

SUPREME COURT OF QUEENSLAND

CITATION: *ASIC v Atlantic 3 Financial (Aust) Pty Ltd (No 3)* [2003] QSC 386

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(applicant)
v
ATLANTIC 3 FINANCIAL (AUST) PTY LTD ACN 056 262 723
(first respondent)
FREDRIC MICHAEL ACKER
(second respondent)
GERILYN MARIE POLANSKI
(third respondent)

FILE NO/S: S4426 of 2003

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 14 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 31 October and 12 November 2003

JUDGE: Mullins J

ORDER: **Direct that the accountants and the first respondent forthwith prepare a draft order that reflects this decision.**

CATCHWORDS: CORPORATIONS LAW – WINDING UP BY COURT – where accountants appointed by the court to various roles in respect of unregistered managed investment schemes which were ordered to be wound up pursuant to s 601EE(2) *Corporations Act 2001* (Cth) – where company that was conducting the schemes appointed to wind up the schemes under the supervision of the accountants– where accountants seek injunctive relief restraining the winding up of the schemes until their fees and expenses are paid – whether power to make order sought by accountants – accountants have equitable lien against assets of the schemes for their fees and expenses

Corporations Act 2001 (Cth)

UCPR r 269

Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd (2002) 42 ACSR 240
Australian Securities and Investments Commission v Takaran Pty Ltd (No 2) (2002) 43 ACSR 334
Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1998) 14 NSWLR 552
Mellor v Mellor [1992] 4 All ER 10
Re Lawrenson Light Metal Die Casting Pty Ltd (1999) 33 ACSR 288

COUNSEL: P H Morrison QC for Messrs Moloney and Geroff
P G Lynch (*slr*) for the first respondent

SOLICITORS: Gadens Lawyers for Messrs Moloney and Geroff
Lynch & Company for the first respondent

- [1] **MULLINS J:** When this proceeding commenced on 21 May 2003, the first respondent was conducting 15 unregistered managed investment schemes. The second and third respondents are the directors of the first respondent. Undertakings were given to the court on behalf of the respondents which were embodied in the order made by McMurdo J on 27 May 2003 and which resulted in the appointment of Messrs Gregory Michael Moloney and Peter Ivan Felix Geroff (“the accountants”) as investigative accountants to prepare a report to the court in respect of the schemes. Paragraph 9 of that order embodies an undertaking by the first, second and third respondents to pay the investigative accountants’ costs and remuneration of preparing the report and of the supervision by the accountants of the respondents’ actions in respect of the schemes required by paragraph 6 of the order. That report was filed in the court on 24 June 2003.
- [2] On 17 July 2003 Fryberg J ordered that the 15 schemes identified in paragraph 1 of that order be wound up and that until the appointment of a person to wind up the schemes or further order, the accountants be appointed as receivers of the property of the schemes for the purpose of identifying, securing and/or preserving the property in the possession custody or control of the first respondent. No order dealing specifically with the remuneration of the accountants as receivers was made on that occasion.
- [3] On 19 August 2003 I ordered that the accountants be appointed the liquidators to wind up five of the schemes identified in paragraph 2 of the order made on that day and that the first respondent be appointed to wind up the other 10 schemes identified in paragraph 12 of that order and described as “the remainder schemes”. By that order, the accountants were also appointed to supervise the first respondent in the winding up of the remainder schemes in accordance with the terms of that order. The remuneration of the accountants as the supervising accountants was dealt with in paragraphs 18 and 19 of that order as follows:
- “18. Subject to the following order, the First Respondent must from time to time pay to the insolvency practitioners fair and reasonable remuneration in relation to supervising the winding up of the remainder schemes on the basis of their Time Charges plus GST referred to in Annexure A to this order and all reasonable out of pocket expenses.

19. The insolvency practitioners shall be entitled to payment of such remuneration upon agreement with the First Respondent or upon approval by the Court of the remuneration.”
- [4] On 11 September 2003 the accountants applied to the court for orders fixing their remuneration and expenses and disbursements incurred as investigative accountants. Directions were given on 25 September 2003 for steps to be undertaken by the accountants and the respondents before the hearing of the application. The application has been set down for hearing on 2 February 2004.
- [5] Although the originating application which initiated this proceeding sought the winding up of the first respondent, that relief was not pursued until the Australian Securities and Investments Commission (“ASIC”) filed an application on 8 October 2003 specifically seeking that relief. ASIC relies on the just and equitable ground. The hearing of the winding up application has been set down to commence on 24 November 2003.
- [6] On 29 October 2003 I commenced hearing an application that was made by ASIC seeking the termination of the appointment of the first respondent to wind up the remainder schemes. Although that application was dismissed by the consent of the parties on 30 October 2003, it was apparent from the evidence adduced in connection with that application that the transfer of the assets the subject of the remainder schemes to Atlantic 3 Funds Management Ltd (“A3FM”) which conducts a registered managed investment scheme was imminent. On the afternoon of 30 October 2003 the accountants raised concerns about recovering their costs in connection with their role as supervising accountants of the remainder schemes under the order of 19 August 2003.
- [7] After it was ascertained that no provision had been made for the payment of the costs of the supervising accountants in respect of the remainder schemes in the prospectuses that have been issued in connection with the proposal for transferring the remainder scheme assets from the first respondent to A3FM, the accountants filed by leave on 31 October 2003 an application under which they sought to protect their position in respect of recovering their costs arising from their roles as investigative accountants and supervising accountants by seeking the following orders:
- “1. That the first respondent by itself, its servants and agents, be restrained from effecting any transfer of the securities and/or properties and/or assets the subject of the schemes to which the first respondent was appointed Liquidator (“the remainder schemes”) by order of Justice Mullins dated 19 August 2003 until payment to the Court Appointed Supervisors, Gregory Michael Moloney and Peter Ivan Felix Geroff, of the remuneration and out of pocket expenses referred to in paragraph 18 of the order made 19 August 2003;
 2. That the first respondent be further restrained (*sic*) from effecting any transfer of the securities and/or properties and/or assets the subject of the remainder schemes until payment of the costs and remuneration of Gregory Michael

Moloney and Peter Ivan Felix Geroff as Investigative Accountants is paid pursuant to paragraph 9 of the order made 27 May 2003.”

- [8] Submissions were made on behalf of the accountants and the first respondent in respect of the application filed by leave on 31 October 2003 on that day. Upon certain undertakings being given by the first respondent, the application was adjourned. It subsequently came on for hearing on 12 November 2003. On that day a further application was filed by leave which sought additional relief to protect the position of the accountants for their costs arising from their role as receivers of the property of the remainder schemes pursuant to the order made on 17 July 2003. That additional relief was sought in the following terms:

“That the first respondent be further restrained (*sic*) from effecting any transfer of the securities and/or properties and/or assets the subject of the remainder schemes until payment of the costs and remuneration of Gregory Michael Moloney and Peter Ivan Felix Geroff as Court appointed receivers of the property of the remainder schemes pursuant to the order of Justice Fryberg made 17 July 2003.”

- [9] In general terms, the issues which the application raised are whether there is power to make the orders sought by the accountants and, if so, whether the orders should be made.
- [10] The accountants have apportioned their claims for remuneration and expenses in each of their roles against each of the schemes. For the purpose of this application, there was no challenge by the first respondent to this concept of apportionment. The accountants attribute \$136,144.63 of their fees and expenses as investigative accountants to the remainder schemes, \$17,515.94 of their fees and expenses as receivers to the remainder schemes and \$36,882.84 of their fees and expenses as supervising accountants to the remainder schemes. The fees and expenses are calculated in each instance to 31 October 2003.

Background to the appointment as supervising accountants

- [11] In order to put this application in context, at least insofar as it relates to the remuneration of the accountants as supervising accountants, it is necessary to refer to the reasons for the appointment of the first respondent to wind up the remainder schemes and why the accountants were appointed as supervising accountants in connection with the winding up of the remainder schemes: *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2003] QSC 265. For the purpose of determining the identity of the person or entity which should wind up the 15 schemes being conducted by the first respondent, the first respondent had put forward proposals for winding up each of the schemes including the remainder schemes. Paragraphs 30 and 31 of the reasons refer to the matters relied on in general terms by the respondents to support the appointment of the first respondent to wind up all the schemes. Those matters included that the respondents would pay the costs associated with winding up the schemes and for that purpose the second and third respondents had injected into the first respondent, by way of capital contribution, the sum of \$200,000, which was paid to the first respondent’s solicitors on 6 August 2003 to be held in trust for the purpose of paying those costs. The respondents

submitted that the accountants' fees were likely to be significant for winding up the schemes and that the respondents were more familiar with the schemes and the underlying securities than the accountants. The first respondent was also prepared to subject itself to the type of supervision, such as that which was imposed in *Lawloan Mortgages Pty Ltd v Lawloan Mortgages Pty Ltd* (2003) 21 ACLC 289.

- [12] Although the first respondent was not permitted to wind up five of the schemes, it was still prepared to take on the winding up of the remainder schemes and the orders that were made on 19 August 2003 were made after extensive submissions were received from the parties, in the light of the reasons for judgment.
- [13] On the hearing of this application by the accountants for injunctive relief in order to protect their position in respect of their remuneration and expenses, an issue was raised about whether paragraph 18 of the order made on 19 August 2003 was intended to mean that the accountants' remuneration was to be paid by the first respondent in its capacity as the party appointed to wind up the remainder schemes and that the payments were to come out of the assets of the remainder schemes. In the light of the reasons for judgment published on 19 August 2003, and after referring to the transcript of the discussion which took place between counsel and me in respect of paragraph 18, it is clear that paragraph 18 was ordered in the context of the respondents' proposal for the winding up of the remainder schemes that they would pay the costs associated with winding up the schemes and that they accepted that supervision of the nature of that required by the orders made on 19 August 2003 from the accountants was a necessary aspect of the winding up of the remainder schemes. The following exchange with Mr Hack of Senior Counsel who appeared for the respondents occurred on 19 August 2003 after discussion of the proposed terms of paragraphs 18 and 19 of the order:

“HER HONOUR: Now, obviously, if at any stage the insolvency practitioners feel they are not going to get paid – I mean, I would've thought that they will be the first people coming back to – to Court.

MR HACK: I would have thought that's right.”

Material filed in respect of the application

- [14] The accountants relied on affidavits of Mr Moloney dealing with their claims for professional fees and expenses in respect of each of their roles as investigative accountants, receivers and supervising accountants and apportioning those fees and expenses against each of the remainder schemes. The correspondence that passed between the parties' solicitors between 30 and 31 October 2003 relating to this application was also before the court.
- [15] No affidavits were filed on behalf of the respondents dealing with any proposal for arrangements which the respondents were prepared to make to secure the payment of the accountants' fees and expenses relating to the remainder schemes, pending the approval of the remuneration and expenses. I was informed by Mr Lynch on behalf of the first respondent that the solicitors acting for the first respondent in the winding up application, Messrs Corrs Chambers Westgarth, had written an open letter to ASIC and the accountants making a proposal in relation to the winding up proceeding and offering to pay into an account certain funds on account of the remuneration and expenses claimed by the accountants. That letter was not

tendered, but it appeared from the information provided by Mr Lynch about that letter that the offer from the first respondent to pay moneys into an account on account of the accountants' fees and expenses was conditional upon the agreement of ASIC to the proposal in relation to the winding up proceeding. No affidavits were forthcoming from the second and third respondents dealing with their capacity to pay the remuneration and expenses of the investigative accountants, if the first respondent were wound up.

Submissions of the accountants

- [16] Separate submissions were made in respect of each of the roles of the accountants for which they seek to protect their remuneration and expenses. In relation to their role as investigative accountants, the point is made that the appointment of the investigative accountants preceded the orders to wind up the schemes and was the foundation on which those orders were made and which resulted in the first respondent being appointed to wind up the remainder schemes. In view of the pending winding up application against the first respondent, it is submitted that the investigative accountants should not be left in the position where they have to go begging for the costs of carrying out what the court ordered them to do. It is therefore submitted that to the extent that the respondents do not pay the costs of the investigative accountants which they have undertaken to pay, they should be borne by the assets of the remainder schemes to the extent that the remuneration and expenses of the investigative accountants are attributable to each of those remainder schemes.
- [17] Although no specific order was made about the remuneration of the accountants as receivers, the accountants in that capacity have an entitlement to the remuneration that is set by the court: r 269 of the *UCPR*. See *Mellor v Mellor* [1992] 4 All ER 10,17.
- [18] The accountants rely on the principle relating to court appointed receivers which is set out in J O'Donovan, *Company Receivers & Administrators* at para 25.310:

“Generally, the receivers’ right to remuneration is limited to the assets of which they are appointed. But it is not confined to those assets which, in the course of the receivership, they are able to bring within their grasp. Any other result might deter receivers from accepting an appointment or compel receivers to take precipitate action upon their appointment to gather assets simply to protect their own position, rather than to preserve the assets for the benefit of all interested parties.” (footnotes omitted).

Support for this principle that the receiver’s right to recover remuneration is not limited to the assets actually under the control of the receiver, but extends to all the assets of which the receiver was appointed is found in *Mellor v Mellor* at 19 and *Re Lawrenson Light Metal Die Casting Pty Ltd* (1999) 33 ACSR 288 at paras 57-59. The court appointed receiver is entitled to an equitable lien over those assets in respect of the receiver’s remuneration and expenses: *Re Lawrenson Light Metal Die Casting Pty Ltd* at paras 60-66.

- [19] The accountants also rely on the general practice of the court to accord to a receiver and manager or other like person appointed by the court priority for that person’s

remuneration: *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1998) 14 NSWLR 552, 568.

- [20] When it became apparent that the assets of the remainder schemes were to be transferred to A3FM without arrangements having been made to secure the payment of the accountants' remuneration and expenses in respect of their role as the supervising accountants of those remainder schemes, the accountants took action to ensure that their position was protected. The accountants rely on the fact that their appointment as the supervising accountants of the remainder schemes was to facilitate the appointment of the first respondent to wind up those schemes which was intended to benefit the investors in each of those schemes, because of the perceived savings in costs if the winding up were actually undertaken by the first respondent with supervision, rather than by independent liquidators. The accountants rely on the fact that, on any view, their remuneration and expenses in undertaking their court appointed role as supervising accountants must be considered an expense of the winding up of each of the remainder schemes, to the extent that their fees and expenses are apportionable to each of those schemes.
- [21] The accountants rely on the protection which the court usually affords a court appointed receiver, as applying to the accountants in each of their roles, as their roles of investigative accountants and supervising accountants are analogous to the role of court appointed receivers.
- [22] Another factor relied on by the accountants for seeking the injunctive relief at this stage is the hearing which is pending of the application made by ASIC to wind up the first respondent. If the winding up order were to be made, it affects the benefit which the accountants have of the obligations assumed by the first respondent to pay the remuneration and expenses of the accountant as investigative accountants and supervising accountants. Mr Morrison of Queen's Counsel on behalf of the accountants indicated that the injunctions sought could last in the first instance until the determination of the winding up and that the accountants would give the usual undertaking as to damages in support of those injunctions.

Submissions of the first respondent

- [23] The written submissions relied on by the first respondent which were Ex 1 at the hearing on 31 October 2003 challenge the jurisdiction of the court to make the injunctions sought, if those orders are viewed as a variation of the orders made on 27 May 2003 and 19 August 2003.
- [24] The first respondent relies on a lengthy list of discretionary factors which are set out in Ex 1 which it submits militates against the exercise of the discretion in favour of ordering the injunctions. It is submitted that making such orders would have a significant effect on the investors in the remainder schemes who should be given an opportunity to make submissions. The first respondent relies on the delay on the part of the accountants in seeking such injunctions. Further delays could be encountered, if the injunctions are ordered and the quantum of the accountants' remuneration and expenses is not resolved for sometime. It is also submitted that the accountants have the benefit of the undertakings of the respondents in respect of their fees and expenses as investigative accountants and the operative order against the first respondent to pay the fees and expenses of the accountants in their role as supervising accountants.

- [25] It is also submitted that not all of the remainder schemes have readily realisable assets, for which specific provision would need to be made in any orders.
- [26] The issue is also raised by the first respondent that the injunctive relief sought by the accountants would preclude the first respondent from carrying out the winding up of the remainder schemes, as the order made on 19 August 2003 requires.

Decision

- [27] In each role, the accountants were appointed by the court. They therefore have standing to seek relief from the court in respect of their remuneration and expenses in undertaking each of those roles.
- [28] The winding up of the remainder schemes has been ordered pursuant to s 601EE(2) of the *Corporations Act 2001* (Cth). The powers that are conferred upon the court are very broad and without restriction. The court has jurisdiction throughout the course of the winding up being conducted under s 601EE(2) to make orders to facilitate the resolution of any issue that arises in the course of the winding up: *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd* (2002) 42 ACSR 240, 243-244 and *Australian Securities and Investments Commission v Takaran Pty Ltd (No 2)* (2002) 43 ACSR 334, 338. As the winding up of such a scheme is not a static process it is to be expected that recourse to the court will be necessary, as steps are taken in the winding up. This application should not be viewed as the seeking of variation of orders previously made, but the making of orders to meet the circumstances that have arisen during the winding up.
- [29] If the proposed transfers of the assets of the remainder schemes to A3FM proceed and each of the investors in those schemes makes the same investment through A3FM (which has been foreshadowed will occur), these steps will effectively bring the winding up of the remainder schemes to an end. What effective orders the court could make in respect of outstanding issues of remuneration of the accountants after the assets of the scheme have been transferred and the investors' interests in the schemes resolved is debatable.
- [30] The accountants were appointed to each of their roles in connection with the remainder schemes, because of the need for the court to take steps to protect the investors in each of these schemes which were being conducted unlawfully by the first respondent. That the accountants are claiming remuneration and expenses is the consequence of the need to provide for the protection of the investors. The submissions made by the first respondent that an order should not be made now which would have the effect of holding up payments to the investors overlooks the fact that the need to make provision for payment of the accountants arose because of the interests of investors requiring protection.
- [31] In their role as receivers, the accountants clearly are entitled to the benefit of the protection that the court gives to a court appointed receiver. I accept that their roles as investigative accountants and supervising accountants are analogous, in the circumstances, to the role of court appointed receiver and that they should have the same protection given to a court appointed receiver in respect of those roles.
- [32] As receivers, the accountants are entitled to an equitable lien over the assets to which they are appointed. The accountants are therefore also entitled to an

equitable lien over those same assets that came with their purview as investigative accountants and supervising accountants to protect the fees and expenses claimed against the remainder schemes in respect of each of those roles. The lien does not depend on the assets in the scheme being immediately realisable. Whether any such lien would survive the winding up of a remainder scheme is not clear.

- [33] The accountants are justified in bringing this application, because of the events that have transpired in the winding up of the remainder schemes to this stage, particularly the proposed transfer of assets in the remainder schemes which would remove those assets from the schemes without arrangements being made to provide for payment of the accountants' fees and expenses, the imminent hearing of the winding up application against the first applicant and that no evidence has been provided by the respondents since 30 October 2003 when this application was first foreshadowed of their capacity to pay or otherwise secure the fees and expenses claimed by the accountants against the remainder schemes.
- [34] Injunctive relief of the type sought by the accountants is appropriate to protect their equitable lien. It may be that this application which brings into question whether the first respondent which was appointed to wind up the remainder schemes on the basis that it was prepared to pay the costs of the winding up of the remainder schemes is able and willing to pay those costs could result in other orders being made in respect of the winding up of the remainder schemes. As the only relief sought by the accountants is the injunctive relief, it is not necessary to consider whether other orders should be made in respect of the winding up.
- [35] The discretionary factors raised by the first respondent against granting the injunctive relief do not outweigh the need for the court to provide protection for the fees and expenses of the accountants in each of their roles in the circumstances applying to the winding up of the remainder schemes. It is a relevant consideration that the appointment of the accountants to each of these roles was for the purpose of protecting the investors and the court depends upon persons such as the accountants being willing to undertake the tasks required of them by the court, in order to provide this protection. It is also relevant that the relief that is sought at this stage can be limited to the determination of the winding up application. The issue to be determined on this application arose between the accountants and the first respondent, as the first respondent has the responsibility for winding up the remainder schemes. Although, in practical terms, the investors' interests are affected by any injunction, that which I propose to order is limited in time at this stage and there remain opportunities for any investor to be heard, if that is the desire.
- [36] During submissions, it was indicated on behalf of the accountants that if arrangements could otherwise be made to secure the payment of their claimed fees and expenses which were attributable to the remainder schemes, those would be considered in lieu of the injunction. After the parties have had the opportunity to consider these reasons, it may be that, by agreement, the parties put forward alternative proposals which provide the protection the accountants seek without holding up the completion of the winding up of the remainder schemes. That is a matter for the parties. The lien in respect of any particular scheme can not exceed the value of the assets that are held by the first respondent in respect of that scheme.

- [37] Until the determination of the winding up application in respect of the first respondent or earlier order, I am disposed to grant the injunctive relief sought by the accountants in support of an equitable lien for their fees and expenses claimed in respect of each of the remainder schemes for each of their roles performed in respect of the remainder schemes.
- [38] I direct the parties forthwith to prepare a draft order that reflects the terms of this decision. I will also hear submissions on costs.