SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Drury Management Pty Ltd (In Liq) & Ors* [2005] QSC 306
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (Applicant) v **DRURY MANAGEMENT PTY LTD (IN LIQUIDATION) ACN 809 253 958** (First Respondent) **PIET CORNELIUS WALTERS** (Second Respondent) **MARK SAMUEL EVANS** (Third Respondent) **RANSOM HOUSE PTY LTD (IN LIQUIDATION) ACN 072 391 407** (Fourth Respondent)
FILE NO/S:	464/2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	7 October 2005
DELIVERED AT:	Cairns
HEARING DATE:	3 October 2005
JUDGE:	Jones J
ORDER:	**I approve the remuneration as follows:-** **1. As receiver of Drury Management Investment Scheme in respect of work performed by Ian David Jessup:-** **a.) Between 1 September 2004 and 31 March 2005 in the sum of $147,451.59;** **b.) Between 1 April 2005 and 30 April 2005 the sum of $16,610.88.** **2. As liquidator of Drury Management Pty Ltd (in liquidation) in respect of work performed by Ian David Jessup between 29 March 2004 and 30 April 2005 in the sum of $14,528.80.** **3. As liquidator of Ransom House Pty Ltd (in liquidation) in respect of work performed by the applicant between 29**

March 2004 and 30 April 2005 in the sum of $7,674.48.

4. I order that the costs of the applicant of and incidental to this application be paid by the receiver from the proceeds from property of the scheme or companies.

CATCHWORDS: CORPORATIONS – RECEIVERS, MANAGERS AND CONTROLLERS – receiver's remuneration – where receiver of managed investment scheme also wound up two companies participating in scheme – where earlier order of the Court gives receiver authority to seek the Court's approval of remuneration in respect of scheme – whether same approval mechanism applies in respect of companies – as winding up of companies was incidental and inevitable to winding up of managed investment scheme receiver has authority to seek the Court's approval of remuneration in respect of companies

SOLICITORS: MacDonnells for the applicant

[2] By this application Ian David Jessup seeks the Court's determination of his remuneration, firstly as the receiver manager of the Drury Management Investment Scheme ("the scheme") for the purpose of its winding up and secondly, his remuneration for acting as receiver of two companies which participated in that scheme namely Drury Management Pty Ltd and Ransom House Pty Ltd.

[3] The authority to seek remuneration for the winding up of the scheme seems to me to be simply an extension of the order made by Justice Moynihan on 27 September 2003. The winding up of the scheme was clearly within the purview of that order.

[4] The question of whether the remuneration in relation to the liquidation of the two companies can be seen as such an extension is not so obvious.

[5] I must consider the effect of s 473(3) of the *Corporations Act* 2001 ("the Act") which is in the following terms:–

> "**Remuneration of liquidator**
> A liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined:
> a.) if there is a committee of inspection – by agreement between the liquidator and the committee of inspection; or
> b.) if there is no committee of inspection or the liquidator and the committee of inspection fail to agree:
> (i) by resolution of the creditors; or
> (ii) if no such resolution is passed – by the Court."

[6] In the instant case there is no committee of inspection and so the issue becomes whether the liquidator should seek a resolution of creditors before applying to the Court.

[7] If a meeting of creditors for the purpose of subsection (3) is to be convened there is a requirement that a statement of all receipts and expenditure by the liquidator be attached to the notice calling the meeting.

[8] On behalf of the liquidator two arguments are raised. Firstly, they seek the Court's approval mechanism applicable to the scheme to be applied also to the incidental and related issues of the liquidation of the two companies. In the alternative the special circumstances prevailing here ought to allow a direct application to the Court pursuant to s 473 of the Act, thereby avoiding the need for compliance with the requirement of seeking a resolution of creditors.

[9] As to whether this process of seeking the creditors' resolution can be avoided there are conflicting opinions. In *Re Norfolk Island Airlines Pty Ltd (in liq)*[1] Master Horton stated:-

> "It will of course always be incumbent upon an applicant liquidator to point to the particular special circumstances that prevail such that would lead to the exercise of the discretion to approach the fixing of remuneration in this method and nothing that I say should be taken as a general approval for the adoption of such approach in the absence of those special circumstances.
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> See *Re Sectam Pty Ltd* (1990) ACLC 476, a decision of the Supreme Court of Western Australia handed down on 4 April 1990 which follows the decision of the Victorian Court in *Re Molyneux Aluminium Pty Ltd* (1970) VR 456 which reinforces very clearly the need to demonstrate special circumstances in order to persuade a court to exercise its power to fix remuneration in the absence of the calling of a creditors' meeting."

[10] This approach was not accepted by Drummond J in *Re Interchase Corp Limited (in prov liq)*[2] where he distinguished the two cases relied upon in *Norfolk Island Airlines*. Drummond J expressed the following opinion (at p 583):-

> "In my opinion, s 473(3) operates as follows: subject to question of waiver, the remuneration of a liquidator must be determined firstly, by agreement between the liquidator and the committee of

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1 (1991) 9 ACLC 1024

2 (1993) 11 ACLC 849 at p 852

> inspection, or, secondly, if agreement cannot be reached or there is no such committee, by resolution passed at a meeting of creditors by the prescribed majority. It is only if no such resolution is passed at a properly convened meeting of creditors that the Court is empowered to fix the liquidator's remuneration.
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> It is therefore essential, before the Court can have any power to act under s 473(3)(b)(ii), that the liquidator has first acted in accordance with s 473(4) to convene a meeting of creditors for the purpose of fixing his remuneration. If no creditor attends either in person or by proxy, or if a meeting actually takes place but the prescribed resolution is not passed, the precondition to the Court being empowered to act will be satisfied. But unless that occurs the Court, in my opinion, has no power to fix the liquidator's remuneration. The apparent deliberateness of the amendments made to the provisions that replaced s 232(3) in the 1981 *Uniform Codes* and in the *Corporations Law* in my opinion admits of no other conclusion."

This approach was adopted by Pullin J in *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd*[3] and in my view is correct. It follows then that at present I have no power to approve the remuneration pursuant to s 473.

[11] I return then to the question whether this approval can legitimately be undertaken pursuant to the order of Moynihan J. The scope of the undertaking consequent upon that order included the appointment of Mr Jessup as the receiver of the two companies and required the delivery of the company's books and records. That situation continued until the trial meaning both companies were ordered to be wound up. That order was made because of both companies' direct involvement in the illegal scheme.[4] The liquidation of both companies was thus an inevitable conclusion of the process which commenced with the order of Moynihan J. It would be artificial to see the winding up order as a separate unrelated event. Accordingly, the remuneration sought by Mr Jessup in respect of the winding up of the two companies is to be considered in the terms of that order which permits the assessment by the Court.

[12] Past approvals of remuneration as a receiver have been simply given on condition that Australian Securities and Investment Commission ("ASIC") had been served with a copy of the costs incurred and the fees charged and that it had made no objection. ASIC was the applicant for the appointment of a receiver and had agreed

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3 [2003] WASC 112

to the provisions of the order of 27 September 2002. The known investors affected by this scheme were numerous and could not sensibly be expected to make any assessment of the reasonableness of the fees and charges. This is a difficult task in any event as the Insolvency Practitioners Association of Australia has not, since 1 July 1999, provided any rates scale, as a guide to fees to be charged. Presently Insolvency practitioners charge hourly rates in accordance with their own internal cost structures. Such rates are to be determined according to a "Statement of Principles" set out in a document dated 1 July 2002. Those principles do not provide any realistic guide to the actual hourly charges that can reasonably be made. This makes it impossible for the Court or Registrar to make any balanced assessment as to the level of remuneration particularly when, as is the case here, there is no opposition to the charges and where a lack of opposition does not necessarily lead to an inference of concurrence.

[13] For these reasons when the matter first came before me I directed that the itemised account in addition to being sent to ASIC, be sent to the committee of investors which had acted as a small group of intermediaries between the receivers and all investors. The members of the committee were advised of the rights of the investors to object to any item in the account. That committee was constituted by four persons, Messrs. Bryant, Daly, Mountney and Lawrence. Each of the representatives was served with the letter advising of their rights to attend the hearing of this application. In fact, no member of the committee appeared.

[14] As to the remuneration for Mr Jessup as liquidator of the two companies, the total amounts are relatively small. They do not, in a practical sense, warrant detailed investigation by potential creditors. The reason for this is that the majority of the expense was related to the receivership and winding up of the scheme. The costs of litigation leading to the order for winding up have also been characterised as expenses relating to the scheme.

[15] The Court's ability to examine accounts of this nature is very limited. It is a feature of the Court's supervision of insolvency practice which has attracted strong criticism in the past. *Re Stockford Limited*[5]*; Mirror Group Newspapers Plc v*

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4 Reasons for Judgment – 29 March 2004 para 47

5 [2004] FCA 1682

Maxwell (No.2).[6] Notwithstanding the Court's limited capacity to undertake a task such as this, this is the only realistic mechanism for the approval of remuneration in this case.

[16] I have perused the accounts attached to Mr Jessup's affidavit and in reliance upon his sworn evidence that the details of the accounts are "true and correct"[7] and that the rates are "fair and reasonable"[8] I approve the remuneration as follows:-

1. As receiver of Drury Management Investment Scheme in respect of work performed by Ian David Jessup:-
    a.) Between 1 September 2004 and 31 March 2005 in the sum of $147,451.59;
    b.) Between 1 April 2005 and 30 April 2005 the sum of $16,610.88.
2. As liquidator of Drury Management Pty Ltd (in liquidation) in respect of work performed by Ian David Jessup between 29 March 2004 and 30 April 2005 in the sum of $14,528.80.
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4. I order that the costs of the applicant of and incidental to this application be paid by the receiver from the proceeds from property of the scheme or companies.

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6 (1998) 1 BCLC 638

7 See paras 19 and 20 Affidavit sworn 9 August 2005

8 Ibid para 23