Australian Securities and Investments Commission v Marco (No 17) [2024] FCA 1449

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| File number: |  |
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| Judgment of: | **FEUTRILL J** |
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| Date of judgment: | 13 December 2024 |
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| Catchwords: | **CORPORATIONS** – application by Court appointed Receivers for fixing remuneration and interim payment of remuneration pending determination by a Registrar – fixing  of an appropriate percentage for interim payment – whether  interim payment is subject to appropriate safeguards |
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| Legislation: | *Corporations Act* *2001* (Cth) s 425(8)  *Federal Court of Australia Act 1976* (Cth) s 20A(2)(c)(ii)  *Federal Court Rules 2011* (Cth) r 2.32(1)(b) |
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| Cases cited: | *Australian Securities and Investments Commission v Marco (No 7****)*** [2021] FCA 429  *Australian Securities Investments Commission v Marco (No 8)* [2021] FCA 885  *Australian Securities and Investments Commission v Marco (No 11)* [2022] FCA 704 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 6 |
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| Date of hearing: | Determined on the papers |

ORDERS

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|  | | WAD 481 of 2018 |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Plaintiff | |
| AND: | CHRIS MARCO  First Defendant  AMS HOLDINGS (WA) PTY LTD (RECEIVERS &  MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 164  700 485)  Second Defendant  AMS HOLDINGS (WA) PTY LTD (RECEIVERS &  MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 164  700 485) AS TRUSTEE FOR AMS HOLDINGS TRUST  Third Defendant | |
|  | ROBERT MICHAEL KIRMAN AND ROBERT CONRY BRAUER AS RECEIVERS  Interested persons | |

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| order made by: | FEUTRILL J |
| DATE OF ORDER: | 13 December 2024 |

THE COURT ORDERS THAT:

Fixing Receivers’ remuneration

1. A Registrar of the Court review and fix the remuneration to which the Receivers are properly entitled for the period from 3 December 2022 to 3 March 2023, 4 March 2023 to 2 June 2023, 3 June 2023 to 8 December 2023 and 9 December 2023 to 31 May 2024 under paragraphs 5, 6, 7 and 10 of the orders made in this proceeding on 7 December 2020.
2. The Registrar will advise the Receivers if the Registrar requires further information to fix the remuneration the subject of the application and copies of any such further information provided to the Registrar must also be provided to the Australian Securities and Investments Commission.
3. If the Registrar requests further information to fix the remuneration the subject of the application, the Receivers must provide such further information within 14 days of receipt of the Registrar’s request.
4. As soon as reasonably practicable after receipt of the further information referred to in paragraph 3 of these orders, the Registrar is to fix the remuneration the subject of the application and deliver short written reasons for their determination.
5. Within 14 days of the Registrar fixing the remuneration and delivering their written reasons under paragraph 4 of these orders, the Receivers or any other party may apply to the Court to review the Registrar’s determination and the Court may review the Registrar’s determination and fix the remuneration the subject of the application.

Interim payment of Receivers’ claimed remuneration

1. Subject to the following, the remuneration of the Receivers for the period from 3 December 2022 to 3 March 2023, 4 March 2023 to 2 June 2023, 3 June 2023 to 8 December 2023 and 9 December 2023 to 31 May 2024 in the amounts equivalent to 85% of $6,617.60 (incl of GST), $2,866.60 (incl of GST), $25,888.50 (incl of GST) and $32,687.60 (incl of GST) respectively, is approved for payment on an interim basis:
   1. if the amount paid on an interim basis under this order is greater than the amount determined by the Registrar under paragraphs 1 or 4 or any subsequent determination by the Court under paragraph 5 of these orders, the Receivers are to refund the difference together with interest at the Westpac 6 month business term deposit rate applicable at the time of drawdown of the interim remuneration amount; and
   2. if the Registrar or Court determines that the Receivers were entitled to recover any amount greater than the amount paid on an interim basis under this order, then the Receivers may drawdown such an amount upon the Registrar or Court making orders reflecting the determination.
2. Until further order, upon the drawdown of any funds for the purposes of payment of the Receivers’ interim remuneration under paragraph 6 of these orders, the Receivers are to file with the Court a Certificate in the form at Annexure Ato these orders.

Confidentiality of Receivers’ reports

1. Pursuant to r 2.32(1)(b) of the *Federal Court Rules 2011* (Cth), until further or other order, the annexures “RCB-1”, “RCB-2”, “RCB-3”, “RCB-4”, “RCB-5”, “RCB-6”, “RCB-7” and “RCB-8” to the affidavit of Robert Conry Brauer sworn 19 September 2024 filed in support of the interlocutory process dated 14 October 2024, by reason of the annexures containing information which is confidential and sensitive is not, except with the leave of the Court, to be available for access or inspection by any party or person besides the Court and the applicants of the interlocutory process.
2. Any application for leave to access or inspect pursuant to para 8 of these orders be referred to a Judge of this Court.

Costs

1. The costs of this application are costs in the receivership.

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

**Annexure A**

**Certificate in respect of the Receivers’ remuneration application**

**No. WAD 481 of 2018**

Federal Court of Australia

District Registry: Western Australia

Division: General Division

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**CHRIS MARCO and others named in the schedule**

Defendants

To: The Registrar

Federal Court of Australia

Western Australia Registry

Peter Durack Commonwealth Law Courts Building

1 Victoria Avenue

Perth WA 6000

Fax: (08) 6317 9767

Email: perth.registry@fedcourt.gov.au

**NOTE**: Terms defined in the orders made by McKerracher J on 7 December 2020 have the same meaning when used in this Certificate.

On [insert date] the amount of $[X] was paid to the Receivers from the Property as interim remuneration pursuant to order 1 of the orders made by Feutrill J on [insert date] 2023.

Signed: …………………………

Date: ……………………

REASONS FOR JUDGMENT

FEUTRILL J:

1. By orders of the Court made on 7 December 2020, Messrs Robert Kirman and Robert Brauer of McGrathNicol were appointed as joint and several receivers and managers of certain property of the first, second and third defendants and all property of the unregistered managed investment scheme operated by each of the defendants described in the orders (Scheme and Property). The Receivers have made seven applications for orders to facilitate the fixing of their remuneration for various periods by a Registrar, as well as for orders approving, subject to certain safeguards, immediate interim payment of amounts equivalent to 85% of the total remuneration claimed for each period. The Court made orders, as requested, on each of those applications.
2. By interlocutory process dated 14 October 2024, the Receivers seek orders fixing their remuneration for the period from 3 December 2022 to 3 March 2023, 4 March 2023 to 2 June 2023, 3 June 2023 to 8 December 2023 and 9 December 2023 to 31 May 2024 and approving an interim payment of 85% of the remuneration claimed for each of those periods. The orders sought are in substantially the same terms as the orders the Court made on the earlier applications. The Receivers filed and rely upon an affidavit of Mr Brauer sworn 19 September 2024 to which he exhibits reports to the committees of inspection established with respect to the winding up of the Scheme. An appendix to each report is a Receivers and Managers’ Remuneration Approval Report. The Receivers and Managers’ Remuneration Reports are for the periods 3 December 2022 to 3 March 2023 (Ninth Remuneration Report); 4 March 2023 to 2 June 2023 (Tenth Remuneration Report); 3 June 2023 to 8 December 2023 (Eleventh Remuneration Report); and 9 December 2023 to 31 May 2024 (Twelfth Remuneration Report).
3. The Receivers requested that the interlocutory process of 14 October 2024 be determined on the papers. The Australian Securities and Investments Commission and Mr Marco have indicated that they do not wish to be heard on the application. I am satisfied that no oral hearing is necessary because determination of the matter would not be significantly aided by an oral hearing as the legal arguments in relation to the matter can be dealt with adequately by written submissions: s 20A(2)(c)(ii) of the *Federal Court of Australia Act 1976* (Cth).
4. The applicable legal principles are set out in the reasons given for orders made on the previous seven applications. See, e.g., *Australian Securities and Investments Commission v Marco (No 7****)*** [2021] FCA 429; *Australian Securities Investments Commission v Marco (No 8)* [2021] FCA 885 and *Australian Securities and Investments Commission v Marco (No 11)* [2022] FCA 704. The nature of, need for, and complexity of the work the Receivers performed in the period from 3 December 2022 to 3 March 2023, 4 March 2023 to 2 June 2023, 3 June 2023 to 8 December 2023 and 9 December 2023 to 31 May 2024 is explained in summary form in Mr Brauer’s affidavit and the Ninth, Tenth, Eleventh and Twelfth Remuneration Reports. In his affidavit Mr Brauer deposes that details of relevant matters mentioned in s 425(8) of the *Corporations Act* *2001* (Cth) as to the reasonableness of the Receivers’ remuneration are set out in those reports. The reports contain a declaration by the Receivers to the effect that they are satisfied that the remuneration claimed is in respect of necessary work properly performed. The tasks undertaken are described in the reports and schedules to them. The methodology for presenting, reviewing and for being satisfied that the work was necessary and properly performed is outlined in the reports. Mr Brauer deposes that the reports have been prepared with the requisite level of detail and to the standards of the applicable professional body – ‘Practice Statement Insolvency 5: Remuneration reporting issued under the ARITA Code of Professional Practice’. There is no opposition to the claimed remuneration by ASIC, Mr Marco or the relevant committee of inspection.
5. I am satisfied for substantially the same reasons I expressed in *Marco (No 11)* and on the basis of the same protections, safeguards and mechanisms there explained, that there should be an order for interim payment of 85% of the Receivers’ claimed remuneration for the period from 3 December 2022 to 3 March 2023, 4 March 2023 to 2 June 2023, 3 June 2023 to 8 December 2023 and 9 December 2023 to 31 May 2024. Accordingly, orders will be made in terms of the Receivers’ interlocutory application of 14 October 2024.
6. The Receivers also requested that the Court make orders, as it has done on four earlier occasions, to maintain the confidentiality of the information contained in the reports to the committee of inspection. These reports contain information relating to ongoing investigations and actual or potential legal proceedings. I am satisfied that the reports should be treated presumptively as confidential and that if any party, other than the applicants for the orders, or any non-party wants to inspect the affidavit, that person may do so with leave of the Court and that any application to inspect should be referred to a judge of the Court for determination.

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| I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Feutrill. |

Associate:

Dated: 13 December 2024