

Prime Trust Action Group Unitholder Update No. 29 – 22 July 2016

Although progress through the Courts continues to be painstakingly slow, we would like to provide investors with a further update on relevant matters as set out below.

Federal Court Proceedings Against Prime Trust Directors

Investors may recall that:

- in December 2013, the Federal Court found that the directors of Prime Trust had breached the Corporations Act in relation to the \$33m listing fee that was paid from the Trust without investor approval;
- in December 2014, the Federal Court imposed financial penalties on the five directors in question, with a fine of \$230,000 being imposed on Mr Lewski and fines of \$20,000 for each of the other directors; and
- in December 2014, the Federal Court disqualified Mr Lewski from being a company director for 15 years, and imposed shorter disqualification periods on Mr Butler and Mr Jaques (4 years each) and Dr Wooldridge (2.25 years); and
- following the above judgment, all five directors lodged appeals, and ASIC also lodged a cross-appeal arguing for a higher financial penalty and a longer disqualification period for Mr Lewski, and higher financial penalties for Messrs Butler, Jaques and Wooldridge, and all of the appeals were heard in May 2015.

Following appeals by each of the directors and also a cross appeal by ASIC, the Federal Court found, in a judgment released on 14 July 2016, that ASIC had not proved that the directors breached the Corporations Act and set aside the previous orders made regarding disqualification periods and financial penalties.

The appeal revolved around whether ASIC was entitled to rely on a resolution of the directors at a Board meeting on 19 July 2006 which introduced the listing fee as well as some other significant fees. Although ASIC had been directly approached by several investors raising concerns about the listing fee from early 2010, ASIC initiated legal proceedings on 21 August 2012. The directors argued, and the appeal judges agreed, that the Board meeting on 19 July 2006 was outside the six-year statute of limitations period, and could not be relied upon by ASIC in making the case that the directors had contravened the Corporations Act.

Additionally, the appeal judges made the following comment in their judgement:

"It is uncontroversial that the Amendments were in favour of, and resulted in a benefit to APCH. There is therefore a question as to the Board's power to pass them."

Several press articles have also discussed the latest appeal judgment. Writing in The Australian, John Durie states that *"It beggars belief that the watchdog took so long to act"* and *"That six year and one month delay was enough to kill the case as far as full court was concerned, and so with costs the ASIC case was thrown out - and gone were 15 year bans ordered against Lewski and a host of fines against the directors."*

Also writing in The Australian, Ben Butler notes that "*Overturing the bans, including one of 15 years slapped on Mr Lewski, the Full Federal Court pointed the finger at the Australian Securities & Investments Commission's tardiness in bringing the proceedings, which meant the regulator could not rely on events at a crucial Prime Trust board meeting to prove its case.*"

Although the appeal judgment is disappointing, and there are concerns around the way in which ASIC prosecuted this case, it remains to be seen whether ASIC will lodge a further appeal.

There has been a significant amount of press coverage following the release of the above appeal judgment and several articles are attached for your information.

Case Management

The various other legal proceedings which have been pursued and remain outstanding are as follows:

Proceedings Brought by the Liquidators

- Management Rights Claim
- Auditors' Claim
- Voidable Transaction Claim

Proceedings Brought by the Receivers

- Listing Fee Claim

Since our previous update earlier this year, the Management Rights Claim and the Auditors' Claim have both regularly returned to Court to deal with various interlocutory (pre-trial) steps such as timetables and discovery of documents etc. It is currently expected that each of the various outstanding claims will all be heard by a single judge in the first quarter of 2017.

In relation to the Voidable Transaction Claim, the defendants (namely various Lend Lease companies and various parties related to Mr Lewski) attempted to have these proceedings struck out and we note that the Supreme Court, in the first instance, ruled that the Liquidators were indeed entitled to pursue these proceedings. The defendants then appealed the judgment, and on 18 December 2015, the Supreme Court ruled that the Liquidators were not entitled to continue these claims as the proceedings had not been commenced within the prescribed time. Following further appeal by the Liquidators, the matter was heard in April 2016 and a decision is currently awaited.

We also note that the Listing Fee Compensation Claim, which will seek compensation from the directors and other parties as a result of the \$33 million listing fee, was initiated several months before the ASIC proceedings and is therefore expected to fully consider whether the conduct of the directors at the crucial Board meeting on 19 July 2006 was appropriate.

Security of Costs

In relation to legal proceedings against Pitcher Partners (“Pitchers”), the long-time auditors of Prime Trust, a dispute arose in relation to the appropriate form of security for legal costs. In the event that Pitchers successfully defend these proceedings and are therefore awarded costs, the Liquidators wished to primarily rely on a Deed of Indemnity from its insurer to settle such costs, whereas Pitchers requested that the Liquidators provide security by way of a bank guarantee or the direct payment of funds into the Court. In a judgment dated 24 September 2015, the Supreme Court of Victoria found against Pitchers and did not require any further security for legal costs to be provided by the Liquidators. Following an appeal by Pitchers against the judgment, the appeal was heard in Court in March 2016 and on 19 July 2016, the Supreme Court dismissed Pitchers’ appeal and confirmed the earlier decision on the form of the costs security.

Investor Capital Losses

A number of investors have asked whether their capital losses in respect of their investments in Prime Trust can be claimed for tax purposes.

Although we are unable of course to provide taxation or other advice, we formally approached the Australian Taxation Office (“ATO”) in 2015 about this matter. Since then, several issues have been raised by the ATO and further information and clarification has been provided as required. We are hopeful that the ATO Ruling will be issued in the near future and will certainly advise investors of the outcome as soon as it is received.

Summary

Although we are naturally disappointed with the appeal judgment recently issued by the Federal Court overturning the earlier findings of contravention and penalties, we are pleased to report that progress is continuing to be made in relation to the other outstanding legal proceedings with a view to conducting a trial early next year.

We are pleased to report that litigation funding continues to be in place for the various legal proceedings that remain on foot, and that Pitchers’ appeal regarding security of costs has been dismissed.

We continue to provide assistance to the Liquidators as required, and remain determined to ensure that all parties that can be proven to have unlawfully contributed to the demise of Prime Trust be held fully accountable for their actions.

Thank you once again for your continued support of the Prime Trust Action Group, and for your patience as the various legal claims progress through the Court system, albeit slowly. We will issue further updates from time to time as newsworthy developments occur.

Prime Trust Action Group
www.primetrustactiongroup.com