

NOTICE OF FILING

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
Court of Filing FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 18/07/2023 4:36:06 PM AEST
Date Accepted for Filing: 18/07/2023 4:36:14 PM AEST
File Number: NSD917/2020
File Title: COMPUMOD INVESTMENTS PTY LIMITED AS TRUSTEE FOR THE
COMPUMOD PTY LIMITED STAFF SUPERANNUATION FUND v
UNIVERSAL EQUIVALENT TECHNOLOGY LIMITED (FORMERLY
A.C.N. 603 323 182 LIMITED AND FORMERLY AXSESSTODAY
LIMITED & ANOR
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.



Defence to Further Amended Statement of Cross-Claim

No. NSD917 of 2020

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

Compumod Investments Pty Limited as trustee for the Compumod Pty Limited Staff Superannuation Fund

Applicant

Universal Equivalent Technology Limited (formerly A.C.N. 603 323 182 Limited and formerly Axesstoday Limited)

First Respondent

PricewaterhouseCoopers Securities Limited

Second Respondent

PricewaterhouseCoopers Securities Limited

Cross-Claimant

Universal Equivalent Technology Limited (formerly A.C.N. 603 323 182 Limited and formerly Axesstoday Limited)

Cross-Respondent

To the Further Amended Statement of Cross-Claim dated ~~20 May 2022~~ 2 June 2023 (**Further Amended Cross-Claim**):

A. Parties

1. The Cross-Respondent admits paragraph 1 of the Further Amended Cross-Claim.

Filed on behalf of (name & role of party)	First Respondent
Prepared by (name of person/lawyer)	Andrew Moore & Thomas Cavanagh
Law firm (if applicable)	Wotton + Kearney
Tel	02 8273 9971
Fax	02 8273 9901
Email	Andrew.Moore@wottonkearney.com.au; Thomas.Cavanagh@wottonkearney.com.au
	Wotton + Kearney
Address for service	Level 26, 85 Castlereagh Street
(include state and postcode)	SYDNEY NSW 2000

2. The Cross-Respondent admits paragraph 2 of the Further Amended Cross-Claim and further says that prior to the appointment of administrators on 7 April 2019, the Cross-Respondent was in the business of lending to small and medium enterprises primarily in the hospitality and transport sectors under the name Axesstoday Limited (**AXL**).

Contribution

3. The Cross-Respondent admits paragraph 3 of the Further Amended Cross-Claim.
4. The Cross-Respondent does not know and therefore does not admit the existence of the circumstances pleaded in paragraph 4 of the Further Amended Cross-Claim.
- 4A The Cross-Respondent does not know and therefore does not admit the existence of the circumstances pleaded in paragraph 4A of the Further Amended Cross-Claim and otherwise repeats its answers to paragraph 5 and 7 below.
5. In answer to paragraph 5 of the Further Amended Cross-Claim , the Cross-Respondent repeats the matters set out paragraphs 1 to 11 and 12A, Parts C, D, E, F, F1, G, paragraphs 49A to 49D, Parts H, I, and J, and paragraphs 85 to 88B, 89 and 90 of its Defence to Second Further Amended Statement of Claim dated ~~20 May 2022~~ 17 April 2023.
6. The Cross-Respondent denies paragraph 6 of the Further Amended Cross-Claim.
7. The Cross-Respondent denies paragraph 7 of the Further Amended Cross-Claim.

Further, and in the alternative:

8. On or about 7 April 2019 Messrs Strawbridge, Kanevsky and Algeri were appointed as administrators of the AXL Entities (**Administrators**), including the Cross-Respondent, pursuant to Part 5.3A of the Corporations Act.
9. At meetings held on 30 August 2019 and convened pursuant to section 439A of the Corporations Act, the creditors of each of the Cross-Respondent and its related entities (**the AXL Entities**) resolved that the AXL Entities execute a deed of company

arrangement proposed by Promontoria Holding 304 BV as deed proponent (**Deed Proponent**) under section 444B(2)(b) of the Corporations Act.

Particulars

Minutes of Meeting of Members, Creditors, Contributories or Committee of Inspection under s436E or s439A – ASIC Document No. 7EAP06906

10. On or about 3 September 2019, the Administrators as deed administrators, the AXL Entities and the Deed Proponent executed a Deed of Company Arrangement to give effect to the 30 August 2019 resolutions (**DOCA**).
11. By its operation, the DOCA binds all Creditors of the Cross-Respondent in accordance with section 444D of the Corporations Act and also binds the Cross-Respondent, its officers and members in accordance with section 444G of the *Corporations Act*.

Particulars

- (a) Clause 1.1 of the DOCA
- (b) Clause 4.1 of the DOCA

12. Clause 1.1 of the DOCA contains the following relevant definitions:
 - a. The Appointment Date is 7 April 2019.
 - b. Completion was defined to mean completion of the steps set out in cl 6.2 of the DOCA.
 - c. Claim is defined to mean, inter alia:

“...a debt owing by, or a claim against, an AXL Entity (whether present or future, certain or contingent, ascertained or sounding only in damages), irrespective of whether the debt or claim arose by virtue of contract, at law (including by statute), in equity or otherwise, being a debt or claim any of the circumstances giving rise to which occurred on or before the Appointment Date and which would be admissible to proof (or would be admissible to proof but for the operation of section 553B of the Act)

against the AXL Entity had that entity been wound up and the winding up was taken to have commenced on the Appointment Date, including:

(a) any Claim of a Simple Corporate Bondholder;

...

but does not include an Excluded Claim.”

d. Creditor is defined to mean

“any person who would have been entitled to prove (or would have been entitled to prove but for the operation of section 553B of the Act) in a winding up of an AXL Entity, if the AXL Entities had been wound up and the winding up was taken to have commenced on the Appointment Date.”

e. Creditor Indemnity has the meaning given to it in cl 12.1(d)(i) of the DOCA.

f. Excluded Claim is defined to mean, inter alia, “...*any Insured Claim*”.

g. Excluded Creditor is defined to mean, inter alia, a Creditor with an Excluded Claim to the extent of the Excluded Claim.

h. Insured Claim is defined to mean:

“...a Claim which a Creditor has against an AXL Entity, which would have been entitled to priority in a liquidation of the AXL Entity under section 562 of the Act, where:

(a) that AXL Entity is insured against the Claim under a contract of insurance (not being a contract of reinsurance) entered into before the Appointment Date; and

(b) an amount in respect of that Claim would be payable by the insurer to the AXL Entity under the contract of insurance, but only to the extent of

such part of the Claim as would be discharged by the payment from the insurer and provided that the Creditor complies with the requirements of clause 12 in relation to such a Claim.”

- i. Trust Creditor is defined to mean Creditors other than, inter alia, Excluded Creditors.

- 13. It was a term of the DOCA that each Creditor who is not a Trust Creditor agreed that on the occurrence of Completion, its Claims (other than any Excluded Claim) were fully extinguished and released in respect of each AXL Entity.

Particulars

Clause 11.1 of the DOCA.

- 14. It was a term of the DOCA that any uninsured component of an Insured Claim is extinguished and released on the Completion Date and Creditors with Insured Claims are not entitled to participate in or receive any distribution from, and will not prove to recover any Insured Claim for the purpose of, or in relation to, the Trust Fund, in respect of an Insured Claim.

Particulars

Clause 11.3 of the DOCA.

- 15. On or about 14 August 2020 the Completion of the DOCA was achieved. Vaughan Strawbridge, an administrator of AXL, by notice in the form of Schedule 2 of the DOCA and dated 14 August 2020 certified that the DOCA had been wholly effectuated in respect of AXL (**Certificate of Effectuation**).

Particulars

The Certificate of Effectuation is signed by Vaughan Strawbridge an administrator of AXL and dated 14 August 2020.

Notice that Deed wholly effectuated was lodged with ASIC on 25 August 2020 – ASIC Document No. 7EAZ79867.

16. It was a term of the DOCA that the signing of the Certificate of Effectuation in respect of AXL terminates, in respect of AXL, this DOCA and all Claims of Creditors of AXL will be extinguished, discharged and released if not extinguished or released earlier under the DOCA.

Particulars

Clause 21.4(b) of the DOCA

17. It was a term of the DOCA that if insurance is held by or on behalf of any AXL Entity in respect of an Insured Claim:
- a. the Creditor may, in relation to its Insured Claim and notwithstanding that Completion has occurred, take action to recover the amount due in respect of the Insured Claim against the AXL Entity, but such action must not exceed what is necessary to obtain payment from the insurer;
 - b. to the extent that the Creditor is able, by settlement, arbitral award or judgment, to obtain payment from the insurer on account of the Insured Claim, the Creditor may retain that amount in full satisfaction of its Claim;
 - c. the AXL Entity is not required to provide assistance to a Creditor in relation to any Insured Claim under this clause or take any action in response to enforcement action taken by a Creditor in accordance with this clause; and
 - d. where a Creditor intends to take action in relation to a Claim under this clause:
 - i. the Creditor must, prior to taking any action in relation to the Claim, provide the AXL Entity with an indemnity in the form of Schedule 5 of the DOCA prior to, or during, any action in relation to the Claim;
 - ii. if requested by the AXL Entity, provide the AXL Entity with evidence, to the reasonable satisfaction of the AXL Entity, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity; and

- iii. the AXL Entity may plead this Deed as a bar to any action taken by a Creditor in relation to the Claim in circumstances where the Creditor has not, prior to commencing that action, given the Creditor Indemnity to the AXL Company.

Particulars

CI 12.1 of the DOCA

- 18. It was a term of the DOCA that to the extent that the Creditor is unable to seek or obtain payment on account of its Insured Claim from the insurer (including by reason of any excess or deductible applicable to the insurance policy, or failure by the relevant AXL Entity to take any action) the DOCA operates as a complete release and bar to that part of the Creditor's Insured Claim which has not been met by the insurer.

Particulars

CI 12.2 of the DOCA.

Limitation of Cross-Claimant's Claim

- 19. On or about November 2017 DUAL Australia Pty Limited on behalf of certain underwriters at Lloyd's issued a DUAL Evolution Insurance Policy to the Cross-Respondent as policyholder for a period commencing on 25 November 2017, which was amended from time to time thereafter by endorsement (**17/18 Policy**).
- 20. It was a term of the 17/18 policy that underwriters agreed to pay on behalf of the policyholder its **loss** on account of a **securities claim** first made against the policyholder during the **insurance period**.

Particulars

CI 2.5 of the 17/18 Policy.

- 21. For the purposes of the operation of cl 2.5 of the 17/18 Policy:
 - a. 'loss' was defined in cl 6.25(a) and (b) to mean the total amount which an insured becomes legally obliged to pay on account of a claim, and included, but was not

limited to, damages, judgments, settlements, and adverse costs orders and defence costs.

- b. 'securities claim' was defined in cl 6.42(b) to mean, inter alia, a civil proceeding commenced by the service of a writ, complaint, summons, statement of claim, or similar originating process alleging a **wrongful act** in connection with the purchase or sale of, or offer to purchase or sell, **securities**.
- c. 'wrongful act' was defined in cl 6.48(b) to mean for the purposes of insuring cl 6.25, any actual or alleged breach of duty, breach of trust, breach of fiduciary duty, neglect, error, omission, misstatement, misleading statement, or other act, error or omission, committed or attempted by a policyholder, in connection with the purchase or sale of, or offer to purchase or sell, **securities**.
- d. 'securities' was defined in cl 6.41 to mean a bond, debenture, note, share, preference share, warrant, option, promissory note or other equity, debt or hybrid security which is issued or given by the policyholder.

22. For the purposes of the 17/18 Policy, coverage under cl 2.5 was subject to:

- a. a deductible of \$150,000; and
- b. a limit of \$2,000,000.

Hereinafter **17/18 Entities Limits**.

23. Underwriters have accepted the 17/18 Policy responds to this Further Amended Cross-Claim subject to the terms and conditions of the 17/18 Policy including the 17/18 Entities Limits and known facts and circumstances.

24. If the 17/18 Policy responds to this Further Amended Cross-Claim, then by operation of the terms of the DOCA:

- a. This Further Amended Cross-Claim is a Claim under the DOCA.

- b. The Cross-Claimant is a person within the definition of Creditors under the DOCA.
 - c. The effect of the DOCA is that the right of the Cross-Claimant to maintain this Further Amended Cross-Claim against the Cross-Respondent is extinguished and released by operation of the DOCA, except to the extent the Further Amended Cross-Claim satisfies the definition of Insured Claim under the DOCA.
 - d. The effect of the DOCA is that the right of Cross-Claimant to maintain this Further Amended Cross-Claim against the Cross-Respondent is limited to that part of the Claim that is insured under the 17/18 Policy, and only to the extent that that part of the Claim would be discharged by payment by the insurer.
 - e. The extent of payment available under the 17/18 Policy is:
 - i. Subject to the application of the deductible of \$150,000; and
 - ii. The total amount which an insured becomes legally obliged to pay on account of a claim by way of damages, judgments, settlements, and adverse costs orders, at the time that such liability is established (**Liability Date**), is the sum of the limit of \$2,000,000 less the sums due and payable by way of defence costs prior to the Liability Date.
25. [not used]
26. Further, by commencing this Further Amended Cross-Claim, the Cross-Claimant has taken, and has evinced an intention to take, action against the Cross-Respondent.
27. By operation of cl 12.1(d) of the DOCA, where a Creditor intends to take action in relation to a Claim under cl 12.1:
- a. The Creditor must prior to taking any action in relation to the Claim, provide, relevantly, the First Respondent/Cross-Respondent with an indemnity in the form of Schedule 5 of the DOCA (**Creditor Indemnity**) prior to, or during, any action in relation to the Claim; and

- b. if requested by, relevantly the First Respondent/Cross-Respondent, provide the First Respondent/Cross-Respondent with evidence to the reasonable satisfaction of the First Respondent/Cross-Respondent, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity.

Particulars

Clauses 12.1(d)(i) and 12.1(d)(ii) of the DOCA

28. The Cross-Respondent pleads the terms of Schedule 5 as if fully set out herein.
29. The Cross-Claimant did not provide the Creditor Indemnity prior to commencing this Further Amended Cross-Claim.
30. In the circumstances, the Cross-Claimant is, and continues to be, in breach of cl 12.1(d)(i) and (ii) of the DOCA.
- 30A. Further, and in the alternative to paragraph 11 above, if the Cross-Claimant's Further Amended Cross-Claim for contribution is not a claim within the definition of clause 1.1 of the DOCA and/or the Cross-Claimant is not bound by clause 4.1 of the DOCA, the Cross-Respondent:
- a. says that the Cross-Claimant's right of contribution is limited to the extent that the Cross-Claimant and the Cross-Respondent share a coordinate liability or common obligation toward the Applicant.
 - b. says that the maximum liability or obligation the Cross-Respondent could have toward the Applicant is the maximum amount recoverable from an insurer in respect of the claim the Applicant has on the Cross-Respondent.

Particulars

The Cross-Respondent repeats the matters pleaded at paragraphs 92 to 108 of its Defence to Second Further Amended Statement of Claim dated ~~20 May 2022~~ 2 June 2023 filed in this Proceeding.

- c. says that, which is not admitted, to the extent that contribution is available to the Cross-Claimant, it is to be calculated by taking into account that maximum liability or obligation of the Cross-Respondent.

31. The Cross-Respondent denies that the Amended-Cross-Claimant is entitled to any relief in these proceedings until it complies with cll 12.1(d)(i) and (ii) of the DOCA.

Date: ~~2 June 2022~~ 18 July 2023



Signed by Andrew Stewart Moore
Lawyer for the Cross-Respondent

This pleading was settled by Michael Jones SC, counsel

Certificate of lawyer

I Andrew Stewart Moore certify to the Court that, in relation to the defence filed on behalf of the Cross-Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~2 June 2022~~ 18 July 2023



Signed by Andrew Stewart Moore
Lawyer for the Cross-Respondent