

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v ALAMMC Developments Pty Ltd (No 2) [2024] FCA 1505

File number(s): QUD 532 of 2024

Judgment of: **O'SULLIVAN J**

Date of judgment: 20 December 2024

Catchwords: **PRACTICE AND PROCEDURE** — where Receivers appointed to the property of the defendants by the Court whilst ASIC conducting an investigation — whether the Receivers would be justified and acting reasonably in refusing to consent to pay and in not paying from the property of a defendant reasonable legal costs incurred by the defendant — orders made that the Receivers would be justified in consenting to pay and in paying from a defendant's property, an amount for that particular defendant's legal costs, and if there is not sufficient property of that defendant, in paying such portion of the amount as the Receivers see fit

Legislation: *Corporations Act 2001* (Cth), s 1323  
*Federal Court of Australia Act 1976* (Cth), s 54A  
*Federal Court Rules 2011* (Cth), rr 28.65(7), 28.66(a)

Cases cited: *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd and Ors* (2006) 60 ACSR 447; [2006] FCA 1415  
*HN QCV Tree Village Pty Ltd v QCV Bottle Tree Village Pty Ltd* [2018] NSWSC 1807  
*Murray v King* [1984] FCA 283; (1984) 55 ALR 559

Division: General Division

Registry: Queensland

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 29

Date of hearing: 3 December 2024

Counsel for the Plaintiff: Mr M Steele KC with Mr L Freckelton  
Solicitor for the Plaintiff: Minter Ellison  
Counsel for the Receivers: Mr C Möller SC with Ms S Hooper  
Solicitors for the Receivers: Norton Rose Fulbright Australia  
Counsel for the Defendants: Mr F Assaf SC with Mr D Monteith  
Solicitor for the Defendants: Strategic Legal

# ORDERS

QUD 532 of 2024

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

**ANDREW PETER FIELDING AND HELEN NEWMAN AS  
JOINT AND SEVERAL RECEIVERS AND MANAGERS OF  
THE FIRST TO FIFTEENTH DEFENDANTS**  
Receivers

**AND:**                 **ALAMMC DEVELOPMENTS PTY LTD**  
First Defendant

**ALAMMC DEVELOPMENTS 2 PTY LTD**  
Second Defendant

**ALAMMC DEVELOPMENTS 3 PTY LTD** (and others named in  
the Schedule)  
Third Defendant

**ORDER MADE BY: O’SULLIVAN J**

**DATE OF ORDER: 20 DECEMBER 2024**

## THE COURT ORDERS THAT:

1. The Court directs that in relation to the property of each defendant, the Receivers would be justified:
  - (a) In consenting to pay and in paying, from that property, an amount for that defendant’s reasonable legal costs that fall within paragraph 12 of the 1 November 2024 orders, provided the Receivers are satisfied that:
    - (i) Those costs are truly costs of that defendant; and
    - (ii) There is sufficient property of that defendant from which to pay the amount;
  - (b) If there is not sufficient property of that defendant from which to pay the amount, in paying such portion of the amount as the Receivers see fit; and
  - (c) Otherwise, and subject to further or other order, in refusing to pay such an amount.

2. In the event the defendants contend the Receivers have withheld unreasonably their consent to the payment of any of the defendants' legal costs, within seven days of such refusal to consent, the defendants may, if so advised, file an application in the Court in relation to the question of whether such consent has been withheld unreasonably.
3. Pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth), any application filed pursuant to order 2 above is referred to a Registrar as referee to conduct an inquiry and report in accordance with Division 28.6 of the *Federal Court Rules 2011* (Cth) (**FCR**).
4. The requirements of FCR 28.65(7) and 28.66(a) be dispensed with.
5. The inquiry be conducted:
  - (a) on the basis of the evidence and submissions filed in support of any application and in accordance with the directions of the referee;
  - (b) without cross-examination of deponents of affidavits unless the referee considers it would be helpful; and
  - (c) in the manner which, in the referee's opinion, is the most efficient and practical in order to answer the questions the subject of the application, with as little formality and expense as is reasonably possible.
6. The referee may make such directions as they consider appropriate in order to effect the inquiry in conformity with these orders.
7. The referee is to submit a report to the Court in accordance with FCR 28.66.

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

## REASONS FOR JUDGMENT

### O'SULLIVAN J:

1 On 11 September 2024, the Court made orders restraining the defendants from dealing with their assets.

2 On 22 October 2024, the Court appointed Receivers of the property of the 14<sup>th</sup> and 15<sup>th</sup> defendants.

3 On 1 November 2024, the Court appointed the same Receivers as Receivers of the property of the 1<sup>st</sup> to 13<sup>th</sup> defendants and made a number of other orders (**1 November 2024 orders**).

4 Orders 12 and 13 of the 1 November 2024 orders provide:

12. The restraints referred to in Orders 4 and 5 of the Orders made by Yates J on 11 September 2024 (as varied by Order 3 of the Orders made by Stewart J on 16 September 2024) and Orders 10 and 11 of these Orders do not prevent the Defendants from paying, including paying monies into trust, or otherwise incurring a legal liability reasonably incurred in these proceedings and any criminal proceedings arising from the Plaintiff's investigations into the affairs of the Defendants, including the reasonable costs of obtaining legal advice in relation to the subject matter of the Plaintiff's investigations, as consented to in writing by the Receivers appointed pursuant to Orders 1 and 3 of these Orders, and Order 1 of the Orders made on 22 October 2024.

13. The consent of the Receivers referred to in Order 12 is not to be unreasonably withheld with the communication of such consent or otherwise to be made by the Receivers within 7 calendar days of a written request being made.

5 The Receivers applied by an amended interlocutory application dated 1 December 2024 for a series of orders and directions, including in relation to orders 12 and 13 of the 1 November 2024 orders, a direction in the following terms:

10. A direction that in relation to the property of each defendant, the Receivers would be justified and acting reasonably:

(a) In consenting to pay and in paying, from that property, an amount for that defendant's reasonable legal costs that fall within paragraph 12 of the 1 November 2024 Order, provided the Receivers are satisfied that:

(i) Those costs are truly costs of that defendant; and

(ii) There is sufficient property of that defendant from which to pay the amount;

(b) If there is no sufficient property of that defendant from which to pay the amount, in paying such portion of the amount as the Receivers see fit; and

- (c) Otherwise, and subject to further or other order, in refusing to pay such an amount.

6 The Receivers also sought a direction that if there is not sufficient property of the defendant in question from which to pay the reasonable legal costs sought for legal work done for that defendant, in paying such portion of the legal costs from the property of that defendant as the Receivers see fit.

7 Still further, the Receivers sought a direction that otherwise and subject to further order, the Receivers would be justified and acting reasonably in refusing to pay such an amount.

8 The defendants oppose the Court making that direction and by their own amended interlocutory application dated 2 December 2024, sought orders 12 and 13 of the 1 November 2024 orders be revoked and replaced by orders in the following terms:

- (5) 12. The restraints referred to in Orders 4 and 5 of the Orders made by Yates J on 11 September 2024 (as varied by Order 3 of the Orders made by Stewart J on 16 September 2024) and Orders 10 and 11 of these Orders do not prevent:
  - (a) The Defendants from paying forthwith to Strategic Legal the amount of \$59,511.90:
    - (i) \$58,001.90 in respect of invoice number 4051 dated 18 November 2024; and
    - (ii) \$1,510 in respect of invoice number 4055 dated 19 November 2024;
  - (b) The Defendants from paying, including by paying monies into a solicitor's trust account, or otherwise incurring a legal liability reasonably incurred in connection with these proceedings and any criminal proceedings arising from the Plaintiffs investigations into the affairs of the Defendants or those of the Receivers, including the reasonable legal costs incurred by the Defendants in relation to the subject matter of the Plaintiff's investigations into the affairs of the Defendants, including the cost of representation for any employee of the Defendants who is required to attend a compulsory examination and those of the Receivers up to an amount of \$100,000;
  - (c) Further to Order 12(b) and in addition to the amount referred to in Order 12(a) herein, the Defendants withdrawing from time to time an amount of up to \$100,000 from the following bank accounts for the sole purpose of paying the Defendants' reasonable legal costs including by paying monies into a solicitor's trust account:
    - i. Alammc Developments Pty Ltd bank account number XXX [redacted];
    - ii. Alammc Developments 2 Pty Ltd bank account number XXX [redacted];

- iii. Alammc Developments 4 Pty Ltd bank account number XXX [redacted];
  - iv. Alammc Developments 5 Pty Ltd bank account number XXX [redacted];
  - v. Harvey Madison Capital Pty Ltd bank account number XXX [redacted];
  - vi. Mortgage Mutual Fund Pty Ltd bank account number XXX [redacted];
  - vii. Coral Coast Mutual Pty Ltd bank account number XXX [redacted].
- (d) The Fifteenth Defendant from utilising funds held in account number XXX [redacted], XXX [redacted] and XXX [redacted]:
- (i) For the purposes of paying reasonable legal costs relating to the Application for Leave to Appeal in Federal Court of Australia proceedings number QUD683/2024 and any subsequent appeal.
  - (ii) As and how she sees fit for the sole purpose of paying, including by paying monies into a solicitor's trust account, or otherwise incurring a legal liability reasonably incurred in connection with these proceedings and any criminal proceedings arising from the Plaintiff's investigations into the affairs of any of the Defendants or those of the Receivers, including the reasonable legal costs incurred by the any of the Defendants in relation to the subject matter of the Plaintiff's investigations into the affairs of the Defendants.
13. The Defendants provide written notice to the Receivers of the withdrawals contemplated by Order 12 within three business days of the making of such withdrawals.

### **The issue**

- 9 Putting the matter in the negative, the issue is whether the Receivers are justified and acting reasonably in refusing to consent to pay and in not paying from the property of a defendant, reasonable legal costs falling within Order 12 of the orders made 1 November 2024 where:
- (a) The costs are not truly costs of that defendant; and/or
  - (b) There is not sufficient property of that defendant from which to pay the amount.

### **The parties' submissions and consideration**

- 10 There has been extensive correspondence on this issue.
- 11 The defendants submit that in broad terms, three issues have arisen, however for the purposes of these reasons, the issue is that the Receivers have objected to the use of available funds from specific defendants to pay legal fees on behalf of other defendants in the proceedings.

12 The affidavit material put before the Court on this and other questions arising on the interlocutory applications reveal that the Receivers have refused to provide their consent for the following fees to be paid out of funds held on trust by the defendants' solicitors:

- (a) \$58,001.90 to cover the defendants' solicitor's and counsel's fees for the period 1 November 2024 to 17 November 2024; and
- (b) Court filing fees.

13 Further, the Receivers have not consented to the payment of any legal fees out of the funds held in the bank account of the 15<sup>th</sup> defendant, Ms Fullarton, in respect of an appeal Ms Fullarton has filed against the appointment of a Receiver to her property.

14 As I understand the matter, it is not a question of whether the fees are reasonable, it is the source of funds to pay those fees.

15 The defendants submit that the property which the Receivers are directed to take into possession does not vest in the Receivers: *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd and Ors* (2006) 60 ACSR 447; [2006] FCA 1415 at [30].

16 The defendants also submit that the Court does not have power to authorise the Receiver to depart from the strict legal position or to take steps that alter legal rights such that any authorisation by the Court must be properly confined to exercise the powers lawfully given to the Receiver: *HN QCV Tree Village Pty Ltd v QCV Bottle Tree Village Pty Ltd* [2018] NSWSC 1807 at [69].

17 The defendants submit further that the Receivers have no power of inquiry given the limited nature of the powers conferred by the Court, nor do they have power or authority to adjudicate claims or determine the substantive rights of the parties: *GDK* at [41], *Murray v King* [1984] FCA 283; (1984) 55 ALR 559, 565.

18 The point the defendants make is that the existing orders, even as varied in the manner proposed by the Receivers, do not permit the Receivers to adjudicate the defendants' respective entitlements to payment of the reasonable legal costs.

19 Rhetorically, the defendants query how the Receivers can be satisfied that the costs claimed relate to a particular defendant and what rights of appeal the defendants have in respect of any adjudication - I assume both as to the particular defendant and the reasonableness of the costs claimed.



20 In making their submissions, the defendants characterise the task to be undertaken by the  
Receivers as being one of investigation or inquiry and adjudication which they submit, is not a  
power the Receivers have.

21 I do not accept that characterisation of what the Receivers are seeking, nor do I accept the  
submission that in making the direction sought, the Court is giving powers to the Receivers  
which they do not have.

22 There is no suggestion of the Receivers adjudicating on anything. There is an existing  
requirement that the Receivers not withhold consent unreasonably. The direction the Receivers  
seek is that they would not be withholding consent unreasonably in the particular circumstances  
identified.

23 By Orders 4 and 5 made by Yates J on 11 September 2024, his Honour restrained the defendants  
from dealing with their property save for properly incurred living and operating expenses up  
to an amount of \$800 per week, liability for costs reasonably incurred in the proceedings, any  
criminal proceedings arising from ASIC's investigations into the affairs of the defendants, and  
any set-off exercised by any bank, building society or financial institution in respect of a facility  
afforded by such an institution to the defendants.

24 Those orders were varied subsequently by Stewart J on 16 September 2024, when his Honour  
added to the matters identified by Yates J, the reasonable cost of obtaining legal advice in  
relation to the subject matter of ASIC's investigations.

25 Order 12 of the 1 November 2024 orders is a further qualification to the restraint orders made  
by Yates J on 11 September 2024. That qualification arose because of the appointment of  
Receivers and is directed at ensuring that the interests of aggrieved persons within the meaning  
of s 1323 of the *Corporations Act 2001* (Cth) are preserved until, at least, ASIC's investigations  
are completed. It is also directed at maintaining a balance between the protection of those  
interests and the right of the defendants to obtain legal advice which, necessarily, involves  
payment for that advice.

26 Further, it is not beyond the realms of possibility that an aggrieved person may have rights  
against some, but not all, of the defendants. In this matter, significant sums of money have  
been moved between the defendants for reasons which are not entirely clear at this stage and a  
tracing exercise forms part of ASIC's investigation. Under those circumstances, depending on  
how the money has been transferred between the defendants and, in some cases, used to

purchase assets, to allow a particular defendant's financial resources to be used for the purposes of paying for legal advice given to a different defendant, has the potential to result in a benefit to a particular aggrieved person, at the expense of a different aggrieved person.

27 It is for those reasons that I am not prepared to make the orders sought by the defendants.

28 Nonetheless, there is merit in the defendants' submissions concerning any right to challenge a refusal to give consent by the Receivers which the defendants consider to be unreasonable. That can be accommodated in an appropriate order by having a Registrar of the Court prepare a referee report on whether any withholding of consent is unreasonable or not.

29 There will be a direction as follows:

- (1) The Court directs that in relation to the property of each defendant, the Receivers would be justified:
  - (a) In consenting to pay and in paying, from that property, an amount for that defendant's reasonable legal costs that fall within paragraph 12 of the 1 November 2024 Order, provided the Receivers are satisfied that:
    - (i) Those costs are truly costs of that defendant; and
    - (ii) There is sufficient property of that defendant from which to pay the amount;
  - (b) If there is not sufficient property of that defendant from which to pay the amount, in paying such portion of the amount as the Receivers see fit; and
  - (c) Otherwise, and subject to further or other order, in refusing to pay such an amount.
- (2) In the event the defendants contend the Receivers have withheld unreasonably their consent to the payment of any of the defendants' legal costs, within seven days of such refusal to consent, the defendants may, if so advised, file an application in the Court in relation to the question of whether such consent has been withheld unreasonably.
- (3) Pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth), any application filed pursuant to order 2 above is referred to a Registrar as referee to conduct an inquiry and report in accordance with Division 28.6 of the *Federal Court Rules 2011* (Cth) (**FCR**).
- (4) The requirements of FCR 28.65(7) and 28.66(a) be dispensed with.
- (5) The inquiry be conducted:

- (a) on the basis of the evidence and submissions filed in support of any application and in accordance with the directions of the referee;
  - (b) without cross-examination of deponents of affidavits unless the referee considers it would be helpful; and
  - (c) in the manner which, in the referee's opinion, is the most efficient and practical in order to answer the questions the subject of the application, with as little formality and expense as is reasonably possible.
- (6) The referee may make such directions as they consider appropriate in order to effect the inquiry in conformity with these orders.
- (7) The referee is to submit a report to the Court in accordance with FCR 28.66.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Sullivan.



Associate:

Dated: 20 December 2024

## SCHEDULE OF PARTIES

QUD 532 of 2024

### Defendants

Fourth Defendant:	ALAMMC DEVELOPMENTS 4 PTY LTD
Fifth Defendant:	ALAMMC DEVELOPMENTS 5 PTY LTD
Sixth Defendant:	ALAMMC DEVELOPMENTS 6 PTY LTD
Seventh Defendant:	ALAMMC DEVELOPMENTS 7 PTY LTD
Eighth Defendant:	HARVEY MADISON CAPITAL PTY LTD
Ninth Defendant:	SDAMF 2 PTY LTD
Tenth Defendant:	SDAMF 3 PTY LTD
Eleventh Defendant:	SDAMF 4 PTY LTD
Twelfth Defendant:	CORAL COAST MUTUAL PTY LTD
Thirteenth Defendant:	MORTGAGE MUTUAL FUND PTY LTD
Fourteenth Defendant:	DAVID GEORGE MCWILLIAMS
Fifteenth Defendant:	LAURA MARY FULLARTON