

NOTICE OF FILING

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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	QUD439/2018
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v LINCHPIN CAPITAL GROUP LTD ACN 163 992 961 & ANOR
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 20/12/2019 1:06:57 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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ASIC v Linchpin Capital Group Pty Ltd and Anor – QUD439/2018

Outline of submissions of the Court appointed Receivers and Managers Interlocutory application filed on 5 December 2019 (Application) for approval of remuneration.

Background

1. The applicants were appointed as receivers and managers pursuant to an order of this Court on 7 August 2018 (**Receivers**). On 15 March 2019 they were retired as receivers and managers and were appointed as liquidators.
2. The circumstances leading to the appointment are set out in the reasons for judgment of 7 August 2018.¹
3. The order appointing the Receivers required them to, amongst other things:
 - (a) identify the property held for the Unregistered Scheme and the Registered Scheme;
 - (b) ascertain the amount of the Unregistered Scheme and Registered Scheme funds;
 - (c) identify any dealings with, payments of, or distributions by or uses made of the funds in the Unregistered Scheme and the Registered Scheme;
 - (d) identify any property purchased or acquired with the funds in the Unregistered Scheme and the Registered Scheme;
 - (e) recover the funds in the Unregistered and Registered Scheme funds; and
 - (f) provide a report to the Court of the above matters.
4. A report was prepared and provided to the Court on 24 September 2018.²
5. On 11 March 2019, this Honourable Court determined the Receivers' remuneration for the period 8 August 2018 to 24 September 2018 to remunerate the Receivers for the work up to the filing of the report with the Court (as varied).
6. This Application relates to the Receivers' remuneration for the period 25 September 2018 to the conclusion of the receivership on 15 March 2019. The affidavit of one of

¹ Australian Securities and Investment Commission v Linchpin Capital Group Ltd [2018] FCA 1104

² Affidavit of Mr Tracy and the confidential annexure JT-1

Filed on behalf of (name & role of party)

David Orr and Jason Mark Tracy

Prepared by (name of person/lawyer)

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the Receivers, Mr Orr filed on 5 December 2019 sets out the work undertaken during that period. It may generally be described as the continued conduct of the Receivership and preparing to and giving evidence at the trial.

7. Mr Orr describes the trial preparation to involve "*undertaking careful preparation to ensure that the relevant information and evidence was able to be given in Court at trial...*"³
8. The Receivers seek approval for their remuneration for the period 25 September 2018 August 2018 to 15 March 2019 as follows:
 - (a) \$59,259 for remuneration and \$250 for expenses (plus GST) from Linchpin in its own right;
 - (b) \$164,844.50 for remuneration (plus GST) from the property of Linchpin as trustee of the Unregistered Scheme; and
 - (c) \$116,645.50 for remuneration (plus GST) from the property of the Registered Scheme.

Notice of the Application

9. The Receivers have given notice of the Application to interested persons⁴ by:
 - (a) posting them a circular on 13 December 2019, attaching the orders made by Justice Derrington on 13 December 2019 (**Orders**);
 - (b) publishing the circular attaching the Orders on the Deloitte webpage on 16 December 2019;
 - (c) publishing the Application on the Deloitte webpage on 10 December 2019; and
 - (d) publishing Mr Orr's affidavit in support of the Application on the Deloitte webpage on 10 December 2019.
10. The Receivers have not received notice from any party objecting to the remuneration sought.
11. The only response received to date was from ASIC who do not object to or query the remuneration for which approval is sought.⁵

The Court's Power

12. The Court has power under rule 14.24 of the *Federal Court Rules* 2011 (Cth) to fix the Receivers' remuneration.

Principles relevant to the exercise of the Court's power

13. The essential function of the Court on this Application is to determine whether the remuneration claimed is a fair and reasonable.⁶

³ Affidavit of David Orr sworn 5 December 2019 at [36].

⁴ Affidavit of Matthew Carr affirmed 12 December 2019.

⁵ Email from Hugh Copley to Associate to the Honourable Justice Derrington and ors dated 12 December 2019 at 11.01 am.

⁶ In the matter of Cannuli Holdings Pty Ltd (in liq) (Court Appointed receiver acting) – [2017] NSWSC 1562 at [8] to [9]

14. The assessment process is recognised as analogous to the process undertaken by Courts adjudicating remuneration claims of liquidators and provisional liquidators under the old section 473 of the *Corporations Act 2001 (Cth) (Act)*.⁷ In turn, this is recognised as being analogous to the approval of an administrator’s remuneration under the old section 449E(1)(c) of the Act.⁸
15. The Court’s objective is to award a sum which will reasonably compensate for the time and trouble expended in the execution of the receivers’ duties and for the responsibility they have assumed.⁹
16. While there are no fixed rules, relevant factors typically include:
- (a) the difficulty involved in collecting and realising assets;
 - (b) the volume and complexity of the work;
 - (c) the time spent;
 - (d) the responsibilities undertaken;
 - (e) the degree of assistance (or otherwise) provided by the company(ies) and their officers; and
 - (f) the proportionality between the size, nature and value of all work and the claimed remuneration.
17. There is no absolute rule or formula as to what must be adduced. Put simply, the receiver must provide “*sufficient detail*” to enable the court to determine whether the amounts claimed are reasonable and whether disbursements were reasonably incurred.¹⁰
18. In *Re Solfire Pty Ltd (No.2)*,¹¹ Shepherdson J said:
- “In my view, when a provisional liquidator seeks to have his remuneration determined by the court he should provide a document not dissimilar in form to the Bill of Costs in taxable form provided by a solicitor to his client (see O.91 r.47). He should identify the person or persons and the grade or grades of the person or persons engaged in the particular task concerning the provisional liquidation, he should identify that task and dates on which time was spent on it, the amount of time spent on it and he should identify the relevant rate, according to the grade of the person or persons performing the work. I also consider that he should require the person performing the work to keep reasonably detailed diary notes and time sheets which documents should be open to inspection by persons entitled to see them.”
19. In that case, in relation to the liquidator’s remuneration, the quantum claimed by the liquidator was identified only by a one-line sum, with no explanation.¹² There was no basis for the creditors or the Court to assess the reasonableness or otherwise of the quantum claimed.¹³
20. Similarly, in *Venetian Pty Ltd v Conlan*,¹⁴ the material was insufficient as it gave the Court no opportunity to determine what work was done, who did the work or how

⁷ Ibid.

⁸ Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2 [2017] QSC 229 per Jackson J at [110].

⁹ *Mohamed v Hurstville Tower Medical Clinic Pty Ltd (in liq)* [2006] NSWSC 4 at [8].

¹⁰ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 per Kennedy and Ipp JJ (with whom Wallwork J agreed) at pp. 102-103. (1999) 2 Qd R 182 at [191]

¹¹ *Re Solfire Pty Ltd (No.2)* (1999) 2 Qd R 182 at pp. 196, 197.

¹² Ibid.

¹³ Ibid. (1998) 20 WAR 96.

long it took for each category of work to be performed.¹⁵ However, Kennedy and Ipp JJ said with direct reference to the above cited passage from *Re Solfire*:

“In our opinion, however, it is, with respect, unnecessary to lay down an absolute rule. In such detailed terms, concerning the statement of account to be provided by a provisional liquidator. It may well be that in a particular case information particularised as suggested by Shepherdson J would be appropriate. In other cases less detailed information may be required. Every case depends on its own circumstances. But the overriding principle remains: sufficient information must be provided to the court to enable it to perform its function under s.473(2).”¹⁶

21. Kennedy and Ipp JJ said earlier in the decision:

“As a starting point, in our view, the onus is on the provisional liquidator to establish that the remuneration claimed is fair and reasonable. It is the function of the court to determine the remuneration by considering the material proffered and bringing an independent mind to bear on the relevant issues. The initial task is to consider whether, prima facie, the provisional liquidator has made out a case for the determination of the amounts claimed. The fact that there may be no person who objects to the claim, or any part of the supporting testimony, or that objectors advance unsustainable arguments, or do not properly formulate their objections, cannot detract from the court’s duty in this respect. The judicial officer conducting an inquiry under s.473(2) is required to make an independent determination of the remuneration claimed, even if there is an absence of objectors, or appropriately detailed objections, or objections advanced on arguable grounds. Of course, once the court is satisfied that the provisional liquidator has made out a prima facie case that the remuneration claimed should be allowed, the absence or inappropriateness of points taken by objectors becomes relevant.”¹⁷

22. Thus, while the lack of any opposition does not detract from the Court’s essential function, it remains a relevant consideration.

23. Relevantly, the Receivers are not aware of any opposition to the remuneration sought.

24. The authorities also recognised that the Court will not perform an item by item analysis as would occur in a formal taxation.¹⁸

25. The reasonableness of the remuneration is a matter of subjective judicial impression.¹⁹

26. Recently, in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2*²⁰ Jackson J said, albeit in respect of an application to approve an administrator’s remuneration:

“[I]n determining remuneration it is not the function of the court to hypercritically assess the day by day activities or tasks carried out in the course of a complex administration over a lengthy period of time with the benefit of hindsight. In this context, it is sometimes remarked that the remuneration available to insolvency practitioners should be sufficient to encourage them to carry out the important public function of the administration of insolvent entities for the benefit of creditors, investors (whether company members or fund members) and the public administration of the insolvency laws in general.

As well, the preparation of detailed affidavit material setting out extensive support for the correlation of individual or groups of line items and charges to particular tasks and functions of sufficient utility to be classed as reasonable remuneration is itself a time consuming and expensive exercise. In the usual

¹⁵ Ibid at p. 105.

¹⁶ *Venetian Pty Ltd v Conlan* (1998) 20 WAR 96 at pp 103

¹⁷ *Venetian Pty Ltd v Conlan* (1998) 20 WAR 96 at pp. 102-103.

¹⁸ *Owen in the matter of Rivercity Motorway Pty Ltd (Administrators appointed) Receivers and Managers Appointed v Madden (No 2)* [2012] FCA 312 per Logan J at [23]; *ASIC v Atlantic Three Financial (Austin) Pty Ltd* [2004] QSC 122 at [16]; *Re Conlan (as liquidator of Oakley Acquisitions Pty Ltd)* [2001] WASC 230 at [24]-[27]; *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 per Jackson J at [160].

¹⁹ *Owen in the matter of Rivercity Motorway Pty Ltd (Administrators appointed) Receivers and Managers Appointed v Madden (No 2)* [2012] FCA 312 Logan J at [20].

²⁰ [2017] QSC 229

course, those costs must be added to the costs of the application for remuneration to be paid to the relevant administrators or liquidators.”²¹

27. These observations are apt to a court-appointed receiver.
28. The remuneration report here is materially the same as that found to be sufficient in *Deputy Commissioner of Taxation v Starpicket Pty Ltd (No 2)*.²²

The remuneration sought and the information provided

29. In support of the application, a detailed remuneration report (**Report**) has been prepared along with affidavits sworn by Mr Orr explaining the nature of the work carried out and the effort involved in fulfilling the terms of the order.²³
30. Relevantly, the Report identifies:
 - (a) the Receivers propose that their remuneration be calculated on a time basis and the reasons for that recommendation;²⁴
 - (b) the hourly rates to be charged – (which were provided to ASIC prior to the appointment);²⁵
 - (c) a declaration from Mr Orr and Mr Tracy that they are satisfied that the remuneration claimed is in respect of necessary work, properly performed, in the conduct of the receivership.²⁶
31. The Report includes the time sheets kept by the applicants and their staff with a description of the work performed and the time spent.
32. In addition to the matters set out the Report, Mr Orr explains in his affidavit that remuneration and certain expenses has been allocated to one of three “estates” being:
 - (a) property owned by Linchpin in its own capacity;
 - (b) property owned by Linchpin in its capacity as trustee for the Unregistered Scheme known as the Investport Income Opportunity Fund; and
 - (c) Endeavour Scheme Property.
33. Additionally, it can be seen from paragraphs 35 to 39 of Mr Orr's affidavit the significant undertaking involved in preparing for trial in this Proceeding.

Linchpin Capital Group - \$59,259

34. Schedule A of the Report at page 35 of the affidavit of Mr Orr provides a breakdown of the persons who worked on the receivership, the position of that person, individual hourly rates and the number of hours worked by that person.
35. From page 36 to 40 there is a high level description of the work carried out broken down into categories and explanation for what each category relates to. It shows for

²¹ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 per Jackson J at [163]-[164].

²² [2013] FCA 699 per Gordon J at [31]-[36] and [41].

²³ Page 24 of the affidavit of Mr Orr sworn 5 December 2019

²⁴ Page 28 of the affidavit of Mr Orr at point 2 of the Report

²⁵ Page 38-9 of the affidavit of Mr Orr at point 3 of the Report

²⁶ Page 31 of the affidavit of Mr Orr at point 1 of the report

example that 65.8 hours were spent on administration (which includes preparation for trial) at a total cost of \$29,487.²⁷

36. Pages 41 to 50 contain detailed descriptions of the tasks carried out in a format similar to a bill of costs.
37. The present cash holdings of Linchpin (in its own right) are \$18,888.²⁸ Without further realisations being made, the cash reserves are insufficient to pay the claimed remuneration.

Linchpin as trustee of the Unregistered Scheme - \$164,844.50

38. Schedule D of the Report at page 51 of the affidavit of Mr Orr provides a breakdown of the persons who worked on the receivership, the position of that person, individual hourly rates and the number of hours worked by that person.
39. At pages 52 to 56 of the Report there is a high level description of the work carried out broken down into categories.
40. The largest item is \$42,633 claimed for the assets. This includes (amongst the many other items set out therein) addressing AFSL licensing issues, care, preservation and realisation of the loan portfolio of the unregistered scheme.
41. Pages 57 to 70 contain detailed descriptions of the tasks carried out in a format similar to a bill of costs.

The Registered Scheme - \$116,645.50

42. Schedule G of the Report at page 71 of the affidavit of Mr Orr provides a breakdown of the persons who worked on the receivership, the position of that person, individual hourly rates and the number of hours worked by that person.
43. At page 72 to 76 there is a high level description of the work carried out. Again, the second largest item relates to investigations in the sum of \$32,897 and the largest item is administration (including trial preparation) in the sum of \$65,328.50.
44. Pages 77 to 87 contain detailed descriptions of the tasks carried out in a format similar to a bill of costs.

Orders Sought

45. The orders sought include an order that the costs of and incidental to the application be paid from the property of Linchpin, the Unregistered Scheme and the Registered Scheme in the same proportion as the remuneration sought meaning that:
 - (a) Linchpin pay 17% of the costs;
 - (b) The Unregistered Scheme pay 49% of the costs; and
 - (c) The Registered Scheme pay 34% of the costs.

²⁷ Page 38-40 of the affidavit of Mr Orr

²⁸ Paragraph 42(a) of the affidavit of Mr Orr

46. A draft order is **attached**.

L Copley

Counsel for the Court appointed receivers.

20 December 2019

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

And

LINCHPIN CAPITAL GROUP LTD (ACN 163 992 961) and another/others named in the
schedule

Defendant

ORDER

JUDGE: JUSTICE DERRINGTON

DATE OF ORDER:

WHERE MADE: Brisbane

THE ORDER OF THE COURT IS THAT:

1. The remuneration and internal expenses of Mr David Orr and Mr Jason Tracy in their capacity as joint and several Receivers and Managers (**Receivers and Managers**) is approved and fixed in the following amounts:
 - (a) \$59,259.00 plus GST, comprised of \$59,009.00 plus GST for remuneration and \$250.00 for internal disbursements (expenses) plus GST, for the period 25 September 2018 to 15 March 2019 to be paid from the property of the First Defendant in its own right; and
 - (b) \$164,844.50 plus GST for remuneration for the period 25 September 2018 to 15 March 2019, to be paid from the property of the First Defendant as trustee of the Investport Income Opportunity Fund (unregistered); and

- (c) \$116,645.50 plus GST, for remuneration for the period 25 September 2018 to 15 March 2019, to be paid from the Endeavour Scheme property (as defined in the orders of the Honourable Justice Derrington on 7 August 2018).
2. The Receivers and Managers' costs of and incidental to this application be paid in the following proportions:
- (a) 17% from the property of the First Defendant in its own right;
 - (b) 49% from the property of the First Defendant as trustee of the Investport Income Opportunity Fund (unregistered): and
 - (c) 34% from the Endeavour Scheme Property in the same proportion as the remuneration and expenses referred to in paragraph 1.
 - (d) The remuneration and internal expenses of Mr David Orr and Mr Jason Mark Tracy in their capacity as joint and several Receivers and Managers (**Receivers and Managers**) is approved and fixed in the following amounts:

Schedule

No. QUD439 of 2018

Federal Court Of Australia
District Registry: Queensland
Division: General

Second Defendant
988

ENDEAVOUR SECURITIES (AUSTRALIA) Ltd ACN 079
819