

# FEDERAL COURT OF AUSTRALIA

## ASIC v Berndale Capital Securities Pty Ltd [2019] FCA 595

File number(s): VID 1554 of 2018

Judge(s): **O'BRYAN J**

Date of judgment: 1 May 2019

Catchwords: **CORPORATIONS** – appointment of receiver and manager – where court previously made asset freezing and disclosure orders – whether existing asset freezing and disclosure orders sufficient to protect interests of company's creditors

Legislation: *Corporations Act 2001* (Cth) ss 1323(1)(h)(ii), 1323(3)

Cases cited: *ASIC v Burke* [2000] NSWSC 694  
*ASIC v Burnard* (2007) 64 ACSR 360  
*ASIC v Carey (No 3)* (2006) 232 ALR 577; [2006] FCA 433  
*ASIC v Global Rule Pty Ltd (in admin)* [2010] QSC 342  
*ASIC v Linchpin Capital Group Ltd* [2018] FCA 1104  
*ASIC v Sydney Investment House Equities Pty Ltd (No 2)* [2006] NSWSC 1264

Date of hearing: 18 April 2019

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub Area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 52

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Solicitor for the Plaintiff: Norton Rose Fulbright

Counsel for the First, Third  
and Fourth Defendants: Mr D Farrands

Solicitor for the First, Third  
and Fourth Defendants: SLF Lawyers

# ORDERS

VID 1554 of 2018

**BETWEEN:**                    **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Plaintiff

**AND:**                         **BERNDALE CAPITAL SECURITIES PTY LTD ACN 113 616  
032**  
First Defendant

(and others named in the Schedule)

**JUDGE:**                     **O'BRYAN J**

**DATE OF ORDER:**    **18 APRIL 2019**

## **THE COURT ORDERS THAT:**

1. Pursuant to s 1323(1)(h)(ii) of the *Corporations Act* 2001 (the **Act**), and subject to any further or other order of the Court, Rachel Burdett-Baker and Bruno Secatore, of Cor Cordis, Level 29, 360 Collins Street, Melbourne, Victoria, 8007, (the **Receivers**), be appointed, without giving security, as joint and several receivers and managers of each of the first, third and fourth defendants (**corporate defendants**) with all of the powers provided in these Orders for the purposes of identifying and securing all of the assets of the corporate defendants.
2. Subject to these Orders and any further or other order of the Court, the Receivers have the following powers:
  - (a) all powers necessary to identify and secure the assets of each of the corporate defendants;
  - (b) all powers necessary to collect the assets referred to in paragraph (2)(c) of these Orders;
  - (c) to enter into possession and take control of all assets (including money) of the corporate defendants, including all assets of the corporate defendants used in or relating to its operations, together with all books, records, computers, computer disks, and any other papers or records relating thereto;

- (d) to deal with any moneys held by or on behalf of the corporate defendants or its officers, employees or agents or any of them, being moneys received in relation to or employed in the corporate defendants' operations;
  - (e) to operate and inspect any account at any bank or other financial institution being an account operated by the corporate defendants or their officers, employees or agents or any of them and to withdraw any such moneys and to pay any such moneys into an account or accounts opened or maintained by or for the Receivers;
  - (f) to appoint a solicitor, accountant or other professionally qualified person either within or outside Australia to assist the Receivers;
  - (g) to delegate to their partners, employees and agents whether within or outside Australia any business or matter that the Receivers are unable to do themselves or that can be done more conveniently by those others;
  - (h) to receive any moneys due to the corporate defendants relating to their operations;
  - (i) to pay any expense or execute any document in the course of the performance of the powers conferred by these Orders in the name, or on behalf, of the corporate defendants, their officers, employees or agents or any of them; and
  - (j) to apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of the Receivers' functions and powers pursuant to these Orders.
3. The Receivers may not, until the first directions hearing following the filing of the reports referred to in paragraph 5 and subject to any directions by the Court, determine the timing of the payment of any debts to clients of the corporate defendants.
4. During the period of receivership and management, subject to these Orders and any further or other order of the Court:
- (a) the Receivers shall assume the management of the corporate defendants and shall perform the duties, and may perform any of the functions and exercise any of the powers of the directors of the corporate defendants;
  - (b) the provisions of the Act relating to the keeping of accounts, the appointment and re-appointment of auditors and the rights and duties of auditors shall continue to apply in relation to the corporate defendants, and in the application

of those provisions to and in relation to the corporate defendants a reference to the directors of any one of the corporate defendants shall be read as a reference to the Receivers as receivers and managers of that company; and

- (c) there shall be no stay of any action or other civil proceedings by or against any of the corporate defendants in any court or other tribunal nor shall there be any restraint upon the commencement or prosecution of any action or other civil proceedings by or against any of the corporate defendants in any court or other tribunal. In all or any of such actions or civil proceedings or otherwise the Receivers shall have authority to bring or defend such actions or civil proceedings in the name of any of the corporate defendants.

5. On or before 31 May 2019 or such other date as the Court allows, the Receivers shall provide to the Court, the Plaintiff and the Defendants a report as to each of the corporate defendants (the **Disclosure Reports**), including:

- (a) the identification of the assets and liabilities of the corporate defendants;
- (b) an opinion as to the solvency of the corporate defendants;
- (c) the likely return to clients of the corporate defendants;
- (d) any other information necessary to enable the financial position of the corporate defendants to be assessed;
- (e) any suspected contravention of the Act by the any directors and or officers of the corporate defendants;
- (f) the nature and identity of the assets of the corporate defendants;
- (g) the claims (actual, contingent and other) of third parties in relation to the assets of the corporate defendants including, but not limited to, whether the assets of the corporate defendants have been given as security for any debt or liability and if so, the nature of the security and the debt or liability so secured;
- (h) in relation to the clients:
  - (i) the identities of the clients and the nature and extent of their interests;
  - (ii) any payments made to or by clients in relation to the corporate defendants; and
  - (iii) any money owing to the clients.
- (i) the nature and identity of the liabilities of the corporate defendants including, but not limited to, liabilities to the clients;

- (j) the most appropriate manner and timing of managing and realising any assets of the corporate defendants so as to most benefit the clients; and
  - (k) a recommendation as to the process for recovering all money owing to the corporate defendants, whether by way of loan or otherwise.
6. The Receivers have such powers as may be necessary to enable them to carry out and complete the inquiry and reports referred to in these Orders. In particular, they shall be entitled to inspect at any reasonable time any books (as defined in s 9 of the Act) in relation to the corporate defendants (except to the extent a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
  7. The Receivers have access to the documents held by the Plaintiff (ASIC) in relation to the corporate defendants (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
  8. Each of the corporate defendants by its officers, agents and/or employees must immediately deliver up to the Receivers all books (as defined in s 9 of the Act), records and other papers relating to the corporate defendants not delivered to ASIC including, but not limited to, all books (as defined in s 9 of the Act), records and other papers relating to the corporate defendants in the possession of any one of the defendants (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
  9. Each of the defendants by their directors, officers, servants and agents answer such questions as the Receivers may reasonably require them to answer as to any of the matters under inquiry (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
  10. Subject to paragraph (11) of these Orders, the Receivers shall be entitled to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as receivers and managers over the assets of each corporate defendant, as may be fixed by the Court on the application of the Receivers, such sum to be calculated on the basis of the time reasonably spent by the receivers and managers, their partners and staff, at the rates specified in the second schedule to the Consent of Receivers filed with the Court on 22 March 2019.

11. Nothing in these Orders is to affect the rights of any prior encumbrancers of the assets of the corporate defendants, including the rights of any secured lender.
12. Any secured lender has liberty to apply to the Court in relation to any matter arising in connection with these Orders upon giving reasonable notice to the parties and to the Receivers.

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

## REASONS FOR JUDGMENT

**O'BRYAN J:**

### Introduction

- 1 By interlocutory process filed on 4 April 2019, the Australian Securities and Investments Commission (**ASIC**) sought orders pursuant to ss 1323(1)(h)(ii) and (3) of the *Corporations Act* 2001 (Cth) (**Corporations Act**) for the appointment of a receiver and manager of the property of the first, third and fourth defendants (the **corporate defendants**).
- 2 The application was supported by affidavits of Wenonah Gwen Tenedero (a Manager in Market Enforcement for ASIC) affirmed 22 March 2019 and 16 April 2019. ASIC also relied on affidavits of Ms Tenedero affirmed 5 and 12 December 2018 which were read in support of an earlier application made by ASIC for asset preservation orders and disclosure orders made against the defendants. Such orders were made by the Court on 5, 13 and 19 December 2018.
- 3 The corporate defendants opposed the application and relied on an affidavit of Lisa Maree McNicholas sworn 18 April 2019. Ms McNicholas gave evidence as to the further steps being undertaken by the corporate defendants to address ASIC's concerns, and sought an adjournment of this application to enable those steps to be completed. The corporate defendants argued that the current asset preservation orders and disclosure orders made by the Court in December 2018 were (and still are) sufficient to protect the interests of the clients of the first defendant, Berndale Capital Securities Pty Ltd (ACN 113 616 032) (**Berndale**).
- 4 At the conclusion of the interlocutory hearing on 18 April 2019, I made orders under ss 1323(1)(h)(ii) and (3) of the Corporations Act largely in the form sought by ASIC. For the reasons given below, the evidence adduced by ASIC satisfied me that it is necessary or desirable to appoint a receiver and manager of the property of the corporate defendants in order to protect the interests of Berndale's clients, and that the current asset preservation orders and disclosure orders made by the Court in December 2018 are not sufficient to protect their interests. The corporate defendants have not established a basis to adjourn the application. The corporate defendants have been aware of ASIC's intention to seek orders under s 1323(1)(h) of the Corporations Act since the originating process for this proceeding was filed on 5 December 2018. Further, ASIC's interlocutory process was filed some two weeks prior to the hearing of the application on 18 April 2019. The order sought by ASIC is interlocutory in the sense that it will continue until further order of the Court. If they choose, the corporate

defendants may make a further application, supported by evidence, to vary or set aside the orders.

5 These are my reasons for making the orders dated 18 April 2019.

### **Background**

6 Between 16 August 2005 and 22 November 2018, Berndale was the holder of an Australian financial services licence (AFSL) 290108 which, among other things, allowed Berndale to provide general financial product advice and deal and make a market in derivatives and foreign exchange products. Pursuant to the AFSL, Berndale conducted business, based in Melbourne, as a retail provider of over the counter derivatives. In providing those financial services to clients, Berndale received deposits from its clients that enabled them to trade. For as long as Berndale held money on behalf of a client, it was required to hold that money in an account opened for that purpose under s 981B of the Corporations Act.

7 Daniel Kirby was appointed as a director of Berndale on 6 August 2014 and continues to hold that position.

8 The second defendant, Stavro D'Amore, was a director of Berndale from 4 November 2015 to 22 November 2018 and was Berndale's responsible manager from 22 November 2011 to 22 November 2018. ASIC's company register for Berndale shows that it is wholly owned by Stavro D'Amore.

9 The third defendant, Berndale Capital Securities Management Pty Ltd (ACN 606 118 736) (**Berndale Management**), is a related company of Berndale.

10 The fourth defendant, Algoplus Pty Ltd (ACN 605 329 575) (**Algoplus**), is a company wholly owned by Stavro D'Amore. Information provided by the defendants to ASIC indicates that the business operations of Algoplus are related to those of Berndale. The precise nature of that relationship is unclear but, as referred to below, the expenses of Berndale appear to be incurred through Algoplus and there have been large transfers of money between Berndale Management (which holds client monies) and Algoplus.

11 The fifth defendant, Mario D'Amore, is the brother of Stavro D'Amore. The information available to ASIC does not show that Mario D'Amore has any involvement in Berndale's business. However, as referred to below, after 22 November 2018 he received large transfers of money from Berndale Management.

- 12 The sixth defendant, Jonas Vong, is or was an employee of Berndale, working in customer support. As referred to below, during 2018 he received large transfers of money from Berndale Management.
- 13 On 9 May 2018, ASIC commenced an investigation under s 13 of the *Australian Securities and Investments Commissions Act 2001* (Cth) (**ASIC Act**) in relation to possible breaches of the AFSL obligations of Berndale and suspected contraventions of various provisions of both the Corporations Act and the ASIC Act. On 16 May 2018, ASIC expanded its investigation under s 13 of the ASIC Act to include Berndale Management. As a result of its investigation under the ASIC Act, on 22 November 2018 ASIC issued orders cancelling Berndale's AFSL under s 915C(1) of the Corporations Act and banning Stavro D'Amore from providing any financial services for a period of six years under ss 920A(1) and 920B(2) of the Corporations Act.
- 14 One of the reasons for the cancellation of Berndale's AFSL was its ongoing failure to submit client money reconciliation reports to ASIC. A new subdivision of the Corporations Act titled "Client Money Reporting Rules" came into effect on 4 April 2018 (Chapter 7, Part 7.8, Division 2, Subdivision AA). Section 981J empowers ASIC to make client money reporting rules and s 981M requires Australian financial services licensees to comply with those rules. Pursuant to those powers, ASIC made the *Client Money Reporting Rules 2017*. Amongst other things, those rules require licensees to keep accurate records of the amount of client money received from, or on behalf of, each client and the total of such amounts. The rules also require licensees to provide to ASIC a monthly reconciliation, within 10 days of the end of the calendar month to which it relates, of the amount of client money held in a client money account for each client, the amount recorded in the licensee's records for each client and the totals of such amounts. As at the date of filing ASIC's originating process on 5 December 2018, ASIC had not received any client money reconciliation reports from Berndale.
- 15 As a result of the cancellation order made on 22 November 2018, Berndale was not permitted to continue its financial services business. Despite that, Google searches conducted by ASIC on 3 December 2018 revealed that "Berndale Capital" websites were still operating.
- 16 ASIC's investigation of the corporate defendants has continued after it made the cancellation and banning orders on 22 November 2018. ASIC became aware of large, unexpected and unexplained transfers of money from bank accounts held by Berndale Management to parties related to Berndale. During the course of its investigation, ASIC identified five bank accounts held by Berndale Management with the Commonwealth Bank of Australia (**CBA**) and a further

account held by Algoplus with the CBA. Berndale has informed ASIC that the five accounts held by Berndale Management are accounts in which client money is held in accordance with s 981B of the Corporations Act, while the account held by Algoplus is an account for expenses of the business. Information obtained by ASIC from the CBA between 22 November and 5 December 2018 showed that the total amounts held in those accounts declined from nearly \$800,000 on 16 October 2018 to just over \$83,000 on 29 November 2018. The transactions that depleted the accounts included the following:

- (a) On 22 November 2018, 4 transfers totalling approximately \$250,000 were made from a Berndale client money account to the Algoplus account.
- (b) On 22 November 2018, 2 transfers totalling \$100,000 were made from a Berndale client money account to the Algoplus account and then transferred to an account in the name of Mario D'Amore.
- (c) On 23 November 2018, transfers of approximately USD300,000 and GPB40,000 were made from Berndale client money accounts to accounts in the name of Mario D'Amore.
- (d) On 26 November 2018, a transfer of approximately \$90,000 was made from the Algoplus expense account to an account in the name of Jonas Vong.
- (e) On 27 November 2018, a transfer of approximately \$45,000 was made from a Berndale client money account to the Algoplus account.
- (f) On 28 November 2018, a transfer of \$49,000 was made from a Berndale client money account to the Algoplus account.

17 On 16 November 2018, Berndale provided ASIC with an unaudited balance sheet as at 30 June 2018. The balance sheet showed that Berndale had client trust liabilities of \$1,243,900.

18 This proceeding was commenced by originating process filed by ASIC on 5 December 2018. The orders sought by ASIC included:

- (a) an order pursuant to ss 1323(1)(h) and (3) of the Corporations Act for the appointment of a receiver and manager of the property of the defendants;
- (b) asset preservation orders against the defendants; and
- (c) disclosure orders requiring the first to fourth defendants to file and serve affidavits setting out details of bank and other financial accounts held by the defendants, the debtors of the defendants, an inventory of the assets and liabilities of the defendants and an inventory of all property owned or controlled by the defendants.

19 When the matter came before the Court on 5 December 2018, ASIC did not press for orders under ss 1323(1)(h) and (3) of the Corporations Act, but sought the less intrusive asset preservation and disclosure orders. Such orders were made by the Court on 5 December 2018, with variations to the orders being made on 13 and 19 December 2018. Relevantly for present purposes:

- (a) asset preservation orders were made against the corporate defendants, including in respect of the CBA accounts referred to above;
- (b) asset preservation orders were made against Mario D'Amore and Mr Vong in respect of the accounts in their names into which Berndale client monies had been transferred;
- (c) a disclosure order was made against Berndale requiring it to file and serve a full and detailed affidavit by 20 December 2018 setting out:
  - (i) details of bank and other financial accounts held by the defendants;
  - (ii) the names and addresses of all debtors of the defendants;
  - (iii) an itemised inventory of the assets and liabilities of the defendants;
  - (iv) an itemised inventory of all property owned or controlled by the defendants; and
  - (v) in the case of the first defendant, all amounts held on behalf of clients; and
- (d) a disclosure order was made against Berndale Management and Algoplus requiring each of them to file and serve a full and detailed affidavit by 22 January 2019 setting out:
  - (i) details of bank and other financial accounts held by the defendants;
  - (ii) the names and addresses of all debtors of the defendants;
  - (iii) an itemised inventory of the assets and liabilities of the defendants; and
  - (iv) an itemised inventory of all property owned or controlled by the defendants.

20 The asset preservation orders made against Mario D'Amore and Mr Vong were subsequently discharged upon their giving of undertakings to repay to Berndale Management the monies that had been transferred to them after 22 November 2018.

21 As discussed further below, on 22 January 2019 Mr Kirby filed an affidavit in purported compliance with the disclosure order applicable to Berndale. The affidavit was both late and unsatisfactory. As at the date of the hearing, neither Berndale Management nor Algoplus had complied with the disclosure orders applicable to them.

### **ASIC's continuing investigations**

22 In her affidavits affirmed 22 March and 16 April 2019, Ms Tenedero of ASIC gave evidence of ASIC's continuing investigation into the defendants.

23 On 6 December 2018, ASIC expanded the scope of its investigation under s 13 of the ASIC Act to include, amongst other things, suspected contraventions of s 1041G of the Corporations Act and s 82 of the *Crimes Act 1958* (Vic). ASIC has undertaken the following steps in respect of its investigation:

- (a) it has issued further notices under s 33 of the ASIC Act to, amongst others, CBA, Westpac and the Australian Financial Complaints Authority (AFCA);
- (b) it has commenced reconstruction and analysis of Berndale's bank accounts for the period commencing 1 April 2018;
- (c) it has conducted examinations of Mr Kirby, Mr Vong and Mr Mario D'Amore pursuant to s 19 of the ASIC Act;
- (d) it has conducted a voluntary interview with Mr Chris Kaltzidis, Berndale's former General Manager; and
- (e) it has obtained information from the Australian Taxation Office pursuant to s 355 of the *Taxation Administration Act 1953* (Cth).

24 On 17 December 2018, Berndale provided ASIC with client money reconciliation reports for the period 4 April to 5 December 2018. The latest report, dated 5 December 2018, states that the total client monies owed was \$854,122.65, whereas the total deposits was an amount of \$2,457,507.50 (a difference of negative \$1,603,384.85). No explanation of the negative difference was provided in the reports.

25 On 22 January 2019, Mr Kirby filed and served an affidavit on behalf of Berndale, purportedly in compliance with the orders of the Court made on 19 December 2018. The affidavit was both late and, in my view, not in compliance with the Court's orders in that it was not full and detailed and did not contain all of the information required by the Court's orders. Nevertheless, the affidavit contains the following statements:

- (a) In relation to bank accounts, Berndale maintains five accounts held with the CBA which are the subject of the asset preservation orders (details of which are set out above). Berndale also maintains an account with CBH Compagnie Bancaire Helvetique SA in

Switzerland which has an approximate balance as at 31 December 2018 of US\$1,029,537.00.

- (b) In relation to debtors, the only persons indebted to Berndale are David Kenneth Crooks and Melissa Jane Crooks, which debt is the subject of County Court proceedings in Victoria.
- (c) In relation to assets, liabilities and property, the affidavit did not contain an itemised inventory. It merely exhibited a balance sheet as at 30 June 2018 which appears to have been extracted from Berndale's accounting system. The balance sheet states net assets as approximately \$2,442,000, with client trust liabilities of approximately \$700,000. The entries in the balance sheet are not explained in the affidavit. Three of the current asset entries, totalling approximately \$2,390,000, are CHF Account (\$1,391,387.45), Funds Equity TM (\$425,000) and HSBC-8838 (\$574,153.16).
- (d) In relation to amounts held on behalf of clients, the affidavit exhibited a list of client names and amounts held by Berndale on their behalf as at 31 December 2018, comprising approximately 500 clients and a total amount held of \$2,375,784.09. Mr Kirby's affidavit does not attempt to reconcile the statement of amounts held on behalf of clients with the statement of client trust liabilities in the balance sheet.

26 In relation to the CBH account referred to in Mr Kirby's affidavit (which appears to be the CHF Account referred to in the balance sheet exhibited to Mr Kirby's affidavit), Ms Tenedero gave evidence that ASIC suspects that the account is not controlled by Berndale or that the funds in the account are not available to Berndale's clients because:

- (a) it is not an account that satisfies the requirements of s 981B of the Corporations Act;
- (b) despite a request from ASIC on 9 March 2018, Berndale has failed to provide information that verifies that the funds held in the account are held by Berndale;
- (c) despite a s 19(2) reasonable assistance notice given to Stavro D'Amore on 5 July 2018, he has failed to provide evidence of Berndale's entitlement to the funds in the CBH account; and
- (d) as far as ASIC is aware, the funds in the CBH account still have not been transferred to an Australian ADI despite concerns being raised with Berndale.

27 In relation to the Funds Equity TM entry in the balance sheet exhibited to Mr Kirby's affidavit, Ms Tenedero gave evidence that ASIC has been unable to verify the existence of any such

account, despite various compulsory notices being issued to Berndale requesting evidence of the funds held in the account. ASIC has also been unable to verify the amounts purportedly held in the HSBC account. An HSBC account statement indicates that the HSBC account is held in the United Kingdom (and is not an Australian ADI account). Based on the information available to ASIC, ASIC considers it likely that the HSBC account and the Funds Equity TM account are the same account.

28 ASIC has also undertaken further investigations of the CBA accounts held by Berndale Management and Algoplus. Based on documents produced by the CBA to ASIC, as at 21 January 2019 the accounts held by Berndale Management with the CBA had an aggregate balance of approximately \$710,000 and the account held by Algoplus with the CBA had a balance of approximately \$60,000. The documents also showed that funds have been frequently transferred between various of the Berndale client money accounts and the Algoplus expense account.

29 The financial records provided by the CBA also show that approximately \$1,000,000 was transferred from Berndale accounts to Mr Vong in the second half of 2018. In a s 19 examination, Mr Vong was unable to provide any satisfactory explanation of the use of those monies, save to claim that a large part of them was loaned to him by Berndale in order to make an unidentified property investment. Any such loan appears to be unsecured. Further, ASIC has been unable to identify any properties registered in Mr Vong's name or in the names of the companies of which Mr Vong is a director. Mr Kirby's affidavit does not refer to any loans made by Berndale to Mr Vong.

30 On 1 April 2019, Berndale provided ASIC with audited financial reports for the financial years ending 30 June 2017 and 30 June 2018. The balance sheet as at 30 June 2018 lists cash and cash equivalents of \$1,651,554, client trust liabilities of \$1,243,900 and net assets of \$2,317,557.

31 There are material differences between the balance sheet as at 30 June 2018 exhibited to Mr Kirby's affidavit and the balance sheet in the audited financial statements for the financial year ending 30 June 2018. In particular, the total assets figure has increased from Mr Kirby's affidavit by some \$500,000 (from approximately \$3,416,000 to approximately \$3,912,000). The client trust liabilities figure has also increased from Mr Kirby's affidavit by some \$544,000 (from approximately \$700,000 to approximately \$1,244,000). Both increases are unexplained.

32 ASIC also sought information from AFCA concerning complaints lodged against Berndale, Berndale Management or their directors or officers and outstanding or unpaid determinations in respect of those entities and persons. ASIC compared the information provided by AFCA with the information exhibited to Mr Kirby's affidavit as to amounts owing to Berndale's clients. The information provided by AFCA, detailing amounts claimed by certain clients of Berndale to be owing from Berndale, differs from the information provided in Mr Kirby's affidavit as to amounts owing to those clients. The aggregate amount claimed by clients who have lodged complaints with AFCA is over \$500,000 more than the amounts shown in the list exhibited to Mr Kirby's affidavit. Further, the information provided by AFCA indicates that there are at least 50 complainants who allege they are owed money by Berndale but are not listed in the exhibit to Mr Kirby's affidavit.

33 As at 1 March 2019, ASIC's misconduct and breach reporting team had received 66 reports of misconduct in relation to Berndale. ASIC again compared the amounts claimed to be owing to complainants with the list exhibited to Mr Kirby's affidavit. That comparison showed that the aggregate amount claimed to be owing to complainants was more than \$650,000 in excess of the amount listed in the exhibit to Mr Kirby's affidavit in respect of those persons. Further, there are at least 15 complainants who allege they are owed money by Berndale but are not listed in the exhibit to Mr Kirby's affidavit.

34 Based on the information available to it, ASIC believes that only approximately \$770,000 (held in the CBA accounts) is available to Berndale to pay out client liabilities. The total amount of client liabilities is unclear. The client list exhibited to Mr Kirby's affidavit shows the amounts held on behalf of clients as at 31 December 2018 to be \$2,375,784.09, although the amounts stated as client trust liabilities in Berndale's audited accounts as at 30 June 2018 is a materially lower figure (\$1,243,900). The complaints filed with AFCA and ASIC in relation to Berndale present a material risk that client liabilities may in fact be significantly greater than those disclosed by Berndale to date.

35 ASIC considers that it is necessary or desirable to appoint a receiver and manager of the property of Berndale to protect the interests of Berndale's clients, being persons to whom Berndale is liable or may become liable to pay money. This is because:

- (a) despite its investigations and requests for information from Berndale, ASIC is unable to quantify amounts owing to Berndale's clients and the assets available to Berndale to meet such liabilities;

- (b) Berndale appears to hold insufficient funds with Australian ADIs to meet its obligations to its clients;
- (c) Berndale has made loans in excess of \$1,000,000 to Mr Vong without adequate documentation or due diligence;
- (d) after the cancellation of Berndale's AFSL, Berndale dispersed its or its clients' funds to persons who were not entitled to them; and
- (e) after the cancellation of Berndale's AFSL and the cessation of its business, Berndale has not taken adequate steps to return funds owing to clients and other aggrieved persons.

### **Power to appoint receiver and manager**

36 ASIC seeks an interlocutory order from the Court under s 1323(1)(h)(ii) appointing a receiver and manager of the property of the corporate defendants for the purpose of identifying and securing all of the assets of the corporate defendants. Section 1323(1)(h)(ii) provides as follows:

- (1) Where:
  - (a) an investigation is being carried out under the ASIC Act or this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of the Act; or
  - (b) a prosecution has been begun against a person for a contravention of this Act; or
  - (c) a civil proceeding has been begun against a person under this Act;

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called an ***aggrieved person***) to whom the person referred to in paragraph (a), (b) or (c), as the case may be, (in this section called the ***relevant person***), is liable, or may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property, the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:

...

- (h) an order appointing:
  - (i) ...
  - (ii) if the relevant person is a body corporate – a receiver or receiver and manager, having such powers as the Court orders, of the property or of part of the property of that person...

...

- (3) Where an application is made to the Court for an order under sub-section (1),

the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the applications.

...

- (5) Where the Court has made an order under this section on a person's application, the Court may, on application by that person or by any person effected by the order, make a further order discharging or varying the first-mentioned order.

37 As observed by French J (as his Honour then was) in *ASIC v Carey (No 3)* (2006) 232 ALR 577; [2006] FCA 433, preconditions for the making of an order under s 1323(1)(h)(ii) are satisfied when, *inter alia*:

- (a) an investigation is being carried out under the ASIC Act or the Corporations Act in relation to an act or omission by a person (the relevant person) that constitutes, or may constitute, a contravention of the Act; and
- (b) ASIC has made an application for one or more of the orders that may be made under the section.

38 Those preconditions are satisfied in this case in respect of the corporate defendants.

39 With those preconditions satisfied, the Court may make an order appointing a receiver or receiver and manager of the property of the relevant person under s 1323(1)(h)(ii) where:

- (a) the relevant person is, or may be, or may become, liable to pay money to another person (the aggrieved person) whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property; and
- (b) the Court considers it necessary or desirable to make the orders for the purpose of protecting the interests of the aggrieved person.

40 Those requirements have been the subject of considerable judicial examination. The parties referred me to *ASIC v Burke* [2000] NSWSC 694; *ASIC v Carey (No 3)* (2006) 232 ALR 577; [2006] FCA 433; *ASIC v Sydney Investment House Equities Pty Ltd (No 2)* [2006] NSWSC 1264; *ASIC v Burnard* (2007) 64 ACSR 360; *ASIC v Global Rule Pty Ltd (in admin)* [2010] QSC 342; and *ASIC v Linchpin Capital Group Ltd* [2018] FCA 1104.

41 The purpose of orders made under s 1323 is to protect the interests of aggrieved persons. As observed by Austin J in *ASIC v Burke* (at [6]):

Although the appointment of a receiver as an interlocutory step is often associated with allegations of fraudulent misappropriation of property, it appears to me that the fundamental issue is not the character of the alleged wrongdoing of the defendants, but the overriding concern to protect assets for the benefit of those entitled to them.

42 The breadth of the circumstances in which orders may be made under s 1323 was discussed by French J in *ASIC v Carey (No 3)* (2006) 232 ALR 577; [2006] FCA 433 (at [25] - [27]):

The orders that can be made under the section are directed, inter alia, to the preservation of assets against which recovery may be sought in the event that liability to an "aggrieved person" is established on the part of a "relevant person". The orders are made in circumstances where "an investigation is being carried out", "a prosecution has been begun" or "a civil proceeding has been begun". That is to say the orders can be made before liability is established and indeed before the evidence necessary to establish liability has been collected. While an application under the section is not interlocutory in an existing criminal or civil proceeding, it is interlocutory in a wider sense. It preserves the status quo and the assets of the relevant person pending the outcome of the investigation, prosecution or civil proceedings which are on foot - *CAC v Lone Star Exploration NL (No 2)* (1988) 14 ACLR 499 at 504. At the stage an order is sought the Court may not be in a position to identify with precision any particular liability owed by the person the subject of the proposed order. This consideration applies to final orders made under the section as well as to interim orders for which it expressly provides in s 1323(3). The final orders made under the section are necessarily of a temporary or holding character rather than finally disposing of the rights and liabilities of the relevant persons affected by them.

The circumstances in which the Court may make orders under s 1323(1) are wide as indicated by the words "necessary or desirable ... for the purpose of protecting the interests of a person ...". There is an element of risk assessment and risk management in the judgment the Court is called on to make. It follows, and has been accepted, that there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person's assets have been or are about to be dissipated - *Corporate Affairs Commission v ASC Timber Pty Ltd* (1989) 7 ACLC 467 at 476 (Powell J); *Australian Securities and Investments Commission v Adler* (2001) 38 ACSR 266 at [7] (Santow J).

The nature and duration of orders made under s 1323(1) can be fashioned by the Court to reflect its assessment of any risk of dissipation of the assets of a person under investigation. But their legitimate purposes can go further. The interests of aggrieved persons may be protected not only by orders designed to protect dissipation of assets, but also by orders which create an opportunity for the assets of the person under investigation to be ascertained.

43 The appointment of a receiver has been described as "an extraordinary step" (*ASIC v Burke* [2000] NSWSC 694 at [8] per Austin J). In my view, it would be incorrect to start with any predisposition for or against the appointment of a receiver. Section 1323 requires the Court to determine whether the appointment is necessary or desirable for the purpose of protecting the interests of persons in the category of aggrieved persons as defined. Nevertheless, in considering the desirability of making the order, attention must be paid to any submission concerning the detriment which might arise from the appointment: *ASIC v Global Rule Pty Ltd*

[2010] QSC 342 at [19] per Martin J. For that reason, the Court will give consideration to whether the interests of aggrieved persons will be adequately protected by a less intrusive remedy: *ASIC v Burnard* (2007) 64 ACSR 360 at [22] per Barrett J.

### **Contentions of the corporate defendants**

44 The corporate defendants relied on the affidavit of Ms McNicholas, a solicitor employed by SLF Lawyers, the solicitors for the corporate defendants. Ms McNicholas gave evidence that SLF Lawyers were only recently engaged to act for the corporate defendants on 26 March 2019. Since the firm's engagement, an application has been lodged in the Administrative Appeals Tribunal seeking review of ASIC's decision to cancel Berndale's AFSL and an order to have it reinstated. SLF Lawyers have also engaged the corporate defendants' accountants to prepare an expert report to address the specific issues with Berndale's audited accounts that have been identified in the affidavits sworn by Ms Tenedero. Ms McNicholas also gave evidence that work is being undertaken to supplement the affidavit sworn by Mr Kirby in purported compliance with the Court's orders made on 19 December 2018, which will be filed and served in the proceeding as soon as the accountant's expert report has been provided. On the basis of the steps being taken by SLF Lawyers on behalf of the corporate defendants, Ms McNicholas requested an adjournment of the hearing of ASIC's application to appoint a receiver of the property of the corporate defendants.

45 In written and oral submissions, Counsel for the corporate defendants advanced three reasons why the Court ought not appoint a receiver or receiver and manager:

- (a) asset preservation orders and disclosure orders have already been made in respect of the corporate defendants and these orders are sufficient to protect the interests of the clients of Berndale;
- (b) the concerns raised by ASIC through the evidence of Ms Tenedero will be addressed through the anticipated supplementary affidavit of Mr Kirby, the accountant's expert report and compliance by the remaining defendants with the disclosure orders of the Court; and
- (c) the appointment of a receiver is "an extraordinary step" and should not be ordered if there is a less drastic remedy which will suffice.

46 The corporate defendants proposed that the application for the appointment of a receiver be adjourned to a date in early May 2019 which would provide time for the corporate defendants to provide the further information to ASIC.

### **Disposition**

47 As noted above, the preconditions to the making of orders under s 1323 are satisfied. An investigation is being carried out by ASIC under both the Corporations Act and the ASIC Act in relation to acts or omissions of the corporate defendants that may constitute a contravention of the Corporations Act, and ASIC has applied for orders under s 1323.

48 The evidence establishes that there are a large number of clients of the Berndale business in respect of whom each of the corporate defendants is, or may be, or may become, liable to pay money, whether in respect of a debt, by way of damages or compensation. Berndale has received client monies in the course of its business as a provider of derivatives. Berndale is now prevented from continuing to carry on its business as a result of ASIC cancelling its AFSL. Clients of the business are therefore entitled to the return of monies previously deposited with Berndale. Further, ASIC is investigating potential contraventions of the ASIC Act and the Corporations Act in connection with Berndale's business, including the use and investment of client monies. A large number of complaints have been made to AFCA and ASIC by clients of Berndale who are seeking either the return of investments or compensation. Some of the client monies appear to have been transferred from Berndale Management to Algoplus.

49 The evidence also establishes that there is considerable uncertainty as to whether Berndale has sufficient funds to meet the potential liabilities to its clients. This uncertainty affects both the assessment of the amount of the potential liabilities to Berndale's clients and the assessment of the assets available to Berndale to meet those potential liabilities. As to liabilities, the client list exhibited to Mr Kirby's affidavit shows the amounts held on behalf of clients as at 31 December 2018 to be \$2,375,784.09, although the amounts stated as client trust liabilities in Berndale's audited accounts as at 30 June 2018 is \$1,243,900. Berndale's Client Money Reconciliation Report as at 5 December 2018 is unclear as to what amount is potentially owing. The complaints filed with AFCA and ASIC in relation to Berndale create a material risk that client liabilities may in fact be significantly greater. As to the value of Berndale's assets, only approximately \$770,000 is held in accounts with an Australian ADI. While Mr Kirby's affidavit and Berndale's audited accounts refer to amounts held in overseas accounts, particularly an account with CBH Compagnie Bancaire Helvétique SA in Switzerland and an

account with HSBC in London, Berndale has failed to provide ASIC with evidence verifying that funds in those accounts are owned and controlled by Berndale and are available to meet client liabilities.

50 I am not persuaded that the asset freezing orders and disclosure orders that have already been made by the Court are sufficient to protect the interests of Berndale's clients. This is for two principal reasons. First, following the cancellation of Berndale's AFSL on 22 November 2018, the corporate defendants engaged in a number of transactions that reduced the amounts standing to the credit of Australian bank accounts that held client monies. While certain monies have been returned to those bank accounts, ASIC's subsequent investigations have revealed that, over time, there have been numerous transfers of money between Berndale's client accounts and the Algoplus account and, during the second half of 2018, Berndale loaned approximately \$1,000,000 to Mr Vong on an undocumented and unsecured basis. The evidence suggests that there are serious doubts as to the recoverability of those monies. Second, the corporate defendants have failed to comply with the Court's disclosure orders made on 19 December 2018. While Mr Kirby prepared an affidavit in purported compliance with the orders made in respect of Berndale, in my view his affidavit did not satisfy the requirements of the relevant order. Instead of providing detailed information concerning the assets and liabilities of Berndale, the affidavit provided generalised and unclear assertions. Neither Berndale Management nor Algoplus have complied with the Court's orders to provide a disclosing affidavit.

51 The evidence adduced by ASIC establishes that ASIC has encountered very great difficulty in ascertaining the assets and liabilities of Berndale. To date, the corporate defendants have not allayed concerns that Berndale may not be able to meet client liabilities. The recent promises of the corporate defendants to provide more information do not persuade me that ASIC's application should be adjourned. I am satisfied that it is desirable to appoint a receiver and manager of the property of the corporate defendants to protect the interests of Berndale's clients.

52 The orders I have made are as follows:

1. Pursuant to s 1323(1)(h)(ii) of the *Corporations Act* 2001 (the **Act**), and subject to any further or other order of the Court, Rachel Burdett-Baker and Bruno Secatore, of Cor Cordis, Level 29, 360 Collins Street, Melbourne, Victoria, 8007, (the **Receivers**), be appointed, without giving security, as joint and several receivers and managers of each

of the first, third and fourth defendants (**corporate defendants**) with all of the powers provided in these Orders for the purposes of identifying and securing all of the assets of the corporate defendants.

2. Subject to these Orders and any further or other order of the Court, the Receivers have the following powers:

- (a) all powers necessary to identify and secure the assets of each of the corporate defendants;
- (b) all powers necessary to collect the assets referred to in paragraph (2)(c) of these Orders;
- (c) to enter into possession and take control of all assets (including money) of the corporate defendants, including all assets of the corporate defendants used in or relating to its operations, together with all books, records, computers, computer disks, and any other papers or records relating thereto;
- (d) to deal with any moneys held by or on behalf of the corporate defendants or its officers, employees or agents or any of them, being moneys received in relation to or employed in the corporate defendants' operations;
- (e) to operate and inspect any account at any bank or other financial institution being an account operated by the corporate defendants or their officers, employees or agents or any of them and to withdraw any such moneys and to pay any such moneys into an account or accounts opened or maintained by or for the Receivers;
- (f) to appoint a solicitor, accountant or other professionally qualified person either within or outside Australia to assist the Receivers;
- (g) to delegate to their partners, employees and agents whether within or outside Australia any business or matter that the Receivers are unable to do themselves or that can be done more conveniently by those others;
- (h) to receive any moneys due to the corporate defendants relating to their operations;
- (i) to pay any expense or execute any document in the course of the performance of the powers conferred by these Orders in the name, or on behalf, of the corporate defendants, their officers, employees or agents or any of them; and

- (j) to apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of the Receivers' functions and powers pursuant to these Orders.
3. The Receivers may not, until the first directions hearing following the filing of the reports referred to in paragraph 5 and subject to any directions by the Court, determine the timing of the payment of any debts to clients of the corporate defendants.
  4. During the period of receivership and management, subject to these Orders and any further or other order of the Court:
    - (a) the Receivers shall assume the management of the corporate defendants and shall perform the duties, and may perform any of the functions and exercise any of the powers of the directors of the corporate defendants;
    - (b) the provisions of the Act relating to the keeping of accounts, the appointment and re-appointment of auditors and the rights and duties of auditors shall continue to apply in relation to the corporate defendants, and in the application of those provisions to and in relation to the corporate defendants a reference to the directors of any one of the corporate defendants shall be read as a reference to the Receivers as receivers and managers of that company; and
    - (c) there shall be no stay of any action or other civil proceedings by or against any of the corporate defendants in any court or other tribunal nor shall there be any restraint upon the commencement or prosecution of any action or other civil proceedings by or against any of the corporate defendants in any court or other tribunal. In all or any of such actions or civil proceedings or otherwise the Receivers shall have authority to bring or defend such actions or civil proceedings in the name of any of the corporate defendants.
  5. On or before 31 May 2019 or such other date as the Court allows, the Receivers shall provide to the Court, the Plaintiff and the Defendants a report as to each of the corporate defendants (the **Disclosure Reports**), including:
    - (a) the identification of the assets and liabilities of the corporate defendants;
    - (b) an opinion as to the solvency of the corporate defendants;
    - (c) the likely return to clients of the corporate defendants;
    - (d) any other information necessary to enable the financial position of the corporate defendants to be assessed;

- (e) any suspected contravention of the Act by the any directors and or officers of the corporate defendants;
  - (f) the nature and identity of the assets of the corporate defendants;
  - (g) the claims (actual, contingent and other) of third parties in relation to the assets of the corporate defendants including, but not limited to, whether the assets of the corporate defendants have been given as security for any debt or liability and if so, the nature of the security and the debt or liability so secured;
  - (h) in relation to the clients:
    - (i) the identities of the clients and the nature and extent of their interests;
    - (ii) any payments made to or by clients in relation to the corporate defendants; and
    - (iii) any money owing to the clients.
  - (i) the nature and identity of the liabilities of the corporate defendants including, but not limited to, liabilities to the clients;
  - (j) the most appropriate manner and timing of managing and realising any assets of the corporate defendants so as to most benefit the clients; and
  - (k) a recommendation as to the process for recovering all money owing to the corporate defendants, whether by way of loan or otherwise.
6. The Receivers have such powers as may be necessary to enable them to carry out and complete the inquiry and reports referred to in these Orders. In particular, they shall be entitled to inspect at any reasonable time any books (as defined in s 9 of the Act) in relation to the corporate defendants (except to the extent a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
7. The Receivers have access to the documents held by the Plaintiff (ASIC) in relation to the corporate defendants (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
8. Each of the corporate defendants by its officers, agents and/or employees must immediately deliver up to the Receivers all books (as defined in s 9 of the Act), records and other papers relating to the corporate defendants not delivered to ASIC including, but not limited to, all books (as defined in s 9 of the Act), records and other papers

relating to the corporate defendants in the possession of any one of the defendants (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).

9. Each of the defendants by their directors, officers, servants and agents answer such questions as the Receivers may reasonably require them to answer as to any of the matters under inquiry (except to the extent that a claim of privilege against self-incrimination, civil penalty privilege, or a claim of legal professional privilege is made on behalf of an individual).
10. Subject to paragraph (11) of these Orders, the Receivers shall be entitled to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as receivers and managers over the assets of each corporate defendant, as may be fixed by the Court on the application of the Receivers, such sum to be calculated on the basis of the time reasonably spent by the receivers and managers, their partners and staff, at the rates specified in the second schedule to the Consent of Receivers filed with the Court on 22 March 2019.
11. Nothing in these Orders is to affect the rights of any prior encumbrancers of the assets of the corporate defendants, including the rights of any secured lender.
12. Any secured lender has liberty to apply to the Court in relation to any matter arising in connection with these Orders upon giving reasonable notice to the parties and to the Receivers.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan.

Associate:



Dated: 1 May 2019

## **SCHEDULE OF PARTIES**

**VID 1554 of 2018**

### **Defendants**

Second Defendant:	STAVRO D'AMORE
Third Defendant:	BERNDALE CAPITAL SECURITIES MANAGEMENT PTY LTD ACN 606 118 736
Fourth Defendant:	ALGOPLUS PTY LTD ACN 605 329 575
Fifth Defendant:	MARIO D'AMORE
Sixth Defendant:	JONAS VONG