

Federal Court of Australia

No.

District Registry: New South Wales

IN THE MATTER of PROSPERO MARKETS PTY LTD (IN LIQUIDATION)
ACN 145 048 577**JONATHON SHERWOOD KEENAN** and others named in the schedule
Plaintiffs**A. DETAILS OF APPLICATION**

This application is made under section 90-15(1) of the *Insolvency Practice Schedule* (Corporations) (**IPS-Corp**) or, alternatively, section 63 of the *Trustee Act 1925* (NSW) (**Trustee Act**) by the Liquidators of Prospero Markets Pty Ltd (in Liquidation) ACN 145 048 577 (**Company**) for judicial advice/directions in relation to the return of funds held on trust for its clients and for remuneration approval in relation to the dealings relating to the trust funds.

Definitions

In these Orders the following meanings are adopted:

Admitted Entitlement Notice means the notice to be provided by the Plaintiffs to clients identifying the proposed value of each clients' admitted claim for payment of funds from the CBA Client Accounts.

Bartier Perry Fees and Disbursements means the costs and disbursements incurred by Bartier Perry in acting for the Plaintiffs as Liquidators of the Company in relation to the CBA Client Accounts and adjudication process prior to the filing of this originating process.

Bartier Perry Future Work means the work required to be undertaken by Bartier Perry and counsel on behalf of the Plaintiffs as Liquidators of the Company and the Company from the date of the application onwards which is including but not limited to legal advice in relation to the final distribution of funds in the CBA Client Accounts and advertising the final distribution circular to

Filed on behalf of Jonathon Sherwood Keenan, Peter Paul Krejci and Andrew John Cummins as Liquidators of Prospero Markets Pty Ltd (in Liquidation), Plaintiffs

Prepared by Adam Cutri, Partner

Law firm Bartier Perry Lawyers

Tel +61 2 8281 7800

Fax +61 2 8281 7838

Email litigation@bartier.com.au

Ref DRD 242964

Address for Service**BARTIER PERRY**

Level 25, 161 Castlereagh Street, Sydney NSW 2000

Email: litigation@bartier.com.au

clients, dealing with unclaimed monies and other ancillary matters that arise during the Proposed Distribution Process.

CBA Client Accounts means the monies held in the Commonwealth Bank of Australia accounts bearing account numbers 1336-0135, 1336-0151, 1336-9981 and 1336-0143.

Client Money funds held by the Company for its clients pursuant to Part 7.8 of the Corporations Act 2001 (Cth).

Client Portal means the web-based client and creditor management platform hosted by Link Market Services on behalf of the Plaintiffs.

Company means Prospero Markets Pty Limited (in Liquidation) bearing ACN 145 048 577.

General Liquidation Account means the account opened by the Plaintiffs as Liquidators of the Company with the National Australia Bank bearing account number 591118659, and any other bank accounts subsequently opened by the Liquidators on behalf of the Company.

Liquidators' Future Work means the work required to be undertaken by the Plaintiffs as Liquidators of the Company in undertaking the Proposed Distribution Process.

Link Market Services is an external service provider of the Client Portal.

MT4 AU Clients Database means the database recording the information for clients of the Company from the MetaTrader 4 trading platform used by the Company but licenced by Prospero Markets Company Limited (New Zealand).

MT4 Offshore Database means the database recording the information from the MetaTrader 4 trading platform used by Prospero Markets LLC in St Vincent & The Grenadines but licenced by the Company.

MT4 Offshore Database Relevant Clients means persons listed in the MT4 Offshore Database who contacted the Plaintiffs prior to the date of the orders.

Proposed Distribution Process means the process outlined in prayers [10] to [15] of this originating process below.

On the facts stated in the supporting affidavit, the Plaintiffs claim:

Interlocutory Orders – Remuneration and Costs

Source of funds

1. Order pursuant to s 90-15 of the IPS-Corp and/or s 63 and s 81 of the Trustee Act that, subject to orders [2] to [8] below, the Plaintiffs are justified in using and applying the following funds to pay their remuneration, and cost and expenses relating to the dealings with the Client Money:
 - (a) the funds held in the CBA Client Accounts; or, alternatively,
 - (b) the funds held in the General Liquidation Account.

Quantum

2. Order that the remuneration of the Plaintiffs relating to the dealings with the trust assets for the period 10 April 2024 (being the Plaintiffs' appointment date) to 30 June 2024 inclusive be fixed in the amount of \$484,093.50 including GST.
3. Order that the Plaintiffs' reasonable remuneration estimated to be incurred in connection with the Liquidators' Future Work from 1 July 2024 relating to the dealings with the trust assets, up to a total amount not exceeding \$250,000.00 inclusive of GST is approved.
4. Order that the costs and expenses (excluding legal fees) of the Plaintiffs relating to the dealings with the trust assets for the period 10 April 2024 (being the Plaintiffs' appointment date) to 30 June 2024 inclusive be fixed in the amount of \$121,304.72 including GST.
5. Order that the Plaintiffs' reasonable costs and expenses (excluding legal fees) estimated to be incurred in connection with the Liquidators' Future Work from 1 July 2024 relating to the dealings with the trust assets, up to a total amount not exceeding \$233,565.47 inclusive of GST is approved.
6. Order that Bartier Perry Fees and Disbursements in relation to the dealings with the trust assets in the sum of \$38,650.70 inclusive of GST for the period 10 April 2024 to 30 June is approved.
7. Order that the reasonable legal fees and disbursements of Bartier Perry in connection with the Bartier Perry Future Work from 1 July 2024 relating to the dealings with the trust assets, up to a total amount not exceeding \$150,000.00 inclusive of GST is approved.
8. Order that the Plaintiffs are justified in paying the amounts in orders [2], [4] and [6] above forthwith from either the CBA Client Accounts or General Liquidation Account in accordance with the Court's orders.

Final Orders – Distribution

Client Money and pooling

9. Orders that the Plaintiffs are justified in:

- (a) treating the money held in the CBA Client Accounts as the full the extent of the funds held by the Company for its clients pursuant to Part 7.8 of the *Corporations Act 2001* (Cth) (**Client Money**); and
- (b) pooling the Client Money for the purposes of the Proposed Distribution Process into a single, interest-bearing bank account held in the Company's name controlled by the Plaintiffs.

Distribution notice and dispute resolution

10. Orders that the Plaintiffs are justified in adopting the following distribution process (**Proposed Distribution Process**) for the purposes of calculating clients' individual proportionate entitlements to distribution from the Client Money:
 - (a) emailing to each client in the MT4 AU Client Database and each MT4 Offshore Database Relevant Client, to the address recorded in the MT4 AU Client Database and MT4 Offshore Database, or an updated email address advised by the client (or, if email communication is not, in the Plaintiffs' reasonable opinion, the most appropriate means of communication with any individual, by posting correspondence to the individual's last known address) a notification:
 - (i) providing the clients with unique login credentials to access the Client Portal, informing clients of the value of the Plaintiffs' proposed admitted amount of the client's claim for distribution from the Client Money and outlining the matters in orders [(c)] to [(d)] below (**Admitted Entitlement Notice**), such amount being:
 - (A) for the clients in the MT4 AU Clients Database, the 'Equity' or 'Balance' amount (as appropriate) recorded in relation to that client in the MT4 AU Clients Database;
 - (B) for the clients in the MT4 Offshore Database – nil; and
 - (ii) asking clients to provide or update their current bank account details in the Client Portal for payment of their distribution entitlement from the Client Money;
 - (b) subject to orders [(c)] to [(d)] and [11] to [15] below, the Plaintiffs are justified in proceeding to distribution of the entirety of the Client Money, by no earlier than forty-two (42) days from the date of the Admitted Entitlement Notices, on the following basis:
 - (i) First, if order [1(a)] is made, in payment of the Plaintiff's remuneration, costs and expenses referred to in each of the orders [2], [4] and [6] to [7] above and the Plaintiffs' costs and expenses in connection with these proceedings (and any further remuneration, costs and expenses approved by the Court);

- (ii) *Next*, subject to order [11] below relating to client balances under AUD\$100, *pari passu* amongst all persons listed as clients in the MT4 AU Client Database according to their 'Equity' or 'Balance' amount (as appropriate) recorded in that database;
- (iii) *Next*, treating any Client Money remaining, if any, after the distribution in [(i)] and [(ii)] above, as assets of the Company;
- (c) providing clients a period of fourteen (14) days from the date of the Admitted Entitlement Notice to dispute, whereby the clients must provide the Plaintiffs notice in writing with satisfactory supporting evidence and reasons emailed to the Plaintiffs (**Dispute Notice**), the Plaintiffs' proposed admitted amount of the client's claim for an entitlement to a distribution from the Client Money;
- (d) in the event that any Dispute Notices are received by the Plaintiffs, the Plaintiffs must review the Dispute Notice and either:
 - (i) issue a revised Admitted Entitlement Notice and, by no earlier than 14 days from the date of the revised Admitted Entitlement Notice, proceed to distributing the client entitlement in accordance with the revised Admitted Entitlement Notice in accordance with orders [(b)(i)] and [(b)(ii)] above; or
 - (ii) notify the client in writing with reasons, that the Dispute Notice is rejected (**Rejection Notice**) and inform the client that the Plaintiffs will proceed to distributing the client entitlement in accordance with the initial Admitted Entitlement Notice in accordance with orders [(b)(i)] and [(b)(ii)] above after fourteen (14) days from the date of the Rejection Notice, unless the client applies to this Court for orders in relation to the Dispute Notice and Admitted Entitlement Amount before the expiry of fourteen (14) days from the date of the Rejection Notice.

Low Account Balances

11. Order that the Plaintiffs are justified in treating persons listed in the MT4 AU Clients Database who have an 'Equity' or 'Balance' amount (as the case may be) recorded as AUD\$100 or less, as having no right to participate in the distribution of the Client Money.

Conversion of Foreign Currency to Australian Dollars

12. Order that the Plaintiffs are justified, for the purposes of calculating each client's proportionate entitlement to the Client Money and for the purpose of pooling and distributing same, in converting any client entitlements in foreign currency to Australian dollars at the exchange rate of 0.6621 being the exchange rate as at 10 April 2024 (the date of the Plaintiffs' appointment).

Credit Bonus Promotion claims

13. Order that the Plaintiffs are justified in assessing the clients claim in relation to withdrawals of credit bonuses recorded in the MT4 AU Client Database by reference to the conditions set out in the 'Credit Bonus Promotion Rules Wholesale Client Only' updated as at 1 October 2023.

Clients for whom no bank account detail available

14. Order that the Plaintiffs are justified in:
- (a) requesting in the Admitted Entitlement Notice that all clients in the MT4 AU Clients Database who, to date, have failed to provide valid bank account details for distribution, provide such bank account details within 14 days of the date of the Admitted Entitlement Notice;
 - (b) if no such bank details are provided within the time provided in order [(a)] above, paying the distribution of the Client Money for the relevant person to:
 - (i) The Australian Securities and Investments Commission in accordance with s 544 of the *Corporations Act 2001* (Cth) ('Unclaimed money to be paid to ASIC'); or
 - (ii) alternatively, into this Court.

Shortfall of Client Money

15. Order that, to the extent that the entitlements of the clients are not fully paid as a result of any deficit in the Client Money whether resulting from the payment of the remuneration, costs and expenses referred to in ~~each of the orders [2], [4] and [6] to [7] above~~ (and any further remuneration, costs and expenses approved by the Court) ~~and the Plaintiffs' costs and expenses in connection with these proceedings~~, or otherwise, the Plaintiffs are justified in treating the shortfall to those clients as unsecured creditors of the Company as to the balance of those entitlements.

Notice of orders and liberty to apply

16. The Plaintiffs, within five (5) business days of the date of these Orders, are to give notice of the Orders to the Company's creditors (including clients and any persons claiming to be creditors) by means of a circular:
- (a) to be published on the website maintained by the Plaintiffs at <https://briferrier.com.au/about-us/current-matters/prospero-markets-pty-ltd> and uploaded to the Client Portal; and
 - (b) sent by email communication to email addresses held by the Plaintiffs or the Company;

Electronic communications with clients

17. Order that the Plaintiffs are justified:
- (a) in communicating with, and serving notices and correspondence on, clients who are unable to access the Client Portal, or who inform the Plaintiffs that their email addresses recorded in the MT4 AU Clients Database and MT4 Offshore Database are out of date, by any alternate email address that may be available to the Plaintiffs for each client for the purposes of the Proposed Distribution Process; and
 - (b) adopting and applying the Proposed Distribution Process for the clients in order [(a)] above;
18. Liberty to apply be granted to any person, including any creditor of the Company or the Australian Securities and Investments Commission, who can demonstrate by affidavit a sufficient interest to vary these Orders on the giving of three (3) business days' notice to the Plaintiffs, and to the Court, such liberty to be exercised within 14 days of the Plaintiffs complying with Order [16] above.
19. The requirement to provide notice for the purpose of s 63(8) of the Trustee Act is dispensed with.
20. The time fixed for making an application under s 63(10) of the Trustee Act is 14 days after the date of these Orders.
21. Such further or other order as the Court deems necessary.

Dated: ~~31 July 2024~~ August 2024



.....
Signed by Adam Cutri
Lawyer for the Plaintiffs

This application will be heard by the Federal Court of Australia at Level 17, Law Courts Building, Queens Square, Sydney in the State of New South Wales at am/pm on

B. NOTICE TO DEFENDANTS

TO: N/A

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the Plaintiffs.

Note Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. APPLICATION FOR WINDING UP ON GROUND OF INSOLVENCY

Not applicable

D. FILING

Date of filing: ~~31 July 2024~~ August 2024

.....
Registrar

This originating process is filed by Adam Cutri, Partner of Bartier Perry, solicitor for the Plaintiffs.

E. SERVICE

The Plaintiffs' address for service is:

C/- BARTIER PERRY
Level 25, 161 Castlereagh St
Sydney NSW 2000
Email: litigation@bartier.com.au

It is not intended to serve a copy of this originating process on the defendants.

Schedule

Federal Court of Australia

No.

District Registry: New South Wales

IN THE MATTER of PROSPERO MARKETS PTY LTD (IN LIQUIDATION)
ACN 145 048 577

Plaintiffs

Second Plaintiff:

PETER PAUL KREJCKI

Third Plaintiff:

ANDREW JOHN CUMMINS