Federal Court of Australia

Senatore, in the matter of Autotech Services (ACT) Pty Ltd (in liq) [2022] FCA 1450

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| File number: |  |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 30 November 2022 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – application by liquidator of trustee company for appointment as a receiver of trust property – approval of receiver’s remuneration, past and future – dispensing with requirements for security and guarantee  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 57*Federal Court Rules 2011* (Cth) rr 14.21, 14.22, 14.24 |
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| Cases cited: | *ASIC v Linchpin Capital Group Ltd (No 3)* [2020] FCA 44; 142 ACSR 193*Cape v Redarb Pty Ltd (receiver and manager appointed)* [1991] FCA 769; 32 FCR 407*Caterpillar Financial Australia Ltd v Ovens Nominees Pty Ltd* [2011] FCA 677*Cremin, in the matter of Brimson Pty Ltd (in liq)* [2019] FCA 1023; 136 ACSR 649*Hosking, in the matter of Business Aptitude Pty Ltd (in liq)* [2016] FCA 1438*Hughes, in the matter of Substar Holdings Pty Ltd (in liquidation)* [2020] FCA 1863; 149 ACSR 185*In the matter of AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004*Park v Whyte (No 2)* [2017] QSC 229; [2018] 2 Qd R 413 |
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| Division: | General Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 30 November 2022  |
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| Solicitor for the Plaintiffs: | M Ness of Mills Oakley |

ORDERS

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|  | ACD 48 of 2022 |
| IN THE MATTER OF AUTOTECH SERVICES (ACT) PTY LTD (IN LIQUIDATION) ACN 131 797 530 |
|  | EZIO MARCO SENATORE IN HIS CAPACITY AS LIQUIDATOR OF AUTOTECH SERVICES (ACT) PTY LTD (IN LIQUIDATION) ACN 131 797 530First PlaintiffAUTOTECH SERVICES (ACT) PTY LTD (IN LIQUIDATION) ACN 131 797 530Second Plaintiff |

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| order made by: | STEWART J |
| DATE OF ORDER: | 30 November 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth), the first plaintiff, Ezio Marco Senatore in his capacity as liquidator of the second plaintiff, Autotech Services (ACT) Pty Ltd (in liquidation) (**the Company**), be appointed, without security, as receiver of all the assets (**the Assets**) of The Lee Family Trust (**Trust**) until further order of the Court.
2. Any requirement for the first plaintiff to file a guarantee under r 14.21 and r 14.22 of the *Federal Court Rules 2011* (Cth) be dispensed with.
3. The first plaintiff have the powersin respect of the Assets, *nunc pro tunc*, that a liquidator has in respect of the property of a company under the *Corporations Act 2001* (Cth) including, without limitation, the power to do all things necessary and convenient to effect the sale of the Assets for the purpose of discharging liabilities incurred by the Company in its capacity as trustee of the Trust.
4. The costs, expenses and remuneration incurred by the first plaintiff in acting:
	1. as receiver of the Trust and
	2. as liquidator of the second plaintiff, including the costs of this proceeding,

be payable from the assets of the Trust.

1. The first plaintiff be allowed remuneration for the work undertaken over the period from 1 September 2021 to 27 September 2022 in the liquidation of the Company in the sum of $38,893 (plus GST).
2. For the approval of costs, expenses and remuneration incurred after 27 September 2022, including the costs of the proceeding, the first plaintiff apply to a Registrar of the Court by interlocutory application supported by affidavit.
3. On the completion of his duties as receiver, the first plaintiff:
	1. file accounts with the Court as required by r 14.25; and thereafter
	2. apply to the Court for orders discharging and releasing him from his appointment as receiver by sending an email to the Associate to Justice Stewart.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. The first plaintiff is the **liquidator** of Autotech Services (ACT) Pty Ltd (**the Company**). He was appointed liquidator on 1 September 2021 by way of a creditors’ voluntary winding up.
2. The second plaintiff is the Company in liquidation.
3. Notice of the proceeding has been given to Henry Lee who is the former director of the Company and the principal beneficiary and appointor of The Lee Family Trust of which the Company was the corporate trustee prior to its winding up. Mr Lee has not sought to appear or otherwise be heard in the proceeding.
4. By cl 21 of the governing trust deed, the Company was disqualified from holding office on being wound up. As no other trustee has been appointed, the Company remains the bare trustee holding the assets of the trust but with its duties, powers and rights being limited to protecting the trust assets. However, as bare trustee the Company retains its right of indemnity or exoneration and its lien over the assets of the trust. See ***Caterpillar*** *Financial Australia Ltd v Ovens Nominees Pty Ltd* [2011] FCA 677 at [26] per Gordon J.
5. The plaintiffs seek orders that the liquidator be appointed as receiver of all the assets of the trust and that he have, in respect of the trust assets, nunc pro tunc, the powers that a liquidator has in respect of the property of a company under the *Corporations Act 2001* (Cth). Relief is also sought with respect to the liquidator’s costs, expenses and remuneration incurred by him in acting as receiver of the trust and as liquidator of the Company being paid from the assets of the trust, and related relief.

## Relevant background

1. The Company was incorporated on 23 June 2008. Prior to the liquidator’s appointment, Mr Lee was the sole director and secretary of the Company. There was a previous director and shareholder of the Company, Paul David Pullin, from the date of its incorporation until 1 July 2018.
2. Since his appointment, the liquidator has conducted extensive investigations into the affairs of the Company. These have revealed that the Company, at all material times, was the corporate trustee of the trust. The trust is a discretionary trading trust which was established by the trust deed which is dated 23 June 2008, the same date as the date of incorporation of the Company.
3. The trust deed includes provisions to the effect that the trustee may from time to time charge and retain out of the trust fund such trustee’s commission as is reasonable, and that the trustee shall be entitled to be indemnified out of the assets of the fund against liabilities incurred by the trustee in the execution of the trustee’s powers and discretions.
4. The liquidator says that his investigations have revealed that for a period of time, the duration of which he has not been able to ascertain, the Company conducted the business of a partnership called Autotech Services Partnership. The partners appear to have been the trustee for each of the Lee Family Trust and the Pullin Family Trust. The ABN of the partnership was also registered from 23 June 2008.
5. Apparently following a dispute between Mr Lee and Mr Pullin, the principals behind the partnership, the partnership dissolved and Mr Lee assumed the business of the Company.
6. By the time the liquidator was appointed, the business of the Company had ceased, and the assets were in various locations within the Australian Capital Territory. The liquidator collected and realised the assets, obtaining a total amount of $73,300. The assets constituted, in the main, tools, parts and manuals relevant to a motor mechanical business.
7. There are a number of creditors of the Company. In his statutory report to creditors, the liquidator reported that he estimated the liabilities of the Company to be in the order of $375,000.
8. From the information available to the liquidator, he believes the following:
9. The Company was established together with the trust for the sole purpose of acting as the corporate trustee of the trust in a discretionary trading trust structure, operating an automotive, mechanical and engine repair business.
10. There is no other entity that may have been appointed as trustee of the trust at any time prior to his appointment, and it appears unlikely that another trustee will be appointed or otherwise consent to act.
11. It appears that, at all material times prior to his appointment, the Company’s sole purpose was to act as trustee of the trust. That is, the Company did not trade in its own right but only in its capacity as trustee of the trust.
12. The Company does not own any assets in its name (including bank accounts) but holds assets beneficially as trustee of the trust.
13. By the Report on the Company’s Activities and Property and the Proofs of Debt submitted to him in the liquidation of the Company, the Company incurred liabilities in its role as trustee of the Trust.
14. The liquidator seeks appointment as receiver of the trust assets in order to regularise what he has already done to realise the trust assets and to enable him to finalise the winding up of the Company.
15. As at 27 September 2022, the liquidator had incurred costs and expenses and claims remuneration in the winding up of the Company in the total amount of $38,893 (excluding GST). He has sworn to a schedule that details how that figure is arrived at, including by charging for a variety of tasks undertaken by him or his staff on a time basis. He seeks approval of those costs, expenses and remuneration in the liquidation of the Company, and that they and the costs of the proceeding be paid from the assets of the trust. That is on the basis that the Company’s sole purpose was to act as trustee of the trust.

## Consideration

1. Section 57 of the *Federal Court of Australia Act 1976* (Cth) provides that the court may appoint a receiver by interlocutory order in any case in which it appears to the court to be just or convenient to do so. Division 14.3 of the *Federal Court* ***Rules*** *2011* contains further provisions with regard to the appointment of receivers.
2. The general ground upon which the court appoints a receiver is the protection or preservation of property for the benefit of persons who have an interest in it: *Hosking, in the matter of Business Aptitude Pty Ltd (in liq)* [2016] FCA 1438 at [17] per Gleeson J. In the present case that is the liquidator in respect of his costs, expenses and remuneration and the creditors of the Company in respect of their claims against the Company.
3. The general principles applicable to the appointment of the liquidator of a corporate trustee as receiver of the trust assets, as well as payment of the liquidator’s fees and charges from those assets, are conveniently identified and summarised by McKerracher J in *Hughes, in the matter of Substar Holdings Pty Ltd (in liquidation)* [2020] FCA 1863; 149 ACSR 185 at [26]-[29]. Relevantly, those principles include the following:
4. The liquidator of a corporate trustee is entitled to apply assets of the trust to satisfy debts properly incurred by the company in performance of its duties as trustee. The company as trustee has a right of indemnity or exoneration out of trust assets secured by an equitable lien or charge over those assets: *Caterpillar* at [14].
5. The liquidator of an insolvent (former) corporate trustee cannot sell the trust’s property without an order of the Court, or by appointment of a receiver over the trust assets: ***Cremin****, in the matter of Brimson Pty Ltd (in liq)* [2019] FCA 1023; 136 ACSR 649 per Moshinsky J at [49].
6. Although in certain circumstances, particularly where all the trust property will be exhausted by the liabilities, it is appropriate for the liquidator to be given a discrete power of sale, the common course is to appoint the liquidator as receiver over all trust property for the purpose of realising the assets for the benefit of creditors: *Cremin* at [50].
7. In addition, where the company is trustee of a trading trust and has no other activities, the liquidator is entitled to be paid their costs and expenses, whether for administering the trust assets or for “general liquidation work”, out of the trust assets: *In the matter of AAA Financial Intelligence Ltd (in liq)* [2014] NSWSC 1004 at [13] per Brereton J.
8. I am satisfied that the realised assets are trust assets, that the business of the Company was limited to acting as trustee of the trust with the result that the liabilities of the Company were incurred by it as trustee, that the Company is entitled to indemnification from the trust assets, that the liquidator’s costs, expenses and remuneration, including the costs of the present application, are recoverable from the trust assets, and that it is in the interests of the body of creditors of the Company that the liquidator have the power to realise the trust assets. On that basis, I am satisfied that the liquidator should be appointed, nunc pro tunc, as receiver of the trust assets with the powers that he seeks.
9. With regard to approval of the liquidator’s costs, expenses and remuneration to 27 September 2022, the power of the court under r 14.24 of the Rules to fix a receiver’s remuneration is governed by the general principle that the court should only allow remuneration which is fair and reasonable. In determining remuneration, it is not the function of the court to hypercritically assess the day by day activities or tasks carried out by the receiver. See *ASIC v Linchpin Capital Group Ltd (No 3)* [2020] FCA 44; 142 ACSR 193 at [7] per Derrington J, citing *Park v Whyte (No 2)* [2017] QSC 229; [2018] 2 Qd R 413 at [163] per Jackson J. I have perused the schedule of such charges in this case and I am satisfied that they are fair and reasonable.
10. I am also satisfied that because most of the work that has to be done as receiver has already been done, the assets have been realised and their value is comparatively little, and that the liquidator is a registered liquidator, it is justified and appropriate that he be excused from providing security, including that he be excused from providing any guarantee as referred to in rr 14.21 and 14.22 of the Rules.
11. Unlike in some other cases, the liquidator has not provided an estimate of the costs, expenses and remuneration to be incurred to finalise the winding up of the Company, which will include what he has to do as receiver. I am therefore not in a position to consider whether any such costs, expenses and remuneration should be approved in advance. As a general rule, a court-appointed receiver is not entitled to draw remuneration from the funds of the receivership without prior orders of the court fixing the basis of the remuneration, and taxing the costs: *Cape v Redarb Pty Ltd (receiver and manager appointed)* [1991] FCA 769; 32 FCR 407 at 417 and 419 per Gallop, Ryan and von Doussa JJ. I am, however, persuaded that the liquidator should be entitled to charge on a time basis in accordance with the usual professional charges of his firm which I take to be market related.
12. The best way to deal with approval of any outstanding costs, expenses and remuneration is to direct the liquidator to apply to a Registrar of the court for that purpose. In that regard, r 14.24 of the Rules provides that a receiver may apply to the court to have the court fix the receiver’s remuneration, and by item 146 of Sch 2 of the Rules that is a power that can be exercised by a Registrar.
13. With reference to r 14.25, which requires a receiver to file accounts at times ordered by the court, the liquidator should file a final account before he applies for his discharge as receiver.
14. I will make orders accordingly.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 30 November 2022