases of their opposition to the pooling orders with a view to narrowing the scope of the dispute, those bases were not articulated until the directors' submissions were served on 26 March 2024.
11. Due to the extensive and complex grounds of opposition, consensus was reached at the hearing on 3 April 2024 that the application could not be determined on that day and the hearing was adjourned to a date to be fixed to enable the Liquidators to consider their position.
12. Following the adjournment of the hearing, I formed the view that:
 - (a) the pooling application was likely to be vigorously opposed by the directors;
 - (b) having regard to an estimate provided by CBP (privilege in which is not waived), the cost of addressing the matters raised in the directors' submissions with further affidavit material and then re-listing the matter for a hearing would be approximately \$50,000 in solicitors and counsel's fees; and
 - (c) in the circumstances, it would be preferable (and more commercial) to explore the option of a Funding Priority rather than incur the further expense associated with pursuing the pooling application.
13. I am informed by William Staples, a Senior Government Lawyer in the employ of the Commonwealth, and I believe, that the Commonwealth's preference is to provide the funding on the basis of a Funding Priority, rather than on the basis that the companies are pooled.
14. The Liquidators have now reached agreement with the Commonwealth for the Insolvent Trading Litigation to be funded with a Funding Priority. The purpose of the Liquidators' amended originating process is to seek approval of the funding agreement and CBP's costs agreement for the Insolvent Trading Litigation.

C. APPROVAL OF AGREEMENTS

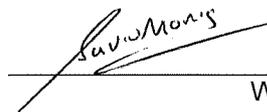
C.1 Litigation funding

15. As outlined in my first affidavit:

- (a) the Commonwealth provided funding for the Liquidators to conduct public examinations in order to investigate the prospects of any Insolvent Trading Litigation and agreements between the Commonwealth, the Liquidators and the Companies in respect of that funding were approved by Justice Cheeseman in Federal Court of



Deponent



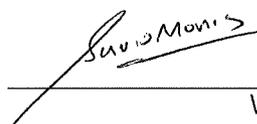
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Australia proceeding no. NSD1358/2021 on 3 February 2022 (**Initial Funding Agreements**);

- (b) the Commonwealth and the Liquidators agreed that the further funding for the Insolvent Trading Litigation would be provided by way of amendment deeds to the Initial Funding Agreements which were executed on 14 August 2023; and
 - (c) if the Companies were pooled, the Liquidators and the Commonwealth proposed to enter into a pooled funding agreement (approval of which was sought by the Liquidators under s 477(2B)).
16. As the proposal is no longer for the Companies to be pooled, the Liquidators have agreed with the Commonwealth that the further funding for the Insolvent Trading Litigation will be provided by terminating the Initial Funding Agreements and entering into a new funding agreement which consolidates the funding for the public examinations, the Insolvent Trading Litigation, the pooling application and the applications under s 477(2B) (**Consolidated Funding Agreement**). A copy of the Consolidated Funding Agreement is exhibited to this affidavit and marked "Confidential Exhibit PPK-3".
17. On 17 May and 19 August 2019, the Liquidators issued circulars to the creditors of the Companies in which they requested that any creditor/s who would be interested in funding the investigation and potential prosecution of the Insolvent Trading Claims contact the Liquidators. Copies of those circulars to creditors are produced at **tab 3 page 138** of Exhibit PPK-1 to my first affidavit.
18. No creditor of either of the Companies has expressed any interest in funding the Insolvent Trading Litigation (or any action by the Liquidators). As such, if the Commonwealth was not prepared to fund the Insolvent Trading Litigation, the Liquidators would be required to either:
- (a) approach alternative, private, funders who in my experience are likely to impose significantly more onerous terms in their funding agreements, including a significant uplift in respect of any recoveries made by the Companies, which in my experience is in the range of 30% to 40% (or more); or
 - (b) abandon the potential claims against the directors.
19. The Consolidated Funding Agreement, like the Funding Agreements, includes acknowledgements by the Liquidators that the funding provided will be treated as a priority payment *pari passu* with the priority afforded to the Liquidators' costs and remuneration by section 556(1)(a) of the *Corporations Act 2001*. I consider this requirement to be reasonable



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as, if the Companies had sufficient funds to meet the costs of the Insolvent Trading Litigation, those costs would have been given priority pursuant to section 556(1)(a). The Commonwealth's request for priority repayment of their funding contribution will not therefore, in my opinion, prejudice the creditors of the Companies.

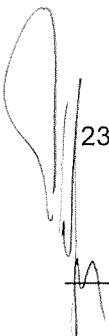
20. Pursuant to the Consolidated Funding Agreement, the Liquidators and the Companies agree that, if any recoveries are made by GSL in the Insolvent Trading Litigation, the Commonwealth will be paid, in addition to the repayment of its funding, 30% of the sum of any recoveries made by GSL (limited to the collective amount of the funds paid by the Commonwealth to the employees of the Companies in respect of unpaid entitlements) as a priority from the recovery. I understand why the Commonwealth requires this Funding Priority to be provided in order for the funding arrangement to be commercial. In my view, obtaining the funding from the Commonwealth remains preferable to obtaining funding from a commercial litigation funder in circumstances where:

- (a) the Funding Priority is only in respect of recoveries made by GSL in the Litigation, whereas a commercial funder would require an uplift of a similar or higher amount in respect of the recoveries made by both Companies; and
- (b) the amount of any Funding Priority will be deducted from the debt owed by the Companies to the Commonwealth (first to repay GSL's debt to the Commonwealth and the surplus, if any, to repay GSA's debt to the Commonwealth) which provides a greater benefit to the unsecured creditors than the commercial funding alternative (where the commercial funder would keep the amount of any uplift).

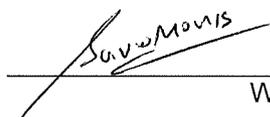
21. Moreover, the Commonwealth is familiar with the matter and has expressed willingness to fund the Litigation. In my view, it would not be a valuable use of the Company's resources for the Liquidators to seek alternate funding when, having regard to my experience with commercial funds, the terms are likely to be less favourable.

22. The Consolidated Funding Agreement provides that, in the event that the Insolvent Trading Litigation does not result in the Liquidators making a recovery on behalf of the Companies, the Liquidators are not required to repay the amounts provided by the Commonwealth to fund the Insolvent Trading Litigation and associated tasks (including this application). I am therefore of the view that there will be no detriment suffered by the Companies or their creditors by the Liquidators accepting funding from the Commonwealth to fund the Insolvent Trading Litigation.

23. Based on the matters I depose to in paragraphs 17 to 22 above, the Liquidators have formed the view that it is in the best interests of the Companies, and the creditors of the Companies,



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to accept funding from the Commonwealth to meet the costs of the Insolvent Trading Litigation.

24. The Commonwealth also agreed to provide funding for the Liquidators to bring this application seeking approval of the Consolidated Funding Agreement.
25. I have, in consultation with the Commonwealth, formed the view that the Liquidators should seek approval of the Consolidated Funding Agreement from the Court without first seeking approval from the creditors of the Companies. This conclusion was reached because the directors of the Companies, being the proposed defendants of the Insolvent Trading Litigation, are substantial asserted creditors of the Companies and could influence the vote at any creditors meeting. I therefore consider that the directors may be successful in opposing any resolution which assisted the Liquidators in pursuing claims against the directors (including the funding of the Insolvent Trading Litigation).
26. I am therefore of the view that the cost of calling and conducting a creditors meeting to seek approval of the Consolidated Funding Agreement would be a waste of the Companies' limited funds.
27. I consider it appropriate, and indeed a requirement of the funding proposed to be offered by the Commonwealth, to seek the Court's approval for the Liquidators and the Companies to enter into the Consolidated Funding Agreement.

C.2 Costs agreements

28. The matters relating to CBP's costs agreement are set out in paragraphs 42 to 46 of my first affidavit and they remain unchanged.

D. CONFIDENTIALITY

29. The Liquidators' amended originating process seeks orders that confidential exhibit PPK-2 to my first affidavit and confidential exhibit PPK-3 to this affidavit be treated as confidential and that access only be granted with the consent of the Liquidators or by order of the court.
30. Confidential exhibit PPK-2 comprises:
 - (a) the amendment deeds to the Initial Funding Agreements;
 - (b) CBP's costs agreement;
 - (c) the estimated outcome statement; and



Deponent



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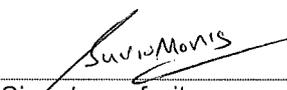
(d) the draft pooled funding agreement.

31. Confidential exhibit PPK-3 is the Consolidated Funding Agreement.
32. These documents all contain information as to the amount of funding that the Commonwealth has agreed to provide in respect of the Insolvent Trading Litigation and the terms upon which the funding is to be provided.
33. In my view, it would be detrimental to the Companies for that information to be publicly available as it would enable the proposed defendants to the Insolvent Trading Litigation to understand the limitations of the available funding and, in respect of the estimated outcome statement, the bases upon which the Liquidators may be willing to settle the Litigation. If the directors had that information, I would be concerned that they could use it to their advantage in the Litigation which may result in a less favourable outcome for the Companies.

Sworn by the deponent
at Sydney
in New South Wales
on 15 August 2024
Before me:

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Signature of deponent



Signature of witness

SAVIO MAURICE MONIS
JUSTICE OF THE PEACE - REG NO. 256525