FEDERAL COURT OF AUSTRALIA

Lock, in the matter of Cedenco JV Australia Pty Ltd (in liq) (No 3) [2019] FCA 879

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| File number: | SAD 222 of 2015 |
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| Judge: | **BESANKO J** |
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| Date of judgment: | 12 June 2019 |
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| Catchwords: | **CORPORATIONS** —application for determination or fixing of remuneration under s 449E(1)(c) and s 511 of the *Corporations Act 2001* (Cth) — where the Australian Securities and Investments Commission intervened in the proceeding pursuant to s 1330 of the Act  **CORPORATIONS** — whether the plaintiffs’ remuneration should be further reduced by reference to a specific category of work — where ASIC submits that the amount is no more than a balancing item and is excessive having regard to the nature of the work involved  **INTEREST** — whether the plaintiffs should pay interest on the remuneration to which they are not entitled — whether the Court has the power to award interest under s 23 or s 51A of the *Federal Court of Australia Act 1976* (Cth) — consideration of the rate at which interest should be paid  **COSTS** — whether the plaintiffs should pay ASIC’s costs of and incidental to the application — where the plaintiffs argued that there should be no order as to costs because ASIC had not succeeded in a number of its objections |
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| Legislation: | *Corporations Act 2001* (Cth) ss 449E, 473, 511, 1322  *Federal Court of Australia Act 1976* (Cth) ss 23, 51A |
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| Cases cited: | *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* [1932] HCA 9;(1932) 47 CLR 1  *Australian Securities and Investments Commission v Letten (No 9)* [2010] FCA 1459  *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612  *Korda, In the matter of Clynton Court Pty Ltd* [2005] FCA 543; (2005) 53 ACSR 432  *Lock, in the matter of Cedenco JV Australia Pty Ltd (in liq)(No 2)* [2019] FCA 93  *Management 3 Group Pty Ltd (in liq) v Lenny’s Commercial Kitchens Pty Ltd (No 2)* [2012] FCAFC 92; (2012) 203 FCR 283  *Pace v Antlers Pty Ltd (In Liq)* (1998) 80 FCR 485  *Tonto Homes Loans Australia Pty Ltd v Taveres; FirstMac Ltd v Di Benedetto; FirstMac Ltd v O’Donnell (No 2)* [2012] NSWCA 129 |
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| Date of hearing: | 1 May 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 50 |
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| Counsel for the Plaintiffs: | Mr R Whitington QC with Mr B Doyle |
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| Solicitor for the Plaintiffs: | DMAW Lawyers Pty Ltd |
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| Counsel for the Intervener: | Mr M Sims |
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| Solicitor for the Intervener: | Corrs Chambers Westgarth |
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ORDERS

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|  | | SAD 222 of 2015 |
| IN THE MATTER OF CEDENCO JV AUSTRALIA PTY LTD (IN LIQUIDATION), SK FOODS AUSTRALIA PTY LTD (IN LIQUIDATION) AND SS FARMS AUSTRALIA PTY LTD (IN LIQUIDATION) | | |
| BETWEEN: | IAN RUSSELL LOCK AND JOHN SHEAHAN AS FORMER JOINT AND SEVERAL ADMINISTRATORS OF CEDENCO JV AUSTRALIA PTY LTD (IN LIQUIDATION)  First Plaintiff  IAN RUSSELL LOCK AND JOHN SHEAHAN AS JOINT AND SEVERAL LIQUIDATORS OF CEDENCO JV AUSTRALIA PTY LTD (IN LIQUIDATION)  Second Plaintiff  IAN RUSSELL LOCK AND JOHN SHEAHAN AS FORMER JOINT AND SEVERAL ADMINISTRATORS OF SK FOODS AUSTRALIA PTY LTD (IN LIQUIDATION) (and others named in the Schedule)  Third Plaintiff | |
| AND: |  | |
|  | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Intervener | |

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| --- | --- |
| JUDGE: | BESANKO J |
| DATE OF ORDER: | 12 June 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 449E(1) and s 511 of the *Corporations Act 2001* (Cth) the remuneration of the plaintiffs first as administrators and then as liquidators of the following companies (the Companies) be fixed in the amounts indicated:
   1. SK Foods Australia Pty Ltd (in liquidation) (SKFA); Cedenco JV Australia Pty Ltd (in liquidation) (CJVA):
      1. the remuneration of the plaintiffs as administrators for the period 6 May 2010 to 10 August 2010 be fixed in the amount of $338,623.65 (plus GST);
      2. the remuneration of the plaintiffs as liquidators for the period 11 August 2010 to 31 October 2013 be fixed in the amount of $2,969,464.46 (plus GST); and
      3. the remuneration of the plaintiffs as liquidators for the period 19 November 2013 to 12 September 2014 be fixed in the amount of $43,162.33 (plus GST).
   2. SS Farms Australia Pty Ltd (in liquidation) (SSFA):
      1. the remuneration of the plaintiffs as administrators for the period 10 July 2010 to 6 August 2010 be fixed in the amount of $10,644.44 (plus GST);
      2. the remuneration of the plaintiffs as liquidators for the period 11 August 2010 to 30 June 2012 be fixed in the amount of $442,377.23 (plus GST);
      3. the remuneration of the plaintiffs as liquidators for the period 1 October 2012 to 31 October 2013 be fixed in the amount of $73,978.99 (plus GST); and
      4. the remuneration of the plaintiffs as liquidators for the period 19 November 2013 to 12 September 2014 be fixed in the amount of $19,151.80 (plus GST).
2. The plaintiffs repay the Companies the amounts by which the remuneration which has been drawn by them exceeds the amounts approved in these orders plus interest on such amounts from the date on which they were drawn to the date on which they are repaid at the rates set out in the Court’s Interest on Judgments Practice Note (GPN-INT). Any dispute about the amount of interest is to be determined by the Court or a Registrar of the Court.
3. The plaintiffs bear their own costs of and incidental to the application personally without any right of indemnity from the assets of the Companies.
4. The plaintiffs pay the intervener’s costs of and incidental to the application, to be taxed if not agreed, personally without any right of indemnity from the assets of the Companies.

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

REASONS FOR JUDGMENT

BESANKO J:

# INTRODUCTION

1. On 11 February 2019, I delivered reasons for judgment in an application made by the liquidators of three companies for orders in the alternative to orders under s 1322(4)(a) of the *Corporations Act 2001* (Cth) (the Act), determining or fixing their remuneration first, as administrators and then, as liquidators of the companies (*Lock, in the matter of Cedenco JV Australia Pty Ltd (in liq) (No 2)* [2019] FCA 93 (the substantive reasons)). The liquidators (and plaintiffs) are Mr Ian Russell Lock and Mr John Sheahan and the companies are Cedenco JV Australia Pty Ltd (in liquidation), SK Foods Australia Pty Ltd (in liquidation) and SS Farms Australia Pty Ltd (in liquidation). The plaintiffs sought orders under s 1322(4)(a) of the Act, but such orders were refused. In the alternative, the plaintiffs sought orders under ss 449E(1) and 511(1) of the Act determining or fixing their remuneration.
2. In the substantive reasons, I expressed my conclusions with respect to the plaintiffs’ remuneration as follows (at [535]–[536]):

535 As far as determining or fixing the plaintiffs’ remuneration is concerned:

(1) the plaintiffs’ remuneration must be reduced to reflect my conclusions with respect to hourly rates (at [314]–[315]);

(2) the plaintiffs’ remuneration in relation to the four work streams and the application to validate appointment as voluntary administrators must be reduced in accordance with my conclusions in these reasons (at [382], [424]–[425], [447], [469]–[471]);

(3) the plaintiffs’ remuneration for minutes of meetings, remuneration reports, write-up of Mr Oliver Sheahan’s time and write-up of Mr Samuel Rees’ time and reports to creditors, 22 December 2011 creditors’ meeting and the ASIC Form 524s are disallowed or reduced in accordance with these reasons (at [476]–[498]);

(4) I will hear the parties as to the disposition of ASIC’s other objections in light of these reasons (at [499]–[533]); and

(5) ASIC submitted that after its specific objections have been considered and an amount determined, the Court should give consideration to whether the resulting amount is proportionate “overall as a check and balance”. Whether there is room for such an approach after the analysis already conducted is a matter that ASIC, if so advised, can raise after the amount has been determined.

536 I will give the parties an opportunity to consider these reasons and fix a date for the final disposition of the proceedings. The parties will then be heard on the question of costs.

1. On 27 February 2019, I made an order that the plaintiffs file any affidavit material in support of orders fixing their remuneration and relating to the outstanding issues identified in the substantive reasons by Wednesday, 13 March 2019. The time in that order was extended.
2. The plaintiffs have filed two further affidavits. The first affidavit is an affidavit of Mr Nicholas Fryer affirmed on 20 March 2019. Mr Fryer is an insolvency practitioner and a director of the plaintiffs’ firm. The second affidavit is an affidavit of Mr Ian Russell Lock affirmed on 27 March 2019.
3. On 27 February 2019, I also made an order that the Australian Securities and Investments Commission (ASIC) file its submissions with respect to the orders sought by the plaintiffs, any further orders which it says should be made, and the matters referred to in subparagraphs (4) and (5) of [535] of the substantive reasons by 20 March 2019. The time in that order was extended. ASIC filed its outline of submissions on final relief on 5 April 2019.
4. Finally, on 27 February 2019, I made an order that the plaintiffs file any submissions in reply by 27 March 2019. The time in that order was extended. The plaintiffs filed an outline of submissions on 10 April 2019.
5. There are three outstanding issues.

## Issue 1

1. Mr Fryer performed the calculations necessary to give effect to the conclusions I expressed in subparagraphs (1), (2) and (3) of [535] of the substantive reasons. He was assisted by a member of the plaintiffs’ staff, Mr Sam Gurner. The results of Mr Fryer’s calculations are set out in the following table which is set out in his affidavit (at [52]):

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| **Work** | **Claim** | **Reduction** | **Allowed** |
| Debt & Equity | $2,300,000.00 | $392.599.09 | $1,907,400.91 (cell C11) |
| ANZ Investigations | $1,300,000.00 | $733,367.36 | $566,632.64 (cell C16) |
| POCA | $354,809.99 | $251,474.68 | $103,335.31 (cell C21) |
| Receivers | $250,000.00 | $73,174.95 | $176,825.05 (cell C26 |
| Taxation Issues | $100,000.00 | $16,788.21 | $83,211.79 (cell C29) |
| Other | $1,492,779.89 | $335,500.61 | $1,157,279.28 (cell C38) |
| Total | $5,797,589.88 | $1,802,904.41 | $3,994,684.97 (cell C40) |

1. The plaintiffs propose a further reduction of $100,000 to cover ASIC’s outstanding objections relating to first (as described in the substantive reasons), travel arrangements and travel time, other administrative work, work performed by persons of inappropriate seniority and work of a legal nature; secondly, a reduction in office manager rates; thirdly, any further objections which he and Mr Gurner may have overlooked; and finally, any additional objections ASIC may wish to maintain (at [71]–[73] of Mr Fryer’s affidavit).
2. The overall effect of the plaintiffs’ calculations is that the plaintiffs’ remuneration is reduced from $5,796,589.88 to $3,912,036.31, an overall reduction to the plaintiffs’ remuneration of $1,884,553.57. ASIC accepts the revised amounts for the four major work streams and that no further reduction on the basis of proportionality is necessary in respect of them. ASIC had identified a number of discrepancies in Mr Fryer’s calculations, but accepts the proposed global reduction of a further amount of $100,000 is adequate and appropriate to address the discrepancies and to dispose of the balance of its outstanding objections.
3. Nevertheless, ASIC contends that the amount for “Other work” ($1,157,279.28 – $100,000.00 = $1,057.279.28) is no more than a “balancing item” and, for this reason and other circumstances it has identified, the amount should be further reduced. ASIC suggests a reduction of 30%. This is Issue 1.

## Issue 2

1. The plaintiffs have given an undertaking that “in the event that the Court finally determines remuneration in an amount less than the amounts already paid in respect of remuneration … to immediately repay those [excess amounts] into the liquidations”. ASIC points to the fact that this undertaking does not include an undertaking to pay interest on the amounts the plaintiffs received to which they were not entitled. It submits that the plaintiffs should pay interest on these amounts. This is Issue 2.

## Issue 3

1. ASIC seeks an order for costs. This is opposed by the plaintiffs. This is Issue 3.
2. I turn now to consider each of these issues.

# ISSUE 1

1. In the substantive reasons, I identified the four work streams (at [5]) and the plaintiffs’ estimate of the appropriate allocation to each of the work streams, together with work identified as “Taxation issues” and “Other matters” (at [122]). At that time, the amount which Mr Sheahan had allocated to “Other work” was $1.6 million. I explained the position in the following passage in the substantive reasons (at [295]):

295 … As I will explain later in these reasons, Mr Sheahan estimates a figure of $1.6 million for other matters, which he said included investigation of matters not directly related to the four major work streams and taxation issues, such as dealing with proofs of debt, adjudicating on creditors’ claims, payment of dividends, clerical and administrative tasks, reporting to creditors, and statutory compliance. ASIC submits that $1.6 million at a partner rate of $700 per hour is 2,285 hours or 285 8-hour days, and 57 working weeks. It submits that there is no basis for thinking that the $1.6 million was other than a balancing item when regard is had to the fact that the unsecured creditors were paid in full with money paid over to the plaintiffs by the receivers, putting to one side (the investigations into the Debt and Equity Issues), adjudicating proofs and creditors’ claims was not complex as only a small number of somewhat contentious proofs of debt needed to be adjudicated. Four are identified in the affidavit material and Mr Sheahan considered that there may have been six to eight. Furthermore, ASIC submitted that the payment of dividends is essentially a mechanical administrative task and only three rounds were paid to 65 unsecured non-related creditors in the case of SKFA and CJVA, and 91 unsecured non-creditors in the case of SSFA. Finally, Mr Sheahan agreed that statutory compliance was principally filing forms with ASIC and filing taxation returns. Mr Sheahan said in response to a suggestion that he did not know how the $1.6 million was made up, that he accepted what he had been told. In my opinion, ASIC’s submission about the allowance for other matters is correct.

1. In the substantive reasons, I left open the disposition of ASIC’s other objections (at [535(4)]). These other objections were as follows: (1) travel arrangements; (2) travel time; (3) work performed by persons of inappropriate seniority; (4) other administrative work; and (5) work of a legal nature.
2. My approach followed fairly closely the structure of ASIC’s Aide Memoire which was handed up as part of its closing submissions. The approach of ASIC was to suggest a reduction in hourly rates over all areas of the plaintiffs’ work, then reductions in all of the four work streams and in fees relating to an application to validate the plaintiffs’ appointment as voluntary administrators, and then a number of specific objections, being Minutes of Meetings, Remuneration Reports, Write-up of Mr Oliver Sheahan’s Time and Write-up of Mr Samuel Rees’ Time, Report to Creditors, 22 December 2011 Creditors’ Meeting and the ASIC Form 524s. All of those matters have been addressed by Mr Fryer.
3. I summarised ASIC’s approach to the remaining objections which it raised in the substantive reasons as follows (at [499]):

499 The matters which follow only arise on ASIC’s case if a broad discount (to use ASIC’s description) is not made in respect of the four work streams and the plaintiffs’ hourly charges. As I understood it, ASIC’s approach was based on the principle (which is correct) that there should not be a double discount of the plaintiffs’ remuneration. I have applied a discount in relation to the plaintiffs’ hourly charges and a discount in relation to three of the four work streams. I have applied only a small discount in relation to the largest work steam on the plaintiffs’ estimate, being the Debt and Equity Issues. I will hear the parties as to the extent to which the following objections remain relevant. In each case, I will outline the nature of the objection and the plaintiffs’ response to it.

This approach is reflected in [189(1)] of the Aide Memoire.

1. Three points may be made about the objections left unresolved in my substantive reasons. First, I did not determine them because it was unclear whether I needed to do so. There had been discounts in relation to hourly rates and significant reductions with respect to three of the four work streams. However, it was not clear whether that meant that the outstanding objections did not need to be determined. Secondly, as I understand the position, the plaintiffs and ASIC accept that the outstanding objections have been dealt with by the plaintiffs’ proposed further $100,000 discount. Thirdly, it follows from the second point that what is left in terms of an outstanding matter is as described in [535(5)] of the substantive reasons as proportionality “overall as a check and balance”. That, as I understood it, was a check when the overall amount was ascertained, in this case, $3,912,036.31, rather than proportionality applied to one possible category of work, for example, Other work of $1,057,279.28. I should say in fairness to ASIC, whose assistance in this case was very considerable, that it did make general submissions about the “Other work” category (at [20]–[22] of the Aide Memoire) which I summarised in the substantive reasons (at [295]). However, I did not, at the time of the substantive reasons, understand it to be suggested that after all the other objections had been considered, there should be a broad reduction to the “Other work” category other than as part of a proportionality exercise as a final check and balance to the whole of the resulting figure. In these circumstances, I have some concern as to the extent to which the approach ASIC now advances was a live issue at the hearing. It may not be a different argument, but it is at least a refashioning of arguments previously put.
2. As far as the merits of ASIC’s submissions are concerned, it repeated a number of the general submissions made at the previous hearing. It submitted that the “category” was no more than a balancing item and that the amount involved was very large, having regard to the known tasks to which it related, or might have related. To illustrate the force of its submission, ASIC submitted that the revised figure for Other work of $1,057,279.28 amounted to 1,887 hours of work for a partner calculated at a revised rate of $560 per hour and that 1,887 hours of work is 236 eight-hour working days or 47 working weeks of a partner’s time.
3. I have hesitated before rejecting ASIC’s submission because there is a good deal of merit in it. However, I do not think that there is a strong case for a further reduction and this is illustrated in part, at least, by the difficulty of determining the quantum of any further reduction on a reasoned basis. Considering these matters with the fact that the submission represents a refashioning of arguments previously put has led me to the conclusion that no further reduction should be made.

# ISSUE 2

1. ASIC submits that the Court should order the plaintiffs to repay to the companies the amounts by which the remuneration drawn by them exceeds the amounts approved by the Court *with interest at the appropriate rate*.
2. There was something of a minor dispute between the parties concerning the repayment of the principal amount and it concerned whether the Court should do no more than note the plaintiffs’ undertaking (the plaintiffs’ position) or make an order for repayment (ASIC’s position). I address this issue below (at [30]).
3. The major dispute between the parties concerned whether the plaintiffs should pay interest. Clearly, if that issue is decided against the plaintiffs, the amount of interest must be calculated. The dispute was not, as I understood it, as to the principal amount upon which interest should be calculated; interest was to be calculated on amounts received which now have to be repaid. The disputes about the calculation of interest concerned the interest rate to be applied and the period over which interest should be calculated.
4. ASIC submits that an order for the payment of interest is within the scope of the relief sought in the proceeding. That submission is correct. The plaintiffs’ Amended Originating Process seeks “[s]uch further or other order as this court deems fit”.
5. It is convenient to address the issues by reference to the plaintiffs’ submissions. The plaintiffs submit that the Court does not have the power to award interest or, in the alternative, should not award interest. They submit as follows:
6. Section 51A of the *Federal Court of Australia Act 1976* (Cth) does not apply because this is not a proceeding for the recovery of money. ASIC accepts this proposition.

Section 23 of the Federal Court of Australia Act is not a source of power to award interest in this case because it is “subservient” (to quote counsel’s word) to s 51A. ASIC disputes this proposition and submits that s 23 is a source of power to make an order for the payment of interest.

1. It is not open to the Court to impose a condition requiring the payment of interest on the determination or fixing of the plaintiffs’ remuneration as administrators under s 449E(1) and as liquidators under s 511 of the Act. It is not one of the matters referred to in s 449E(4) or s 473(10) of the Act. Although ASIC did not rely on such a power and made no submissions about it, I reject the plaintiffs’ submission for reasons set out below (at [33]).
2. The trilogy of cases to which ASIC referred were distinguishable from this case. Although interest was awarded in *Pace v Antlers Pty Ltd (In Liq)* (1998) 80 FCR 485, the claim was a claim in restitution or, in the alternative, the issue of power was not raised in that case. *Korda, In the matter of Clynton Court Pty Ltd* [2005] FCA 543; (2005) 53 ACSR 432 involved an undertaking given by a liquidator as a condition of being granted relief which is (to use counsel’s words) “a very different case”, and *Australian Securities and Investments Commission v Letten (No 9)* [2010] FCA 1459involved a claim for interim relief and is in a similar category. ASIC relied on these cases.
3. An award of interest is compensatory, not punitive. The only person who stands to benefit from an award of interest in favour of the companies (Mr Sharp) has resolved any claims with respect to the plaintiffs’ remuneration. ASIC disputes this contention, both at a factual level and in a relevance sense.
4. ASIC abandoned any claim for interest at an interlocutory hearing in this proceeding on 18 August 2015 and it would be unfair and unreasonable to the plaintiffs to award interest on the amounts they must repay. ASIC disputes this proposition.
5. The rate of interest should be the rate earned by the plaintiffs on monies deposited during the administrations and liquidations and thereafter at bank market rates. ASIC submits that the rates applied should be those laid down in the Court’s Practice Note (Interest on Judgments Practice Note GPN-INT).
6. In my opinion, the plaintiffs should pay interest on the amounts they have received to which they are not entitled. I note in this context that ASIC said it was taking a practical approach and that it had been open to it to submit that interest should be paid on the whole amount of the plaintiffs’ remuneration up to the day upon which the remuneration is approved by the Court. ASIC referred the Court to cl 16.3 of the Insolvency Practitioners Association of Australia Code of Professional Practice for Insolvency Practitioners (IPAA COPP) which requires insolvency practitioners upon becoming aware that they are not entitled to fees to repay them immediately into the administration account of the affected company.
7. The order sought by ASIC in relation to interest should be made. It is as follows:

The plaintiffs repay the Companies the amounts by which the remuneration which has been drawn by them exceeds the amounts approved in these orders plus interest on such amounts from the date on which they were drawn to the date on which they are re-paid at the rates set out in Court’s Interest on Judgments Practice Note (GPN-INT).

1. I will add to this order the following:

Any dispute about the amount of interest is to be determined by the Court or a Registrar of the Court.

1. I note the undertaking by the plaintiffs to repay the amount to which they are not entitled, but as I am making an order for the payment of interest which was opposed by the plaintiffs, it is convenient to combine the two obligations in an order of the Court.
2. Although there is no authority on this point, it seems to me that s 23 of the Federal Court of Australia Act is a source of power to award interest. The section provides:

**23 Making of orders and issue of writs**

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

1. The power has been described as a broad one (*Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 622 per Deane J). I do not think this is a case for the application of the approach in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* [1932] HCA 9;(1932) 47 CLR 1 at 7 per Duffy CJ and Dixon J. I say that because the circumstances in which the Court might be called on to consider awarding interest are many and varied as this case neatly illustrates. There is no reason to think that in this respect Parliament considered s 51A of the Federal Court of Australia Act exhaustive.
2. Even if I am wrong, I would hold that it is an incident of the statutory power to determine or fix the remuneration of an administrator or liquidator to order, not only the repayment of monies to which the administrator or liquidator is not entitled, but also interest on those amounts.
3. The plaintiffs claim that interest should not be awarded because no creditor or shareholder in the administrations has been disadvantaged by the plaintiffs’ conduct. In fact, Mr Sharp voted in favour of resolutions approving the plaintiffs’ remuneration at creditors’ meetings, withdrew an application to have the plaintiffs’ remuneration reviewed and entered into two settlement deeds. The two Deeds of Settlement were described in the substantive reasons as follows: (at subparagraphs (50)–(51) of [29]):

29 I will adopt the chronology of events which was annexed to the plaintiffs’ written outline of opening submission with such changes as I consider necessary.

…

(50) In November 2013, a resolution of all of the outstanding issues in the liquidations was reached with the various stakeholders. Specifically, the settlement resolved the POC Act proceedings, the proceedings relating to the receivers and the application to remove and replace the plaintiffs and review their remuneration. A Deed of Settlement was entered into that provided for:

(a) according to the plaintiffs, a release in favour of the plaintiffs in relation to their conduct and remuneration claimed to date;

(b) remuneration for the plaintiffs up to an amount of $750,000; and

(c) the submission of a consent order to the Supreme Court of Victoria that the entirety of the surplus funds held by the plaintiffs be forfeited to the Commonwealth and then on forwarded to:

(i) Mr Robert Greeley (as receiver appointed by the United States Bankruptcy Court) with respect to 90% of 1 of 101 shares in SKFA, less an amount $100,000; and

(ii) SK Foods, LP and Mr Sharp with respect to 90% of 100 of 101 shares in SKFA.

(iii) The 10% balance of the surplus funds was retained by the Commonwealth.

(51) The plaintiffs proceeded to draw remuneration up to the $750,000 cap. Mr Sharp objected to the drawing of such remuneration, asserting that the deed did not operate as approval of remuneration. In consequence, the plaintiffs repaid the amounts drawn. On 29 August 2014, the plaintiffs entered into a subsequent Deed of Settlement with Mr Sharp which, according to the plaintiffs, resolved all issues, including the remuneration after November 2013.

…

1. It is also convenient to note what I said in the substantive reasons about the position of the Commonwealth (at [265]):

265 Finally, ASIC submits even on the plaintiffs’ approach, that it was not the case that Mr Sharp was or is the only person who could suffer prejudice were an order to be made. Even if that submission embodied the correct approach, it was not correct as a matter of fact. The Commonwealth has an interest in 10% of the surplus assets of the Companies. That is correct, and I refer to the orders made by the Supreme Court of Victoria in the POC Act Proceedings on 28 November 2013.

1. There are two answers to the plaintiffs’ submission. First, the plaintiffs have, I have found, received monies to which they were not entitled and those monies are repayable to the respective company’s administration accounts. The persons or entities who may benefit from the repayment of those monies is a separate question and, in my opinion, is irrelevant to whether interest should be paid on those monies. Secondly, I accept ASIC’s submission that if contrary to my view, the conduct of those persons or entities who may benefit is relevant, there is nothing in the Commonwealth’s conduct which indicates that it should not benefit from monies which come into the liquidation.
2. The submission by the plaintiffs that ASIC abandoned any contention it would make that interest should be paid on monies to be repaid into the administrations in the interlocutory stages of this proceeding is misguided. I am not convinced that it is up to ASIC to do that, even if it was found that it had done so. The matter is one for the Court. In any event, ASIC did not abandon a contention that interest should be paid on monies to be repaid to the companies.
3. ASIC made it clear in its letter to the plaintiffs dated 24 June 2015 that monies repaid to the administrations should carry interest. Mr Lock in his affidavit sworn on 10 July 2015 gave an undertaking to pay amounts found to be excessive into the administrations, but the undertaking did not include interest on the amounts repaid. The proceeding came before a Deputy Registrar of this Court on 18 August 2015. The undertaking proffered by Mr Lock on behalf of the plaintiffs was discussed. The solicitor appearing for ASIC raised both the question of whether the monies should be repaid immediately in accordance with the IPAA COPP and the question of interest. I have read the transcript of the hearing and I do not consider anything the solicitor for ASIC said amounted to an abandonment of a contention by ASIC that interest should be paid on the amounts the plaintiffs were required to repay to the administrations.
4. Finally, I am of the opinion that interest should be calculated by reference to the Court’s Practice Note. I have considered Mr Lock’s affidavit. I have also considered the remarks of the Full Court of this Court in *Management 3 Group Pty Ltd (in liq) v Lenny’s Commercial Kitchens Pty Ltd (No 2)* [2012] FCAFC 92; (2012) 203 FCR 283 at [25]–[26]. The Practice Note is an appropriate and proper basis for the calculation of interest.

# ISSUE 3

1. The orders sought by ASIC are as follows:

The plaintiffs bear their own costs of and incidental to the application personally without any right of indemnity from the assets of the Companies; and

The plaintiffs pay the intervener’s costs of and incidental to the application, to be taxed if not agreed, personally without any right of indemnity from the assets of the Companies.

1. The plaintiffs accept that they will not seek to recover costs from the administrations pursuant to any right of indemnity they might otherwise have. That is consistent with cl 16.3 of the IPAA COPP. They submit that no order should be made as to costs.
2. For reasons which follow, the orders sought by ASIC should be made.
3. Both parties had a common starting point and that was that in the usual case, an order to costs is not made in favour of an intervener. They referred to *Tonto Homes Loans Australia Pty Ltd v Taveres; FirstMac Ltd v Di Benedetto; FirstMac Ltd v O’Donnell (No 2)* [2012] NSWCA 129 at [16]. It is, with respect, worth noting some observations made by the Court of Appeal in that case (at [7]–[9] and [14]–[16]):

7 I might say at the outset, and without the slightest intended disrespect to counsel for the respondents to the appeals, the presence of ASIC was of great assistance in the conduct of the appeals. Litigation involving statutes of such public importance as the Corporations Act often calls for the participation of the regulator, who will often have a perspective on the application of the statute not as sharply perceived as by others. It is in the public interest and in the interests of the administration of justice that ASIC not be deterred from giving assistance to the court. At the same time, private litigants should not have to pay additional sums in legal fees, for the general good of the administration of justice and in the elucidation of a statute of particular concern to an intervenor.

8 Debelle J helpfully expressed guidance about the costs of intervenors in *City of Burnside v Attorney-General (SA)* [1994] SASC 5136; 63 SASR 65 at 67‑68 [11]:

There appears to be no reason why as a matter of general principle an unsuccessful intervener should not be subject to the general rule that costs follow the event. However, it is not appropriate to apply that general rule without qualification. If a successful intervener is not entitled to his costs where his interests are adequately protected by an existing party to the action, it would be inequitable for an unsuccessful intervener to be liable to costs in like circumstances. However, an unsuccessful intervener might be liable for costs if his intervention has substantially extended the hearing or put the successful party to unnecessary cost. In such circumstances, the intervener might be liable to pay a portion of the successful party’s costs, that portion being determined by the extent to which the hearing has been lengthened by the intervention. Such a rule is consistent with the principle that, generally speaking, an intervener must take the action as he finds it.

This statement was applied in *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* [2009] WASCA 31(S) at [8].

9 The High Court in *Liverpool City Council v Weir* (1984) 53 ALR 77 at 83 said:

... an intervener, even a Minister responsible for the administration of the legislation in question in the case, cannot expect as of course that the unsuccessful party to the litigation in which he has intruded should bear the extra burden of his costs, even if his intervention was well intentioned and proved to be of assistance to the court.

…

14 Without belabouring facts canvassed in the main judgment, the lending practices of these lenders and the behaviour of their commercial counterparty (Streetwise) were such as to attract the regulator to participate in the way it did: in my view, entirely justifiably. The lenders, through the conduct of their agent (the mortgage originators), bear much of the responsibility (amongst the parties to the litigation) for the long and costly legal battle, in which ASIC participated perfectly properly.

15 Though there was inevitably a degree of extension of the time taken to run the trial and hear the appeal, given the primary facts, the importance of this kind of structure of lending to the market and ASIC’s significant assistance in an efficient manner, I would not order it to pay any costs to the appellants for any such extension.

16 As an intervenor, ASIC should participate at its own cost: *Weir* at 83; *Speno Rail* at [8]-[10]; and *City of Burnside* at 67-68 [10].

1. ASIC’s role as an intervener in this case was quite different from what it might be in other cases. It pointed to the following matters:
2. The plaintiffs’ application for orders under s 1322(4)(a) of the Act was substantial and was rejected;
3. ASIC was the only other “party” to the plaintiffs’ application;
4. ASIC played a very substantial role in the case, including adducing expert evidence from Mr Gothard and evidence about hourly rates from a number of insolvency practitioners. It also cross-examined the plaintiffs. The result of the case is that the plaintiffs’ remuneration has been reduced by approximately $1.9 million;
5. Other than some minor concessions by Mr Sheahan in cross-examination, the plaintiffs made no substantial concessions from start to finish. Their response to the Notice of Objections was, for the most part, a simple statement of not agreed; and
6. Neither of the plaintiffs had personally conducted a detailed examination of the WIP reports even by the time of trial (substantive reasons at [291]).
7. Each of these submissions are correct and, subject to my consideration of the plaintiffs’ arguments, provide an overwhelming case for the payment of ASIC’s costs by the plaintiffs. In fact, it is difficult for me to see how there could have been a proper review of the plaintiffs’ remuneration without the substantial role played by ASIC.
8. First, the plaintiffs submitted that Mr Sharp was not disadvantaged and that is a reason not to award costs. It seems to me that Mr Sharp’s position, whatever is or may have been, is irrelevant to the question of costs and I reject the submission.
9. Secondly, the plaintiffs submitted that there should be no order as to costs because ASIC had not succeeded in a number of its objections. The plaintiffs analysed ASIC’s objections and the substantive reasons and produced a 13-page schedule which analysed the results by issue and the evidence relevant to each issue and the time spent on each issue before and at trial calculated by the number of paragraphs in affidavits and written submissions and the number of transcript pages.
10. It is true that not every objection advanced by ASIC has been accepted. The most notable of the objections not accepted related to the extent of the plaintiffs’ investigations into the debt and equity issues. It is also true that some objections were not accepted to the full extent. I should say, in this context, that I am not here referring to those cases where there was a substantial reduction on any view, albeit not by the percentage advanced by ASIC. In my opinion, such cases should not bear on the question of costs. The key feature for costs purposes is that both the suggested reduction and the actual reduction are substantial reductions.
11. The fact that not every objection was accepted or (in the relevant sense not accepted to the full extent) does not mean that costs should not be awarded in favour of ASIC. I have already referred to the matters advanced by ASIC. A number of ASIC’s specific submissions were advanced after I made a request during the trial for further assistance from it. Furthermore, this is a case where the Court should stand back and consider the overall result of the case. The plaintiffs were unsuccessful in their application for orders under s 1322(4)(a) of the Act. Their remuneration was reduced by approximately $1.9 million or 30% of their overall claim. They should pay ASIC’s costs.

# CONCLUSIONS

1. For these reasons, I will make the following orders:
2. Pursuant to s 449E(1) and s 511 of the Act the remuneration of the plaintiffs first as administrators and then as liquidators of the following companies (the Companies) be fixed in the amounts indicated:
   1. SK Foods Australia Pty Ltd (in liquidation) (SKFA); Cedenco JV Australia Pty Ltd (in liquidation) (CJVA):
      1. the remuneration of the plaintiffs as administrators for the period 6 May 2010 to 10 August 2010 be fixed in the amount of $338,623.65 (plus GST);
      2. the remuneration of the plaintiffs as liquidators for the period 11 August 2010 to 31 October 2013 be fixed in the amount of $2,969,464.46 (plus GST); and
      3. the remuneration of the plaintiffs as liquidators for the period 19 November 2013 to 12 September 2014 be fixed in the amount of $43,162.33 (plus GST).
   2. SS Farms Australia Pty Ltd (in liquidation) (SSFA):
      1. the remuneration of the plaintiffs as administrators for the period 10 July 2010 to 6 August 2010 be fixed in the amount of $10,644.44 (plus GST);
      2. the remuneration of the plaintiffs as liquidators for the period 11 August 2010 to 30 June 2012 be fixed in the amount of $442,377.23 (plus GST);
      3. the remuneration of the plaintiffs as liquidators for the period 1 October 2012 to 31 October 2013 be fixed in the amount of $73,978.99 (plus GST); and
      4. the remuneration of the plaintiffs as liquidators for the period 19 November 2013 to 12 September 2014 be fixed in the amount of $19,151.80 (plus GST).
3. The plaintiffs repay the Companies the amounts by which the remuneration which has been drawn by them exceeds the amounts approved in these orders plus interest on such amounts from the date on which they were drawn to the date on which they are repaid at the rates set out in the Court’s Interest on Judgments Practice Note (GPN-INT). Any dispute about the amount of interest is to be determined by the Court or a Registrar of the Court.
4. The plaintiffs bear their own costs of and incidental to the application personally without any right of indemnity from the assets of the Companies.
5. The plaintiffs pay the intervener’s costs of and incidental to the application, to be taxed if not agreed, personally without any right of indemnity from the assets of the Companies.

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| I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 12 June 2019

SCHEDULE OF PARTIES

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| Plaintiffs |  |
| Fourth Plaintiff: | IAN RUSSELL LOCK AND JOHN SHEAHAN AS JOINT AND SEVERAL LIQUIDATORS OF SK FOODS AUSTRALIA PTY LTD (IN LIQUIDATION) |
| Fifth Plaintiff: | IAN RUSSELL LOCK AND JOHN SHEAHAN AS FORMER JOINT AND SEVERAL ADMINISTRATORS OF SS FARMS AUSTRALIA LTD (IN LIQUIDATION) |
| Sixth Plaintiff: | IAN RUSSELL LOCK AND JOHN SHEAHAN AS JOINT AND SEVERAL LIQUIDATORS OF SS FARMS AUSTRALIA PTY LTD (IN LIQUIDATION) |