Federal Court of Australia

Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd (No 2) [2022] FCA 652

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 2 June 2022 |
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| Catchwords: | **CORPORATIONS** - application for advice by Court appointed receivers - issues as to final form of orders - whether order should provide for priority of right of recoupment over right of exoneration |
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| Cases cited: | *Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd* [2022] FCA 199 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 15 |
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| Date of hearing: | 31 May 2022 |
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| Counsel for the Applicant: | Mr PR Edgar |
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| Solicitor for the Applicant: | Lavan |
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| Counsel for the Respondent: | Mr JP Cook |
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| Solicitor for the Respondent: | Mendelawitz Morton |
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| Counsel for the Receivers: | Mr C Pearce |
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| Solicitor for the Receivers: | Blackwall Legal |

ORDERS

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|  | | WAD 143 of 2020 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF MICHAEL GEORGE FOTIOS | | |
| BETWEEN: | IAN CHARLES FRANCIS AND JOANNE EMILY DUNN AS JOINT AND SEVERAL TRUSTEES OF THE BANKRUPT ESTATE OF MICHAEL GEORGE FOTIOS  Applicant | |
| AND: | HELIOS CORPORATION PTY LTD (ACN 636 970 771)  Respondent | |
|  | ROBERT MICHAEL KIRMAN AND ROBERT CONRY BRAUER AS JOINT AND SEVERAL RECEIVERS OF THE MICHAEL FOTIOS FAMILY TRUST  Receivers | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 2 June 2022 |

THE COURT NOTES THAT:

1. In these orders:
   1. **Bankrupt** means Mr Michael George Fotios whose bankrupt estate is being administered by the applicants.
   2. **Entitlement** means any Unpaid Present Entitlement as defined in the Experts' Report as may be ultimately established (but only where that term is capitalised).
   3. **Experts** means Mr Martin Bruce Jones and Mr Thomas Donald Birch of KPMG appointed as experts by this Court on 30 November 2020.
   4. **Experts' Report** means the Experts' report annexed to the Affidavit of Thomas Donald Birch sworn 30 May 2021.
   5. **Trust** means the Michael Fotios Family Trust created by a deed dated 29 October 1986.
   6. **Property** means property of the Trust.
   7. **Receivers** means the receivers appointed as the joint and several receivers of the Trust by orders made on 6 September 2021 in these proceedings.

THE COURT ORDERS THAT:

1. The orders made in these proceedings by way of judicial advice on 21 December 2021 as varied by orders made on 23 February 2022 be vacated.
2. The Receivers will be justified if they treat the Property and the rights of parties to access the Property on the basis that it is subject to the following entitlements in order from highest priority to lowest:
   1. the Experts are entitled to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as Experts as approved by the Court to be paid out of the assets of the Trust and such entitlement is secured by a first-ranking lien; and
   2. the Receivers are entitled, subject to any necessary approvals, to have recourse to the assets of the Trust for their reasonable costs, expenses and remuneration in respect of the work undertaken:
      1. as external administrators of the Respondent and to render the assets of the Trust available to meet the claims against the trust assets; and
      2. in the course of their receivership,

up to the amounts ordered by the Court under order 4 of the orders made by this Honourable Court in this proceeding on 6 September 2021 and under order 4 of these orders.

* 1. The applicants are entitled, subject to any necessary approvals, to their reasonable costs, expenses and remuneration in respect of the work undertaken in assisting the Receivers with their care, preservation and realisation of the Property, up to the amounts ordered by the Court (including under order 5 of these orders), with such costs, expenses and remuneration to be paid out of the assets of the Trust and secured by a lien over the Property.
  2. The applicants are entitled to rights of:
     1. reimbursement for personal expenditure (by the Bankrupt or by the applicants) to satisfy liabilities owed by the Bankrupt in his capacity as trustee of the Trust; and
     2. exoneration for unsatisfied liabilities of the Bankrupt properly incurred in his capacity as trustee,

where a proper basis for those rights has been demonstrated and on the basis that any right of reimbursement in respect of a liability satisfied by the Bankrupt ranks against the trust assets where the right of exoneration in respect of that debt would have ranked had the liability remained unsatisfied and is supported by an equitable lien or charge against the property of the Trust and on the basis that the applicants will distribute property obtained in the exercise of those rights subject to the priorities established under the applicable statutory scheme including under the *Bankruptcy Act 1966* (Cth), each such right of reimbursement and exoneration being subject to any obligations of the Bankrupt or applicants which may decrease their entitlements.

* 1. The respondent is entitled to rights of:
     1. reimbursement for personal expenditure (by the Bankrupt or by the applicants) to satisfy liabilities owed by the Bankrupt in his capacity as trustee of the Trust; and
     2. exoneration for unsatisfied liabilities of the Bankrupt properly incurred in his capacity as trustee,

where a proper basis for those rights has been demonstrated and on the basis that any right of reimbursement in respect of a liability satisfied by the Bankrupt ranks against the trust assets where the right of exoneration in respect of that debt would have ranked had the liability remained unsatisfied and is supported by an equitable lien or charge against the property of the Trust and on the basis that the applicants will distribute property obtained in the exercise of those rights subject to the priorities established under the applicable statutory scheme including under the *Corporations Act 2001* (Cth), each such right of reimbursement and exoneration being subject to any obligations of the respondent which may decrease their entitlements.

1. The:
   1. reasonable additional remuneration of $198,814 plus GST and expenses of $12,236 plus GST for the period between 10 April 2021 and 4 June 2021; and
   2. reasonable additional remuneration of $1,000 plus GST and expenses of $3,500 plus GST for the period between 5 June 2021 and the date of the hearing of this Application,

of the Experts is approved.

1. Subject to further order, the combined costs, expenses and remuneration of the Receivers and the administrators the subject of the priorities stated in order 2(b) shall not exceed $550,000.
2. Subject to further order, the costs, expenses and remuneration of the applicants the subject of the priority stated in order 2(c) shall not exceed $125,000.
3. The Receivers will be justified if they treat the Property and the rights of parties to access the Property on the basis that the Entitlements are claims by creditors to be subrogated to the rights of the Bankrupt or the respondent as the case may be as trustee of the Trust to be exonerated from the assets of the Trust that are of the kind described in order 2.
4. The Receivers will be justified if they treat the Property and the rights of parties to access the Property on the basis that the amount of $267,380.75 contributed by Ms Renee Fotios to the satisfaction of her guarantee of the debt of the Bank of Queensland secured by her interest in the property at 12 Kathleen Street Trigg in Western Australia is a subrogated claim as a creditor to be subrogated to the rights of the Bankrupt as trustee of the Trust to be exonerated from the assets of the Trust of the kind described in order 2, if such a claim is made by Ms Fotios.
5. The Receivers will be justified if they only distribute Property to which the applicants or respondent are entitled by way of exoneration as described in order 2 on the basis that, in the case of any creditor seeking to be subrogated to the rights of the applicants or respondent, the Property must be dealt with according to the priorities established under the applicable statutory schemes, including under the *Bankruptcy Act 1966* (Cth) and the *Corporations Act 2001* (Cth) as property that is not available to creditors of the applicants or respondent who are creditors in respect of liabilities other than Trust liabilities.
6. The Receivers will be justified if they treat any valid security interest under the terms of a loan deed executed between Ms Fotios and the respondent as trustee of the Trust on or about 9 August 2021 on the basis that the security interest ranks below the claims the subject of order 2(a) to (d).
7. In addition to the powers granted to the Receivers under order 2 of the orders made in this proceeding on 24 September 2021, and without limiting any existing powers, the Receivers shall have the following powers:
   1. to apply the assets of the Trust in satisfaction of the rights to Court approved remuneration (and other costs and expenses) of the Experts and the approved remuneration of the Receivers (including remuneration, costs and expenses as external administrators of the Respondent to the extent they fall within the category in order 2(b)(i) above); and
   2. to agree or make any compromise for the purpose of facilitating the distribution of the Property provided that any distribution shall be subject to approval by the Court.
8. Within two working days of the making of these orders the Receivers shall provide notice of these orders and the reasons of the Court for making these orders to each person who is identified in the Experts' Report as claiming an Entitlement.
9. There be liberty to any person affected by these orders (including without limitation the Receivers, the Experts, any party to these proceedings and any person notified in accordance with these orders) to apply within 30 days of the making of these orders to vary these orders by filing a notice in these proceedings stating that the person wishes to be heard concerning these orders, specifying an address for service and stating the aspect of these orders that the party seeks to vary.
10. If any notice is filed in accordance with order 11 then the application for judicial advice be listed for a further case management hearing on a date to be fixed.
11. The Receivers' costs of and incidental to the Receiver's application for judicial advice be costs in the receivership and be paid out of the assets of the Trust.

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

REASONS FOR JUDGMENT

COLVIN J:

1. Mr Michael Fotios was formerly the trustee of the Michael Fotios Family Trust (**Trust**). He was made bankrupt. His trustees in bankruptcy (**Trustees in Bankruptcy**) claim that creditors of his estate are subrogated to rights to seek exoneration from the assets of the Trust and can pursue his associated right of indemnity. On the basis of those rights, the Trustees in Bankruptcy have brought claims against the current trustee of the Trust, Helios Corporation Pty Ltd (**Helios**). Helios is in administration. It is unclear whether there is a deficiency in assets of the Trust to meet all claims against the property of the Trust.
2. The Court has made orders appointing joint and several receivers of the property of the Trust (**Receivers**). They have taken control of the property of the Trust. The Receivers have sought judicial advice concerning certain matters arising in the ongoing conduct of the receivership of the Trust.
3. In December 2021, I made orders as to certain aspects of the application for judicial advice. After a subsequent hearing as to the remaining aspects of the application, reasons were given and the parties were invited to provide a minute of proposed orders to give effect to the reasons: *Francis (Trustee), in the matter of Fotios (Bankrupt) v Helios Corporation Pty Ltd* [2022] FCA 199. It was proposed that the orders would replace the orders made in December 2021 so that there was a single set of orders on the application. A draft of the orders that might be made was provided to the parties for their consideration.
4. The parties have submitted proposed orders. There are two matters of controversy that arise in respect of the draft orders. First, the priority to be afforded the costs of the external administration of Helios. Second, the priority as between parties claiming against the assets of the Trust based upon rights of exoneration and recoupment.

## Priority of the costs of the external administration

1. An issue arises because the Receivers are also the voluntary administrators of Helios. The orders for their appointment were made by consent and were informed by the practical advantages and cost savings to be achieved if the same persons held the two offices each of which required steps to be taken in respect of the assets of the Trust. Reflecting that position, orders were made at the time of the appointment to provide for a cap on the overall costs to be incurred in both capacities. The orders made in December 2021 also reflected the fact that the costs were being treated, in effect, as a single set of costs.
2. On the basis that the work of the administrators was for care, preservation and realisation of assets, that treatment was appropriate and is appropriate up until this point. Work of that kind is appropriately treated as having the same status as the work of the Receivers.
3. However, it is possible that in respect of future costs, there may be costs of the administration that do not relate to such matters. There is no reason why those costs should be afforded the same priority as the cost of the receivership. Therefore, the orders should reflect that position in respect of any future costs that exceed the limits that have already been approved. The treatment of any such costs should be considered at the time of any application to further increase the cap.

## Competing priorities between rights of exoneration and recoupment

1. The Trustees in Bankruptcy contend that the appropriate priority between rights of recoupment and exoneration in respect of the assets of the Trust is that the rights of recoupment trump the rights of exoneration.
2. As I sought to state in my earlier reasons, the advice being sought is confined to the position of the Receivers when it comes to making payments from the fund comprising the property of the Trust. It is no concern of the Receivers as to how those funds might be dealt with by the Trustees in Bankruptcy or an administrator in insolvency of Helios. The distributions to be made out of those administrations will depend upon principles that include whether there have been preferences. This is reflected in the approach adopted by the Receivers on the application.
3. The issue for advice is confined to whether the assets of the Trust in the hands of the Receivers should be applied first to meet claims based upon the trustee's right to reimbursement and then to meet claims by creditors based upon subrogation to the trustee's right of exoneration. There appear to be no authorities on the point so it must be approached as a matter of principle.
4. The point has significance for two interrelated reasons. First, it is possible that there may be an insufficiency in the trust assets in the hands of the Receivers to meet the claims by subrogation to the claims of the trustee of the Trust to both exoneration and reimbursement. Second, as explained in my earlier reasons, the pool of creditors who may make subrogated claims based upon the trustee's right of exoneration do not include general creditors of the trustee. Therefore, in circumstances where the relevant trustee is insolvent, the question of priority may determine whether assets of the Trust in the hands of the Receivers flow to those creditors with claims in respect of liabilities of the Trust or to all creditors of the trustee. Further, if the general creditors are large in quantum an equal priority may mean that a large part of the assets end up in the hands of general creditors (noting the possibility of hotchpot claims by exoneration creditors against general assets of the trustee of the Trust).
5. It is suggested that I could provide advice on the basis that relevant creditors have been notified and no creditors appear to oppose the proposed orders which would give priority to reimbursement creditors. However, in my view, such an approach would not be appropriate. This is not an instance where the Court has some form of discretion to exercise (or is asked to provide advice concerning the proposed exercise by the trustee of a discretion) nor is it a case where the Court is entrusted with a power to determine what may be appropriate. The advice to be given is not affected by whether parties with a particular interest take the trouble to appear and argue their position. The advice to be provided must reflect the Court's view of the relevant law.
6. It is further suggested that as orders were made in the terms proposed in December 2021 that I should not now revisit that advice. However, the orders made in December 2021 were made to allow the Receivers to proceed, particularly to be able to incur costs knowing that they could be recovered. At that time I reserved other issues for later argument. There is no suggestion that the earlier orders have been acted upon in any way insofar as they concerned the question of priorities. In circumstances where other issues on the application were reserved for later consideration and those issues focussed attention on matters that exposed the significance of the question of competing priorities, I am satisfied that the Court can and should revisit the earlier orders given by way of advice. They were not a final adjudication of rights. They were made in the exercise of the special jurisdiction to provide judicial advice.
7. In the course of further oral submissions it was proposed that if the order of priorities was not to give preference to the reimbursement creditors then it ought to provide for any right of reimbursement in respect of a liability satisfied by the trustee to rank against the trust assets in the same way that the right of exoneration would have ranked had the liability remained unsatisfied. In the circumstances of the present case I am satisfied that an order in those terms would give effect to the principle of equality that should apply as between the two types of claims that may be made by the trustee. I do so recognising that other principles of equity may assume significance in another case.
8. For those reasons and my earlier reasons, I have today made orders by way of advice in terms that consolidate the earlier orders, deal with the issue of priorities and make adjustments for certain infelicities in expression so that the advice to the Receivers is contained in a single order.

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| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 2 June 2022