IOUPAY LIMITED (ASX: IOU)
(ACN 091 192 871)

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6 April 2023 **ASX Announcement**

Federal Court Judgment

IOUpay Limited (**IOUpay** or **the Company**) announces that the formal judgment has now been handed down by his Honour Justice Jackman in the Federal Court proceedings commenced against the Company by Clee Capital Pty Ltd (**Clee**). A copy is attached.

Extracts that are particularly relevant to shareholders are set out below. The judgment refers to Clee as the "applicant" and the Company as the "respondent".

> "*Representations were made to the board of the respondent by its then CFO that approximately AUD$4 million was held in [law firm] Thomas Philip's trust account. But it now appears that those representations were wrong, and that the surplus has been disbursed to other parties."*
>
> *"…. the applicant does not make any suggestion that [the Managing Director] was involved in any fraud and has expressly disclaimed any allegation of dishonesty by anyone in the management of the respondent company…"*
>
> *"There is no feature here of any failure or continuing failure by the respondent or its directors to investigate any of those matters. Indeed, the respondent appears to have moved quickly to put investigations in train in relation to the suspected fraud, and it has engaged accountants from a firm known as Crowe Malaysia to give urgent attention to an investigation of the suspected fraud and other transactions."*
>
> *"…Mr Chong [the current CFO] says that the respondent is obliged to pay the sellers of iDestinasi shares approximately AUD$3.2 million within 60 days of the Malaysian government renewing iDestinasi's Accountant General Code for salary deduction of federal government servants. It is anticipated that that renewal will occur some time in the month of April 2023, which would mean that the amount of $3.2 million will be payable in June 2023. However, Mr Chong says that, in his experience, it is prudent and more cost and time efficient for the respondent to raise money to cover both the April 2023 expenses set out above and the second tranche payment of AUD$3.2 million in the same transaction. That appears to me to be an entirely reasonable position for him, as well as the other directors of the respondent, to take."*
>
> *"Even if the full amount of the proposed $5 million is not necessary to be raised at the moment, the interlocutory relief sought by the applicant would prevent the respondent from raising any capital or entering into any loan agreement for any amount."*
>
> *"I regard the application for oppression on the current evidence as weak and not amounting to a serious question to be tried. In my opinion, the respondent has provided sufficient answers to the various complaints of the applicant to satisfy me that, on the current evidence, there is no realistic prospect of a receiver being appointed. The directors of the respondent appear to be taking appropriate steps to investigate transactions and to safeguard the company's property. The apparent perpetrator of the fraud has been removed from the company."*

The release of this announcement was authorised by the Board of the Company and released by the Company Secretary.

Yours faithfully,

IOUpay Limited

Ben Reichel
Company Secretary

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About IOUpay (ASX:IOU):

IOUpay Limited (ASX:IOU) provides fintech and digital commerce software solutions and services that enable its institutional customers to securely authenticate end-user customers and process banking, purchase and payment transactions.

The Company's core technology platform enables large customer communities to connect to end user customers using any mobile device and integrate mobile technology throughout their existing business and customer product offerings. The Company's business divisions consist of Mobile Banking and Digital Payments which service leading banks in Malaysia and large telcos and corporates in Malaysia & Indonesia. IOUpay also works with telecommunication network providers to provided mobile OTT (over-the-top) services that leverage their subscriber base to build active communities.

Forward Looking Statements

This announcement contains forward looking statements, including statements of current intention, statements of opinion and predictions as to possible future events. Forward looking statements should, or can generally, be identified by the use of forward-looking words such as "believe", "expect", "estimate", "will", "may", "target" and other similar expressions within the meaning of securities laws of applicable jurisdictions, and include but are not limited to the expected outcome of the acquisition. Indications of, and guidance or outlook on, future earnings or financial position or performance are also forward-looking statements. Such statements are not statements of fact and there can be no certainty of outcome in relation to the matters to which the statements relate. These forward-looking statements involve known and unknown risks, uncertainties, assumptions and other important factors that could cause the actual outcomes to be materially different from the events or results expressed or implied by such statements. Those risks, uncertainties, assumptions and other important factors are not all within the control of IOUpay and cannot be predicted by IOUpay and include changes in circumstances or events that may cause objectives to change as well as risks, circumstances and events specific to the industry, countries and markets in which IOUpay operates. They also include general economic conditions, exchange rates, interest rates, competitive pressures, selling price, market demand and conditions in the financial markets which may cause objectives to change or may cause outcomes not to be realised.

None of IOUpay or any of its subsidiaries, advisors or affiliates (or any of their respective officers, employees or agents) makes any representation, assurance or guarantee as to the accuracy or likelihood of fulfilment of any forward-looking statement or any outcomes expressed or implied in any forward-looking statements. Statements about past performance are not necessarily indicative of future performance.

FEDERAL COURT OF AUSTRALIA

Clee Capital Pty Ltd v IOUpay Limited [2023] FCA 312

File number(s):	NSD 264 of 2023
Judgment of:	**JACKMAN J**
Date of judgment:	3 April 2023
Catchwords:	**CORPORATIONS** – interlocutory application seeking to restrain respondent from incurring liabilities or raising capital – allegations of oppressive conduct – where an extraordinary general meeting will be held concerning the removal of directors – where there has been a suspected fraud upon the company – where the injunctions sought could lead to the insolvency of the company – whether maladministration or failures of corporate governance are capable of amounting to oppression – where there is no serious question to be tried as to oppression – where the balance of convenience does not favour the grant of the injunctions sought – where the interlocutory relief sought does not correspond meaningfully with the final relief sought
Legislation:	*Corporations Act 2001* (Cth) ss 203D, 232, 233(1)(h), 233(1)(j), 249D
Cases cited:	*Parker v National Roads & Motorists Association* (1993) 11 ACSR 370 *Whitehouse v Carlton Hotel Pty Ltd* (1997) 162 CLR 285
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	32
Date of hearing:	3 April 2023
Counsel for the Plaintiff:	Mr P S Braham SC and Ms C O Gleeson
Solicitor for the Plaintiff:	Marque Lawyers

Counsel for the Defendant:	Mr J Knackstredt and Ms S Danne
Solicitor for the Defendant:	Hamilton Locke

ORDERS

NSD 264 of 2023

BETWEEN:	**CLEE CAPITAL PTY LTD** Plaintiff
AND:	**IOUPAY LIMITED** Defendant

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **3 APRIL 2023**

THE COURT ORDERS THAT:

1. The plaintiff's interlocutory application be dismissed.
2. The injunctions in orders 1 to 6 of the orders made on 22 March 2023 be dissolved.
3. The plaintiff pay the defendant's costs of the application referred to in order 1 above.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

JACKMAN J:

1 This matter first came before me on 21 March 2023, when I granted short service to the plaintiff of the originating process and accompanying documents. The matter was returnable the following day, 22 March 2023, when consent orders were made to preserve the status quo pending the application for interim relief being prepared for hearing on 29 March 2023. On that day, I granted an adjournment until today.

2 The plaintiff (the applicant in this interlocutory application) seeks interlocutory orders to the effect of orders 1 to 6 of the orders made on 22 March 2023, namely that the respondent, IOUpay Ltd (**IOUpay**):

(a) be restrained from making any payments or incurring any liabilities other than:

(i) in the ordinary course of business;

(ii) in connection with the investigation of and actions under way to recover the misappropriated funds the subject of the respondent's ASX announcements made on 22 March 2023; and

(iii) in connection with these proceedings;

(b) take necessary steps to ensure that its wholly owned subsidiaries do not make any payments or incur liabilities other than in the circumstances above;

(c) be restrained from raising capital and entering into any loan agreements;

(d) take necessary steps to ensure that its wholly owned subsidiaries do not raise any capital or enter into any loan agreements;

(e) be restrained from destroying or deleting any books, records or information generated or stored in the course of the respondent's business;

(f) take necessary steps to ensure that no wholly owned subsidiary destroys or deletes any books, records or information generated or stored in the course of the subsidiary's business.

3 In addition, the applicant seeks an order that upon the applicant providing the usual undertaking as to damages, until 4 May 2023, the respondent be restrained from:

(a) raising any capital;

(b) entering into any loan agreements; and

(c) otherwise incurring any debt on behalf of the respondent except on such terms as the court may specify.

4 The applicant also seeks an order pursuant to s 233(1)(j) of the *Corporations Act 2001* (Cth) (the **Act**) requiring the respondent to make available and cause its subsidiaries to make available such of their books and records as are required for Andrew Sallway of BDO, Level 11, 1 Margaret Street, Sydney, New South Wales 2000 to undertake an investigation into the affairs of the respondent on behalf of the applicant.

5 Alternatively to those orders, the applicant seeks an order that upon the applicant providing the usual undertaking as to damages, until 4 May 2023 the respondent be restrained from entering into any agreement which contemplates the issue of equity by the respondent except on three clear business days' notice to the applicant.

6 The applicant is a shareholder of the respondent, which is a public listed company, its shares being quoted on the ASX. The respondent is a digital software company which specialises in providing "fintech" and digital commerce software and services in Southeast Asia. It has a wholly owned Malaysian subsidiary, iSentric Sdn Bhd (**iSentric**), which in turn has a wholly owned Malaysian subsidiary IOUpay (Asia) Sdn Bhd (**IOUAsia**).

7 On 2 March 2023, the solicitors for the applicant, together with four other shareholders, sent a letter to the respondent enclosing a notice of intention to move resolutions for the removal of the directors of the respondent pursuant to s 203D(2) of the Act. On 3 March 2023, the solicitors for the applicant and the same four shareholders (who together hold over 5% of the votes that may be cast at a general meeting) sent a letter enclosing a request for the directors of the respondent to call a general meeting pursuant to s 249D of the Act. Section 249D(5) provides that the meeting must be called within 21 days after the request is given to the company and that the meeting must be held no later than two months after the request is given to the company, that is, by 3 May 2023.

8 The board of the respondent resolved on 19 March 2023 to call the requested extraordinary general meeting (**EGM**) for 3 May 2023. The reasons for selecting that date are set out in the affidavit of Mr Reichel, the Secretary of the respondent, of 27 March 2023 at paragraph 27, and include the constitutional requirement of 28 clear days' notice of the EGM, the fact that

IOUpay has over 15,000 members and thus the process for printing and posting notice of the EGM takes some time, and also the fact that due to the discovery of a significant fraud in IOUpay's Malaysian operations, all members of the board were required to focus on stabilising the business and ensuring that IOUpay had enough capital to continue to operate. The notice of meeting was sent to shareholders on 31 March 2023, and there is no reason to think that the meeting will not go ahead on 3 May 2023, nor is there any reason to think that the meeting will not be properly conducted on that day.

9 Before I come to the particular complaints made by the applicant, I note that at the hearing on 29 March 2023, I indicated that although the application was interlocutory in nature, I would readily give leave for cross-examination of any witnesses, provided that the cross-examiner did not exceed a 30 minute time limit, although I was open to persuasion that a longer time should be provided if cause were shown. In the event, no witness was cross-examined.

10 The applicant makes a number of complaints of what it calls maladministration or serious failures of corporate governance in aid of its claim that the affairs of the company are being conducted oppressively or unfairly prejudicially to members within the meaning of s 232 of the Act.

11 The applicant places significant reliance on the circumstances associated with a suspected fraud involving funds which were required to settle the second tranche of a corporate transaction to acquire shares in iDestinasi Sdn Bhd (**iDestinasi**), the overall transaction being worth about AUD$7.3 million. The funds needed to settle the second tranche of approximately AUD$3.2 million were thought to be held in a trust account by a law firm in Malaysia known as Thomas Philip. When the transaction was renegotiated in August 2022, some AUD$4 million was surplus to the requirements of paying the purchase money. Representations were made to the board of the respondent by its then CFO that approximately AUD$4 million was held in Thomas Philip's trust account. But it now appears that those representations were wrong, and that the surplus has been disbursed to other parties.

12 The applicant relies upon that disbursement of funds, which it points out included a payment to a Singaporean company known as Piminik Investment Holdings Pte Ltd, which it says has a connection with Mr Lee, the CEO of the respondent. However, the applicant does not make any suggestion that Mr Lee was involved in any fraud and has expressly disclaimed any allegation of dishonesty by anyone in the management of the respondent company. The applicant also relies upon a list of so-called business-to-business arrangements, which appear

in an email at pages 511 and 512 of the chronological bundle (Exhibit A), which have been under investigation by the respondent, as an email of 17 March 2023 indicates.

13 For the purposes of today's application, I will accept without deciding that so-called maladministration or failures of corporate governance are capable of amounting to oppression. However, the circumstances fall well short of those which arose in *Parker v National Roads & Motorists Association* (1993) 11 ACSR 370 at 399, where Clarke JA referred to Hodgson J's (the trial judge) reference to a continuing failure of a company to inquire into the complaints of the plaintiff, in that case, as amounting to oppression in the relevant sense. There is no feature here of any failure or continuing failure by the respondent or its directors to investigate any of those matters. Indeed, the respondent appears to have moved quickly to put investigations in train in relation to the suspected fraud, and it has engaged accountants from a firm known as Crowe Malaysia to give urgent attention to an investigation of the suspected fraud and other transactions.

14 The applicant also relies on what it says is a concern that Mr Lee may be trying to shut down the operations of the respondent, as evidenced by his encouragement of employees to resign or have their employment terminated. The applicant points to a delay in paying merchants for certain transaction between 6 and 12 March 2023, and also points to a number of significant changes in directors and management since early March 2023. In response to those allegations, the respondent has put on evidence from Mr Reichel and Mr Lee as to the steps it has taken in response to its discovery of the suspected fraud, which has involved the misappropriation of cash which was thought to be available to the company, of about AUD$4 million. The company has taken steps to reduce costs, including the temporary cessation of loan offers in its buy now pay later business (**BNPL**) and a reduction in the number of employees and office space in its Malaysian office.

15 Mr Lee, in his affidavit of 27 March 2023, sets out a number of detailed steps which he took to cut the respondent's costs as an emergency measure, having identified that those funds of about AUD$4 million were no longer within the control of IOUpay.

16 Next, the applicant relies upon the efforts by the respondent to raise about AUD$5 million to finance current cash flow requirements, despite the respondent's financial report for the first half of financial year 2023 stating that it had over AUD$4.4 million in cash or cash equivalents. The evidence indicates that that financial report was prepared and audited before the discovery of the suspected fraud involving some AUD$4 million of that amount.

17 The applicant questions the need to raise AUD$5 million on an urgent basis, or indeed any money at all. The argument in relation to this matter has focused on an affidavit by Mr Chong, the interim CFO of the respondent, which was affirmed on 1 April 2023. In that affidavit, Mr Chong proves that the respondent has cash at bank of about AUD$330,000, trade receivables of about AUD$3.8 million, and trade payables of about AUD$3.5 million. He explains that a large portion of the trade payables will need to be paid in the next month – that is, in the month of April – and a large proportion of the trade receivables will not be received for upwards of six months.

18 He also explains that about AUD$3 million of the trade receivables will take between three and six months to be collected from customers, and other receivables totalling approximately $19 million are the subject of investigation, as a large proportion of them relate to questionable or fraudulent transactions. Mr Chong expresses the view that the respondent requires about AUD$1.25 million immediately to enable it to pay its April 2023 expenses, current outstanding creditors and further costs of prosecuting proceedings in the Malaysian High Court concerning the suspected fraud, as well as defending these proceedings through to 3 May 2023. Specifically, Mr Chong says that the respondent requires AUD$284,153 to pay its April 2023 expenses, AUD$563,373 to pay its outstanding creditors (which I understand to be a reference to those trade payables which are due in the month of April) and approximately AUD$400,000 for further legal, regulatory and compliance expenses to be incurred in the Malaysian High Court proceedings, as well as defending these proceedings and preparing for the EGM on 3 May 2023.

19 In addition, Mr Chong says that the respondent is obliged to pay the sellers of iDestinasi shares approximately AUD$3.2 million within 60 days of the Malaysian government renewing iDestinasi's Accountant General Code for salary deduction of federal government servants. It is anticipated that that renewal will occur some time in the month of April 2023, which would mean that the amount of $3.2 million will be payable in June 2023. However, Mr Chong says that, in his experience, it is prudent and more cost and time efficient for the respondent to raise money to cover both the April 2023 expenses set out above and the second tranche payment of AUD$3.2 million in the same transaction. That appears to me to be an entirely reasonable position for him, as well as the other directors of the respondent, to take.

20 Mr Chong also says that the respondent has had discussions with various potential providers of equity or debt funding. However, given the existing interlocutory orders, it has not been

possible to progress those discussions. At this stage, he does not know whether or not it will be possible for the respondent to raise debt funding. But based on his experience, he expects it is more likely that the group will only have access to equity funding. The applicant was critical of the generality with which that evidence was given but there is no reason to think that Mr Chong is in a position to provide any greater particularity, noting also that the interlocutory orders that have been in place since 22 March 2023 have restrained the respondent from proceeding further with that matter. Even if the full amount of the proposed $5 million is not necessary to be raised at the moment, the interlocutory relief sought by the applicant would prevent the respondent from raising any capital or entering into any loan agreement for any amount.

21 On the current evidence, it appears very likely that some further funding will be required in April 2023 in order to ensure that the company does not face the likelihood of insolvency such as to require the appointment of voluntary administrators.

22 The applicant also relies on an instruction given by Mr Lee on 3 March 2023 to the then CFO of the respondent to transfer an amount of AUD$2.25 million from IOU Asia to the respondent, being the parent company. The CFO refused to make that transfer and his employment was terminated for that reason, perhaps among other reasons. Mr Lee gives evidence that his understanding was that the payment of that $2.25 million would have come out of the surplus funds which were then thought to be held in the Thomas Philip trust account.

23 Mr Lee says that the request to transfer funds from IOUpay Asia to its holding company was not unusual, as the respondent does not generate its own revenue and had expenses to pay. In his affidavit of 27 March 2023, Mr Lee sets out the liabilities of the respondent in a total amount of AUD$343,330.53 currently owed by the respondent to various parties, and he explains that the balance of the funds which he instructed to be transferred to the respondent included a provision of $250,000 for incidental expenses and ongoing operation costs of the respondent for the next 12 months, estimated to be AUD$1.6 million. He sets out some of the regular costs incurred by the respondent which are anticipated to be paid in that period.

24 Although there were earlier suggestions to the contrary, the applicant has disclaimed any reliance on any allegation that there has been any deletion of data files or removal of computers or computer servers from the respondent's offices or the offices of its subsidiaries.

25 As I indicated earlier, the cause of action relied upon by the applicant is oppression under s 232 of the Act, relying on the various matters which I have outlined. The final relief which is sought by the applicant in its amended originating process includes an order pursuant to s 233(1)(h) of the Act that a receiver and manager be appointed to all of the respondent's property. That appears to be the relief in aid of which the interlocutory relief is currently being sought.

26 I regard the application for oppression on the current evidence as weak and not amounting to a serious question to be tried. In my opinion, the respondent has provided sufficient answers to the various complaints of the applicant to satisfy me that, on the current evidence, there is no realistic prospect of a receiver being appointed. The directors of the respondent appear to be taking appropriate steps to investigate transactions and to safeguard the company's property. The apparent perpetrator of the fraud has been removed from the company. The shareholders will have an opportunity of deciding, on 3 May 2023, whether the current directors should remain in office. On the current evidence, I see no serious question to be tried as to whether a receiver would be required to be appointed to protect the respondent's property, noting of course that that is a relatively drastic remedy within the suite of remedies available for oppression.

27 In any event, I will proceed to deal with the balance of convenience on the assumption that that conclusion is wrong. The first point to make on the balance of convenience is that the respondent is a going concern with 42 employees and $3 million on loan to consumers via its BNPL business. It has 75,000 registered retail customers, including 7000 who are active in the sense of having current loans, and there are some 3000 registered merchants offering the respondent's BNPL product.

28 The evidence of Mr Lee is that if the respondent is prohibited from obtaining finance or entering a loan and the directors form the view that additional funding is required to enable the respondent to continue as a going concern, the directors would have no choice but to appoint a voluntary administrator. There appears to me to be a real risk that, absent further funding in the month of April 2023, the directors will face that spectre and may well form a view that additional funding is required to enable the respondent to continue as a going concern. That, of course, would likely lead to the collapse of the respondent's business, the termination of many of its employees, and at the very least serious disruption in any attempt to continue or revive the BNPL business.

29 The applicant submits, as I understand it, that the potential prejudice to it is that if injunctions restraining further capital raising or borrowing are not made then there may be a sufficiently large issue of shares or convertible notes which would skew the votes of the EGM on 3 May 2023. The concern appears to be that a new majority may be created contrary to the directors' duties recognised in *Whitehouse v Carlton Hotel Pty Ltd* (1997) 162 CLR 285 at 289, and in the cases cited there. In my opinion, there is no evidence at present of any significant threat of that occurring. The applicant itself appears to be among the candidates for potential sources of funding, and if negotiations for funding by the applicant come to fruition, then its voting percentage may well be enhanced by 3 May 2023. At present, on the current state of the evidence, this potential prejudice is too speculative to outweigh the risk of the respondent entering into voluntary administration if it is unable to raise further funds.

30 Further, apart from the application for a receiver to be appointed to the respondent, the interlocutory relief sought does not appear to correspond meaningfully to the final relief sought by the applicant. That includes: an order granting leave to the applicant to bring proceedings in the name of the respondent against Mr Lee; an order that the respondent commence and prosecute all proceedings as are reasonably necessary to recover the funds misappropriated from the respondent and its subsidiaries; an order that the respondent be restrained from raising any capital, except on such terms as may be authorised by the company in general meeting(which would appear to confer on the general meeting responsibilities which are properly that of the board); and an order that the respondent take all steps to arrange and convene an extraordinary general meeting in accordance with s 249D(1) of the Act. I have dealt already with the lack of evidence in support of a receivership of the company. I do not understand how the grant of the interlocutory relief which is claimed would advance or protect the applicant's position in relation to those other claims for final relief.

31 In the alternative, the applicant has sought an order that, upon the applicant providing the usual undertaking as to damages, until 4 May 2023 the respondent be restrained from entering into any agreement which contemplates the issue of equity by the respondent, except on three clear business days' notice to the applicant. As I have found that there is no serious question to be tried, I will not make that order. As to the balance of convenience, it is difficult, at this point, to predict what impact such an order may have on any proposed capital raising, but it would appear at least possible that the disclosure of these details three days in advance of the entry into any such agreement may prejudice the implementation of any transaction being negotiated.

32 Accordingly, I dismiss the application for interlocutory relief. The applicant is to pay the respondent's costs of that application, and in addition I dissolve the injunctions which were the subject of the consent orders, paragraphs 1 to 6, made on 22 March 2023.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 3 April 2023