

SUPREME COURT OF QUEENSLAND

CITATION: *The Trust Company (Australia) Ltd v Diverseport Fixed Income Ltd (Receivers & Managers Apptd) (In Liq)* [2010] QSC 391

PARTIES: **THE TRUST COMPANY (AUSTRALIA) LIMITED**
(ABN 21 000 000 993)
(the applicant)
v
DIVERSEPORT FIXED INCOME LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 113 122 286)
(first respondent)
THE DEBENTURE HOLDERS LISTED IN SCHEDULE 1 OF THE ORIGINATING APPLICATION
(second respondents)
NORTHSIDE VETERINARY CLINICS PTY LTD (ACN 010 007 753) AS TRUSTEE FOR THE LANDER FAMILY TRUST
(third respondent)

FILE NO/S: BS9879 of 2010

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 21 October 2010

DELIVERED AT: Brisbane

HEARING DATE: 14 October 2010

JUDGE: Mullins J

ORDER: **Order as per the amended draft initialled and placed with the file**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATION TO COURT FOR ADVICE AND AUTHORITY – where applicant is trustee for debenture holders under trust deed between applicant and issuing company – where issuing company defaulted under trust deed and applicant appointed receivers and managers of the trust property – where applicant seeking directions on construction of trust deed – whether application moneys accompanying applications for debentures that had been lodged prior to the appointment of the receivers and managers, but for which debentures had not been issued, formed part of the trust property – where applicant gave notice to the receivers and managers under clause 19.1 of the trust deed that any principal redeemed in

respect of debentures had to be paid to the applicant – where several debenture holders had made requests for redemption of debentures that matured between the date of appointment of the receivers and managers and the giving of the notice under clause 19.1 – where none of the redeemed amounts had been repaid to debenture holders prior to applicant giving notice under clause 19.1 – whether principal redeemed formed part of the trust property – where applicant under the trust deed must pay accrued interest on the debentures first and then principal or in such other order as is determinable by the applicant – where amount obtained from sale of investments insufficient to meet all principal and interest outstanding on the debentures – whether appropriate exercise of discretion that applicant proposed to repay principal first and then interest

Corporations Act 2001 (Cth), s 9, s 92, s 283HA, s 706, s 718, s 722

Trusts Act 1973, s 96

McGrath & Honey as the joint liquidators of HIH Insurance Ltd (in liq) v Perpetual Trustee Co Ltd (2008) 66 ACSR 210, considered

COUNSEL: B D O'Donnell QC for the applicant
D M Harrison in person

SOLICITORS: Allens Arthur Robinson for the applicant

- [1] The applicant, as the trustee for debenture holders of debentures issued by the first respondent (Diverseport), applies to the court for directions as to the construction and application of the trust deed made on 12 July 2005 between Diverseport and the applicant. The directions are sought pursuant to s 96 of the *Trusts Act 1973* and s 283HA of the *Corporations Act 2001 (Cth)* (the Act).

Background

- [2] Diverseport is an unlisted public company that attracted investments from members of the public for which debentures were issued on the basis of a series of prospectuses that were lodged with Australian Securities and Investments Commission (ASIC). The prospectus was lodged with ASIC to comply with s 718 of the Act. Disclosure to investors via a prospectus was required under s 706 of the Act, because Diverseport was making an offer of securities for issue to investors. (The definition of “securities” is set out in s 92 of the Act and it is also necessary to refer to the definition of “disclosure document” found in s 9 of the Act.)
- [3] Diverseport had the same directors and some of the same management as FIIG Securities Limited (FIIG) which was appointed by Diverseport as a distributor for the issue of the debentures. Many of the investments with Diverseport (but not all) were made via FIIG. The applicant is the independent trustee for the holders of the debentures issued by Diverseport in accordance with each prospectus. The

prospectus identified the trust deed as governing the issue of the debentures by Diverseport. The trust deed was supported by a charge granted by Diverseport in favour of the applicant over the investments made by Diverseport with the funds raised from debenture holders. The applicant holds its rights pursuant to that charge on trust for the debenture holders.

- [4] On 6 May 2008 the directors of Diverseport asked the applicant to appoint a controller to the secured property of Diverseport, as it could not meet payments on the debentures as they fell due. That was an event of default under clause 23.1(16) of the trust deed. On 7 May 2008 the trustee appointed receivers and managers of the charged property of Diverseport pursuant to clause 25 of the trust deed. The receivers and managers are Mr England and Mr Hall of PricewaterhouseCoopers. They accepted appointment at 5:40pm on 7 May 2008.
- [5] On 12 May 2008 the applicant gave Diverseport notice in the following terms:
 “In accordance with clause 19.1 of the Trust Deed, Trust hereby gives notice that on and from the date of this notice (12 May 2008) Diverseport must:
- (a) pay the amount of any principal redeemed or paid off to the Trustee when a debenture is redeemed or paid off in accordance with its terms of issue;
 - and
 - (b) pay interest to the trustee on the Debenture in accordance with its terms of issue, until it is redeemed or paid off.”
- [6] The receivers and managers have realised the investments of Diverseport and the applicant is in a position to finalise payments to the debenture holders. The quantum of the investments that have been realised is less than the face value of the debentures.

Issues

- [7] The application requires three separate issues to be determined.
- [8] The first issue relates to the receipt of application moneys by Diverseport between 2 and 6 May 2008 for which debenture certificates had not been issued and the applicants had not been notified that their applications had been accepted. The applicant seeks a direction from the court on whether the moneys accompanying those applications should be returned to the respective applicants (who are listed in schedule 2 to the originating application) or should be treated as part of the trust property.
- [9] The second issue arises in respect of eight applications for redemption received by Diverseport where the debentures matured and were due for payment between 7 and 12 May 2008. The applicant seeks a direction from the court on whether the moneys that became payable upon those redemptions should be treated as part of the trust property, or should be returned to the respective debenture holders (who are listed in schedule 3 to the originating application).
- [10] The third issue arises in relation to the proposal by the applicant to exercise the discretion conferred on it under clause 19.2 of the trust deed to switch the order in which principal and interest are repaid to the debenture holders.

Notice of the application

- [11] Although it was not strictly necessary to serve the debenture holders, the applicant considered it desirable to do so. Because it would have been impractical to effect personal service on 649 debenture holders, the applicant obtained an order from the Chief Justice on 21 September 2010 approving an alternative means of communication with those debenture holders which involved serving on each of them by post a copy of the originating application and a letter dated 27 September 2010 from the receivers and managers summarising the purpose of the application and advising that copies of the affidavits to be relied on by the applicant could be obtained from the receivers and managers or the website maintained by the receivers and managers. The application was also advertised in two newspapers.
- [12] The list of debenture holders in schedule 1 of the originating application did not include those persons who had applied to take up debentures, but whose applications had not been accepted by 7 May 2008. There were three applications from an existing debenture holder who was otherwise notified of the application. One of the applications was from a company that was deregistered on 6 October 2010. The last of the applications was from Northside Veterinary Clinics Pty Ltd. The applicant therefore applied to join that company as a separate respondent to the application and an application for that purpose together with a copy of the originating application and the supporting affidavit of Mr England that was filed at the same time were served on Northside Veterinary Clinics Pty Ltd on 29 September 2010 which did not appear at the hearing. It is appropriate to order that Northside Veterinary Clinics Pty Ltd be joined as the third respondent to the originating application and for leave to be given to file an amended originating application showing the addition of the third respondent.
- [13] The receivers and managers received three responses from debenture holders to the letter dated 27 September 2010. Those responses were exhibited to the affidavit of Mr England sworn on 13 October 2010.
- [14] One of the responses was from Mr and Mrs Harrison who are the assignees of the interests of Deka Resources Pty Ltd (Deka). Deka was one of the debenture holders affected by the second issue raised on this application. In addition to putting in the written submission through the receiver and manager, Mr Harrison appeared at the hearing of the application and made additional oral submissions. Another response was received from G&M Hull Pty Ltd as trustee for the Hull Superannuation Fund (Hull) which was also the holder of debentures that were affected by the second issue to be determined on this application.

Relevant provisions of the prospectus, the trust deed and the charge

- [15] Mr England exhibited to his affidavit sworn on 13 October 2010 a copy of Diverseport's prospectus 04 for fixed rate and floating rate debentures. That prospectus was dated 22 February 2008 and was the prospectus current at the time that the applications for debentures were made in early May 2008. Consistent with how the applicant's submissions were put to the court, I have proceeded on the basis that the earlier prospectuses for Diverseport's debentures were in similar terms to prospectus 04.
- [16] The debentures offered under the prospectus were for either fixed or floating income returns for terms up to five years and Diverseport proposed to use the

funds to invest in fixed income financial products that would give the debenture holders greater exposure to a variety of such products than may otherwise be available to them individually for investment. The fixed income financial products that were used by Diverseport for investment of the funds raised from the debenture holders were defined in the trust deed as authorised investments.

- [17] An application for debentures was made by an applicant completing and lodging the application form linked to the prospectus and sending the amount of funds for which the application was made. The prospectus specified that Diverseport had the right not to accept an application form and to refund the application money. Interest was only required to be paid on the application money after the application form was accepted by the registry. Computershare Investor Services Pty Limited (Computershare) was named in the prospectus as the registry or registrar. The prospectus stated that debentures would be allotted as soon as the application form and application money had been received and accepted by Computershare. Allotment referred to the recording of the debentures in the register of debenture holders maintained by Computershare and the issue of a debenture certificate by Diverseport to the debenture holder recording details of the investment within 14 days after acceptance of the application by Diverseport. The investment would be repaid on maturity, if that were requested by the debenture holder, but otherwise the investment would be rolled over for the same term.
- [18] The terms and conditions of the trust deed also detail the scheme for issuing the debentures and the investment of the debenture holders' funds substantially as described in the prospectus. Under clause 2.1(3) of the trust deed the applicant declares that it holds on trust the benefit of the trust deed for the debenture holders which includes the right to enforce Diverseport's duty to repay the debentures and any other duties that Diverseport has under the terms of the debentures, the trust deed, the charge and any other relevant transaction documents (as defined in the trust deed) and chapter 2L of the Act.
- [19] Clause 11.3 of the trust deed states that Diverseport must issue each debenture holder with either a debenture certificate or a notice sent within 28 days after the receipt of an application for debentures giving details of the debentures issued. Clause 11.4 of the trust deed confirms that debentures evidenced by a debenture certificate would be held subject to the terms of that debenture certificate and the terms of the trust deed. There are terms and conditions of debentures set out in schedule 2 to the trust deed, but there does not appear to be any clause in the trust deed that makes those terms and conditions operative. Clause 22.3 of the trust deed required Diverseport to issue to each debenture holder a certificate substantially in the forms of schedule 3 or any other form approved by the applicant and Diverseport. The forms of certificate that were issued by Diverseport differed from schedule 3 and no terms and conditions were endorsed on the debenture certificates.
- [20] Under clause 16.1 of the trust deed Diverseport was required immediately after execution of the trust deed to execute a charge (in the form that was identified in the trust deed) in favour of the applicant. That was done.
- [21] Clause 19.1(1) of the trust deed provides:

- “19.1(1) If an Event of Default has occurred, the Debenture Trustee may give a notice to the Issuer to the effect that after the date specified in the notice, the Issuer must:
- (a) pay the amount of any principal redeemed or paid off to the Debenture Trustee when a Debenture is redeemed or paid off in accordance with its terms of issue; and
 - (b) pay interest to the Debenture Trustee on the Debenture in accordance with its terms of issue, until it is redeemed or paid off.”

[22] Clause 19.2 of the trust deed provides:

“19.2 Manner of Distribution

All money received by the Debenture Trustee under the Transaction Documents (including proceeds of enforcement action) must, subject to any mandatory statutory requirements, be distributed and applied by the Debenture Trustee as soon as practicable after the Debenture Trustee receives it as follows:

- (1) first, towards satisfaction of all costs, charges and expenses incurred by the Debenture Trustee and its Representatives in or incidental to the exercise or attempted exercise of any right, power of discretion conferred under a Transaction Document including satisfaction of all costs, charges and expenses incurred in connection with any receivership of property secured by a Security;
 - (2) secondly, towards satisfaction of any amount of the Debenture Trustee Fee due and payable;
 - (3) thirdly towards payment of the Secured Money which is then due for payment or in accordance with clause 19.3 but in the following order:
 - (a) payment of accrued interest on each Debenture to Debenture Holders; and
 - (b) payment of the Face Value of each Debenture to Debenture Holders;
 - (4) fourthly, to the extent of any remainder after payment of all Secured Moneys and any other security, to the Issuer;
- or, subject to clause 19.3, in any other order as the Debenture trustee determines.”

[23] Clause 19.3 of the trust deed allows for provision to be made for contingent and prospective indebtedness and is therefore not relevant to this application.

[24] Subject to an exception that is not relevant, clause 19.5(1) of the trust deed provides that the applicant is not obliged to pay interest on the money received by it under clause 19.1.

[25] Clause 21.1(3) expressly provides that each debenture holder is bound by the terms of the trust deed, as does clause 26.1 of the trust deed.

- [26] Clause 22.1 of the trust deed requires Diverseport to keep or cause to be kept a register identifying the debentures issued and other specified details relating to the terms of the issue of the debentures and the debenture holders.
- [27] Clause 22.2 of the trust deed provides:
“22.2 Conclusiveness of Register
- (1) Subject to clause 22.2(4), the Register is conclusive evidence of the identity of Debenture Holders and prevails over any register or other records, kept by the Issuer to the extent of any inconsistency. The onus of proving the Register to be incorrect rests with the person challenging it.
 - (2) Subject to clause 22.2(4), a person whose name is entered on the Register as a Debenture Holder will remain a Debenture Holder until that name is removed from the Register by the Debenture Trustee regardless of whether or not:
 - (a) the Debenture is-or proves to have been void, invalid or was improperly issued; or
 - (b) the Debenture has been redeemed, repaid or cancelled.
 - (3) Subject to clause 22.2(4), the Debenture-Holders whose names appear from time to time on the Register are to be regarded as the beneficial owners of the Debenture registered in their respective names. Except as required by law neither the Debenture Trustee nor the Issuer will recognise (even when having notice) any other interest in any Debenture.
 - (4) Any Debenture issued in contravention of this document or of any other Transaction Document has no force or effect, whether or not its details are entered in the Register.”

[28] Clause 23.1 of the trust deed defines what is an event of default for the purpose of the enforcement of the charge granted by Diverseport in favour of the applicant.

[29] Under clause 2 of the charge, Diverseport charged the authorised investments made with the debenture holders' funds in favour of the applicant as security for the payment of the secured money which included the aggregate of the face value of all of the debentures on issue as at the relevant date and any interest payable on the aggregate value. Pursuant to clause 4.1 of the charge, the floating charge in favour of the applicant automatically crystallised on the appointment of the receivers and managers on 7 May 2008 by the applicant.

Application moneys received between 2 and 6 May 2008

[30] The first issue on which the applicant seeks advice is complicated by the fact that, apart from the registry maintained by Computershare, Diverseport maintained its own register. The applications for debentures lodged with the relevant moneys between 2 and 6 May 2008 were recorded in the register maintained by Diverseport, but not in the register maintained by Computershare.

- [31] It is consistent with the role assigned to Computershare in the prospectus that the register maintained by Computershare was the register for the purpose of the trust deed. The receivers and managers' investigations of how Diverseport dealt with applications for debentures confirms that the register maintained by Computershare was used for the purpose of issuing debentures and making payments to debenture holders. The critical fact for determining this first issue is that no debentures had been issued in respect of the applications lodged between 2 and 6 May 2008.
- [32] Section 722(1) of the Act also assists in determining what should be done with the application money in respect of the applications lodged between 2 and 6 May 2008. Section 722(1) provides:
- “If a person offers securities for issue or sale under a disclosure document, the person must hold:
- (a) all application money received from people applying for securities under the disclosure document; and
 - (b) all other money paid by them on account of the securities before they are issued or transferred;
- in trust under this section for the applicants until:
- (c) the securities are issued or transferred; or
 - (d) the money is returned to the applicants.”
- [33] Despite what Diverseport may have recorded in the register which it kept as its record, as no debentures were issued to the applicants whose applications were lodged between 2 and 6 May 2008, both the terms of the trust deed and s 722(1) of the Act require those application moneys to be returned to the respective applicants in full and they should not be treated as part of the trust property held by the applicant under the trust deed.
- [34] During the hearing of the application, I raised with Mr O'Donnell QC whether any interest was due on the application moneys that were paid with the applications lodged between 2 and 6 May 2008, if those application moneys were not part of the trust property. Mr O'Donnell QC obtained instructions to seek advice on that aspect of the matter, even though that was not a specific matter raised in the originating application.
- [35] On further reflection, the conclusion that the application moneys should not be treated as part of the trust property means that it is not necessary for the applicant to seek advice in respect of any interest that may be claimed on these application moneys. Notice was not given to the applicants for debentures where the applications were lodged between 2 and 6 May 2008 that the question of any interest on those moneys would be the subject of advice sought from the court and there has been no opportunity to put before the court any correspondence that could be relevant to the issue. I note that the applicants listed in schedule 2 of the originating application have not sought to raise the matter of interest in response to the originating application and that s 722 of the Act makes no reference to interest being payable on the application moneys that must be returned to applicants when debentures are not issued. I will not embark on this additional issue that was not specifically raised in the originating application and which may be unnecessary to consider.

Redemption of debentures that matured between 7 and 12 May 2008

- [36] Each of the eight debenture holders, who are the subject of the second issue raised by the application, had made a request to redeem debentures with effect on the maturity date that fell between 7 and 12 May 2008. None of the redeemed amounts had been paid to the relevant debenture holder before the applicant gave the notice dated 12 May 2008 to the receivers and managers under clause 19.1 of the trust deed. When that notice was received by the receivers and managers, each of the debenture holders was still recorded in the register maintained by Computershare as a debenture holder.
- [37] Mr Harrison's submission that he and Mrs Harrison as the assignees of Deka's interests in the debentures should receive a refund of the full redemption amount was based on the correspondence that Deka's financial adviser had in relation to the redemption. The face value of Deka's debentures was for \$263,000 and interest of \$15,846.55 was due on 7 May 2008, making a total of \$278,846.55. Deka had given the requisite notice to redeem the debentures. Deka's financial adviser received on 7 May 2008 at 1:34pm a notice entitled "Trade Confirmation" from FIIG that confirmed the total amount of principal and interest due to Deka on maturity of the debentures would be paid to Deka's nominated account.
- [38] Hull had also given the requisite notice to redeem debentures on 7 May 2008 with a face value of \$69,736 for which interest of \$452.81 was due. Hull's submission to the receivers and managers made on 30 September 2010 also sought payment of the full redemption amount based on the "Trade Confirmation" from FIIG that was sent to Hull's financial adviser on 7 May 2008 that confirmed the principal and interest due on 7 May 2008 would be paid to Hull's account.
- [39] This second issue raises the construction and application of clause 19.1 of the trust deed.
- [40] The applicant submits that the giving of the notice dated 12 May 2008 to Diverseport had the effect under clause 19.1 of the trust deed of requiring Diverseport to pay to the applicant any principal redeemed, but then unpaid to the debenture holder, whether the redemption occurred before or after the notice was received by Diverseport.
- [41] The reference in clause 19.1(a) to "the amount of any principal redeemed or paid off" must be a reference to the value of the debentures that have been redeemed. It appears that the words "paid off" do not add anything to the word "redeemed" when used in relation to debentures: *McGrath & Honey as the joint liquidators of HIH Insurance Ltd (in liq) v Perpetual Trustee Co Ltd* (2008) 66 ACSR 210 at [24].
- [42] Although FIIG had given a "Trade Confirmation" to the respective financial advisers of Deka and Hull, they were given after Diverseport had defaulted under the trust deed and when the appointment of the receivers and managers was pending. Trade confirmations given by FIIG may have been acted on by Diverseport when it was trading in the normal course of its business, but the trade confirmations relating to Deka and Hull did not result in the removal of Deka and Hull from the register of debenture holders and were not implemented by Diverseport making the relevant deposits to the respective bank accounts to Deka and Hull.

- [43] In accordance with clause 22(2) of the trust deed, each of the debenture holders of the debentures that matured between 7 and 12 May 2008 in accordance with requests for redemption remained a debenture holder and therefore was bound by clause 19.1 of the trust deed.
- [44] There are two possible constructions that can be given to clause 19.1(1). The first is consistent with the submission of the trustee and construes the reference to “after the date specified in the notice” as the date on and from which Diverseport must pay any amount of principal redeemed to the applicant, whether the principal was redeemed before or after that date, provided the amount of the principal is held by Diverseport. The other construction is that the words “after the date specified in the notice” also qualify the timing of the redemption of the principal.
- [45] As the words “after the date specified in the notice” are in the opening words of clause 19.1(1) of the trust deed, rather than in paragraph (a) of clause 19.1(1), the better construction is that which gives effect to those words as from the date of the notice. There is no warrant within the structure of clause 19.1(1) to read down the literal meaning of paragraph (a) by imposing the timing that relates to the implementation of the notice given by the applicant to Diverseport to the event of the redemption of the debentures that are affected by the notice. What is caught by clause 19.1(1) of the trust deed when the notice is given under that provision by the applicant is all the amounts held by Diverseport on account of any redeemed debentures. That construction of clause 19.1(1) gives an appropriate operation to that provision in the circumstances where Diverseport sought the appointment of receivers and managers because it did not have the funds to meet the payments on the debentures for which requests for redemption were being made, as those requests exceeded what was the usual rate of redemptions.
- [46] It is therefore appropriate to give the direction that is sought by the applicant that both the principal and any interest otherwise payable upon the redemption of the debentures listed in schedule 3 to the originating application should be paid to the applicant, so as to form part of the trust property. That means that the debentures of those debenture holders listed in schedule 3 will be repaid rateably with the debentures of the debenture holders listed in schedule 1.

Order of payment under clause 19.2 of the trust deed

- [47] The pool of funds available for distribution to the debenture holders is insufficient to meet the principal and interest accrued on the debentures up to 7 May 2008 or pay any interest accruing after that date. On 19 June 2008 the receivers and managers sent a notice to the debenture holders advising that it was anticipated that the principal would not be paid in full and the applicant had determined, as a result of concerns expressed by some debenture holders, to reverse the order of payment, so that the principal was to be paid before interest that had accrued and remained unpaid as at 7 May 2008. Debenture holders were given an option to remain with the order of payment as set out in clause 19.2(3) of the trust deed. One debenture holder only, Mr J H West, responded to the notice dated 19 June 2008 to request that the amounts of principal and interest due to him not be switched.
- [48] The receivers and managers ascertained that there were 59 different rates of interest applying to the debentures that accrued interest at a fixed rate. In addition there were ten debentures that accrued interest at a floating rate which was

determined by reference to the term of the debenture and the frequency upon which interest was paid. The receivers and managers took the view that, to increase the return to debenture holders generally and to ensure that debenture holders were treated fairly, the applicant should make distributions to the debenture holders based on the total amount due to them as at the date the receivers and managers were appointed of 7 May 2008. The receivers and managers were concerned that if they adopted other means of calculation which required updating of the computer system used by Computershare that would lead to additional costs in the receivership, reducing the amounts payable to the debenture holders, but that was also an academic calculation, when the debenture holders would not be receiving any amount on account of interest accrued after 7 May 2008.

- [49] Under clause 19.2 of the trust deed the applicant has an unfettered discretion to determine the order of payment of the secured money to the debenture holders. The applicant proposes to follow the recommendation of the receivers and managers. This will entail two departures from the manner of distribution set out in clause 19.2(3) of the trust deed, in relation to the accruing of interest up until the time of distribution and for repayments to be applied, first, in meeting the outstanding interest and, secondly, in the meeting of the outstanding principal. This will result in the applicant determining the principal and interest owing to each debenture holder as at 7 May 2008 and rateably distributing the trust funds amongst those debenture holders by reference to the principal and interest owing on each debenture as at 7 May 2008 and those distributions will be *pari passu*. The moneys will be returned to each debenture holder in satisfaction of principal first and interest second, except in the case of the debentures held by Mr West where the amount distributed will be paid towards interest first and the balance in payment of the principal.
- [50] What the applicant proposes is an equitable and fair means of distribution for maximising the repayments to the debenture holders in the circumstances of the shortfall. I therefore propose to make the direction sought by the applicant in relation to the third issue to approve the exercise by the applicant of the discretion to vary the order of payment under clause 19.2.

Orders

- [51] During the hearing of this application, Mr O'Donnell QC provided a draft order that reflected the joinder of Northside Veterinary Clinics Pty Ltd as the third respondent and the directions that were sought by the applicant in relation to the three issues. As I have accepted the applicant's submissions in relation to those three issues, it is appropriate to make the orders that are sought by the applicant. I have amended the draft order to correct minor errors. The order that I will make therefore is an order in terms of the amended draft initialled and placed with the file.