Federal Court of Australia

 Topp (Liquidator), in the matter of Aidzan Pty Limited (in Liquidation) v Nazdia Pty Limited [2020] FCA 1764

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| File number(s): |  |
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| Judgment of: | **RARES J** |
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| Date of judgment: | 20 November 2020 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – application *nunc pro tunc* for approval of payments of remuneration of Court appointed receivers and liquidators paid to themselves without prior application to Court – where liquidators misunderstood effect of orders entitling Registrar to determine amount of liquidators’ and receivers’ remuneration – *Held*: Registrar to determine and approve for payment, out of funds held by liquidators, their remuneration, costs and expenses as liquidators and receivers **BANKRUPTCY AND INSOLVENCY** – application *nunc pro tunc* for payment from assets held on two trusts by company in liquidation – whether necessary to apportion liability between assets of two trusts for remuneration of liquidators for brief period until new trustee appointed to superannuation fund – where only business of company was to act as trustee and liquidators and receivers did no substantive work in respect of superannuation trust and did not seek any remuneration for relevant short period – *Held*: liquidators authorised not to seek or apportion remuneration in respect of superannuation trust  |
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| Legislation: | *Superannuation Industry (Supervision) Act 1993* (Cth) s 120(2)(e) |
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| Cases cited: | *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 368 ALR 390 |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 32  |
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| Date of hearing: | 20 November 2020  |
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| Counsel for the Plaintiffs: | Mr Roger Marshall SC |
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| Solicitor for the Plaintiffs:  | Ashurst |
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| Solicitor for the Defendant: | Surry Partners Lawyers |
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| Solicitor for Mr Hayes (Interested Person):  | Watson Mangioni Lawyers Pty Limited |

ORDERS

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|  | NSD 306 of 2019 |
| IN THE MATTER OF AIDZAN PTY LIMITED (IN LIQUIDATION) |
| BETWEEN: | ALAN GODFREY TOPP IN HIS CAPACITY AS OFFICIAL LIQUIDATOR OF AIDZAN PTY LIMITED (IN LIQUIDATION) ACN 003 889 558First PlaintiffBRUCE GLEESON IN HIS CAPACITY AS OFFICIAL LIQUIDATOR OF AIDZAN PTY LIMITED (IN LIQUIDATION) ACN 003 889 558Second PlaintiffAIDZAN PTY LIMITED (IN LIQUIDATION)Third Plaintiff |
| AND: | NAZDIA PTY LIMITED ACN 631 617 331Defendant |

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| order made by: | RARES J |
| DATE OF ORDER: | 20 NOVEMBER 2020 |

THE COURT ORDERS THAT:

1. The Registrar determine the amount of the remuneration of the First and Second Plaintiffs for acting as liquidators of the Third Plaintiff for any work done not covered by order 1 made on 22 March 2019 or the approval given by the creditors of the Third Plaintiff on 22 May 2019.
2. *Nunc pro tunc* from 24 October 2019, the First and Second Plaintiffs, in their capacity as joint and several receivers and managers of the assets of the P.A.L. Property Trust (**Receivers**) pursuant to order 2 made on 6 March 2019 be authorised to pay the First and Second Plaintiffs’ expenses of the Third Plaintiff’s liquidation and their remuneration as liquidators of the Third Plaintiff as determined or authorised by order 1 made on 22 March 2019, the approval given by the creditors of the Third Plaintiff on 22 May 2019 or pursuant to order 1 made today from the funds they hold as Receivers.

THE COURT DIRECTS THAT:

1. The Receivers pay from the funds they hold as Receivers:
	1. the amount in order 2;
	2. the Receivers’ remuneration and expenses as approved by the Registrar,

and then hold the balance of the funds in the Receivership until further order.

1. The balance of the claims for relief in the Interlocutory Application filed on 29 July 2020 be fixed for hearing at 10:15am on 17 December 2020.
2. The Plaintiffs file and serve any further evidence by 4pm on 27 November 2020.
3. Any person wishing to apply for leave to be heard file any Interlocutory Process seeking leave to be heard by 27 November 2020, and that any such interlocutory Process be returnable for hearing at 10:15am on 17 December 2020.
4. Any person wishing to apply for leave to be heard, or who has leave to be heard, file and serve any evidence they wish to rely on by 4pm on 4 December 2020.
5. The Plaintiffs file and serve their written submissions limited to 5 pages by 4pm on 8 December 2020.
6. Alan Hayes file and serve his written submissions limited to 5 pages by 4pm on 11 December 2020.
7. Any person who has filed an Interlocutory Process under order 6 file and serve their written submissions limited to 5 pages by 4pm on 14 December 2020.
8. The Plaintiffs file and serve their submissions in reply limited to 3 pages by noon on 16 December 2020.

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

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

RARES J:

1. The first and second plaintiffs are the **liquidators** appointed by the Supreme Court of New South Wales on 4 February 2019 to **Aidzan** Pty Limited (in liq), which is the third plaintiff. On 6 March 2019, Yates J, in this Court, ordered that Alan **Topp** and Bruce **Gleeson** be appointed, without security, as joint and several **receivers** and managers of the assets of the **PAL** Property **Trust** until further order.
2. The orders made on 6 March 2019 included, *first*, objective 1 in annexure B that stated that the objective of the appointment of the receivers was to enable them to realise the assets of the PAL Trust, to enforce Aidzan’s right of indemnity against those assets and to apply the proceeds to discharge those liabilities of Aidzan to which the right of indemnity applied, and, *secondly*, order 8 that directed the Registrar to determine the amount of the liquidators’ remuneration for the period 4 to 26 February 2019, as claimed in Mr Topp’s affidavit of 27 February 2019.

## This application

1. The liquidators and receivers also seek a number of orders in their interlocutory application filed on 29 July 2020, including orders that that application be determined in two stages. The first stage seeks orders today that:
* the Registrar should determine the amount of the liquidators’ remuneration for the period from 27 February 2019;
* the liquidators pay that remuneration as fixed and their expenses as receivers (which are likely to be mainly legal fees) to themselves from the funds they hold in the receivership; and
* any funds held by the receivers, after paying any amount owing to the Commissioner of Taxation (which Mr Topp believes will be the subject of a nil certificate soon to be forthcoming), be paid to **Nazdia** Pty Ltd, the first defendant, after the Registrar determines the receivers’ remuneration for the period up to 24 June 2020, and the retention by the receievers of $350,000 to meet anticipated costs and expenses of the receivership and liquidation up to the anticipated terminations of those appointments.
1. Aidzan was the trustee of the PAL Trust. The circumstances in which Aidzan came to be the trustee of the PAL Trust, and their aftermath, are somewhat complex but, for present purposes, can be summarised broadly as follows, based on Mr Topp’s investigations as liquidator and receiver.
2. On 27 April 1955, each of Alan Laird (Holdings) Pty Limited (**ALH**) and K. & A. Laird (N.S.W.) Pty Ltd (**K. & A. Laird**) was incorporated. ALH did not appear to engage any trade or business activities. K. & A. Laird was the operating company of the family’s steel metalwork business. The eponymous **Alan** Laird appears to have been the patriarch of the family and the initial driving force behind its steel metalwork and associated businesses.
3. Subsequently, on 17 June 1959, **Winbourne** Engineering Pty Limited was incorporated, but according to Alan’s son, **Peter** Laird, it also did not engage any trade or business activities. Peter became a director of Winbourne on 4 March 1980. His mother, **Dorothy** Laird, became a director of Winbourne from 16 April 1984 until she passed away on 27 November 2009. One of Mr Laird’s siblings, **Michael** Laird, was appointed as secretary of K. & A. Laird on 28 September 1983 and as a director of Winbourne on 1 June 2017. Another sibling of Peter, **Debora** Laird (also known as Debora Roberts), became a director of ALH on 1 May 1979, and Peter also became one of its directors on 16 April 1984. Dorothy had been appointed a director of ALH on 30 June 1955 and remained so until her death. Michael became a director of ALH only on 7 August 2018.
4. Peter managed K. & A. Laird with his father during the 1970s and 1980s, having been appointed a director on 4 May 1980. Peter’s siblings did not take part in the day to day activities of the companies or their management although, as I have noted, Michael was appointed secretary of K. & A. Laird on 28 September 1983.
5. From the time that Alan withdrew from the day to day operations of K. & A. Laird in the late 1980s, Peter managed its operations alone. Alan passed away on 27 August 1987. Between 30 July 1987 to 27 November 2009, the shares in ALH were held as follows:

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| **Shareholder** | **Holding** |
| Dorothy | 50% |
| Peter | 16% |
| Michael | 8.5% |
| **David Laird** (another sibling) | 8.5% |
| Debora | 8.5% |
| **Christine** Laird(another sibling, now known as Christine Cook) | 8.5% |

1. Aidzan was incorporated on 26 October 1989. Dorothy and Peter became its directors, and each owned half of its shares. In around March 1990, Aidzan acquired industrial land at 146 Sunnyholt Road, Blacktown (the **Blacktown property**) in its capacity as trustee of the **Peter Laird Trust** that was settled contemporaneously, and Aidzan was appointed its trustee. The Blacktown property included a large warehouse and factory building. Aidzan leased the Blacktown property to K. & A. Laird from 24 March 1990. K. & A. Laird ran the steel metalwork business from the Blacktown property, and Peter managed it.
2. On about 1 January 1993, the Aidzan **Superannuation Fund** was established, and its sole beneficiary was, and remains, Peter. On about the same day, the PAL Property Trust was also established, and Aidzan was appointed its trustee under a trust deed which is apparently lost. All of the units in the PAL Trust, according to Mr Topp’s investigations, are held by Aidzan as trustee of the superannuation fund.
3. In 1993, the beneficial interest in the Blacktown property was transferred from the Peter Laird Trust to the PAL Trust for a consideration of $3.48 million but Aidzan, as trustee, remained the registered proprietor of that land.
4. Once Dorothy died on 27 November 2009, her shareholding was distributed among her children. The result of that distribution was that Peter held 32% and each of his four siblings held 17% in ALH. However, Dorothy’s shares in both Aidzan and Winbourne passed to Peter, and he became each of their sole director.
5. Peter informed Mr Topp that K. & A. Laird ceased operating in around 2013 and that stock that it owned remained at the Blacktown property for at least a year, before it was removed. Since then it has remained vacant. From about 2015 to the time of the appointment of the liquidators, rates and charges incurred in respect of the Blacktown property appear to have remained unpaid, including a debt to the petitioning creditor in the liquidation, Sydney Water, totalling over $30,000.
6. On about 24 August 2018, in members’ voluntary windings up, Alan **Hayes** was appointed the liquidator of K. & A. Laird, Winbourne and ALH.
7. Mr Topp’s investigations revealed that since 1993, Aidzan’s only business was to act as the trustee of the PAL Trust. Immediately after its liquidation on 18 February 2019, Aidzan was replaced as trustee of the superannuation trust by Nazdia. That is because the winding up of a superannuation fund trustee is a disqualifying event pursuant to s 120(2)(e) of the *Superannuation Industry (Supervision) Act 1993* (Cth).
8. Nazdia has, since its appointment, had administrative responsibility for ensuring that the superannuation fund complied with its obligations as a superannuation trustee, and the liquidators have never had any occasion to concern themselves with that work. Thus, although the liquidators were in legal control of Aidzan for about two weeks (until Nazdia’s appointment as trustee of the superannuation fund) it does not appear that they performed any substantive work in relation to the superannuation fund. Realistically and practically, in all of the circumstances, the liquidators do not think it is necessary to apportion anything for that short period in respect of any work done as an expense of the liquidation of Aidzan or in its capacity as the then insolvent trustee of the superannuation fund.
9. On 19 July 2019, the receivers caused Aidzan to enter into a contract to sell the Blacktown property. That contract completed on 23 October 2019, realising net proceeds, inclusive of GST, of $7,749,583.53. The three creditors of Aidzan were paid in full on completion of the sale.

## The liquidators’ remuneration

1. On 22 March 2019, the Registrar approved the liquidators’ remuneration of $33,084.50 for the period 4 to 26 February 2019, and that sum was paid from funds in the receivership.
2. On about 22 May 2019, Mr Topp obtained approval from Sydney Water, as petitioning creditor, for payment of remuneration and expenses totalling $12,590.50, excluding GST, incurred by the liquidators between 26 February 2019 to 28 April 2019, and for payment of their future anticipated remuneration of $15,000, excluding GST. Up until 24 July 2020, the total remuneration and expenses that Mr Topp and Mr Gleeson incurred amounted to about $132,500.
3. Mr Topp came to understand that those payments ought not to have been made without seeking a further order of the Court. He explained that the liquidators misunderstood the effect of the orders that Yates J made on 6 March 2019. He said that they believed that they had the right to make those payments, based on his initial understanding of *first*, objective 1 in annexure B to those orders and *secondly*, order 8. Mr Topp apologised in his affidavit for misunderstanding the proper interpretation of the Court’s orders, and now seeks that the Court retrospectively approve all of the payments of their remuneration as the receivers or liquidators that the liquidators made.

### Consideration – remuneration

1. As Aidzan is now clearly solvent, the liquidators anticipate that the winding up will soon be terminated and the company restored to its shareholders. Likewise, the purpose of the receivership is now fulfilled.
2. I am satisfied that, in all of the circumstances, Mr Topp has explained the basis of the liquidators’ misunderstanding of the 6 March 2019 orders. While the Registrar was entitled to determine the amount of the liquidators’ remuneration, as officers of the Court, for the period 4 to 26 February 2019, they were nonetheless required to seek the Court’s authorisation by an order for payment of any further remuneration. The misunderstanding may have arisen from an infelicity in the drafting of the orders. It is appropriate to approve the amount of remuneration, since it was determined by the Registrar in accordance with his Honour’s orders, and I will do so.
3. In my opinion, it is appropriate to order that the Registrar determine and approve for payment, out of the funds held by the liquidators, their remuneration as receivers and the costs and expenses of the receivership and liquidation up to 24 June 2020.

## Can the liquidators and receivers be paid from money held by Aidzan as trustee?

1. The second question that arises in the first stage of the interlocutory application is whether the liquidators’ and receivers’ remuneration and expenses can be paid from the assets that Aidzan holds on trust for the PAL Trust.
2. The liquidators contend that this is possible because the only business of Aidzan was to act as trustee of the PAL Trust. They submit that the consequence of the High Court’s decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 368 ALR 390 is that they will have a right of exoneration out of the trust property from which to discharge the amount of the remuneration, costs and expenses due to them in performance of their duties as liquidators and receivers, being to carry on the business of Aidzan solely in its capacity as trustee.
3. The liquidators argue that because Aidzan acted only as trustee, all of the work which they performed in their capacity as liquidators and receivers in its winding up ought be paid by the trust fund. They contend that it is not necessary for there to be any apportionment of liability for the cost of the work done by the liquidators for the short period during which Aidzan continued in its role as trustee of the superannuation fund.

### Consideration – can Aidzan pay?

1. Importantly, as Kiefel CJ, Keane and Edelman JJ explained in *Carter Holt* 368 ALR at 401 [24], a trust is not a separate entity. Therefore, a trust does not have a separate solvency status from that of its trustee. A trustee is personally liable for debts it incurs as trustee, whether or not the trustee contracted with creditors as a named trustee and whether or not creditors knew of the existence of trust. The Court held that a trustee’s power of exoneration can only be used according to its terms, and is confined to the use of trust funds to discharge debts properly incurred by the trustee. That right survives liquidation or bankruptcy of the trustee itself: *Carter Holt* 368 ALR at 403–404 [31]–[32] and 407–408 [44] per Kiefel CJ, Keane and Edelman JJ, 420 [92] per Bell, Gageler and Nettle JJ and 429 [130] and [132] per Gordon J. Kiefel CJ, Keane and Edelman JJ explained (at 409 [50], and see also at 437 [171] per Gordon J) that the power of exoneration is the property of the company in its capacity as trustee and can be used for its personal benefit as trustee.
2. As Bell, Gageler and Nettle JJ pointed out (at 422 [97], and Gordon J appears to have agreed at 435 [160]), ordinarily, where there is more than one trust of which a corporation is trustee, it will be necessary to apportion the burden of the work performed by the trustee to the relevant trust fund to which the trustee’s common work contributed.
3. In essence, that was the issue of present concern to the liquidators and receivers, which I have discussed above. However, as they have pointed out, in a practical sense the problem is more theoretical than real. It is not possible or apparent how to quantify or value, nor is it sensible to burden the superannuation fund with, any such expense for the two week period of the liquidation until Nazdia replaced Aidzan as trustee. That is because the liquidators and receivers did no substantive work in respect of the superannuation fund in that fortnight.
4. I accept the liquidators’ and receivers’ submission that, in the particular circumstances of the present case, it is not necessary to undertake what might be an artificial and expensive exercise in trying to make some small, and largely theoretical, allocation for that two week period.
5. For these reasons, I am of opinion that I should make orders that the Registrar determine the remuneration of the plaintiffs when acting as liquidators and receivers of the PAL Trust of Aidzan, for any work done and expenses not covered by the Registrar’s approval of 22 March 2019 or the approval of the creditors of Aidzan on 27 May 2019.
6. I shall make an order *nunc pro tunc* that, from 24 October 2019, the liquidators, as receivers of the PAL Trust, be authorised to pay their expenses of the liquidation of Aidzan, including the amount of their remuneration and expenses fixed by the Registrar, from the funds they hold in the receivership, and that after paying the amounts owing to themselves as liquidators, their own expenses and remuneration as approved by the Registrar, they hold the balance of the funds in the receivership until the further order.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 8 December 2020