

NOTICE OF FILING

Details of Filing

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File Number:	WAD329/2023
File Title:	DANIEL HILLSTON WOODHOUSE AND ROSS ANDREW BLAKELEY IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF FOREX CAPITAL TRADING PTY LTD ACN 119 086 270 (IN LIQUIDATION) & ANOR v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Registry:	WESTERN AUSTRALIA 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.



Form 17
Rules 8.05(1)(a)

Statement of claim

Federal Court of Australia

WAD 329 of 2023

District Western Australia
Registry:

Division: Commercial and Corporations

IN THE MATTER OF FOREX CAPITAL TRADING PTY LTD ACN 119 086 270 (IN
LIQUIDATION)

ACN 119 086 270

Daniel Hillston Woodhouse and Ross Andrew Blakeley in their capacities as joint and several liquidators of Forex Capital Trading Pty Ltd ACN 119 086 270 (in liquidation) and another named in the schedule

Plaintiffs

Australian Securities and Investments Commission

Defendant

Background

- 1 The first plaintiffs (**Liquidators**):
 - (a) are and were at all material times registered liquidators within the meaning of section 9 of the *Corporations Act 2001* (Cth) (the **Act**); and
 - (b) are joint and several liquidators of the second plaintiff, Forex Capital Trading Pty Ltd ACN 119 086 270 (in liquidation) (the **Company**).
- 2 The Company is incorporated under the Act, and is capable of suing in its corporate name.
- 3 The defendant, the Australian Securities and Investments Commission (**ASIC**), is a statutory body corporate and is capable of suing and being sued in its corporate name.

Particulars

Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**),
section 8(1)(d).

Filed on behalf of: the plaintiffs

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- 4 On 27 June 2021, the sole member of the Company passed a special resolution to place the Company into a members' voluntary liquidation.
- 5 On 7 December 2021, the Federal Court of Australia made orders under section 459A of the Act to have the Company wound up in insolvency.

Particulars

Order 1 the orders of Registrar Trott made on 7 December 2021 in Federal Court of Australia proceedings WAD 254 of 2021.

- 6 By reason of the matters set out in paragraphs 4 and 5 above, the 'relation-back day' in respect of the winding up of the Company is 27 June 2021 (the **Relation Back Day**).

Particulars

Act, sections 9, 91, 513A and 513B.

- 7 For the purposes of section 588FE of the Act, the six months ending on the Relation Back Day is the period between 28 December 2020 and 27 June 2021 (inclusive) (the **Relation Back Period**).

Insolvency of the Company during the Relation Back Period

- 8 From 28 April 2021 at the latest, the Company was insolvent within the meaning of section 95A of the Act.

Particulars

- A. Particulars of the Company's insolvency throughout the Relation Back Period are set out in Annexure A hereto.
- B. Further particulars may be provided prior to trial.

Unfair preference claim

- 9 On 29 April 2021, the Company was ordered to pay to the Commonwealth of Australia a pecuniary penalty of \$20,000,000 (**Pecuniary Penalty**).

Particulars

Order 16 of the orders of Middleton J made on 29 April 2021, in proceedings VID 462 of 2020 in the Federal Court of Australia (**Contravention Proceeding**).

- 10 On 25 June 2021, the Company paid \$20,000,000 to ASIC (**Pecuniary Penalty Payment**).

Particulars

- A. The Pecuniary Penalty Payment was made by Ashurst, solicitors then acting for the Company, from funds held on trust for the Company by Ashurst.
- B. Ashurst Trust Account Statement for the period 1 December 2020 to 1 December 2021, dated 1 December 2021.
- C. ASIC Receipt dated 25 June 2021.

D. The plaintiffs repeat and rely on the particulars in paragraphs 13 to 16 set out in Annexure A hereto.

- 11 The Pecuniary Penalty Payment constituted a 'transaction' (as defined in section 9 of the Act) to which ASIC and the Company were parties.
- 12 The Pecuniary Penalty was:
 - (a) a debt payable to ASIC on behalf of the Commonwealth of Australia, by operation of section 1317GAA of the Act; and
 - (b) an unsecured debt owed by the Company to ASIC.
- 13 The Pecuniary Penalty Payment resulted in ASIC receiving from the Company more than ASIC would have received from the Company if the Pecuniary Penalty Payment were set aside and ASIC was to prove for the debt in a winding up of the Company.

Particulars

By operation of section 553B of the Act, ASIC could not prove for the Pecuniary Penalty in any winding up of the Company.

- 14 By reason of the matters set out in paragraphs 9 to 13 above, the Pecuniary Penalty Payment was an 'unfair preference' (as defined in section 588FA of the Act) given by the Company to ASIC.
- 15 By reason of the matters set out in paragraphs 8 and 14 above, the Pecuniary Penalty Payment was an 'insolvent transaction' (as defined in section 588FC of the Act) of the Company.
- 16 By reason of the matters set out above:
 - (a) the Pecuniary Penalty Payment is voidable under section 588FE of the Act; and
 - (b) the Liquidators are entitled to seek an order under section 588FF of the Act that ASIC pay the sum of \$20,000,000 to the Company.
- 17 By letter to ASIC dated 24 October 2022, the Liquidators demanded, among other things, payment from ASIC of the amount of the Pecuniary Penalty Payment.

Particulars

Letter from the Liquidators to Joseph Longo, ASIC Chair, dated 24 October 2022.

- 18 ASIC has not paid to the plaintiffs any part of the Pecuniary Penalty Payment.

Void dispositions claim

- 19 By reason of the matters set out in paragraphs 4 and 5 above, the date of commencement of the winding up of the Company was 27 June 2021.

Particulars

Act, sections 459A, 513A and 513B.

- 20 On 29 April 2021, the Company was ordered to pay ASIC's costs in the Contravention Proceeding, fixed at \$1,180,000 (**Legal Costs**).

Particulars

Order 18 of the orders of Middleton J made on 29 April 2021 in the Contravention Proceeding.

- 21 On 24 June 2021, pursuant to section 91(1)(e) of the ASIC Act, ASIC ordered the Company to reimburse it to the extent of \$351,143.00, being the whole of the cost to ASIC of making the investigation resulting in the Contravention Proceeding (**Investigation Costs**).

Particulars

ASIC letter to the Company dated 24 June 2021.

- 22 On 28 June 2021, ASIC received \$1,180,000 from the Company in satisfaction of the Legal Costs (**Legal Costs Payment**).

Particulars

- A. The Legal Costs Payment was made by Ashurst, solicitors then acting for the Company, from funds held on trust for the Company by Ashurst on 25 June 2021.
- B. Ashurst Trust Account Statement for the period 1 December 2020 to 1 December 2021 dated 1 December 2021.
- C. ASIC Receipt dated 28 June 2021.
- D. The plaintiffs repeat and rely on the particulars in paragraphs 13 to 16 set out in Annexure A hereto.

- 23 On 12 July 2021, ASIC received \$351,143 from the Company in satisfaction of the Investigation Costs (**Investigation Costs Payment**).

Particulars

- A. The Investigation Costs Payment was made by Ashurst, solicitors then acting for the Company, from funds held on trust for the Company by Ashurst.
- B. Ashurst Trust Account Statement for the period 1 December 2020 to 1 December 2021 dated 1 December 2021.
- C. ASIC Receipt dated 12 July 2021.
- D. The plaintiffs repeat and rely on the particulars in paragraphs 13 to 16 set out in Annexure A hereto.

- 24 Each of the Legal Costs Payment and the Investigation Costs Payment:
- (a) was made from money which was property of the Company;
 - (b) was a disposition of property of the Company made after the commencement of the Company's winding up;

(c) was not an 'exempt disposition' within the meaning given to that phrase by section 468(2) of the Act; and

(d) is void under section 468(1) of the Act.

25 By reason of the matters pleaded in paragraphs 22 to 24 above, ASIC is liable to refund the sum of \$1,531,143 to the Company.

26 By letter to ASIC dated 24 October 2023, the Liquidators demanded, among other things, payment from ASIC of the \$1,531,143.

27 ASIC has not paid to the plaintiffs any part of the \$1,531,143 claimed.

Alternative unfair preference claim in relation to the Legal Costs

28 Paragraphs 29 to 35 below are pleaded in the alternative to the matters pleaded at paragraphs 19 to 27 above (to the extent that they relate to the Legal Costs).

29 If, contrary to the allegations made at paragraph 24(b) above, the Legal Costs Payment was made on or before 27 June 2021, then that payment was made during the Relation Back Period.

Particulars

The plaintiffs repeat and rely on the particulars to paragraph 22.

30 The Legal Costs Payment was a 'transaction' (as defined in section 9 of the Act) to which ASIC and the Company were parties.

31 By reason of the matters pleaded at paragraph 20 above, at the time of the Legal Costs Payment:

(a) ASIC was a creditor of the Company in respect of the Legal Costs; and

(b) the Legal Costs were a debt payable to ASIC.

32 The Legal Costs Payment resulted in ASIC receiving from the Company more than ASIC would have received from the Company if the Legal Costs Payment was set aside and ASIC was to prove for the debt in a winding up of the Company.

Particulars

Unsecured creditors of the Company will receive less than 100c in the dollar in the liquidation.

33 By reason of the matters set out in paragraphs 28 to 32 above, the Legal Costs Payment was an 'unfair preference' (as defined in section 588FA of the Act) given by the Company to ASIC.

34 By reason of the matters set out in paragraphs 8 and 30 to 33 above, the Legal Costs Payment was an 'insolvent transaction' (as defined in section 588FC of the Act) of the Company.

35 By reason of the matters set out above:

- (a) the Legal Costs Payment is voidable under section 588FE of the Act; and
- (b) the Liquidators are entitled to seek an order under section 588FF of the Act that ASIC pay the sum of \$1,180,000 to the Company.

Relief sought

36 By reason of the matters set out above, the plaintiffs seek the relief set out in the originating process filed in this proceeding.

Date: 7 February 2024



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Samuel James Dundas
Lawyer for the Plaintiffs
King & Wood Mallesons

This pleading was prepared by Samuel James Dundas, lawyer, and settled by Stewart Maiden KC and Paul Edgar SC.

Certificate of lawyer

I, Samuel James Dundas, certify to the Court that, in relation to the statement of claim filed on behalf of the Plaintiffs, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 7 February 2024



Samuel James Dundas
Lawyer for the Plaintiffs
King & Wood Malletsons

Annexure A

- 1 For the reasons which follow, the Company was insolvent during the Relation Back Period because it had:
 - (a) no material assets;
 - (b) liabilities of at least \$80 million;
 - (c) no business from which it could earn revenue;
 - (d) no capacity to raise sufficient debt or capital to pay all of its liabilities; and
 - (e) no ability to draw down any funds from any other arrangement to meet all of its liabilities.
- 2 The Company's sole meaningful source of revenue was a financial services business which was undertaken pursuant to and dependent upon the maintenance of an Australian Financial Services Licence (**AFSL**).
- 3 In March 2019, ASIC commenced proceedings in the Federal Court of Australia in proceedings numbered VID 218 of 2019, seeking orders restraining the Company from removing assets from Australia (**Restraint Proceedings**). The first orders were made in the Restraint Proceedings on 12 March 2019.
- 4 On 17 March 2019, the Company's ultimate holding company, Invesus Group Limited (a company incorporated in Gibraltar) (**Invesus**) provided the Company with an irrevocable undertaking to provide to the Company, and its directors, financial support to the extent the Company or its directors require such financial support to meet any debts, including judgment debts, incurred by the Company or its directors, prior to or after 17 March 2019 (**Letter of Comfort**).
- 5 The Letter of Comfort did not include any security or mechanism for the Company to draw down funds to discharge the undertaking contained therein.
- 6 On 9 June 2020, with effect from 30 July 2020, pursuant to section 915C of the Act, ASIC cancelled the Company's AFSL. From that point in time, the Company could no longer generate revenue in accordance with its ordinary business and was entirely reliant on funding from external sources.

Particulars

AFSL Cancellation Notice published on 9 June 2020.

- 7 The Company's audited accounts for the 2020 financial year show:
 - (a) a loss of \$2,232,232;

- (b) a current account surplus of circa \$1.2 million; and
- (c) net assets of circa \$1.9 million.

- 8 On 15 July 2020, ASIC commenced the Contravention Proceeding against both the Company and Mr Shlomo Yoshai (the sole director of the Company) (**Mr Yoshai**), relating to a number of alleged contraventions of the Act and the ASIC Act. The Contravention Proceeding focused on the Company's conduct in the 27 month period between 1 January 2017 and 1 April 2019 (**Relevant Period**).
- 9 On 28 April 2021, the Company, Mr Yoshai and ASIC signed a statement of agreed facts and admissions in relation to the Company's alleged contraventions (**SAFA**).
- 10 As a result of the Company's admissions contained in the SAFA, on 29 April 2021, Middleton J made final orders in the Contravention Proceeding (**Orders**). The Orders included a declaration that the Company had engaged in an unconscionable system of conduct contrary to section 12CB of the ASIC Act.
- 11 As at the time of the Orders:
 - (a) by reason of the declaration that the Company had engaged in an unconscionable system of conduct contrary to section 12CB of the ASIC Act, it became apparent (to the extent that it was not already apparent) that customers who had dealt with the Company in the period between 1 January 2017 and 1 April 2019 had claims against the Company for loss and damage caused by that unconscionable system of conduct pursuant to section 12GF of the ASIC Act (**Former Customer Claims**);
 - (b) the Company, through its sole director, must reasonably have had in its contemplation the existence of the Former Customer Claims;
 - (c) the Company had no reasonable basis to defend the Former Customer Claims;
 - (d) the quantum of damages which the Company may have been liable to pay to former customers in respect of Former Customer Claims was at least \$77,619,916 (corresponding to total realised net losses of former customers during the Relevant Period, which translated to a corresponding net gain to the Company); and
 - (e) the Company did not have the financial resources to meet the Former Customer Claims.
- 12 At no time following the Orders being made, did the Company:
 - (a) have the capacity to meet the Former Customer Claims; or

(b) have any basis on which it could reasonably defend the Former Customer Claims.

- 13 On 28 April 2021, the Company executed a convertible loan agreement with Invesus (**Convertible Loan Agreement**), which provided funding of up to \$21,680,000 in respect of the Company's liabilities to ASIC arising from the Contravention Proceeding. Between 4 June and 24 June 2021, the Company drew down \$21,180,000 in advances under the Convertible Loan Agreement.
- 14 On 25 June 2021 the Company issued shares to Forex Capital Trading Limited (being a company incorporated in Vanuatu with registration number 32852) (**FCT**) on the terms of the Convertible Loan Agreement, and FCT was entered onto the share register for those shares on that day.

Particulars

- A. Application for shares in the Company by FCT dated 25 June 2021.
 - B. Share certificate issued to FCT for 21,180,000 shares in the Company dated 25 June 2021.
 - C. Share registry of the Company dated 25 June 2021.
- 15 Upon and by reason of the issuance of the shares on the terms of the Convertible Loan Agreement, any obligation to pay the principal outstanding on the convertible note was discharged. The plaintiffs will rely on the full terms of the Convertible Loan Agreement.
- 16 On 25 June 2021, the Company paid the Pecuniary Penalty Payment to ASIC.
- 17 On 26 June 2021, the Company executed a letter of financial support with Invesus (**Letter of Financial Support**). Under the Letter of Financial Support, Invesus irrevocably undertook to pay to the Company an amount of up to \$3,630,497 in respect of the Company's 'winding up process'. Prior to the Letter of Financial Support, the Company had debts exceeding \$3,100,000 which it did not have the capacity to pay, without funding from external sources.

Particulars

- Annexure A of the Letter of Financial Support sets out invoices of \$3,153,209.22 which Invesus agreed to pay directly to those creditors.
- 18 On 26 June 2021, Mr Yoshai made a declaration of solvency pursuant to section 494 of the Act, stating that the Company would be able to pay all its debts within 12 months of the commencement of a winding up (**Declaration of Solvency**). The Declaration of Solvency disclosed the Company had a net asset position of \$85,000. No provision regarding the Former Customer Claims was disclosed in the Declaration of Solvency.
- 19 Invesus denies any obligation to pay or procure the payment of the Former Customer Claims pursuant to the Letter of Comfort.

Particulars

Email from Invesus to King & Wood Mallesons (solicitors for the plaintiffs) dated 29 June 2022.

- 20 By reason of the above, the Company was insolvent, at the latest:
- (a) on and from 28 April 2021, being the time the SAFA was agreed, and the Company admitted to the contraventions of section 12CB of the ASIC Act;
 - (b) alternatively, on and from 29 April 2021, being the time the Orders were made, including the declaration that the Company had contravened section 12CB of the ASIC Act; or
 - (c) alternatively, on and from 25 June 2021, being the date on which the Pecuniary Penalty Payment was paid to ASIC.

Schedule

Federal Court of Australia

WAD 329 of 2023

District Western Australia

Registry:

Division: Commercial and Corporations

IN THE MATTER OF Forex Capital Trading Pty Limited ACN 119 086 270 (in liquidation)

ACN: 119 086 270

Forex Capital Trading Pty Limited ACN 119 086 270 (in liquidation)

Second Plaintiff

Date: 7 February 2024