FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Merlin Diamonds Limited (No 2) [2019] FCA 2094

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| File number: |  |
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| Judge: | **O'BRYAN J** |
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| Date of judgment: | 11 December 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – request pursuant to rule 2.32 of the *Federal Court Rules 2011* (Cth) to inspect a copy of a report prepared by the provisional liquidators – application by provisional liquidators for an order for the suppression of parts of the report under s 37AF of the *Federal Court of Australia Act* *1976* (Cth) – limited suppression order made – leave granted to inspect provisional liquidators’ report  |
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| Legislation: | *Federal Court of Australia Act* *1976* (Cth) ss 37AE, 37AF, 37AG(1)(a)*Federal Court Rules 2011* (Cth) r 2.32  |
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| Cases cited: | *Australian Securities and Investments Commission v Merlin Diamonds Limited* [2019] FCA 1546*Hogan v Australian Crime Commission* (2010) 240 CLR 651*Sandell v Porter* (1966) 115 CLR 666  |
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| Date of hearing: | 6 December 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 43 |
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| Counsel for the Plaintiff: | Mr S Senathirajah QC with Ms C Klemis |
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| Solicitor for the Plaintiff: | Australian Securities and Investments Commission |
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| Solicitor for the provisional liquidators to the Defendant: | Ms H Solaymani-Jamal of Norton Rose Fulbright Australia |
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| Solicitor for the interested parties: | Mr C Dale of O’Donnell Salzano |
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| Counsel for Edensor Holdings: | Mr P L Ehrlich QC |
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| Counsel for the non-party shareholders and noteholders of the Defendant: | Mr S Bell |
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| Solicitor for the non-party shareholders and noteholders of the Defendant: | Ian B. Mitchell & Associates |

ORDERS

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|  | VID 505 of 2019 |
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| BETWEEN: | AUSTRALIAN SECURITIES & INVESTMENTS COMMISSIONPlaintiff |
| AND: | MERLIN DIAMONDS LIMITEDDefendant |

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| JUDGE: | O'BRYAN J |
| DATE OF ORDER: | 11 DECEMBER 2019 |

THE COURT ORDERS THAT:

1. Subject to paragraph 3 of these Orders, and pursuant to rule 2.32 of the *Federal Court Rules 2011* (Cth), the shareholders and noteholders in the defendant identified in a list attached to a letter dated 5 December 2019 from their solicitors, Ian Mitchell of Ian B. Mitchell and Associates (**non-party shareholders/noteholders**), to the Court have leave to inspect a copy of the report prepared by the provisional liquidators of the defendant dated 1 November 2019 and which has been filed with the Court (**PL Report**), solely for the purpose of determining whether to make an application for leave to be heard in the proceeding.
2. Subject to paragraph 3 of these Orders, the provisional liquidators provide a copy of the PL Report to the shareholders in the defendant identified in the schedule to the application for leave to be heard filed on 20 June 2019 (**opposing shareholders**).
3. Pursuant to s 37AF of the *Federal Court of Australia Act* *1976* (Cth):
	1. the copy of the PL Report provided by the provisional liquidators to the non-party shareholders/noteholders and the opposing shareholders pursuant to paragraphs 1 and 2 of these Orders respectively be redacted to keep confidential:
		1. the line items in the table on page 36 that identifies the estimated valuations of the property, plant and equipment and mine tenements of the defendant, and all line items in the table that incorporate those figures;
		2. the sentence at the bottom of page 36 that identifies the estimated valuations of the property, plant and equipment of the defendant; and
		3. the sentence at the top of page 37 that identifies the estimated valuation of the mine tenements of the defendant,

(**valuation information**);

* 1. the provisional liquidators must provide an unredacted copy of the PL Report to the external lawyers for the non-party shareholders/noteholders and the opposing shareholders upon receipt from the external lawyers of an undertaking to keep the valuation information confidential and not to disclose that information to any other person, including their clients.
1. The application by the provisional liquidators of the defendant pursuant to s 37AF of the *Federal Court of Australia Act* *1976* (Cth) be otherwise dismissed.
2. There be liberty to apply.
3. Costs be reserved.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. A group of shareholders and noteholders in the defendant company, Merlin Diamonds Limited (**Merlin**), has made a request pursuant to rule 2.32 of the *Federal Court Rules 2011* (Cth) to inspect a copy of a report prepared by the provisional liquidators of Merlin dated 1 November 2019 and which has been filed with the Court (**PL Report**). Those shareholders and noteholders (the **non-party shareholders/noteholders**) are identified in a list attached to a letter dated 5 December 2019 from their solicitors, Ian Mitchell of Ian B. Mitchell and Associates, to the Court. None of those persons or entities are a party to the proceeding.
2. The provisional liquidators have sought an order for the suppression of parts of the PL Report under s 37AF of the *Federal Court of Australia Act* *1976* (Cth) (**FCA Act**).
3. I heard the application made by the provisional liquidators on 6 December 2019. The plaintiff, Australian Securities and Investments Commission (**ASIC**), neither consented to nor opposed the provisional liquidators’ application. All other interested parties opposed the application, comprising:
	1. the 13 shareholders identified in the schedule to the application for leave to be heard filed on 20 June 2019, who were granted leave to be heard on the application for the appointment of provisional liquidators to Merlin and who opposed the appointment (**opposing shareholders**);
	2. Edensor Holdings Pty Ltd (**Edensor**), being a company controlled by Mr Joseph Gutnick, his wife Mrs Stera Gutnick and his son Mr Mordechai Gutnick; and
	3. the non-party shareholders/noteholders, the members of which are not among the opposing shareholders.
4. The Court also received a communication from the solicitors for Mr Joseph Gutnick and Mr Mordechai Gutnick that they opposed the request by the non-party shareholders/noteholders to inspect the PL Report, which is considered below.
5. For the following reasons, I grant leave for the non-party shareholders/noteholders to inspect the PL Report, but I will make a limited suppression order in respect of one aspect of the PL Report.

## Background

1. By originating process filed on 14 May 2019, ASIC sought an order that Merlin be wound up pursuant to ss 461(1)(e) and/or (k) or s 464 of the *Corporations Act* *2001* (Cth) (**Act**). As an interim step, ASIC also sought the appointment of a provisional liquidator under s 472(2) of the Act.
2. On 20 September 2019, I made orders appointing Salvatore Algeri and Timothy Norman of Deloitte Financial Advisory Pty Ltd as joint and several provisional liquidators to Merlin: see *Australian Securities and Investments Commission v Merlin Diamonds Limited* [2019] FCA 1546. I also made an order requiring the provisional liquidators to provide to the Court and to ASIC a report as to the provisional liquidation of Merlin including:
	1. the identification of the assets and liabilities of Merlin;
	2. an opinion as to the solvency of Merlin;
	3. an opinion as to the value of the assets of Merlin;
	4. the likely return to creditors of Merlin;
	5. an opinion as to whether Merlin has proper financial records;
	6. any other information necessary to enable the financial position of Merlin to be assessed;
	7. an opinion as to whether Merlin contravened any provisions of the Act; and
	8. an opinion as to whether there are any suspected contraventions of the Act by the current and former directors and officers of Merlin.
3. On 17 October 2019, I made orders listing ASIC's primary application for an order that Merlin be wound up for hearing on 10 March 2020.
4. On 1 November 2019, the provisional liquidators filed the PL Report with the Court pursuant to the orders I made on 20 September 2019.
5. On 29 November 2019, the Court received a request pursuant to rule 2.32 of the *Federal Court Rules 2011* (Cth) from a solicitor, Mr Ian Mitchell, on behalf of the non-party shareholders/noteholders to inspect a copy of:
	1. the PL Report; and
	2. the affidavit filed by ASIC on 22 November 2019 if such affidavit related to the PL Report.
6. Mr Mitchell’s clients sought access to the PL Report to assist them in making a decision whether to seek leave to intervene or otherwise be heard at the hearing of ASIC's application to wind up Merlin. Under rule 2.32, the non-party shareholders/noteholders require leave of the Court to inspect the PL Report.
7. Following the receipt of the request from the non-party shareholders/noteholders, the Court requested the parties to the proceeding, and the opposing shareholders, to advise whether they had any objection to the documents being inspected by the non-party shareholders/noteholders.
8. On 3 December 2019, the Court received a communication from the solicitors for the provisional liquidators objecting to the release of the PL Report to the non-party shareholders/noteholders on the basis that the report contained confidential information. That communication stated:

The Provisional Liquidators object to the release of the report filed with the Court on 1 November 2019 on the basis that it contains confidential information.

The Provisional Liquidators will be seeking at the hearing on 6 December 2019 limited suppression orders or confidentiality orders in respect of the Report for the reasons set out in the affidavit sworn by Mr Norman on 3 December 2019 and filed with the Court this morning (see paragraphs [5] – [11]).  The Provisional Liquidators are prepared to provide a redacted version of the Report to those parties who are opposing ASIC’s winding up application and others who may demonstrate a legitimate basis for obtaining a copy.  It would be helpful to know who has sought a copy of the report, but in the absence of that information, the Provisional Liquidators’ view is that if the Court considers the party is entitled to a redacted copy of the Report, the Provisional Liquidators will provide a redacted copy to them.

1. On the same day, an affidavit was filed on behalf of the provisional liquidators in support of an application under s 37AF of the FCA Act for a suppression order in relation to the PL Report. The affidavit was made by one of the provisional liquidators, Mr Norman. Mr Norman deposed that the provisional liquidators sought a limited suppression order in respect of the PL Report on the basis that parts of the report contained sensitive or confidential information and that it is necessary to maintain the confidentiality of that information in order to prevent prejudice to the proper administration of justice. The aspects of the PL Report sought to be suppressed were:
	1. information relating to valuations obtained by the provisional liquidators in respect of the assets of Merlin (**valuation information**); and
	2. a summary of potential contraventions of the Act identified by the provisional liquidators as possibly having been committed by Merlin or its officers (**potential contraventions information**).
2. In relation to the valuation information, Mr Norman deposed that the provisional liquidators sought to maintain the confidentiality of that information until the assets in question were sold or control of the company was returned to its directors. Mr Norman stated that the provisional liquidators were concerned that if the valuation information became public, that could undermine future negotiations for the sale of Merlin’s assets (if such a sale were to occur). Mr Norman expressed the opinion that the release of the valuation information was likely to materially adversely affect the sale process.
3. In respect of the potential contraventions information, Mr Norman deposed that the provisional liquidators sought to maintain the confidentiality of that information until such time as the Court considers there is a public interest in the information being made public. Mr Norman said that the provisional liquidators were aware that their investigations of potential breaches of the Act have been preliminary. The investigations were undertaken in a relatively short timeframe and the provisional liquidators encountered significant resistance from a number of parties, including the directors of Merlin, in providing information to them. Mr Norman deposed that the provisional liquidators are concerned that it may be prejudicial to the individuals involved for the preliminary investigations to be publicised or that their reputations may be unfairly tarnished as the preliminary views of the provisional liquidators, based on the investigations conducted thus far, are not determinative.
4. Mr Norman’s affidavit also exhibited an email from Mr Ben Waterson of Waterson Legal, attaching resignations as directors of Merlin signed by Mr Joseph Gutnick and Mr Mordechai Gutnick dated 1 November 2019.
5. On 4 December 2019, the Court received a communication from ASIC, stating that:
	1. ASIC considered that the request for access to the PL Report was a matter principally for the provisional liquidators; and
	2. with respect to the request for access to the affidavit filed 22 November 2019 by ASIC in so far as it related to the PL Report, ASIC considered that neither of the two affidavits filed by ASIC on that day relevantly related to the PL Report.
6. On 4 December 2019, the Court also received a communication from Mr Waterson, the solicitor for Mr Joseph Gutnick and Mr Mordechai Gutnick, opposing the request by the non-party shareholders/noteholders for access to the PL Report. That communication was in the following terms:

We act for Mr Joseph Gutnick and Mr Mordechai Gutnick.  It has come to our attention that a representative of an unidentified group of interested persons not presently represented in this proceeding (group) has requested access to:

* The provisional liquidators’ report filed with the Court pursuant to the orders dated 20 September 2019; and
* The affidavit filed 22 November 2019 by ASIC if such affidavit relates to the provisional liquidators’ report.

In our respectful submission our clients have an interest in the determination of the request and are owed procedural fairness in respect of said determination.

Our clients oppose access on the basis that such material apparently makes serious untested allegations against our clients.  In our clients’ view, the group has sufficient material available to it from the Reasons for Judgment dated 20 September 2019 to make an informed decision as to joinder at this time.   If they are joined, then the question of access can then be re-determined at that time.

If access is to be granted despite our clients’ submission, then strict confidentiality conditions should be imposed.

1. On 5 December 2019, Mr Waterson sent a further communication to the Court stating that Messrs Joseph and Mordechai Gutnick did not intend to appear at the interlocutory hearing scheduled for the next day, but would rely on the submission made in the communication to the Court on 4 December 2019 (set out above).
2. On 4 December 2019, the opposing shareholders filed written submissions opposing the provisional liquidators’ application for a suppression order. In relation to the valuation information, the opposing shareholders submitted that the information was relevant to the insolvency ground for winding up proposed to be relied upon by ASIC and that procedural fairness required that the valuation information be disclosed to the parties to the proceeding and the opposing shareholders. In that regard, the opposing shareholders referred to the statement of Barwick CJ in *Sandell v Porter* (1966) 115 CLR 666 at 670:

"Insolvency is expressed ... as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or by pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

1. The opposing shareholders also submitted that the valuation information was relevant to the decision by them whether to continue to oppose the winding up of Merlin. The opposing shareholders submitted that the concerns raised by the provisional liquidators (prejudice to a future sale process) could be addressed, in the first instance, by confining disclosure of the valuation information to interested parties.
2. In relation to the potential contraventions information, the opposing shareholders submitted that procedural fairness required that the parties and the opposing shareholders see those parts of the PL Report in circumstances where ASIC proposed to rely on the report in support of its application to wind up Merlin on insolvency grounds.
3. On 5 December 2019, the provisional liquidators filed an affidavit affirmed by Fiona Kathleen Murray-Palmer, a solicitor employed by Norton Rose Fulbright Australia, the solicitors for the provisional liquidators. Ms Murray-Palmer exhibited to her affidavit a copy of the PL Report redacting the information that was sought to be kept confidential by the provisional liquidators.

## Hearing

1. The request to inspect the PL Report, and the application for suppression orders, were heard at an interlocutory hearing on 6 December 2019. The following interested parties appeared: ASIC; the provisional liquidators; the opposing shareholders; Edensor; and the non-party shareholders/noteholders. Each interested party made oral submissions consistent with the written submissions or communications that had been received by the Court prior to the hearing.
2. At the hearing, no party supported the application by the provisional liquidators for a suppression order.
3. ASIC's formal position was that it neither supported nor opposed the application. ASIC informed the Court that, at the hearing of its application to wind up Merlin, ASIC would seek to rely on the PL Report but would not seek to rely on the valuation information.
4. The opposing shareholders opposed the provisional liquidators’ application.
5. Edensor also opposed the provisional liquidators’ application. It also submitted that the provisional liquidators’ concerns with respect to the valuation information could be addressed by confining disclosure to the external legal advisers to the parties.
6. The non-party shareholders/noteholders generally adopted the submissions made by the opposing shareholders. However, the non-party shareholders/noteholders observed that if disclosure of the valuation information were confined to external lawyers, that may place those lawyers in a difficult position, requiring them to make an assessment about commercial matters.

## Consideration

1. In my view, the opposing shareholders have a legitimate interest in being provided with a copy of the PL Report. The PL Report was created pursuant to an order of the Court at the time of the appointment of the provisional liquidators. The content of the PL Report is relevant to the winding up application being pursued by ASIC. ASIC has informed the Court that it will seek to rely on the PL Report at the hearing of its winding up application. Procedural fairness requires that any person who will or may be heard on that application should receive a copy of the PL Report. While ASIC has informed the Court that, at this time, it will not be seeking to rely on the valuation information in the PL Report at the hearing of its winding up application, in my view the valuation information is relevant to the insolvency ground proposed to be relied on by ASIC.
2. For the same reasons, I consider that the non-party shareholders/noteholders have a legitimate interest in being provided with a copy of the PL Report. As shareholders and noteholders in Merlin, they have an interest in the winding up application and may seek to be heard on the application. They seek a copy of the PL Report in order to assess whether to seek leave to participate in the hearing of the winding up application. In my view, that is a legitimate reason for seeking a copy of the PL Report.
3. The only persons who opposed the application by the non-party shareholders/noteholders to inspect the PL Report were Messrs Joseph and Mordechai Gutnick. As noted above, they opposed access on the basis that the PL Report makes serious untested allegations against them and that the non-party shareholders/noteholders have sufficient material available to them from the reasons for judgment dated 20 September 2019 to make an informed decision as to joinder.
4. It is correct that the PL Report makes serious allegations against Messrs Joseph and Mordechai Gutnick. However, I do not consider that that is a sufficient reason for the Court to refuse leave to the non-party shareholders/noteholders to inspect the PL Report. To a large extent, the potential breaches of the Act by Messrs Joseph and Mordechai Gutnick canvassed in the PL Report traverse the same matters considered in my reasons for judgment dated 20 September 2019. The matters are therefore already public. To the extent the PL Report goes beyond my reasons for judgment, the matters raised are relevant to the hearing of ASIC’s winding up application and, more broadly, the future conduct of the affairs of Merlin. In those circumstances, I consider that leave ought to be given to the non-party shareholders/noteholders to inspect the PL Report.
5. The provision of the PL Report to the parties to the proceeding, and the opposing shareholders, will be subject to the Harman undertaking. As such, the PL Report can only be used by those persons for the purposes of the proceeding and they will not be entitled to disseminate the report more widely. In granting leave to the non-party shareholders/noteholders to inspect the PL Report, I consider it appropriate to make that leave subject to the condition that the PL Report only be used by the non-party shareholders/noteholders for the purpose of assessing whether to seek leave to be heard on the winding up application in this proceeding, and not for any other purpose.
6. That leaves for consideration the application by the provisional liquidators for a suppression order over parts of the PL Report. The exercise of the Court's power under s 37AF of the FCA Act to make a suppression order is controlled by two other statutory provisions. First, s 37AE provides that, in deciding whether to make a suppression order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. Second, s 37AG(1) stipulates the grounds on which a suppression order may be made, one of which is (relevantly) that the order is necessary to prevent prejudice to the proper administration of justice. As observed by the High Court in *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30] (with respect to the predecessor provision to s 37AG (1)(a) – s 50 – which was in substantially identical terms), "necessary" is a strong word and it is insufficient that the making of a suppression or non-publication order appears to be "convenient, reasonable or sensible".
7. In the present case, I do not consider that there is any basis to make a suppression order in respect of the potential contraventions information. Having reviewed the PL Report, it is apparent that the potential contraventions information largely replicates matters referred to and considered in my reasons for judgment in appointing the provisional liquidators. Accordingly, the majority of the information is already public. To the extent that the PL Report traverses matters beyond those considered in my reasons for judgment, I do not consider that suppression is necessary to prevent prejudice to the proper administration of justice. To the contrary, the PL Report has been prepared pursuant to orders made by the Court for the purpose of investigating the affairs of Merlin, in anticipation of the hearing of ASIC’s winding up application. ASIC has indicated that it will seek to refer to and rely on the PL Report at the hearing of that application. In the circumstances, the proper administration of justice requires that the PL Report be available to all parties to that proceeding and persons who, by reason of their interest in Merlin, may seek to become parties to the proceeding or be heard on that application.
8. The position with respect to the valuation information is different. There are potentially two competing interests with respect to that information. The first are the interests of Merlin’s shareholders and creditors on the hearing of the winding up application. The second are the interests of Merlin, its shareholders and creditors upon a winding up. In the present case, there is conflict in those interests, and they are finely balanced. The present proceeding concerns the future of Merlin, in which the company, its shareholders and creditors have an interest. In the future, an order may be made winding up Merlin and, if that occurs, its assets may be sold. The provisional liquidators were ordered to prepare the PL Report to provide further information relevant to the hearing of ASIC’s application to wind up the company. The PL Report is intended to benefit ASIC, the company, its shareholders and creditors by informing them of matters relevant to the consideration of the winding up application. Thus, shareholders and creditors have an interest in seeing the valuation report for that purpose and the proper administration of justice favours the disclosure of the report to them. Conversely, I accept the evidence of Mr Norman, and the submissions made on behalf of the provisional liquidators, that the disclosure of the valuation information may prove to be prejudicial to the interests of Merlin, its shareholders and creditors in the event that an order is made for the company’s winding up and the provisional liquidators arrange for the sale of its assets. The valuation information reveals information received by the provisional liquidators as to the present value of Merlin's assets. The negotiating position of the provisional liquidators would be undermined, to some extent, if bidders for those assets were aware of the valuation information that has been received by the provisional liquidators. It would be prejudicial to the proper administration of justice if the publication of the PL Report were to have a detrimental financial impact on Merlin, its shareholders and creditors in the event of a winding up.
9. Balancing the interests of justice, in my view it is appropriate to make a limited suppression order at this time, restricting the publication of the valuation information to the external legal advisers to the parties to the proceeding and to the non-party shareholders/noteholders. Such disclosure may provide relevant information to those persons with respect to the value of Merlin and its solvency, enabling them to decide whether they wish to oppose ASIC’s winding up application. The order will also reduce the risk of potential prejudice to the interests of Merlin, its shareholders and creditors if an order for the winding up of Merlin is ultimately made and the provisional liquidators offer its assets for sale. I recognise that, having received disclosure of the valuation information, the external legal advisers may find themselves in difficulty in advising their clients in relation to the winding up application. If that occurs, the parties will have liberty to make a further application to vary the orders I will make.
10. At the hearing, the provisional liquidators identified three pages of the PL Report that contained valuation information:
	1. a sentence on page 33 concerning Merlin’s net asset position (specifically, whether the position was above or below zero);
	2. the line items in the table on page 36 that identify the estimated valuations of the property, plant and equipment and mine tenements of Merlin, and all line items that incorporate those figures;
	3. the sentence at the bottom of page 36 that identifies the estimated valuations of the property, plant and equipment of Merlin; and
	4. the sentence at the top of page 37 that identifies the estimated valuation of the mine tenements of Merlin.
11. In my view, the sentence on page 33 is at a sufficient level of generality that its disclosure to the non-party shareholders/noteholders and the opposing shareholders would be very unlikely to cause commercial detriment to Merlin, its shareholders and creditors in the event of a winding up. Accordingly, that sentence will not be included in the information which will be restricted by the orders I will make.

## Conclusion

1. In conclusion, I will make orders giving leave to the non-party shareholders/noteholders to inspect a copy of the PL Report, and for the provisional liquidators to provide a copy to the opposing shareholders. The disclosure will be on the basis that:
	1. the copy provided to the non-party shareholders/noteholders and the opposing shareholders may be redacted by the provisional liquidators to keep confidential the valuation information identified above in paragraphs 40(b), (c) and (d) above; and
	2. the provisional liquidators must provide an unredacted copy to the external lawyers for the non-party shareholders/noteholders and the opposing shareholders upon receipt from the external lawyers of an undertaking to keep the valuation information confidential and not to disclose that information to any other person, including their clients.
2. I will reserve the costs of the application.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan. |

Associate:

Dated: 11 December 2019