

NOTICE OF FILING

Details of Filing

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v PAUL RYAN
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Form NCF1

Concise Statement

No. VID of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

and

PAUL RYAN
Defendant

A. SUMMARY

1. This proceeding concerns alleged contraventions of statutory duties of care and diligence, good faith and use of position by Paul Ryan (**Ryan**), who was a director of Dixon Advisory & Superannuation Services Pty Ltd (subject to deed of company arrangement) (**DASS**) and E&P Operations Pty Ltd (**E&P Ops**) at the time of the alleged contraventions.
2. The contraventions arose from Ryan's conduct in December 2021, where he was involved in:
 - (a) amending the constitution of DASS on 22 December 2021 to expressly authorise the directors of DASS to act in the interests of DASS' holding company; and
 - (b) executing a deed of acknowledgement of debt on 24 December 2021 between DASS and E&P Ops to the advantage of E&P Ops (DASS' holding company) and to the detriment of DASS,

in circumstances where DASS was nearing insolvency and Ryan, amongst others, had already started to explore voluntary administration for DASS from as early as July 2021 and had attended a meeting with PWC on 20 December 2021 to discuss the potential voluntary administration of DASS.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, the Plaintiff
Prepared by (name of person/lawyer)	Tom Jarvis, lawyer for the Plaintiff
Law Firm (if applicable)	Johnson Winter Slattery
Tel +613 8611 1336	Fax +613 8611 1300
Email tom.jarvis@jws.com.au	
Address for service (include state and postcode)	Level 34, 55 Collins Street, Melbourne VIC 3000

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

B.1 Corporate entities

3. At all material times Ryan was a director of DASS and E&P Ops; both of which were wholly owned subsidiaries of E&P Financial Group Limited (**EP1**).
4. DASS operated a financial advice business focused on retail clients and held an Australian Financial Services Licence (**AFSL**) numbered 231143, which was suspended by ASIC on 8 April 2022 after the board of DASS resolved to appoint voluntary administrators to the company on 19 January 2022. DASS specialised in the provision of financial advice, investment advice, portfolio management and superannuation services, including the administration of self-managed superannuation funds.
5. E&P Ops provided certain services to DASS. Amongst other things, it employed the DASS advisers and support staff, leased the offices from which DASS operated and owned and operated the technology systems used by DASS and other EP1 subsidiaries (**Services**). E&P Ops charged a fee equivalent to 90% of DASS' gross revenue for the provision of the Services (**Management Fee**).

B.2 Waiver of the management fee

6. In the period from 2020, DASS faced a number of claims arising from the provision of financial advice to clients who were advised to invest in the US Masters Residential Property Fund (**URF**) and URF related products. Specifically:
 - (a) a proceeding issued by ASIC on 4 September 2020 in the Federal Court of Australia (proceeding number VID595/2020), in respect of which DASS and ASIC agreed to resolve on the basis that DASS would pay a pecuniary penalty of \$7.2 million and a \$1 million contribution to ASIC's legal and investigation costs;
 - (b) over 90 complaints made to the Australian Financial Complaints Authority (**AFCA**), and of which 76 remained on foot as at 19 January 2022;
 - (c) a claim made by an individual in the Federal Court of Australia (proceeding numbered NSD1060/2021); and
 - (d) two separate class action proceedings in the Federal Court of Australia (proceedings numbered VID640/2021 and VID769/2021) (**class actions**),(referred to together as the **DASS claims**).
7. It was a condition of DASS' AFSL that it maintained a positive net asset position.
8. In order to ensure that the condition was not breached as a result of the regulatory proceedings and associated costs, E&P Ops agreed to waive the Management Fee for the financial year ending 30 June 2021. This decision was made as the financial statements for the 2021 financial year were being prepared; and occurred in or about July 2021. The

management fee waived, in relation to the 2021 financial year, was approximately \$11.6 million (calculated at 90% of DASS' total revenue for that year as recorded in its accounts).

9. Ryan had direct involvement in the decision by E&P Ops to waive the Management Fee.

B.3 Contingency planning

10. From at least in or about September 2020, EP1 established a corporate contingency planning project named "Project Fork", which involved personnel from EP1 and its wealth division, E&P Wealth, and which was designed to explore the option of ringfencing any material consequences to DASS in order to protect the broader corporate group.
11. From in or about July 2021, "Project Fork" specifically considered the possibility and consequences of placing DASS into voluntary administration if the DASS claims increased or became unmanageable. In addition, regular monitoring of DASS' cashflow position was also undertaken from mid-2021. By late October 2021, a voluntary administration date of 17 January 2022 was identified in Project Fork materials.
12. Ryan was directly involved in this contingency planning project.

B.4 Amendments to DASS' constitution

13. On 22 December 2021, at a meeting of DASS' board of directors, Ryan resolved to approve a revised constitution for DASS (**Revised DASS Constitution**) and to put the Revised DASS Constitution to E&P Ops, the sole shareholder of DASS, to approve and adopt. The Revised DASS Constitution inserted the following provision:

For so long as the Company is a Wholly-Owned Subsidiary in accordance with section 187 of the Act:

- (a) a Director is taken to act in the best interests of the Company if that Director acts in the best interests of a Holding Company of the Company; and
 - (b) each Director is expressly authorised to act in the best interests of any Holding Company of the Company.
14. On 24 December 2021, Ryan in his capacity as a director of E&P Ops resolved in favour of a circulating resolution approving the Revised DASS Constitution and authorising the execution of the "resolution of sole member" giving effect to the Revised DASS Constitution.

B.5 Deed of acknowledgement of debt

15. On 24 December 2021, DASS executed a deed of acknowledgement of debt (**Deed**) in relation to a defined portion of the intercompany loan owed by E&P Ops to DASS.

16. At the time the Deed was entered into, E&P Ops owed DASS over \$19 million. The intercompany loan was undocumented. It was repayable on call.
17. The Deed defines “Intercompany Debt” as \$19,608,267; defined as being an amount referable to:
 - (a) the \$7.2 million pecuniary penalty and \$1 million of costs agreed between DASS and ASIC in respect of the ASIC proceeding (such amount remaining subject to approval by the Federal Court of Australia) (**ASIC Penalty and Costs**); and
 - (b) the amount of \$11,408,267, being the amount provisioned in DASS’ Statement of Financial Position for AFCA claims, as well as certain internal dispute resolution claims that were expected to proceed to AFCA but had not yet reached AFCA (**AFCA Claims Payable**).
18. The terms of repayment of the Intercompany Debt were set out in clause 3 of the Deed. The relevant effect of clause 3 is that:
 - (a) the Intercompany Debt only became repayable by E&P Ops to DASS if the ASIC Penalty and Costs or the AFCA Claims Payable became due and payable (cl 3.1(a));
 - (b) DASS was required to seek to recover any part of the relevant penalties, costs and claims from insurance policies before E&P Ops was required to make any repayments (cl 3.2); and
 - (c) E&P Ops was entitled to serve a “forgiveness notice” on DASS, which had the effect, if served, of causing the Intercompany Debt to be immediately forgiven upon receipt of the notice by DASS (cl 3.5).

B6. The DASS voluntary administration and deed of company arrangement

19. On 19 January 2022, the directors of DASS resolved to appoint voluntary administrators to DASS. At that time the intercompany receivable owed by E&P Ops to DASS was \$19.519 million.
20. The Report on Company Activities and Property (**ROCAP**) dated 3 February 2022 provided to the administrators of DASS by the DASS directors valued the E&P Ops intercompany receivable, which had a book value of \$19.399 million, at -\$709,000. The disclosure in the ROCAP reflected the operation of the Deed.
21. On 16 December 2022, the creditors of DASS resolved to cause the company to enter into a deed of company arrangement (**DOCA**). The DOCA proponent was EP1. At a high level, the terms of the DOCA were:
 - (a) E&P Ops contributed a \$1,000,000 deposit to cover costs and expenses associated with defending any applications pursuant to s445D of the Act;

- (b) E&P Ops contributed \$17,662,489 (less a settlement adjustment for expenses incurred by E&P Ops during the administration period);
- (c) DASS released the directors of the EP1 Group (including the DASS directors) from any claims DASS might have with respect to the E&P Ops intercompany liability to DASS and the Deed;
- (d) EP1 contributed \$4 million plus the balance of any insurance proceeds recovered as part of a settlement of the class actions; and
- (e) EP1 are to contribute future tax receivables to DASS in accordance with the relevant tax funding agreement.

C. RELIEF SOUGHT

- 22. ASIC seeks the relief set out in its Originating Process dated 3 August 2023.
- 23. Specifically, it seeks:
 - (a) declarations of Ryan's contravention of ss 180(1), 181(1)(a) and/or 182(1) of the Act;
 - (b) pecuniary penalties against Ryan for his contraventions of ss 180(1), 181(1)(a) and 182(1) of the Act;
 - (c) an order that Ryan be disqualified from managing corporations for a period to be determined by the Court; and
 - (d) costs.

D. PRIMARY LEGAL GROUNDS

- 24. At all material times, as a director, Ryan was:
 - (a) required by s 180(1) of the Act to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person in his position would exercise;
 - (b) obliged by virtue of s 181(1)(a) of the Act to exercise his powers and discharge his duties in good faith in the best interests of DASS; and
 - (c) prohibited by s 182(1) of the Act from improperly using his position to: (a) gain an advantage for someone else; or (b) cause detriment to the corporation,
 - (together, the **statutory duties**).
- 25. As DASS was nearing insolvency at the time of entering the Deed, Ryan was required to consider the interests of DASS' creditors when exercising his powers and discharging his duties.

26. By reason of the matters summarised in Pt B, above, Ryan failed to comply with the statutory duties, and/or one or more of them (including by failing to consider the interests of DASS' creditors; alternatively failing properly to consider the interests of DASS' creditors).

E. ALLEGED HARM

27. The duties imposed on directors and officers pursuant to s 180(1) and 181(1)(a) are to protect the interests of the corporation (including where the company is approaching insolvency, the interests of creditors). The conduct of Ryan was contrary to the interests of DASS' creditors at a time when he was subject to an obligation to consider their interests.
28. Harm suffered comprises the harm suffered by the creditors of DASS, including that the right of DASS to call on the E&P Ops intercompany liability was materially impaired upon the Deed being executed. As a result, the DASS administrators did not have access to those funds.

Dated: 3 August 2023

This Concise Statement was prepared by Philip Solomon KC and Vicki Bell.

Certificate of lawyer

I Thomas Litchfield Jarvis certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 3 August 2023



Solicitor for the Plaintiff