



Federal Court of Australia

District Registry: Western Australia

Division: General

No: WAD481/2018

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Plaintiff

CHRIS MARCO and others named in the schedule

Defendants

ORDER

JUDGE: JUSTICE MCKERRACHER

DATE OF ORDER: 07 December 2020

WHERE MADE: Perth

THE COURT NOTES THAT:

- A. For the purposes of these orders, ‘the **Scheme**’ means the managed investment scheme operated by the each of the defendants, whereby between 1 January 2014 and 31 October 2018:
- (a) the first defendant obtained moneys from investors;
 - (b) the first defendant pooled the moneys in bank accounts, including the following accounts:
 - (i) Westpac Banking Corporation – BSB 036406, Account number 239817;
 - (ii) Westpac Banking Corporation – BSB 037131 Account number 684106;
 - (iii) Westpac Banking Corporation – BSB 037 131 Account number 693360;
 - (iv) Westpac Banking Corporation – BSB 037 165 Account number 857175; and
 - (v) Westpac Banking Corporation – BSB 736 053 Account number 654708;
 - (c) the first defendant represented and/or agreed with investors that the moneys were to be used as a proof of funds for investments and/or to fund investments;



- (d) the first defendant represented and/or agreed with investors that in return for advancing funds, investors would receive a right to interest payments;
- (e) the first defendant was to use the moneys as proof of funds for investments and/or to fund investments, with a view to generating a profit out of which interest payments were to be paid to investors;
- (f) the first defendant transferred moneys to the second and/or third defendants with a view to purchasing real and/or personal property;
- (g) the real and/or personal property of the second and/or third defendants purchased with the moneys that were transferred was to be available to meet liabilities to investors;
- (h) the first defendant, second defendant and/or third defendant transferred, or expended moneys obtained from investors for private gain and/or for the private gain of related parties or associates; and
- (i) the investors did not have day to day control over the use of the moneys.

THE COURT DECLARES THAT:

1. Each of the defendants, by investing client funds with the intention of generating a financial return, contravened the provisions of section 911A of the *Corporations Act 2001* (Cth) (the *Corporations Act*) in that each carried on a financial services business without holding an Australian Financial Services Licence in the period between at least 1 January 2014 and 31 October 2018.
2. Each of the defendants operated the Scheme in contravention of section 601ED(5) of the *Corporations Act*, in circumstances where the Scheme was required to be registered under section 601EB of the *Corporations Act* in the period between at least 1 January 2014 and 31 October 2018.

THE COURT ORDERS THAT:

Receivership appointment orders

1. Pursuant to section 1101B(1) of the *Corporations Act*, Mr Robert Michael Kirman and Mr Robert Conry Brauer of McGrathNicol, Level 19, 2 The Esplanade, Perth, Western Australia, be appointed as joint and several receivers and managers (**Receivers**), without security, of all property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, of:
 - (a) the first defendant and second defendant;
 - (b) the third defendant immediately prior to the appointment of voluntary administrators to the third defendant; and



- (c) the Scheme,
together, the **Property**.
2. To the extent that it has not already occurred, each of the first defendant, the second defendant and the third defendant are to immediately give over possession of all their property (as defined in the *Corporations Act*), whether within or outside the State of Western Australia, together with all books and records relating to that property, to the Receivers.
3. The Receivers have the following powers:
- (a) the power to do all things necessary or convenient to be done, in Australia and elsewhere, for or in connection with, or as incidental to the attainment of the objectives for which the Receivers are appointed including, without limitation, for the identification, preservation and securing of all of the Property for the benefit of creditors;
 - (b) the powers under section 1101B(8) of the *Corporations Act*;
 - (c) the powers set out in section 420 of the *Corporations Act* provided that wherever in that section the word ‘corporation’ appears, it shall be taken to refer to the first defendant, the second defendant, the third defendant and the Scheme; and
 - (d) the power to require, by request in writing, the first defendant and any employee, agent, banker, solicitor, stockbroker, accountant, consultant or other professionally qualified person who has provided services or advice to the first defendant, the second defendant or the third defendant to provide such reasonable assistance (including access to any documents, books or records to which the first defendant has a right of access or control) to the Receivers as may be required from time to time.
4. Upon being called upon to do so, the Receivers must deliver up that part of the Property that is property of the Scheme to the liquidators appointed under order 14 below.

Receivership remuneration and indemnity orders

5. The Receivers shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Receivers, together with all costs, expenses and disbursements.
6. The Receivers’ remuneration is to be calculated on the basis of time reasonably spent by the Receivers and any partner or employee of the firm to which the Receivers are attached, at the standard rates of the Receivers’ firm from time to time for work of that nature.



7. The Receivers' remuneration, costs, expenses and disbursements are to be paid from the Property.
8. The Receivers be indemnified from the Property against any claim, liability, proceedings, cost, charge or expense however arising and whether past, present or future, fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.
9. The above orders are not to affect the rights of any prior encumbrances over the Property, including the rights of any secured creditor.
10. For the avoidance of doubt, the entitlement of the Receivers to be paid or indemnified from the Property under orders 7 and 8 is not restricted or in any way limited by whether they are acting as receivers of property of the first defendant, the second defendant, the third defendant or the Scheme and they are entitled to treat the Property as a single combined pool of property for those purposes.

Termination of Interim Receivership

11. Immediately upon order 1 taking effect, the appointment of Mr Kirman and Mr Brauer as 'Individual Receivers' and as 'Corporate Receivers' pursuant to section 1101B(5) of the *Corporations Act* under orders 2 and 7 of the orders made on 27 May 2020 (the **Interim Receivers**) be terminated.

Windup up orders

12. Pursuant to section 601EE(2) of the *Corporations Act*, the Scheme be wound up.
13. Pursuant to sections 467B, 459B and 461(1)(k) of the *Corporations Act*, AMS Holdings (WA) Pty Ltd (ACN 164 700 485) be wound up.
14. If and to the extent required, pursuant to section 532 of the *Corporations Act*, leave be granted for Mr Kirman and Mr Brauer be appointed as joint and several liquidators (the **Liquidators**) of:
 - (a) the Scheme; and
 - (b) AMS Holdings (WA) Pty Ltd (ACN 164 700 485).
15. Upon the appointment of the Liquidators in accordance with order 14 above, the appointment of Cameron Shaw, Richard Albarran and Marcus Watters of Hall Chadwick as liquidators of the Second Defendant be terminated.
16. The asset preservation orders made on 1 November 2018 be vacated on the later of the appointment of the Liquidators pursuant to order 14 and the appointment of Receivers pursuant to order 1.
17. Pursuant to section 601EE(2) of the *Corporations Act*, and subject to any further orders of the Court:



- (a) the winding up of the Scheme be conducted as if the Scheme were a 'company' or 'corporation' for the purposes of the *Corporations Act* and the provisions of Parts 5.4B, 5.6, 5.7B and 5.9 of the *Corporations Act* and Schedule 2 to the *Corporations Act* (Insolvency Practice Schedule (Corporations)) applied to the winding up (with such modifications as are reasonably necessary in the circumstances);
- (b) the Liquidators of the Scheme have power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with the winding up of the Scheme, or incidental to the attainment of the winding up of the Scheme, including the functions and powers set out in Chapter 5 of the *Corporations Act* (as applicable) as if each reference there to a 'company' or 'corporation' was a reference to the Scheme (with such modifications as are reasonably necessary in the circumstances); and
- (c) without limiting the above, the Liquidators of the Scheme shall have the power to investigate or cause to be investigated any deficiency in the Scheme and to exercise the powers under Part 5.9 Division 1 of the *Corporations Act* as if the Scheme were a 'corporation' being wound up.

Liquidation remuneration and indemnity orders

18. The Liquidators shall be entitled to reasonable remuneration properly incurred in the performance of their duties arising in connection with their appointment and in the exercise of their powers as may be approved by the Court on the application of the Liquidators, together with all costs, expenses and disbursements.
19. The Liquidators' remuneration is to be calculated on the basis of time reasonably spent by the Liquidators and any partner or employee of the firm to which the Liquidators are attached, at the standard rates of the Liquidators' firm from time to time for work of that nature.
20. The Liquidators' remuneration, costs, expenses and disbursements are to be paid out of the assets of the Scheme.
21. The Liquidators be indemnified from the assets of the Scheme (including the Property) against any claim, liability, proceedings, cost, charge or expense however arising and whether past, present or future, fixed or ascertained, actual or contingent, known (actually or contingently) or unknown which they may incur or be subject to as a result of or in connection with their appointment.
22. The above orders are not to affect the rights of any prior encumbrances over the assets of the Scheme, including the rights of any secured creditor.
23. For the avoidance of doubt, the entitlement of the Liquidators to be paid or indemnified from the assets of the Scheme under orders 20 and 21 is not restricted or in any way limited by whether they are acting as liquidators of the Scheme or AMS



Holdings (WA) Pty Ltd (ACN 164 700 485) and they are entitled to treat the assets of the Scheme as a single combined pool of assets for those purposes.

Injunctive relief

24. Pursuant to section 1324 of the *Corporations Act*, the first defendant be permanently restrained from:
- (a) carrying on a financial services business in Australia without holding an Australian financial services licence covering the provision of the financial services; and
 - (b) operating an unregistered managed investment scheme in contravention of section 601ED(5) of the *Corporations Act*.

Costs

25. The defendants pay the plaintiff's costs of the proceedings, including the costs of the plaintiff's interlocutory application filed on 12 December 2019 and ruled on in *Australian Securities and Investments Commission v Marco (No 3)* [2020] FCA 719, as taxed or agreed.

Miscellaneous

26. The Receivers and/or Liquidators and other parties have liberty to apply on short notice, including as to termination of the Receivers appointed under order 1 above.

Date that entry is stamped: 7 December 2020


Registrar



Schedule

No: WAD481/2018

Federal Court of Australia

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Division: General

Interested Person	ROBERT MICHAEL KIRMAN AND ROBERT CONRY BRAUER AS INTERIM RECEIVERS
Interested Person	CAMERON SHAW, RICHARD ALBARRAN AND MARCUS WATTERS, THE JOINT AND SEVERAL ADMINISTRATORS OF AMS HOLDINGS (WA) PTY LTD (RECEIVERS APPOINTED) (ADMINISTRATORS APPOINTED)
Interested Person	CAMERON SHAW, RICHARD ALBARRAN AND MARCUS WATTERS, THE JOINT AND SEVERAL ADMINISTRATORS OF AMS HOLDINGS (WA) PTY LTD (RECEIVERS APPOINTED) (ADMINISTRATORS APPOINTED) AS TRUSTEE FOR AMS HOLDINGS TRUST (THE ADMINISTRATORS)
Second Defendant	AMS HOLDINGS (WA) PTY LTD (ACN 164 700 485)
Third Defendant	AMS HOLDINGS (WA) PTY LTD (ACN 164 700 485) AS TRUSTEE FOR AMS HOLDINGS TRUST