Federal Court of Australia

Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 3) [2023] FCA 251

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 22 March 2023 |
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| Catchwords: | **CORPORATIONS** - application by Court appointed receivers of trust assets for advice and approval of entry into instruments to effect proposed settlement - application for approval of remuneration and orders for release from liability - application by trustees in bankruptcy for approval of remuneration on basis of work done to preserve trust assets - application for conditional orders dismissing proceedings - where issue as to whether priority of claims against trust assets by successive trustees should be determined in order of time or equally - orders made substantially in terms sought |
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| Cases cited: | *Equity Trust (Jersey) Ltd (Respondent) v Halabi (in his capacity as Executor of the Estate of the Late Madam Intisar Nouri)* [2022] UKPC 36*Fletcher v Brown (No 3)* [2021] FCA 803*Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd* [2022] FCA 199*Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 2)* [2022] FCA 652*Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (Administrators Appointed) (No 3)* [2021] FCA 519*Official Assignee in Bankruptcy of the Property of James Adair Hanna v Hanna* [2019] FCA 1934*Re Application by Hughes; Richardson v Aileen Pty Ltd* [2007] VSC 104*Stewart v Atco Controls Pty Ltd (in Liquidation)* [2014] HCA 15; (2014) 252 CLR 307 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| Sub-area: |  |
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| Date of last submissions: | 21 March 2023 (Respondent) |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | Mr P Edgar |
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| Solicitor for the Applicant: | Lavan |
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| Counsel for the Respondent: | Mr J Cook |
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| Solicitor for the Respondent: | Mendelawitz Morton |
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| Counsel for the Receivers: | Mr C Pearce |
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| Solicitor for the Receivers: | Blackwall Legal |

ORDERS

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|  | WAD 143 of 2020 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF MICHAEL GEORGE FOTIOS |
| BETWEEN: | IAN CHARLES FRANCIS AND JOANNE EMILY DUNN AS JOINT AND SEVERAL TRUSTEES OF THE BANKRUPT ESTATE OF MICHAEL GEORGE FOTIOSApplicant |
| AND: | HELIOS CORPORATION PTY LTD (ACN 636 970 771)Respondent |
|  | ROBERT MICHAEL KIRMAN AND ROBERT CONRY BRAUER AS JOINT AND SEVERAL RECEIVERS OF THE MICHAEL FOTIOS FAMILY TRUSTReceivers |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 22 March 2023 |

THE COURT NOTES THAT:

In these orders:

1. **Composition** means the composition proposal by Michael Fotios accepted at a meeting of creditors held on 16 August 2022.
2. **DOCA** means the deed of company arrangement for Helios Corporations Pty Ltd dated 15 July 2022.
3. **Experts** means Mr Martin Bruce Jones and Mr Thomas Donald Birch of KPMG appointed as experts by this Court on 30 November 2020.
4. **Receivers** means the receivers appointed as joint and several receivers of the Trust by orders made on 6 September 2021 in these proceedings.
5. **Settlement Deed** means a deed substantially in the terms of annexure RCB9 to the affidavit of Robert Conry Brauer dated 20 October 2022.
6. **Trust** means the Michael Fotios Family Trust created by a deed dated 29 October 1986.

**THE COURT ORDERS THAT:**

1. To the extent that the compromise constituted under the DOCA and the Composition requires the approval of the Court for the purposes of order 10(b) of the orders made in this proceeding on 2 June 2022, the implementation of the compromise, and the agreement of the Receivers to the compromise, is approved.
2. In addition to the powers granted to the Receivers in orders made in this proceeding on 21 September 2021 and on 2 June 2022, the Receivers shall have power to use and apply the assets of the Trust as required or contemplated under the DOCA and the Composition.
3. To the extent necessary, in addition to the powers granted to the Receivers in orders made in this proceeding on 21 September 2021 and on 2 June 2022, the Receivers shall have power to enter into the Settlement Deed.
4. The Receivers are justified in entering into and giving effect to the Settlement Deed.
5. The remuneration of the Receivers (in their capacities as receivers of the Trust) be fixed:
	1. for the period from 6 September 2021 to 19 August 2022, in the sum of $129,755, exclusive of GST; and
	2. for the period from 20 August 2022 to the conclusion of the receivership, in a sum not exceeding $10,000, exclusive of GST.
6. Pursuant to r 1.34 of the *Federal Court Rules 2011* (Cth), the requirement in r 14.25 for the Receivers to file accounts is dispensed with, as is the need to pass accounts.
7. For the purposes of paragraph 2(c) of the orders made 2 June 2022, the applicants' remuneration and disbursements incurred for work undertaken in assisting the Receivers with their care, preservation, and realisation of the property of the Trust is fixed as follows:
	1. remuneration in the amount of $30,837.25 (exclusive of GST); and
	2. disbursements in the amount of $19,567.00 (exclusive of GST).
8. Conditional upon and effective upon the effectuation of the DOCA in accordance with its terms, the Receivers forthwith be discharged as the receivers of the Trust.
9. Upon discharge of the Receivers in accordance with these orders, the Receivers, their agents and employees, be released from all or any claims and liability arising out of their appointment as receivers.
10. Within two working days of the making of these orders the Receivers shall provide notice of these orders and the reasons of the Court for making these orders to each trust creditor known to the Receivers.
11. There be liberty to any person affected by these orders (including without limitation the Receivers, the Experts, any party to these proceedings and any person notified in accordance with these orders) to apply within 30 days of the making of these orders to vary these orders by filing a notice in these proceedings stating that the person wishes to be heard concerning these orders, specifying an address for service and stating the aspect of these orders that the party seeks to vary.
12. The Receivers' costs and expenses in respect of and incidental to this interim application be costs of the Receivership and be paid forthwith from the assets of the Trust.
13. Upon the effectuation of the DOCA, these proceedings be dismissed with no further order as to costs.

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

REASONS FOR JUDGMENT

COLVIN J:

1. Mr Michael Fotios was formerly the trustee of the Michael Fotios Family Trust (**Trust**). He was made bankrupt. His trustees in bankruptcy brought claims against the current trustee of the Trust, Helios Corporation Pty Ltd **(Helios**) on the basis of a subrogated claim to seek exoneration from the assets of the Trust and enforce the associated right of indemnity out of the assets of the Trust. Helios is now in voluntary administration.
2. The Court made orders appointing joint and several receivers of the property of the Trust (**Receivers**). They have taken control of the property of the Trust. The Court has provided judicial advice as to the conduct of the receivership: *Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd* [2022] FCA 199 (***Fotios 1***); and *Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 2)* [2022] FCA 652 (***Fotios 2***). The judicial advice included advice to the effect that the Receivers would be justified in adopting a particular approach to the priorities as between competing claims to the property of the Trust. Provision was made for notification of the terms of the advice to interested parties. Liberty was preserved for application to be made by any affected person. No such application has been forthcoming.
3. The Receivers now seek orders as to the following:
4. the use of the assets of the Trust to implement a proposed compromise with creditors of the Trust by way of deed of company arrangement (**DOCA**) of Helios and a composition of the bankruptcy of Mr Fotios;
5. the approval of entry into a proposed settlement deed effecting a compromise with a debtor of the Trust in respect of a disputed receivable debt;
6. the determination of the remuneration of the Receivers for the purposes of finalising the receivership;
7. the discharge and release of the Receivers; and
8. the dismissal of the proceedings in this Court as between the trustees in bankruptcy of the estate of Mr Fotios (as applicants) and Helios (as respondent).
9. The trustees in bankruptcy also seek orders approving their remuneration and payment of disbursements in respect of work done to preserve the assets of the Trust.
10. For the following reasons, I am satisfied that there should be orders in the terms sought.

## An initial point concerning the judicial advice previously provided

1. One aspect of the judicial advice given to the Receivers concerned the competing claims to trust assets by Mr Fotios and Helios as successive trustees (and the rights of creditors that may depend upon those claims). The advice given recognised the priority of claims against the assets of the Trust by Mr Fotios over the claims by Helios as replacement trustee: *Fotios 2* at [9]. To support that advice, reliance was placed upon general equitable principle and the decision in *Re Application by Hughes; Richardson v Aileen Pty Ltd* [2007] VSC 104 where Mandie J recognised the application of the general rule about prior equities in the context of competing remuneration claims by successive trustees: at [51] (though his Honour went on to hold that there should be a postponement in the particular circumstances where the efforts of another had created the available fund).
2. Since that advice was given, the decision in *Equity Trust (Jersey) Ltd (Respondent) v Halabi (in his capacity as Executor of the Estate of the Late Madam Intisar Nouri)* [2022] UKPC 36 has been delivered. It is a decision of the Privy Council concerned with Jersey law (held to be the same as English law). One of the questions considered by the Court was expressed as: 'does a former trustee's proprietary interest in the trust assets take priority over the equivalent interests of successor trustees?'. A majority of the Board held that the interests of successive trustees rank equally. The remaining three members of the Board held that the first in time has priority. The majority reasons are based upon the view that there should be a special priority rule in such cases (not previously the subject of any authority). The reasons of the minority apply general principles of equity as to priorities.
3. An issue now arises as to whether the delivery of the decision in *Equity Trust (Jersey) v Halabi* should affect the approach to whether the Court should approve the Receivers participating in and giving effect to the terms of the proposed resolution of claims to assets of the Trust. It arises in the following circumstances.
4. The Receivers are also the administrators of Helios. As administrators they provided the report to creditors of Helios for the purposes of the creditors considering and approving the DOCA. The report explained that a fund would be established against which claims could be made by creditors. It identified the creditors who would be able to participate in the fund. As to the priorities to be applied, the report said:

**Priorities -** The Deed Fund will be distributed to Participating Creditors in line with the Federal Courts orders of 2 June 2022 (refer section 1.6) except the Bankrupt Estate will receive a priority for its right of recoupment claim of circa $267,400. Broadly speaking costs and expenses of the process will rank first, followed by the Bankrupt Estate right of recoupment claim, then liabilities incurred by the Bankrupt as trustee of MFFT (per the Bankruptcy Act 1966 priorities), then liabilities incurred by Helios as trustee of MFFT (per the Corporations Act 2001 priorities).

The reference to MFFT is to the Trust.

1. In short, consistently with the judicial advice to the Receivers as to how the assets should be distributed, the report stated that the claims based upon the term of Mr Fotios as trustee would rank before the claims based upon the subsequent term of Helios as trustee.
2. I remain of the view that it is appropriate for the priorities between successive trustees to a charge or lien over the property of the trust to be determined in accordance with general equitable principles as to competing priorities. This reflects the current state of the law in Australia. It is not an absolute rule. As the reasoning of Mandie J in *Re Application by Hughes; Richardson v Aileen Pty Ltd* exposes, equity will depart from affording priority to the prior equity where there is inequality in merit. Further, if the subsequent trustee takes office without any knowledge of the possibility of a prior equity that may affect the position. Here, where there is a family connection between Mr Fotios and Helios and the appointment of Helios took place at the time of the bankruptcy of Mr Fotios, we are not in that class of case. It is not for this Court acting at first instance to form the view that it would be appropriate to introduce some new rule of equity as part of Australian law to deal with the particular case of priorities between successive trustees, even with the support of such high authority as *Equity Trust (Jersey) v Halabi*. All the more so where the context is the provision of judicial advice as to the course that the Receivers are justified in taking. On the state of the existing law, I remain of the view that they are justified in proceeding on the basis that the claims of Mr Fotios (and the subrogated creditors' claims) have priority over those of Helios.
3. Therefore, I am satisfied that it is appropriate to continue to give effect to the judicial advice previously given.

## The evidence in support of the orders sought by the Receivers

1. The present application is supported by an affidavit of Mr Brauer, one of the Receivers. It refers to and relies upon earlier affidavits of Mr Kirman, the other of the Receivers, that were relied upon for the purposes of the earlier judicial advice applications in *Fotios 1* and *Fotios 2*. Mr Brauer's affidavit produces the relevant documents that are proposed by way of settlement, being the DOCA, an Implementation Deed, a Settlement Deed and a Forbearance Deed, together with a composition proposal by Mr Fotios.
2. The proposed resolution of the competing claims to the assets of the Trust will be facilitated by the contribution to the settlement of those claims of some (but not all) of the assets of the Trust as well as the provision of some assets which are not assets of the Trust. The Settlement Deed agrees terms for dismissal of the proceedings between the trustees in bankruptcy and Helios. It is conditional upon the implementation of the DOCA and the composition of the bankruptcy of Mr Fotios. By their terms, the various instruments address many uncertainties exposed by an expert report provided separately to the Court. There are good reasons, in those circumstances, for the creditors to be allowed to make an informed choice as to the resolution of the competing claims.
3. Insofar as the proposed resolution requires the composition of the bankruptcy of Mr Fotios and the entry into a DOCA in respect of Helios, those actions have been approved by the creditors of Mr Fotios and Helios respectively. In reasons for providing earlier advice to the Receivers, I observed that there is nothing to indicate that any of the beneficiaries of the Trust would have a vested interest in the property of the Trust (as distinct from a right to call upon the Trust to be performed according to the terms of the trust instrument). Therefore, it is difficult to see how there could be any form of tracing claim by the beneficiaries against the assets of the Trust that might be asserted in competition with the claims based upon exoneration and the associated right of indemnity in favour of the trustee: *Fotios 1* at [34]. I see no reason to depart from that view. In consequence, the effective compromise of the creditor's claims should deal with all claims to assets of the Trust.

## Orders sought by the Receivers

1. I turn to the specific terms of the orders sought, as set out in [3] above.
2. As to (1), I am satisfied that it is appropriate for orders to be made that will have the effect of granting to the Receivers the authority to apply the assets of the Trust in the manner necessary to implement the instruments produced by Mr Brauer. They will enable the Receivers to give effect to a compromise which deals with all known claims to the assets of the Trust in circumstances where Fotios, the present trustee, is in administration. Also, creditors have agreed to the terms of the DOCA and the composition. The orders that have been made contemplated that any compromise proposed by the Receivers would be submitted for approval. I am satisfied that it is appropriate for orders to be made to allow the compromise to be effected by the instruments now provided to the Court to be carried into effect.
3. As to (2), the Receivers also propose entering into a particular settlement in respect of an interest of the Trust in a property in Balcatta. The uncertainties associated with that property and claims to rental are deposed to by Mr Brauer. The settlement that is proposed may compromise an asset of the Trust, namely an interest of the Trust in the property. It is to be entered into subject to any court approval that may be required. In the circumstances deposed to, I am satisfied that it is appropriate to make an order making clear that the Receivers have power to enter into the Settlement Deed and for advice to be given that the Receivers are justified in entering into and giving effect to the settlement provided for by the terms of the Settlement Deed.
4. As to (3), I have previously approved capped amounts for remuneration for the Receivers. An order is now sought to approve remuneration to finalise the receivership. The affidavit of Mr Brauer deposes to the detail of the work. The circumstances of the Trust have been complex and have a number of unusual aspects, some of which have been raised in the context of the application for judicial advice. Those circumstances are also evident from the terms of the expert report to which reference has been made and examination of the report to creditors for the purpose of the meeting at which the DOCA was approved. On the basis of the affidavit evidence, I am satisfied that the remuneration sought is reasonable and ought to be approved.
5. As to (4), the proposed orders will bring any need for the court appointed receivership to an end. As I am persuaded that the other orders should be made, it is appropriate for orders to be made discharging the Receivers and for an appropriate release. This is usual practice and, in the absence of any contrary reason such as threatened or foreshadowed claims against the Receiver or some reasonable basis for entertaining that possibility, such an order would usually be made: *Official Assignee in Bankruptcy of the Property of James Adair Hanna v Hanna* [2019] FCA 1934 at [6]‑[7]. It is also common to dispense with the requirement for the filing of accounts where he cost of doing so would outweigh any benefit: *Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (Administrators Appointed) (No 3)* [2021] FCA 519 at [9]; and *Fletcher v Brown (No 3)* [2021] FCA 803 at [16]. In the present case, creditors and other potential claimants have available to them detailed information about the conduct of the receivership in the form of the reports for the purposes of the DOCA and the composition (as well as the affidavits filed in these proceedings). Costs have already been significant relative to the amounts in issue. As a protection, the orders will provide for creditors to be notified and for application to be made to vary the orders.
6. As to (5), as the proposed resolution will bring the subject matter of the substantive proceedings to an end, it is appropriate to make the order sought for dismissal of the proceedings conditional upon the agreed terms being carried into effect.

## The evidence in support of the application by the trustees in bankruptcy

1. Mr Francis, one of the trustees of the bankrupt estate of Mr Fotios has deposed to the circumstances of the appointment of the trustees and the steps taken by them to preserve and take control of the property of Mr Fotios that he held as trustee of the Trust. It is accepted by the Receivers (acting in that capacity and as administrators of Helios) that the work undertaken was incurred in relation to the care, preservation and realisation of the property of the Trust. The affidavit of Mr Francis sets out the work that was undertaken and the costs and disbursements incurred. Having examined that material I am satisfied that the charges are reasonable.

## Orders sought by the trustees in bankruptcy

1. The trustees in bankruptcy seek orders fixing their remuneration and payment of disbursements. It is well established that work undertaken in the care, preservation and realisation of trust property may be recovered out of that property: *Stewart v Atco Controls Pty Ltd (in Liquidation)* [2014] HCA 15; (2014) 252 CLR 307. In the circumstances I have described, I am satisfied that the orders sought should be made.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 22 March 2022