Federal Court of Australia

Australian Securities and Investments Commission v Dawson [2021] FCA 301

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| File number: |  |
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| Judgment of: | **ANASTASSIOU J** |
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| Date of judgment: | 1 April 2021 |
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| Catchwords: | **CORPORATIONS** – application for approval of **Receivers** and Managers’ remuneration in connection with two receiverships pursuant to s 425 of the *Corporations* ***Act*** *2001* (Cth) or alternatively r 14.24 of the *Federal Court* ***Rules*** *2011* (Cth) – whether remuneration was fair and reasonable – whether costs were appropriately apportioned between two receiverships – application granted |
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| Legislation: | *Corporations Act 2001*(Cth), s 425  *Federal Court Rules 2011*(Cth)*,* rr 9.1, 13.24 |
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| Cases cited: | *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 3)* [2020] FCA 44; 142 ACSR 193  *In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 21 |
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| Date of hearing: | 23 February 2021 |
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| Counsel for the Applicant: | Mr B. W. Wacker |
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| Solicitor for the Applicant: | Johnson Winter & Slattery |

ORDERS

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|  | | VID 521 of 2020 |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Applicant | |
| AND: | LARRY JOHN DAWSON  First Respondent  PW KITT CO PTY LTD (ACN 635 767 047)  Second Respondent | |

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| order made by: | ANASTASSIOU J |
| DATE OF ORDER: | 23 February 2021 |

THE COURT ORDERS THAT:

1. Pursuant to section 425 of the *Corporations Act 2001* (Cth), the applicants' remuneration as receivers and managers of the property of PW Kitt Co Pty Ltd (In Liquidation) (ACN 635 767 047) be fixed at the amount of $112,154.00 for the period 7 August 2020 to 5 November 2020.
2. Pursuant to section 425 of the *Corporations Act 2001* (Cth), the applicants' remuneration as receivers and managers of the property of Larry John Dawson be fixed at the amount of $10,113.00 for the period 7 August 2020 to 5 November 2020.
3. An order that the costs of and incidental to this Interlocutory Process be paid out of the assets of the Second Defendant.

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

REASONS FOR JUDGMENT

(Delivered *ex tempore,* revised from transcript)

# ANASTASSIOU J:

# BACKGROUND

1. At the hearing dated 7 August 2020, I made orders appointing Michael John Hill, Anthony Norman Connelly and Katherine Sozou of McGrathNichol as **Receivers** and Managers over the property of the First and Second Defendants, being **Mr** Larry John **Dawson** and **PW Kitt Co** Pty Ltd, to report on the financial positions of the defendants within 42 days of the order. The **First Receivership**, and principal receivership, is that of PW Kitt Co in liquidation, and the **Second Receivership** is for the assets of Mr Dawson.
2. By amended interlocutory application dated 23 February 2021, the Receivers, who are now liquidators, seek authority pursuant to s 425 of the *Corporations* ***Act*** *2001* (Cth) and alternatively, pursuant to r 14.24 of the *Federal Court* ***Rules*** *2011* (Cth), for the fixing of their remuneration in connection with the two receiverships for the period of 7 August 2020 to 5 November 2020 in the amounts of:
3. $112,154 in respect of the First Receivership; and
4. $10,113 in respect of the Second Receivership.
5. For the reasons that follow, I give leave for the Receivers to file the amended interlocutory application, and approve the costs as sought by the Receivers as well as the division of the costs as between the two receiverships.

# CONSIDERATION

1. The Receivers’ application is made pursuant to s 425 of the Act, which empowers the Court to fix the remuneration of a court-appointed receiver. Relevantly, s 425(8) specifies the matters to be taken into account when determining whether such an application should be granted:

(8) In exercising its powers under this section, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:

(a) the extent to which the work performed by the receiver was reasonably necessary;

(b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;

(c) the period during which the work was, or is likely to be, performed by the receiver;

(d) the quality of the work performed, or likely to be performed, by the receiver;

(e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;

(f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;

(g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;

(h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;

(i) whether the receiver was, or is likely to be, required to deal with:

(i) one or more other receivers; or

(ii) one or more receivers and managers; or

(iii) one or more liquidators; or

(iv) one or more administrators; or

(v) one or more administrators of deeds of company arrangement; or

(vi) one or more restructuring practitioners; or

(vii) one or more restructuring practitioners for restructuring plans;

(j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company’s creditors;

(k) if the remuneration is ascertained, in whole or in part, on a time basis:

(i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and

(ii) whether the total remuneration payable to the receiver is capped;

(l) any other relevant matters.

1. *In the matter of* ***Say Enterprises Pty Ltd*** [2018] NSWSC 396, in reference to the matters in s 425(8) of the Act, Brereton J held at [6]:

…

7. Many of those factors - in particular, pars (d)-(e) and (g)-(h) - have as their unifying theme the concept of proportionality (being the relationship of the work done and the remuneration claimed to the value of the estate), which is an important consideration in determining reasonableness.

1. The alternative basis upon which relief was sought is r 14.24 of the Rules. That rule provides that:

**14.24  Remuneration**

A receiver may apply to the Court to have the Court fix the receiver’s remuneration.

1. The power of the Court under r 14.24 of the Rules to fix the receivers’ remuneration is governed by the general principle that the Court should only allow remuneration which is fair and reasonable: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 3)* [2020] FCA 44, 142 ACSR 193 at [7] (Derrington J).
2. A convenient summary of the relevant principles to be applied when fixing the remuneration of a court appointed receiver is found in *Say Enterprises Pty Ltd* at [6] (Brereton J):

1. A receiver is entitled to the costs, charges and expenses properly incurred in the discharge of the receiver’s ordinary duties, or in the performance of extraordinary services that have been sanctioned by the Court.

2. The ultimate question is what amount of remuneration is ‘reasonable’, and this involves considering whether the work in respect of which remuneration is claimed was reasonably undertaken in the due course of the receivership, and whether the amount claimed for it is a fair and reasonable reward for it. The objective is to award a sum or devise a formula which will reasonably and fairly compensate the receiver for the time and trouble expended in the execution of his or her duties and the responsibility he or she has assumed.

3. The receiver bears the onus of justifying the reasonableness and prudence of the tasks undertaken for which remuneration is sought, and the reasonableness of the remuneration claimed for them.

4. Remuneration may be allowed on the basis of a fixed salary, a commission on receipts, or a quantum meruit having regard to the time, trouble and responsibility involved. It is a matter for the Court to determine what basis is appropriate in the particular case, having regard to the principle that the remuneration must be reasonable.

5. If a time-based approach is adopted, the Court is guided by professional scales of charges, with emphasis on the broad average or general rate charged by persons of the relevant status and qualifications who carry out the relevant type of work. The Court will usually act on time sheets created in the receiver’s office, provided that they do significantly more than merely detail the total number of hours spent by the receiver and officers of particular grades on his or her staff.

1. In the present case, the application is supported by detailed written submissions prepared by Counsel for the Receivers, as well as four affidavits which address the relevant criteria as set out under s 425 of the Act.
2. Of the four affidavits relied on, two affidavits are sworn by the solicitor acting on behalf of the receiver, Ms Lauren Emma Danckwerts, and two affidavits are sworn by the receiver, Mr Michael John Hill, who is now a liquidator of PW Kitt Co.
3. As detailed in Ms Danckwerts’ two affidavits, dated 27 January 2021 and 22 February 2021, the Receivers, in compliance with r 9.1 of the *Federal Court (Corporation) Rules 2000* (Cth), notified the Australian Securities and Investments Commission (**ASIC**), the five largest creditors of PW Kitt Co and Mr Dawson, the sole shareholder of PW Kitt Co, of their intention to apply for the order fixing their remuneration. ASIC did not object to the amount claimed, and of the five creditors who were served, only two raised objections. The application and supporting affidavits were subsequently served on each of the objecting creditors, as required by the *Federal Court (Corporation) Rules 2000* (Cth).
4. Mr Hill’s affidavits are dated 18 December 2020 (**First Affidavit)** and 17 February 2021 (**Second Affidavit**). In his First Affidavit, Mr Hill summarises the work undertaken by the Receivers. Specifically, the First Affidavit details:
5. the tasks required to be performed in each receivership and the nature of the work performed under each task;
6. how the receiverships were staffed;
7. the complexity of the work undertaken; and
8. the reasonableness and necessity of the work performed.

## Tasks required to be performed

1. Work performed was allocated to various tasks or “work streams”, namely Assets, Creditors (in the case of PW Kitt Co only), Investigations and Statutory and Administration.

## Staffing of Receivership

1. Remuneration was claimed on the basis of time entries recorded by McGrathNicol staff at their respective hourly rates. On a monthly basis Mr Hill and another member of his staff would review the time entries recorded to be satisfied that the time recorded was reasonable and commensurate with the nature of the work performed. If the time recorded was not considered to be reasonable, it was reduced to reflect the amount Mr Hill considered appropriate.

## Complexity of work undertaken

1. The Receivers were also required to conduct external investigations to attempt to obtain and verify information concerning the property and affairs of PW Kitt Co, which was provided by ASIC by way of affidavits filed in this proceeding. Further, a number of investors contacted the Receivers and their staff concerning the nature of their investments. The Receivers were required to review material to determine the manner in which investments were made, to understand how PW Kitt Co conducted its affairs and identify the persons and entities associated with the conduct.
2. Investigations undertaken by the Receivers included making enquiries into:
3. dealings with six companies, entities or persons that may be related to PW Kitt Co or Mr Dawson;
4. a significant proportion of moneys transferred overseas; and
5. purchases of Bitcoin made in Australia and Indonesia.

## Reasonableness and necessity of work performed

1. The hourly rates charged were those applicable to McGrathNicol’s professional staff. These rates were reasonable having regard to, amongst other things, the experience and professional qualifications of the relevant staff member and the nature and complexity of the work performed. The work was carried out in a timely fashion, to a high standard and without unnecessary duplication.
2. Taking into consideration the matters referred in s 425(8) of the Act, in conjunction with the material deposed in the affidavits relied on, it is apparent that the remuneration claimed is reasonable and proportionate to the tasks required to be undertaken by the Receivers.
3. Further, Mr Hill, in his Second Affidavit, deposes the basis upon which time was allocated between the two receiverships as well as how fees were apportioned, namely:
4. all work associated with the Creditors work stream was allocated to PW Kitt Co as Mr Dawson did not have any creditors;
5. all work associated with the Investigations work stream was allocated to PW Kitt Co, with four exceptions related to dealing with Mr Dawson’s and PW Kitt Co’s solicitors and with Mr Dawson’s insurance;
6. the majority of time associated with tasks performed in the Statutory and Administration work stream was allocated to PW Kitt Co, because most was only relevant to PW Kitt Co;
7. time relevant to reviewing bank accounts was apportioned 80% to PW Kitt Co and 20% to Mr Dawson as PW Kitt Co had 10 bank accounts to be reviewed as compared to Mr Dawson’s three;
8. time relevant to corresponding with the Australian Taxation Office, PW Kitt Co’s and Mr Dawson’s solicitors and attending a teleconference with Mr Dawson was allocated equally between the receiverships; and
9. time relevant to the administration of Mr Dawson’s insurance was allocated solely to Mr Dawson’s receivership.
10. A detailed report of the time entries of the Receivers and their staff, attributable to the two receiverships, is also exhibited to the Second Affidavit. In my view, it is clear that the principal work undertaken by the Receivers was in connection with the First Receivership, and a smaller percentage of the Receiver’s work related to the Second Receivership.

# DISPOSITION

1. I am therefore satisfied, based on the material which I have briefly summarised above, that it is appropriate in this instance to approve the costs as sought by the Receivers and the division of the costs as between the two receiverships. As a result, I have made orders in accordance with those sought in the amended interlocutory application, including the order that the costs of this application be paid from the assets of the Second Defendant, namely PW Kitt Co.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anastassiou. |

Associate:

Dated: 1 April 2021