FEDERAL COURT OF AUSTRALIA

Daly v Australian Securities and Investments Commission [2024] FCAFC 125

Appeal from:	*Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290 and *Australian Securities and Investments Commission v Daly (Penalty Hearing)* [2024] FCA 3
File number:	QUD 53 of 2024
Judgment of:	**O'CALLAGHAN, MCELWAINE AND JACKMAN JJ**
Date of judgment:	24 September 2024
Catchwords:	**CORPORATIONS** – civil penalty proceedings – liability phase – duties of officers of responsible entity of a registered managed investment scheme – whether appellant an officer of the responsible entity – where primary judge held that the contraventions were established – appeal dismissed **PRACTICE AND PROCEDURE** – application to amend notice of appeal – where proposed contention contrary to admission on the pleadings, contrary to the way in which the proceedings were conducted at first instance, would cause prejudice to the respondent, and is untenable – application dismissed **CORPORATIONS** – civil penalty proceedings – penalty phase – where primary judge ordered that the appellant be disqualified from managing corporations for five years and pay a pecuniary penalty of $150,000 – whether primary judge erred in exercise of discretion – appeal dismissed
Legislation:	*Corporations Act 2001* (Cth) s 601FD *Evidence Act 1995* (Cth) s 140
Cases cited:	*Adams v Director of Fair Work Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5; (2023) 407 ALR 302 *Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104

	Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2) [2019] FCA 398 *Briginshaw v Briginshaw* (1938) 60 CLR 336 *Chew v R* (1992) 173 CLR 626 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; (2007) 162 FCR 466 *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179; (2018) 129 ACSR 265 *House v R* (1936) 55 CLR 499 *Jones v Dunkel* (1959) 101 CLR 298 *R v Byrnes* (1995) 183 CLR 501
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	47
Date of hearing:	15–16 August 2024
Counsel for the Appellant:	Ms F McLeod AO SC and Ms L Keily
Solicitor for the Appellant:	Ten Four Law
Counsel for the Respondent:	Mr M Brady KC and Mr L Clark
Solicitor for the Respondent:	Gadens

ORDERS

QUD 53 of 2024

BETWEEN:	**MR PETER DALY** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY:	**O'CALLAGHAN, MCELWAINE AND JACKMAN JJ**
DATE OF ORDER:	**24 SEPTEMBER 2024**

THE COURT ORDERS THAT:

1. Leave to amend the Further Amended Notice of Appeal be refused.

2. The appeal be dismissed.

3. The appellant pay the respondent's costs of the appeal.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J

1 I agree with Jackman J.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan.

Associate: 

Dated: 24 September 2024

REASONS FOR JUDGMENT

MCELWAINE J:

2 I have read in draft the reasons of Jackman J. I agree with the orders that his Honour proposes and agree with his reasons.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice McElwaine.

Associate: 

Dated: 24 September 2024

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

3 This is an appeal brought on relatively narrow grounds from two judgments of the primary judge, namely *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290 (the **Liability Judgment**) and *Australian Securities and Investments Commission v Daly (Penalty Hearing)* [2024] FCA 3 (the **Penalty Judgment**).

4 In the proceedings at first instance, the Australian Securities and Investments Commission (**ASIC**) sought declaratory relief, pecuniary penalties and disqualification orders in relation to alleged contraventions of ss 601FD(1) and 601FD(3) of the *Corporations Act 2001* (Cth) (the **Act**) by four respondents in relation to their conduct as officers of Endeavour Securities (Australia) Ltd (in liquidation) (**Endeavour**), the responsible entity of the Investport Income Opportunity Fund (the **Registered Scheme**), a registered managed investment scheme. The four respondents were Mr Daly, Mr Nielsen, Mr Raftery and Mr Williams, the last three of whom were directors of Endeavour. Before Linchpin Capital Group Ltd (**Linchpin**) acquired Endeavour in December 2014, the Registered Scheme was known as the "Endeavour Hi-Yield Fund", although the Registered Scheme was inactive at the time of the acquisition by Linchpin. The allegations concerned failure to exercise reasonable care and diligence (s 601FD(1)(b)), failure to act in the best interests of members (s 601FD(1)(c)), improper use of position (s 601FD(1)(e)), and failure to take reasonable steps to ensure compliance with the Act (s 601FD(1)(f)). The primary judge found that Mr Daly contravened each of those provisions as an officer of Endeavour.

5 Another managed investment scheme bore the same name, Investport Income Opportunity Fund, and was an unregistered managed investment scheme of which Linchpin was the trustee (the **Unregistered Scheme**). Before Linchpin acquired Endeavour in December 2014, Linchpin had issued an Information Memorandum on about 22 January 2014 offering units in the Unregistered Scheme to investors, and about 46 investors invested a total of about $5.4 million between January 2014 and June 2015. During this period, Linchpin as trustee of the Unregistered Scheme commenced making loans using the pooled funds administered in the Unregistered Scheme.

6 Investport Pty Ltd (**IPL**) was the investment manager for both the Registered Scheme and the Unregistered Scheme from about December 2014. Australian Executor Trustees Ltd (**AET**) was the custodian for the Registered Scheme.

7 Endeavour raised about $17.3 million in the Registered Scheme from 131 investors pursuant to three product disclosure statements (**PDS**), issued on 27 April 2015, 1 October 2015 and 24 June 2016. About $16.5 million of the funds raised in the Registered Scheme were transferred to Linchpin as trustee of the Unregistered Scheme. Linchpin as trustee of the Unregistered Scheme then made loans, described by the primary judge in three categories as the Linchpin Entity Loans (being five loans to five different entities of the Linchpin group totalling about $14.8 million), the Adviser Loans (being loans to authorised representatives of AFSL holders within the Linchpin group totalling about $6.3 million), and the Linchpin Director Loans (being loans to Mr Daly and Mr Raftery totalling about $200,000). It is common ground between the parties in this appeal that the use of the common name, Investport Income Opportunity Fund, for both schemes was to make them appear to the public to be the same fund (T56.1–8; 108.1–6).

8 The primary judge referred to the period from 1 April 2015 to 7 August 2018 as the **Relevant Period**. The date of 1 April 2015 was the date of the circular resolution of a committee concerning the investment strategy of the Registered Scheme and the Unregistered Scheme, to which I refer in detail below. On 7 August 2018, receivers and managers were appointed to the property of Linchpin, the Unregistered Scheme and the Registered Scheme: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104. ASIC later brought proceedings against Linchpin and Endeavour (to which the respondents to the present proceedings were not parties) which were, to the extent possible, resolved by agreement, and by orders entered on 15 March 2019: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2)* [2019] FCA 398. On 15 March 2019, the receivers and managers were appointed as the joint and several liquidators of Linchpin and Endeavour and as the responsible persons for winding up the funds of the Registered Scheme and the Unregistered Scheme.

9 Mr Daly, the appellant, was a director of Linchpin during the Relevant Period but was not appointed as a director of Endeavour. A critical question in the proceedings at first instance was whether Mr Daly was an officer of Endeavour within the meaning of the then para (b)(i) and (ii) of the definition of "officer" in s 9 of the Act because he was a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or

(ii) who has the capacity to affect significantly the entity's financial standing.

10 At the commencement of the liability hearing, Mr Nielsen, Mr Raftery and Mr Williams confirmed that they did not contest ASIC's entitlement to declaratory relief on the basis that the evidence led by ASIC established to the requisite standard of proof that they had each contravened s 601FD(1) of the Act as alleged. Mr Daly was the only respondent who took an active part in the liability hearing. The primary judge was satisfied that ASIC had established that the respondents had contravened ss 601FD(1) and 601FD(3) of the Act. The primary judge also found that ASIC had established that Mr Daly was an officer of Endeavour from at least 1 April 2015 to 7 August 2018.

The 1 April 2015 Resolution

11 The resolution of 1 April 2015 is headed "Lending Committee" with the name and logo of "investport", and then states as follows:

> **Circular Resolution**
>
> 1st April 2015
>
> **Lending Committee Members**
>
> Peter Daly
> Andrew Blanchette
> Paul Nielsen
> Ian Williams
>
> The Lending Committee is requested by Circular Resolution to note & approve the following:
>
> 1) With the launch of the new IIOF PDS the committee notes the following loan facilities are in place with IIOF (old)
>
> a) Loan Facility to Beacon of $3M
> b) Loan facility to LPCG of $3M
>
> 2) These funds are being drawn progressively.
>
> 3) As AET does not be [sic] provide loans, loans will continue to be undertaken through IIOF (old).
>
> 4) IIOF (new) will invest in (old). These funds will be lent by old in accordance with the investment mandate of the IIOF (new).

12 The references to "the new IIOF" and "the IOOF (new)" are to the Registered Scheme, and the references to "IIOF (old)" are to the Unregistered Scheme. The reference to "the launch of the IIOF PDS" is to the PDS ultimately issued on 27 April 2015. The reference to AET is to the

custodian of the Registered Scheme. The resolution was approved by each of Mr Blanchette, Mr Nielsen, Mr Daly and Mr Williams.

Salient Findings of the Primary Judge relevant to the Grounds of Appeal

13 The primary judge referred at [36]–[43] to the applicable principles relevant to fact-finding. In particular, the primary judge referred to the requirement in a case involving civil penalties for the Court to reach a state of satisfaction or actual persuasion on the balance of probabilities, while taking into account the seriousness of the allegations and the consequences which will follow if the contraventions are established: s 140(2) of the *Evidence Act 1995* (Cth), and *Briginshaw v Briginshaw* (1938) 60 CLR 336. Further, the primary judge referred to Mr Daly's decision not to give evidence, and ASIC's contention that it should be inferred that Mr Daly's evidence on certain matters on which he could have, but did not, give evidence would not have assisted his defence, citing *Jones v Dunkel* (1959) 101 CLR 298, and the Full Federal Court decisions applying those principles to civil penalty proceedings where there is an available claim for the privilege against self-exposure to a penalty: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; (2007) 162 FCR 466 at [74] (Weinberg, Bennett and Rares JJ) and *Adams v Director of Fair Work Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 at [147] (North, Dowsett and Rares JJ).

14 Turning to the facts of the case, the primary judge referred to the resolution of 1 April 2015, and said that the names for the committee (being "Credit Committee", "Lending Committee", and "Investment Committee") were used interchangeably and there was in fact only one committee which was referred to variously by each or a combination of those names: [46]. The primary judge referred to Mr Daly's concession that those terms each referred to the same committee notwithstanding the use of different names, which the primary judge referred to as the **Investment Committee**: [46]. The primary judge said that the central contest for the purpose of Mr Daly's defence was whether, from about 1 April 2015, that committee operated with respect to the Registered Scheme as well as the Unregistered Scheme: [46]. In fact, as I will explain further below, that last matter was also conceded by Mr Daly, although the primary judge did not say so.

15 The primary judge returned to this point at [97], observing that an important component of ASIC's case was the allegation that, from about 1 April 2015, there was a single investment committee that made decisions as to the use of the pooled funds in both the Registered Scheme

and the Unregistered Scheme. The primary judge referred to Mr Daly's submission that he was a member of the Investment Committee of the Unregistered Scheme only: [98]. The primary judge said that her Honour was satisfied on the evidence that ASIC was correct in its contention that the Investment Committee, which had operated in the past as the relevant committee for the Unregistered Scheme, operated from 1 April 2015 as the committee responsible for making decisions in relation to the use of funds in both the Registered Scheme and the Unregistered Scheme: [99]. The primary judge found that Mr Daly was a member of the Investment Committee from about 1 April 2015 until 7 August 2018: [100].

16 In order to explain the conclusion that during the Relevant Period the Investment Committee made the investment decisions for both the Unregistered Scheme and the Unregistered Scheme, her Honour made a number of findings in relation to the activation and operation of the Registered Scheme, commencing with the circular resolution of 1 April 2015: [102]–[103]. The primary judge referred to that resolution as having been made in anticipation of the issue of the first PDS of 27 April 2015, whereby the Investment Committee approved "an overarching investment strategy" in relation to both the Unregistered Scheme and the Registered Scheme. That strategy provided for Endeavour to transfer the funds invested in the Registered Scheme to the Unregistered Scheme, and that Linchpin (as trustee of the Unregistered Scheme) would in turn lend those funds in accordance with the investment mandate of the Registered Scheme: [103]. The primary judge said that, consistently with there being a single Investment Committee for both the Registered Scheme and Unregistered Scheme, the resolution of 1 April 2015 identified a strategy for the joint future operation of the two funds: [105]. The primary judge said that the Investment Committee commenced functioning as a decision-maker in respect to the strategy to be employed with respect to both schemes prior to the formal establishment of the Registered Scheme, and in anticipation of the Registered Scheme receiving an influx of funds pursuant to the first PDS: [106]. The primary judge said that the Investment Committee continued to function that way in relation to the funds received pursuant to the two later PDSs until the receivers were appointed: [106].

17 The primary judge said that the terms of the resolution of 1 April 2015 made it plain that the Investment Committee was considering the present operation of the Unregistered Scheme and the future operation of both schemes: [107]. The primary judge noted that the investment strategy across the two schemes appeared on the face of the 1 April 2015 resolution to be directed to circumventing the constraint identified in respect of AET: [107]. The primary judge found that in practice, and consistently with the overarching strategy promulgated in the 1 April

2015 resolution, the funds passed from Endeavour and the Registered Scheme to Linchpin and the Unregistered Scheme and were then lent by Linchpin by way of the three categories of loans made by the Unregistered Scheme: [108]. The primary judge then gave detailed consideration to the constituent documents for the Registered Scheme and Endeavour: [112]–[152].

18 The primary judge dealt in detail with the various loans made by the Unregistered Scheme, commencing at [169]. In relation to the loans made to Mr Daly personally, the primary judge referred to two such loans, being:

(a) an initial loan to Mr Daly dated 14 September 2015 in the sum of $20,000, which was subsequently increased to $55,000 on or around 11 November 2015; and

(b) a further loan to Mr Daly dated 5 January 2017 in the sum of $35,000, which was subsequently increased to $75,000 on or around 25 July 2017.

19 In relation to the first of those loans, the primary judge said that it was made on the express basis that the funds advanced would be used for the personal purposes of Mr Daly, and not for the purposes consistent with the offer documents in relation to the Registered Scheme or the Unregistered Scheme: [182]. The primary judge referred to Mr Daly's loan application, which expressly stated that the purpose of the loan was to alleviate his personal financial difficulty: [182]–[183]. The primary judge later found that Mr Daly contravened s 601FD(1)(e) in applying for and obtaining those loans: [372]–[376].

20 The primary judge returned to the operation of the two schemes and the role of the Investment Committee, beginning at [189]. The primary judge said that the evidence demonstrated that the two schemes were conducted under the management of the Investment Committee, broadly as envisaged in the resolution of 1 April 2015, except that the investments were not in accordance with the investment mandate of the Registered Scheme as described in the PDS: [190]. The primary judge observed that the distinction between the two schemes was further blurred as a result of the Registered Scheme being renamed after Linchpin acquired Endeavour, both being referred to by the acronym IIOF: [192]. A designation of "old" or "new" was sometimes applied to that acronym, but not consistently : [192]. The primary judge referred to references to the Credit Committee in both the Information Memorandum of the Unregistered Scheme and the PDS for the Registered Scheme as being references to the Investment Committee, being a single committee that made decisions in relation to both schemes: [193].

21 The primary judge referred to a statutory notice dates 5 December 2017 to produce all books recording the assessment, approval and review by the Credit Committee for the Registered Scheme of the assets and investments of the Registered Scheme during the period 1 July 2015 to 5 December 2017, and the only document that Endeavour produced in response was the resolution of 1 April 2015: [194]. In doing so, the primary judge said that Endeavour clearly recognised that the document was a document of the committee making decisions in relation to the Registered Scheme: [194]. I note that Mr Daly made no objection to the tender of that material. Further, in response to a statutory notice to Linchpin dated 7 March 2018 to produce all agendas and minutes of any meeting of the Investment Committee and/or Lending Committee for the Investport Income Opportunity Fund during the period 1 January 2014 to 7 March 2018, Linchpin produced the resolution of 1 April 2015, among other documents, again clearly recognising the document as a document of the committee making decisions in relation to the Unregistered Scheme: [195]. The primary judge referred again to Mr Daly's concession that the terms "credit committee", "investment committee" and "lending committee" were interchangeable, referring to the same committee but using different names: [197]. The primary judge also said that whether there was a single committee performing that function was a matter upon which Mr Daly could have given evidence, and it was appropriate to draw a *Jones v Dunkel* inference against him in that respect, to the effect that any evidence that Mr Daly may have given on that issue would not have assisted him: [198]. The primary judge considered and rejected a submission by Mr Daly that ASIC's decision not to call Mr Blanchette as a witness was a factor to be taken into account when deciding if ASIC's case was proven on the balance of probabilities: [200]–[206].

22 The primary judge said the following at [207]:

> In conclusion on the issue of the operation of the Investment Committee, based on my review of the whole of the evidence touching on this issue, and cognisant of the gravity of the consequence in making the finding, I am satisfied that the Credit Committee, the Lending Committee and the Investment Committee were one and the same. Further, and critically, I am satisfied that this committee operated as a single committee which made decisions in relation to the use of the pooled investor funds in both schemes. Mr Daly, although not a director of Endeavour, was a member of this committee from about 10 February 2014 when it commenced approving loans made using funds invested in the Unregistered Scheme and at the time of the 1 April 2015 Resolution and at all relevant times thereafter.

23 The primary judge was satisfied that Mr Daly was an officer of Endeavour within the meaning of s 9 and for the purpose of s 601FD(1) of the Act during the Relevant Period: [220]. The primary judge referred to the fact that Mr Daly was appointed a director of Beacon Financial

Group Pty Ltd (**Beacon**) on 6 May 2013, and described himself as the founder of Beacon. Linchpin was registered on 28 May 2013 and subsequently acquired all the shares in Beacon. From 2 October 2013, Mr Daly was appointed a director of Linchpin, which was the ultimate holding company of the Linchpin group: [222]. Following the Beacon acquisition, Beacon operated as part of the financial advisory business of the Linchpin group, and Mr Daly was group managing director of the Beacon group within the Linchpin group: [223]. As the group managing director of Beacon, Mr Daly was involved in promoting the Registered Scheme to authorised representatives of the companies within the Beacon group in order to attract investment in the Registered Scheme: [224]. He was also involved in the approval of the Adviser Loans: [224].

24 Mr Daly was a director of IPL from 11 March 2014, being the investment manager of the Unregistered Scheme: [225]. IPL became the investment manager of the Registered Scheme following the acquisition of Endeavour: [225]. IPL was assisted in its management function in respect of both schemes by the Investment Committee, of which Mr Daly was a member throughout the Relevant Period: [225]. In addition to the 1 April 2015 resolution, Mr Daly signed numerous circular resolutions of the Investment Committee which implemented the investment strategy approved in the 1 April 2015 resolution for the Registered Scheme and the Unregistered Scheme, in so far as it was directed to passing the funds raised by the Registered Scheme to the Unregistered Scheme to fund the loans made by the Unregistered Scheme: [230].

25 Mr Daly, as a member of the Investment Committee, approved the overarching investment strategy of the Registered Scheme and, in substance, approved the manner in which it was implemented by approving the loans subsequently made or varied by Linchpin as trustee of the Unregistered Scheme, applying the funds sourced from the Registered Scheme: [232]. The primary judge said that, in doing so, Mr Daly participated in making decisions that affected at least a substantial part of the business of Endeavour, in that the implementation of the overarching investment strategy resulted in about $16.5 million being passed from the Registered Scheme (for which Endeavour was responsible) to the Unregistered Scheme (over which Endeavour had no formal control): [232]. That amount represented about 95% of the total amount invested in the Registered Scheme: [232]. The primary judge said that the fact that Mr Daly was a member of the Investment Committee responsible for setting the overarching strategy and the fact that he participated in approvals that determined the manner in which the strategy was implemented weighed strongly in favour of concluding that he was a person who had the capacity to affect significantly Endeavour's financial standing: [232].

The act of participating in the approval of both the strategy and the way in which the strategy was implemented directly impacted the prospect of Endeavour recovering the funds passed to Linchpin, being about 95% of the funds raised in the Registered Scheme: [232].

26 The primary judge said that the evidence in relation to Mr Daly's role in respect of the financial affairs of Endeavour went considerably further: [233]. As a director of Linchpin, Mr Daly was involved in approving the accounts of Endeavour: [234]. Mr Daly participated in the development of the PDSs of 27 April 2015 and 24 June 2016 which were issued to raise funds for the Registered Scheme: [235]. That was clearly a substantial part of Endeavour's business: [235]. Mr Daly was involved in communicating with Mr Williams and Mr Nielsen in relation to the finalisation of the PDS of 27 April 2015, and was asked to provide (and did provide) his approval for the PDS of 24 June 2016: [235].

27 In addition, between about 26 May 2015 and 26 May 2017, Mr Daly promoted the Registered Scheme to financial advisers, and through them to their clients or potential clients, as an alternative to a term deposit: [236]. The primary judge found that finance was provided to financial planners by Linchpin, using the funds passed to it by Endeavour from the Registered Scheme, as an incentive for advisers to recommend the Registered Scheme to their clients, and as a member of the Investment Committee, Mr Daly approved the making of such loans: [236]. Further, Mr Daly was a director of both Linchpin and of Beacon, both of which were borrowers under the Linchpin Entity Loans. As a member of the Investment Committee, Mr Daly participated in the approval of those loans: [237].

28 In the Penalty Judgment, the primary judge re-iterated that the evidence was overwhelming that there was relevantly a single Investment Committee that operated the Unregistered Scheme and the Registered Scheme and of which Mr Daly was a member: [121]. The primary judge described Mr Daly as one of the architects of the strategy that was at the heart of the contravening conduct: [121]. Mr Daly's contention that he was a member of an Investment Committee that functioned only in relation to the Unregistered Scheme after 1 April 2015 was described as "implausible": [121].

29 The primary judge referred to Mr Daly having disregarded the PDSs, Endeavour's lending policy and compliance plan, and having applied investor funds in a way that was not consistent with the Registered Scheme's foundational documents: [125]. In addition, Mr Daly improperly used his position as an officer of Endeavour to obtain a personal benefit by way of unsecured personal loans when he was in financial difficulty, to the detriment of investors in the

Registered Scheme: [125]. The primary judge ordered that Mr Daly be disqualified from managing corporations for a period of five years and pay to the Commonwealth a pecuniary penalty of $150,000: [138].

Grounds 1 and 2: Was Mr Daly an Officer of Endeavour?

30 Senior Counsel for Mr Daly (who, along with junior counsel, did not appear at the trial), identified the central and critical issue as being whether the Investment Committee was a committee of the Unregistered Scheme only (as Mr Daly submitted), or of both schemes (as ASIC submitted). A great deal of time was spent by counsel for the appellants debating whether the Investment Committee acted in relation to both schemes.

31 On the first business day after the hearing of the appeal, the Full Court received an email from the legal representatives for Mr Daly as follows (omitting formal parts):

> We refer to the above matter and the hearing held on 15 and 16 August 2024.
>
> We ask that you bring to the attention of their Honours the following note from Ms McLeod AO SC in relation to her oral submissions to their Honours:
>
> Upon a review of the transcript of closing submissions made on behalf of the Appellant Peter Daly at trial on 11 March 2022, in particular at P-142.23 to P-153.38, P-160.1 to P-162.36 and P164-12 to P-177 (Appeal Book Part C pgs 708-719, 724-743) the Appellant accepts that it was conceded by his counsel at trial (see P-146.40-46, P-147.10-31 and P-153.36) that there was an investment committee operated by Investport Pty Ltd in its capacity as investment manager pursuant to the relevant delegation, that it operated one investment committee in respect of both of the registered and unregistered fund, and which made decisions as to whether loans were to be made but not on what terms.
>
> The Appellant withdraws the submissions made on his behalf to the contrary by his senior counsel at appeal transcript P-34.14, P-39.26, P-41.46 to P-42.2, P-43.15 to P-43.33 and P-48.15. Ms McLeod apologises to the Court for advancing those submissions prior to reviewing the relevant passages of the original hearing's transcript.
>
> It is also accepted, as already noted in oral submissions regarding the First PDS, that Investport Pty Ltd was the investment manager of the registered scheme at least by the date of the First PDS, being 27 April 2015.
>
> Other submissions preceding the above concessions appear in the original trial transcript at P-89.40 to P-90.26.

32 I accept that concession, and counsel's apology. The concession made by Mr Daly at the trial was obviously correct having regard to the terms of the 1 April 2015 resolution, which indicate that the Investment Committee was setting a strategy for both the Registered Scheme and for the Unregistered Scheme. Further, each of the three PDSs referred to Endeavour being assisted

in its investment selection and managerial duties by IPL and "its Credit Committee", which is defined in the glossary as "The Credit Committee of the RE [ie Endeavour] and Investment Manager [ie IPL]". As indicated above, it was conceded before the primary judge that the terms Credit Committee, Lending Committee and Investment Committee were used interchangeably to refer to the same committee.

33 Further, the concession is also obviously correct, having regard to the transcript of the closing submissions at the liability hearing, which included the following exchange with counsel for Mr Daly:

> HER HONOUR: Is it now no longer in issue that there was a common investment manager — that was Investport — for both funds — both unregistered and registered fund. I don't think that has ever been controversial.
>
> MR COVENEY: No, that's not controversial.
>
> HER HONOUR: And that there was an investment committee that was operated by Investport in its capacity as investment manager pursuant to the relevant delegation that it had.
>
> MR COVENEY: Yes
>
> HER HONOUR: And it operated one investment committee in respect of both funds.
>
> MR COVENEY: Correct.

34 In light of those concessions, Mr Daly's argument on the appeal in relation to grounds 1 and 2 must fail. Mr Daly was a member of the Investment Committee which set the fundamental business strategy for the Registered Scheme by way of the 1 April 2015 resolution. Mr Daly thus participated in making decisions that affected the whole, or a substantial part, of the business of Endeavour, and had the capacity to affect significantly Endeavour's financial standing. Mr Daly was therefore an officer of Endeavour. While it was unnecessary to do so, the primary judge referred to a number of other aspects of Mr Daly's conduct which her Honour correctly identified as fortifying that conclusion, including: approving Endeavour's accounts (at [235]), participation in the development of the PDSs of 1 April 2015 and 24 June 2016 (at [236]), and promotion of the Registered Scheme to financial advisers (at [236]).

35 The matter is so clear on the evidence and the concessions made by Mr Daly's counsel that there is no need to consider the principles pertaining to fact-finding applied by the primary judge, against which Mr Daly also appeals. For completeness, I note that complaint is made by Mr Daly that the primary judge did not take into account the seriousness of the allegations and the gravity of the consequences for Mr Daly as required by s 140(2) of the *Evidence Act 1995* (Cth). However, the primary judge expressly did so at [37] and in a number of other places in

her Honour's reasoning. Further, complaint is made of the *Jones v Dunkel* inferences drawn against Mr Daly. In particular the proposition is advanced that a number of threshold matters must be satisfied before such inferences can be drawn. However, the primary judge identified the issues where it would be reasonably expected that Mr Daly would have been called to give evidence but elected not to do so, including whether there was a single Investment Committee which operated in respect of both schemes (see for example at [198]). Mr Daly has not advanced any cogent reason as to why the inference was not available and appropriate. Mr Daly also appears to submit that *Jones v Dunkel* cannot apply where a party decides not to give evidence in reliance on the privilege against self-exposure to a penalty, but that submission is contrary to the Full Federal Court authority to which I have referred above, and which Mr Daly does not submit to be wrong.

36 Senior Counsel for Mr Daly sought to amend the Further Amended Notice of Appeal during the course of oral argument on the appeal in order to contend that it is not possible as a matter of construction that the 1 April 2015 resolution was a resolution of the Registered Scheme, as "the scheme" had not been registered in accordance with the Act. We refused leave to amend, saying that we would give reasons in the final judgment. My reasons for refusing leave to amend are as follows.

37 First, the proposed contention is contrary to Mr Daly's admission on the pleadings in relation to para 23 of the Amended Statement of Claim to the effect that as at 25 March 2015, the name of the managed investment scheme previously registered with ASIC with the name "Endeavour Hi-Yield Fund" was changed, and that Endeavour was the responsible entity of "the registered fund". Accordingly, it was admitted on the pleadings that the Registered Scheme had been registered well before 1 April 2015. Indeed, the evidence showed that the Registered Scheme had been registered on 6 October 2006, more than eight years before 1 April 2015.

38 Second, the proposed contention is contrary to the way in which the proceedings had been conducted at first instance. Although Senior Counsel for Mr Daly drew attention to paras 11(a) and 18(a) of Mr Daly's closing written submissions at first instance at the liability hearing, those paragraphs did not disclose the proposed contention.

39 Third, there would be prejudice caused to ASIC if the amendment were to be allowed. ASIC submitted, and I accept, that if the proposed contention had been in issue at first instance, then ASIC may have considered leading evidence about the "dormancy" of the Registered Scheme

prior to 2015, and might have re-formulated its case so as to contend in the alternative that Mr Daly was an officer of Endeavour from (say) 1 May 2015 rather than 1 April 2015.

40 Fourth, the proposed contention is not tenable, in any event. The Registered Scheme had been registered on 6 October 2006, with a constitution and compliance plan that had been lodged with ASIC. Following the acquisition of Endeavour, on or about 25 March 2015, the name of the Registered Scheme was changed. On 27 April 2015, Endeavour lodged an amended compliance plan, and on 1 May 2015, ASIC was notified of Endeavour's intention to replace its constitution. However, Endeavour remained at all times the responsible entity of the Registered Scheme, which had been registered for over eight years. It was entirely natural for Endeavour to formulate and document its strategy on 1 April 2015 in anticipation of those amended documents (together with the 27 April 2015 PDS) being finalised, and in advance of receipt of funds by Endeavour pursuant to the anticipated PDS of 27 April 2015. It was submitted that a scheme cannot be a registered scheme until people acquire rights and benefits produced by the scheme pursuant to its constituent documents. However, s 601ED(5) prohibits a person from operating a managed investment scheme which is required to be registered until the scheme is so registered. Accordingly, registration must precede the operation of the scheme, not the other way around.

Ground 3: Did Mr Daly contravene s 601FD(1)(e)?

41 Section 601FD(1)(e) provides that an officer of the responsible entity of a registered scheme must:

> not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme …

42 As indicated above, the primary judge found that Mr Daly contravened that provision by applying for and obtaining two personal loans for himself. Mr Daly's criticism in Ground 3 is that neither ASIC nor the primary judge addressed the element of subjective intention required under s 601FD(1)(e), which necessitates proving Mr Daly's intention to gain a personal advantage or a detriment to scheme members.

43 Mr Daly draws attention to High Court authority as to the construction of substantially identical provisions concerning directors' duties. "Improper use" is an objective standard of impropriety: *R v Byrnes* (1995) 183 CLR 501 at 514–5 (Brennan, Deane, Toohey and Gaudron JJ). However, the word "to" before "give" and "cause" requires an actual (ie subjective) purpose on the part

of the wrongdoer to effect either of those consequences: *Chew v R* (1992) 173 CLR 626 at 630–34 (Mason CJ, Brennan, Gaudron and McHugh JJ), cited with approval in *Byrnes* at 511–2; *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179; (2018) 129 ACSR 265 at [16] and [78] (Basten JA); [159] (Gleeson JA, with whom Meagher JA agreed).

44 Mr Daly's contention is a carping criticism. It is so obvious that it need not have been expressly stated that Mr Daly was seeking to gain an advantage for himself, namely a loan of money to alleviate his personal financial difficulties. Indeed, Mr Daly's counsel acknowledged that that was the reason for the loans (Amended Outline of Submissions of the Appellant at [54]).

45 In those circumstances, I do not regard the absence of an express finding on this point as being of any significance. In any event, ASIC has filed a Notice of Contention to the effect that this Court should find (if it be necessary) that the purpose of Mr Daly's conduct was to gain an advantage for himself in applying for and obtaining the loans using funds sourced from the Registered Scheme. In order to put the matter beyond doubt, I make that finding.

Ground 4: Was the Penalty Excessive?

46 To succeed on this ground of appeal against the orders made by the primary judge in accordance with ss 206C (in relation to disqualification from managing corporations) and 1317G (in relation to pecuniary penalty orders), Mr Daly must show an error in the exercise of discretion in accordance with the principles in *House v R* (1936) 55 CLR 499: *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5; (2023) 407 ALR 302 at [29]–[41] (Rares, Stewart and Abraham JJ). No error of that kind has been raised by Mr Daly. Mr Daly makes a generalised complaint that the penalty is excessive and unfair. However, the penalty and period of disqualification ordered by the primary judge are well within the range of reasonable decisions, and one cannot infer any misapplication of principle from that outcome.

Conclusion

47 Accordingly, the appeal must be dismissed. The appropriate orders are as follows:

1. Leave to amend the Further Amended Notice of Appeal be refused.
2. The appeal be dismissed.
3. The appellant pay the respondent's costs of the appeal.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 24 September 2024