

FEDERAL COURT OF AUSTRALIA

Australia Securities and Investments Commission v Prakash [2024] FCA

321

File number(s): QUD 168 of 2024

Judgment of: **MEAGHER J**

Date of judgment: 28 March 2024

Catchwords: **CORPORATIONS** – investigations by Australian Securities and Investments Commission – ex parte application for appointment of receivers, asset preservation, disclosure and travel restriction orders – where ASIC suspects contraventions of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act); ss 911A, 912A and 1041G of the *Corporations Act 2001* (Cth), and s 408C of the *Criminal Code Act 1899* (Qld) – whether it is necessary or desirable that orders be made – interim orders made

Legislation: *Australian Securities and Investments Commission Act 2001*(Cth) ss12, 13
Corporations Act 2001 (Cth) ss 192A, 911A, 912A, 1041, 1323(1)
Criminal Code Act 1899 (Qld) s 408C
Penalties and Sentences Act 1992 (Qld) s35

Division: General Division

Registry: Queensland

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 32

Date of hearing: 28 March 2024

Counsel for the Plaintiff: S M Derrington

Solicitor for the Plaintiff: Australian Securities and Investments Commission

ORDERS

QUD 168 of 2024

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

AND: **SUNNY MAHENDRA PRAKASH**
First Defendant

PRINCIPAL FINANCIAL SERVICE PTY LTD
Second Defendant

SELF-MANAGED SUPER PTY LTD (and others named in the
Schedule)
Third Defendant

ORDER MADE BY: MEAGHER J

DATE OF ORDER: 28 MARCH 2024

THE COURT NOTES THAT:

1. **Property:** means property defined under section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

THE COURT ORDERS THAT:

Ex Parte / Short Service Orders

1. The Plaintiff have leave to file:
 - (a) its outline of written submissions dated 28 March 2024 (**Submissions**); and
 - (b) a further affidavit of Mr Brett Jamal Crawford sworn on 28 March 2024 in support of the Plaintiff's application (**Second Affidavit**).
2. In the first instance, service of this Originating Process be dispensed with and the prayers for interim relief at paragraphs 9, 11 to 18 and 20 to 22 of the Originating Process be made returnable instanter.
3. The time for service of this Originating Process and the affidavit of Brett Jamal Crawford sworn 27 March 2024 (**Supporting Affidavit**) be abridged to 5:00 pm on 3 April 2024.

4. This Originating Process be returnable before the Commercial and Corporations Duty Judge or List Judge at a date convenient to the Court.

Non-Publication

5. Pursuant to section 37AF(1)(a) of the *Federal Court of Australia Act 1976* (Cth), on the grounds set out in section 37AG(1)(a), the following details of the any clients of the First, Second, Third, Fourth or Fifth Defendants, referred to in the proceeding:
 - (a) their names;
 - (b) their postal or residential addresses;
 - (c) their email addresses;
 - (d) their telephone numbers;
 - (e) their dates of birth; and
 - (f) any account details associated with them,be prohibited from publication.

Non-Party Access

6. Any application made by a non-party pursuant to rule 2.34 of the Federal Court Rules 2011 (Cth) to inspect the following documents:
 - (a) any affidavits filed by ASIC, including the Supporting Affidavit and Exhibit BJC-1 to the Supporting Affidavit; and
 - (b) the Submissions,and for which access is not otherwise permitted under rule 2.32(2) be considered only after notice of the application has been given to the parties and they have been given a reasonable time to respond.

Asset Preservation Orders

7. Subject to paragraph 8 below, until further order, the First, Second, Third, Fourth and Fifth Defendants, by themselves or their agents and employees are restrained from:
 - (a) removing, or causing or permitting to be removed from the State of Queensland and from Australia all or any of their Property;
 - (b) selling, charging, mortgaging or otherwise dealing with, disposing of and/or diminishing the value of all or any of their Property;

- (c) causing or permitting to be sold, charged, mortgaged, or otherwise dealt with, disposed of, or diminished in value, all, or any of their Property;
 - (d) without limiting the terms of sub-paragraphs (a) to (c) above, incurring liabilities including, without limitations, liabilities incurred either directly or indirectly, through the use of a credit card, a credit facility, a drawdown facility, or a re-draw facility; and
 - (e) without limiting the terms of sub-paragraphs (a) to (d) above, withdrawing, transferring, or otherwise disposing of any monies available in any account with any bank, building society, cryptocurrency exchange or other financial institution, in which the Defendant has legal or equitable interest.
8. Order 7 above does not prevent:
- (a) the First Defendant from paying or otherwise incurring a liability for ordinary, bonafide and properly incurred living and operating expenses up to an amount of eight hundred dollars (\$800) per week;
 - (b) the First, Second, Third, Fourth or Fifth Defendants from paying or otherwise incurring a liability for costs reasonably incurred in these proceedings and any criminal proceedings arising from the Plaintiff's investigation into the affairs of the First, Second, Third, Fourth or Fifth Defendants; and
 - (c) any bank, building society or financial institution from exercising any right of set-off which it may have in respect of a facility afforded by it to the First, Second, Third, Fourth or Fifth Defendants prior to the date of these Orders.

Disclosure Orders

9. Except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, by 9:45 am AEST on the date which is 14 days after the date of service of these Orders, a full and detailed affidavit sworn or affirmed by the First Defendant setting out, to the best of the First Defendant's knowledge or belief:
- the name and address of any bank, building society or other financial institution at
- (a) which there is an account in the name of or under the control of the First Defendant, together with the number of such accounts, the name of any such account and the balance of any such account;

- (b) the name and contact details (including address, telephone number and email address, if known) of any person or persons indebted to the First Defendant and the amount of the indebtedness;
 - (c) the name and contact details (including address, telephone number and email address, if known) of any clients of the First Defendant;
 - (d) an itemised inventory of the First Defendant's assets and liabilities;
 - (e) an itemised inventory of any and all Property whether real or personal owned or controlled by the First Defendant or in which the First Defendant has any legal or beneficial interest; and
 - (f) in respect of any of the Property of the First Defendant which has been given as security for any debt, the details of that Property and the nature of the security and the debt so incurred.
10. 10. Except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, by 9:45 am AEST on the date which is 14 days after the date of service of these Orders, a full and detailed affidavit sworn or affirmed by the Second Defendant setting out, to the best of the Second Defendant's knowledge or belief:
- (a) the name and address of any bank, building society or other financial institution at which there is an account in the name of or under the control of the Second Defendant, together with the number of such accounts, the name of any such account and the balance of any such account;
 - (b) the name and contact details (including address, telephone number and email address, if known) of any person or persons indebted to the Second Defendant and the amount of the indebtedness;
 - (c) the name and contact details (including address, telephone number and email address, if known) of any clients of the Second Defendant;
 - (d) an itemised inventory of the Second Defendant's assets and liabilities;
 - (e) an itemised inventory of any and all Property whether real or personal owned or controlled by the Second Defendant or in which the Second Defendant has any legal or beneficial interest; and
 - (f) in respect of any of the Property of the Second Defendant which has been given as security for any debt, the details of that Property and the nature of the security and the debt so incurred.

11. Except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, by 9:45 am AEST on the date which is 14 day after the date of service of these Orders, a full and detailed affidavit sworn or affirmed by the Third Defendant setting out, to the best of the Third Defendant's knowledge or belief:
- (a) the name and address of any bank, building society or other financial institution at which there is an account in the name of or under the control of the Third Defendant, together with the number of such accounts, the name of any such account and the balance of any such account;
 - (b) the name and contact details (including address, telephone number and email address, if known) of any person or persons indebted to the Third Defendant and the amount of the indebtedness;
 - (c) the name and contact details (including address, telephone number and email address, if known) of any clients of the Third Defendant;
 - (d) an itemised inventory of the Third Defendant's assets and liabilities;
 - (e) an itemised inventory of any and all Property whether real or personal owned or controlled by the Third Defendant or in which the Third Defendant has any legal or beneficial interest; and
 - (f) in respect of any of the Property of the Third Defendant which has been given as security for any debt, the details of that Property and the nature of the security and the debt so incurred.
12. Except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, by 9:45 am AEST on the date which is 14 days after the date of service of these Orders, a full and detailed affidavit sworn or affirmed by the Fourth Defendant setting out, to the best of the Fourth Defendant's knowledge or belief:
- (a) the name and address of any bank, building society or other financial institution at which there is an account in the name of or under the control of the Fourth Defendant, together with the number of such accounts, the name of any such account and the balance of any such account;
 - (b) the name and contact details (including address, telephone number and email address, if known) of any person or persons indebted to the Fourth Defendant and the amount of the indebtedness;

- (c) an itemised inventory of the Fourth Defendant's assets and liabilities;
 - (d) an itemised inventory of any and all Property whether real or personal owned or controlled by the Fourth Defendant or in which the Fourth Defendant has any legal or beneficial interest; and
 - (e) in respect of any of the Property of the Fourth Defendant which has been given as security for any debt, the details of that Property and the nature of the security and the debt so incurred.
13. Except to the extent that a claim of privilege against self-incrimination or civil penalty privilege is made, by 9:45 am AEST on the date which is 14 day after the date of service of these Orders, a full and detailed affidavit sworn or affirmed by the Fifth Defendant setting out, to the best of the Fifth Defendant's knowledge or belief:
- (a) the name and address of any bank, building society or other financial institution at which there is an account in the name of or under the control of the Fifth Defendant, together with the number of such accounts, the name of any such account and the balance of any such account;
 - (b) the name and contact details (including address, telephone number and email address, if known) of any person or persons indebted to the Fifth Defendant and the amount of the indebtedness;
 - (c) an itemised inventory of the Fifth Defendant's assets and liabilities;
 - (d) an itemised inventory of any and all Property whether real or personal owned or controlled by the Fifth Defendant or in which the Fifth Defendant has any legal or beneficial interest; and
 - (e) in respect of any of the Property of the Fifth Defendant which has been given as security for any debt, the details of that Property and the nature of the security and the debt so incurred.
14. In the event that the First, Second, Third, Fourth or Fifth Defendants wish to object to compliance with Orders 9 to 13 above, on the basis that compliance may tend to incriminate the Defendant or make the Defendant liable to a civil penalty, the relevant Defendant must, in accordance with section 128A of the *Evidence Act 1995* (Cth):
- (a) prepare, file, and serve on the Plaintiff an affidavit disclosing so much of the

information required to be disclosed by Orders 9 to 13 which no objection is taken;

- (b) prepare an affidavit containing so much of the information required to be disclosed by Orders 9 to 13 to which objection is taken and deliver it to the Court in a sealed envelope; and
- (c) prepare, file, and serve on the Plaintiff a separate affidavit setting out the basis of the objection.

Travel Restraint Orders

15. Pursuant to section 1323(1)(k) of the Corporations Act, in the first instance until further order, the First Defendant be prohibited from leaving Australia or attempting to leave Australia.
16. Pursuant to section 1323(1)(j) of the Corporations Act, within five (5) days of the date of service of these Orders, the First Defendant deliver up to the Queensland registry of this Court:
 - (a) all passports in his name which are in his possession, custody, or control;
 - (b) any tickets in his name concerning any international travel arrangements made for the twelve (12) month period commencing from the date of these Orders; and
 - (c) any copy in his possession, custody, or control of any application in his name for a passport, replacement passport, or other document permitting international travel made to the authorities of any country on or after the date of these Orders.
17. The documents delivered up to the Queensland Registry pursuant to Order 16 above be held by the Court pending the determination of the relief in paragraphs 17 to 20 of the Originating Process and in the first instance until further order.
18. In the event that the First Defendant cannot locate any passport or other document permitting international travel, he promptly:
 - (a) give notification to the Australian Passport Office, or other relevant authorities responsible for the issue and control of Australian passports or travel documents, or, in the case of a foreign passport or travel document, the relevant authority responsible for the issue and control of such passports or travel documents, confirming that he has lost his passport or travel document; and

- (b) file and serve an affidavit stating that fact and exhibiting a copy of the above notification sent.
19. Pursuant to section 23 of the *Federal Court of Australia Act 1974* (Cth) that, in the first instance until further order, the First Defendant may not apply for the issue of any passport.

Service of Orders on Third Parties

20. To the extent necessary, the Plaintiff has leave to give to:
- (a) the relevant authorities that record, control, and regulate the ownership of real property;
 - (b) the relevant authorities that record, control, and regulate the ownership of motor vehicles;
 - (c) the relevant authorities that record, control, and regulate the ownership of maritime vessels and craft;
 - (d) any bank, building society, cryptocurrency exchange or other financial institution through which, to the best of the Plaintiff's belief, any of the Defendants operates any account;
 - (e) any other person or entity, holding or controlling Property, which, to the best of the Plaintiff's belief, belongs to any of the Defendants;
 - (f) the relevant authorities that issue and control of passports; and
 - (g) the Australian Border Force,
- notice of these Orders, by delivering a copy of a minute of the Orders to a person apparently in the employ of that entity or person.

General Orders

21. The Plaintiff is to provide the First, Second, Third, Fourth and Fifth Defendants with a copy of the Second Affidavit and the transcript of the interlocutory hearing before 5:00 pm on 3 April 2024, or if a copy of such transcript is not available by that time, as soon as reasonably practicable after a copy of the transcript becomes available.
22. Costs be reserved.
23. An order that there be liberty to any party to apply to the Commercial and Corporations List Judge on reasonable notice.

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

REASONS FOR JUDGMENT
(REVISED FROM TRANSCRIPT)

MEAGHER J

INTRODUCTION

1 By originating application filed by leave on 28 March 2024, the plaintiff, Australian Securities & Investment Commission (ASIC) urgently seeks orders ex parte against the defendants. The orders are to preserve assets under section 1323(1)(h) of the *Corporations Act 2001* (Cth), and to prevent the first defendant Mr Prakash, from travelling overseas. The plaintiff also seeks disclosure orders to assist in the asset preservation orders. The plaintiff conceded that one aspect of the last category of orders was somewhat novel.

2 Also filed by leave were the plaintiff's affidavit of Mr Crawford, sworn on 27 March 2024, and submissions dated 28 March 2024. Also relied upon in the delivery of these reasons is the further affidavit of Mr Crawford, sworn on 28 March 2024.

3 The first defendant is Mr Prakash. Mr Prakash is an accountant who became the authorised representative of the second defendant, on 12 September 2022. The extract from the ASIC database indicates that Mr Prakash is authorised to provide financial product advice. The second defendant is Principal Financial Services Pty Ltd, of which Mr Prakash is the sole director, secretary, and shareholder. The third defendant is Self-Managed Super Pty Ltd, of which Mr Prakash is the sole director and secretary. There are ten shares in Self-Managed Super, of which eight are held by Mr Prakash, and the remaining two are held by Mrs Jenny Prakash. The fourth defendant is Provest Enterprises Pty Ltd, of which Mr Prakash is the sole director, secretary, and shareholder. The fifth defendant is Super Funds Australia Pty Ltd, of which Mr Prakash is also the sole director, secretary, and shareholder.

4 The matter arises as a result of the receipt by ASIC of suspicious activity reports and a reportable situation lodged with it by CommSec, which is an online share trading platform operated by the Commonwealth Bank of Australia.

5 The background to this matter is comprehensively explained in the affidavits of Mr Crawford.

6 The concerns raised by CommSec were as to the manner in which the defendant's invested money on behalf of the clients, movements of money between clients' accounts and those of

the defendants, including Mr Prakash's personal accounts and those of other defendants, and as to whether Mr Prakash was investing client funds for his own purposes. CommSec have suspended the defendants' accounts until 2 April 2024. Thereafter, CommSec proposes to close the defendants' suspended accounts.

BACKGROUND

7 ASIC's concerns relate to misappropriation of client funds and unauthorised share trading. They are therefore conducting investigations into the first and second defendants pursuant to section 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), with respect to suspected contraventions of section 12CB of the ASIC Act, sections 912A and 1041G of the *Corporations Act 2001* (Cth) and section 408C of the *Criminal Code Act 1899* (Qld). ASIC are also investigating suspected contraventions of section 911A of the Corporations Act and the conduct of the third, fourth and fifth defendants.

8 The basis of the investigations is that the first defendant provides financial services as an authorised representative of the second defendant and conducts his business through the third defendant. Further, the fourth and fifth defendant are entities of the first defendant. While the investigation was initially limited to the first and second defendant, on 22 March 2024, ASIC widened its investigation to include the third, fourth and fifth defendant. ASIC noted additional concerns raised by the conduct of the fourth defendant in which ASIC was alerted to the fact that one of the first defendant's clients holds a \$1 million term deposit with the fourth defendant, but ASIC has been unable to identify it in the bank accounts of any of the defendants. In that regard, ASIC submitted that the client may have been misled as to the nature of the investment.

9 The investigations are at an early stage. Mr Prakash first became aware of them when ASIC executed a search warrant at his home and the business premises of the corporate defendants on 27 March 2024. The investigation is likely to take at least nine months.

10 In conducting its investigation, ASIC has undertaken searches of its databases, interrogated information obtained pursuant to section 30 of the ASIC Act from financial institutions and had communications with either clients of Mr Prakash or representatives of those clients, who have assisted by providing information.

11 According to Mr Crawford's affidavit, the investigations so far undertaken by ASIC, including detailed financial analysis of the defendants' bank accounts and statements, show that funds

have been transferred from clients' Commonwealth Direct Investment Account or CommSec accounts into a bank account or CommSec account of the defendants. In some instances, the funds stayed in those accounts, and in others they were transferred to the account of another client, often on the same day.

12 Mr Crawford's affidavit contains specific examples. This analysis has led to ASIC having concerns that Mr Prakash is undertaking transactions without the knowledge or consent of his clients and obtaining a benefit for himself. This conduct Mr Crawford posits may be dishonest conduct in relation to a financial service in contravention of s 1041G of the Corporations Act, s 408C of the Criminal Code and unconscionable conduct in contravention of s 12CB of the ASIC Act.

13 Further, according to Mr Crawford, it appears that Mr Prakash has engaged in conduct directly contrary to the instructions of one of his clients. In that regard, Mr Crawford deposes to one of the suspicious activity reports lodged by CommSec with ASIC which refers to a conversation between CommSec and that client to the effect that she had instructed the first defendant some time ago to cease trading in shares on her behalf and convert her assets to cash in order that she may live off the interest. However, the financial analysis undertaken discloses that Mr Prakash has continued to trade in shares on the client's account. ASIC's concerns regarding this conduct of Mr Prakash are that it may amount to unconscionable conduct in contravention of section 12CB of the ASIC Act, and that he may have acted outside the scope of the second defendant's authorisation under its Australian Financial Services Licence (AFSL), and to have contravened section 912A of the Corporations Act.

14 According to Mr Crawford's affidavit, Mr Prakash told Mr Crawford that he has about 380 clients. Of those, twenty-three clients have established CommSec accounts, in respect of which Mr Prakash operates and effects share trades on their behalf. The twenty-three clients referred to may be categorised as vulnerable. They range in age from 70 to 90 years old, and one of them describes herself as legally blind.

15 Mr Crawford's affidavit deposes to examples of transfers between the accounts which give rise to concerns that the accounts of other clients, that is those within Mr Prakash's 380 clients who do not necessarily have a CommSec account, are also the subject of misappropriation and/or unauthorised share trading. Further, ASIC submitted that in tracing the money with which Mr Prakash has dealt, it may be assisted by knowing the identities of all of Mr Prakash's clients,

who may then choose to assist ASIC and who may also be aggrieved persons for the relevant purposes of the Corporations Act.

16 Mr Crawford's affidavit sets out the assets and financial position of the defendants as they are currently known to ASIC. Those assets are set out in Mr Crawford's affidavit, at paragraphs 118 to 121, as follows:

...ASIC has to date identified:

- (a) 5 different bank accounts held by Mr Prakash with CBA and WBC, with balances totalling \$33,364.35 as at 9 February 2024;
- (b) 2 different bank accounts held by Principal Financial with Suncorp and WBC, with balances totalling \$2149.49 as at 9 February 2024;
- (c) 4 different bank accounts held by Self-Managed Super with CBA and Suncorp, with a net balance totalling \$961,305.29 as at 9 February 2024;
- (d) 2 different bank accounts held by Provest with CBA, with a net balance totalling \$427,772 as at 9 February 2024;
- (e) 1 bank account held by Super Funds Australia with CBA, with a balance of \$348,055.26 as at 9 February 2024; and
- (f) 3 bank accounts held by S Superannuation funds with CBA and WBC, with a balance of \$346,782.99.

In addition, as set out in table 2 of paragraph [90] above, ASIC has to date identified a total of 14 share trading accounts owned or operated by the defendants, comprising:

- (a) 4 accounts held in the name of Mr Prakash with CommSec;
- (b) 3 accounts held in the name of Mr Prakash with Australian Investment Exchange Limited;
- (c) 2 accounts held in the name of Self-Managed Super;
- (d) 1 account held in the name of Provest, two accounts held in the name of Super Funds Australia;
- (e) 1 account held in the name of MSS Superannuation Fund account with CommSec; and
- (f) 1 account held in the name of S Superannuation Fund with Australian Investment Exchange Limited.

As set out in paragraph [90] above, ASIC understands that the balance of the defendant's CBA bank account is approximately 1.87 million.

ASIC has carried out searches of real property through the Land Titles Offices in Queensland, and motor vehicle assets in the name of Mr Prakash and the other defendants. The searches identified the below assets:

Table 7: Defendants' assets

Asset	Registered Owner	Encumbrance
32 Verbena St Mount Gravatt QLD 4122	Sunny Mahendra Prakash	None
1/1953 Logan Road, Upper Mount Gravatt, Queensland 4122	Self-Managed Super Pty Ltd	Mortgage in favour of CBA (<u>PRF.0013.0001.0086</u>)
119 to 125 School Road, Logan Reserve, Queensland 4133	Provest Enterprises Pty Ltd	Caveat in favour of Australis Land Pty Ltd ACN 617209891, registered 1 November 2023

LEGAL PRINCIPLES

17 ASIC has helpfully set out the well-established principles and statutory framework in its written submissions, at paragraphs 10 to 28, 30 to 31 and 64 to 65, and I gratefully adopt them as follows:

10. Section 1323(1) of the Corporations Act empowers the court to make a range of different orders where, relevantly:
 - (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**) which constitutes or may constitute a contravention of the Corporations Act; and
 - (b) the Court considers it “*necessary or desirable*” to make such orders for the purpose of “protecting the interests” of a person (the **aggrieved person**) to whom the relevant person is liable, or may be or become liable, to pay money (whether in respect of a debt, by way of damages, compensation or otherwise) or to account for financial products or other property.
11. The orders which may be made under section 1323(1) are enumerated in sections 1323(1)(d) to (k). They include, inter alia:
 - (a) per section 1323(h), orders appointing receivers over the property or part of the property of the relevant person (be they a natural person or a body corporate); and
 - (b) per sections 1323(j) and (k), where the relevant person is a natural person, orders requiring the person to deliver up their passport to the court and prohibiting the person from leaving the jurisdiction or Australia without the consent of the court.
12. Although asset preservation orders are not one of the types of order expressly

identified in section 1323(1), it is now established where the grounds for the appointment of receivers under section 1323(h) have been made out, a lesser order restricting or prohibiting dealings with the relevant property may be made instead (noting that such orders will often serve the same function, but be less practically prejudicial than the appointment of receivers): *Australian Securities and Investments Commission v Carey (No. 14) (Carey (No 14))* [2007] 158 FCR 92; [2007] 310, at [33] (French J); *Australian Securities and Investment Commission v Ostrava Equities Pty Ltd* [2015] FCA 425, at [11] (Davies J).

13. An asset preservation order made in this context remains an order made under section 1323(1) (albeit one made calling in aid s 23 of the *Federal Court of Australia Act 1976* (Cth)). As such, it remains that the principles governing the exercise of the Court's discretion under s 1323 apply, not those relevant to the making of *Mareva*-style injunctions more generally: *Australian Securities and Investments Commission v Krecichwost (Krecichwost)* (2007) 213 FLR 314; [2007] NSWSC 948, at [35]-[37] (McDougall J). The question is whether the power to make an order under s 1323(h) is enlivened. If so, the Court may consider whether a less drastic remedy will suffice: *Australian Securities and Investments Commission v Burnard (Burnard)* [2007] NSWSC 1217, at [22] (Barrett J); citing *Australian Securities and Investments Commission v Banovec (No 2)* [2007] NSWSC 961.
14. If the Court is satisfied that it is necessary and desirable to make asset preservation orders or to appoint a receiver under section 1323(1)(h), it may also make disclosure orders requiring a person the subject of those orders to set out their assets and liabilities. Such disclosure orders are justified on the basis that they are ancillary to and in aid of the effective implementation of the preliminary order: *Krecichwost* (2007) 213 FLR 314; [2007] NSWSC 948, at [50] (McDougall J); *Burnard* [2007] NSWSC 1217, at [116]-[121] (Barrett J). Even though relevant persons may be taken to know what their assets are and therefore to need no disclosure in order to comply with an asset preservation order, it has been accepted that such an order is something in which ASIC has a continuing interest and that some ability to monitor compliance should be afforded to ASIC: *Burnard* [2007] NSWSC 1217, as [118] (Barrett J).
15. Pursuant to section 1323(6), an order made under section 1323(1) may be expressed to operate for a specified time or until further order.
16. Section 1323(3) empowers the court to grant interim orders pending determination of an application under section 1323(1).

...Principles relevant to the exercise of the Court's power

17. The critical question of whether the orders sought are "*necessary or desirable*" to protect the interests of an aggrieved person is not concerned with the character of the alleged wrongdoing of the defendants or the ability or willingness of the aggrieved persons to pursue their interests. Rather, it is concerned with the protection of the interests of those persons who may ultimately have claims against the defendants: *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd* [2014] FCA 565, at (Davies J and the authorities cited therein).
18. The words "*protecting the interests*" of aggrieved persons in section 1323(1) are wide, and not amenable to precise definition: *Mauer-Swisse Securities* (2002) 20 ACLC 1530; [2002] NSWSC 684, at [36] (Palmer J). In *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd (Mauer-Swisse Securities)* (2002) 20 ACLC; [2002] 1530 NSWSC 684,

Palmer J explained the proper approach of the inquiry [at [37]] as follows:

Accordingly, in any particular case, where the Court determines that the interests of aggrieved persons are or may be prejudicially affected, it will be a matter for the Court, in the exercise of a discretionary judgment, to decide what sort of protection available within the parameters afforded to s 1323(1) should be given. Sometimes, where claims actual or potential against a “relevant person” are few in number, readily identifiable and tolerably quantifiable, orders would be made primarily directed to the preservation of assets in order to meet those claims, and no further. But in other cases, there may be evidence to suggest that fraud has been perpetrated on a large scale and that many of the victims have no or little information about the extent of the fraud, no or little means for their own investigations, and no or little resources to prosecute their own claims. In such a case, the interests of such persons are protected, within the contemplation of s 1323, by enabling ASIC to conduct an investigation for the purpose of identifying the wrongdoers and exposing them not only to penalties under the Corporations Act and other legislation, but also to claims for compensation from the victims themselves.

19. 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: *Re Richstar Enterprises Pty Ltd and Australian Securities and Investments Commission v Carey (No. 3) (Carey (No3))* [2006] FCA 433, at [27] (French J),
20. Given the very nature of an application under s 1323 there is necessarily “an element of risk assessment and risk management in the judgment the Court is called to make”: *Carey (No 3)* [2006] FCA 433, at [26] (French J). It has been accepted 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: *Carey (No 3)* [2006] FCA 433, at [26] (French J) and the authorities cited therein.
21. The terms of section 1323 do not themselves make any express provision for the nature of the evidence upon which the court may act in making orders under it. The matter was considered by French J, as his Honour then was, in *Richstar Enterprises Pty Ltd and Australian Securities and Investments Commission v Carey (No. 3)* [2006] FCA 433, at [30]-[31], where his Honour held that:
 - (a) s 1323 does not require concluded findings of fact about liability or whether assets have been dissipated;
 - (b) the logic of the section assumes that the court will not always have before its evidence of the kind that would be necessary and admissible in proceedings to final relief. Nor will it necessarily have before its evidence of the kind that would establish definitively that dissipation of assets has occurred or is likely to occur or that flight is imminent;
 - (c) in light of the above, hearsay evidence may be received and acted upon, not as proof of the truth of its contents but as evidence of the existence of a risk; and
 - (d) in particular:

[e]vidence may be received of the opinion of a suitably qualified person who has had the opportunity to review extensive documentation collected in the course of an investigation and to offer

an overview of it for the benefit of the court. In such a case the opinion or overview should be supported by reference to the relevant documentation and factual material. The opinion is received not for the determination of any ultimate issue of liability but as probative of the risk which the Court must assess in determining whether to make an order under the section.

22. At the stage, an order is sought under section 1323 the court may not be in a position to identify with precision any particular liability owed by the person or persons the subject of the proposed order: *Carey (No 3)* [2006] FCA 433, at [25] (French J). The statutory text makes clear that the purpose of the provision is to protect the interests of not only persons to whom a defendant is liable, but also those to whom a defendant may be or become liable. In the case of an application made during an early stage of an investigation the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought there may be some liability on the part of a relevant person: *Corporate Affairs Commission NSW v Walker* (1987) 11 ACLR 884, at 888 (Waddell CJ in Eq); cited with approval in, for example, *Krecichwost* (2007) 213 FLR 314; [2007] NSWSC 948, at [42].
23. A finding of necessity or desirability enlivens the discretion to make orders under section 1323(1) but does not compel the exercise of that discretion: *Krecichwost* (2007) 213 FLR 314; [2007] NSWSC 948, at [33].
24. In *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, re; Australian Securities and Investments Commission (ASIC) v Adler (Adler)* (2002) 41 ACSR 72, [at 77] Santow J set out what his Honour considered to be the proper approach to the exercise of the discretion to make asset preservation orders under section 1323. That passage has since been cited with approval on a number of occasions. *Australian Securities and Investments Commission v Guo (Guo)* [2024] FCA 125, at [29] (Button J); *Australian Securities and Investments Commission v Goel* [2020] FCA 1369, at [22] (Jackson J); *Australian Securities and Investments Commission v M101 Nominees Pty Ltd* [2020] FCA 1166, at [47] and [48] (Anderson J); *Australian Securities and Investments Commission v Secure Investments Pty Ltd* [2020] FCA 639, at [27] (Derrington J).
25. Most relevantly to the present application, his Honour observed that:
 - (a) Evidence of dissipation of assets and at least a reasonably persuasive case are powerful discretionary considerations affecting the court's willingness to make an order and, if so, effecting the scope of the orders justified in the circumstances.
 - (b) That said, where there is an ongoing investigation and ASIC has investigated seeks asset preservation orders in pursuit of its public interest role, ASIC may satisfy the court that the state of its investigations and the wider public interest justify such orders, even absent evidence of the significant risk of dissipation of assets, noting that ASIC must act in the public interest, rather than self-interest, and
 - (c) in giving a reasonable margin of appreciation to ASIC in its public interest role. The court does not abdicate from its responsibility to make sure that the orders that it makes operate in a manner that is proportionate and not more intrusive than is necessary in the circumstances, recognising that it is inevitable that such orders will intrude upon private rights.

26. The making of travel restraint orders under sections 1323(1)(j) and (k) was very recently considered by the court in *Australian Securities and Investments Commission v Guo (Guo)* [2024] FCA 125.
27. As the authorities make clear, it is a serious matter to restrain a person from travelling internationally. Nonetheless, in appropriate circumstances, the private right to travel may be outweighed by the public interest in ASIC being able to pursue its investigations and for the purpose of protecting of aggrieved persons: *Guo* [2024] FCA 125, at [20]-[22] (Button J) and the authorities discussed therein.
28. Factors to be weighed against the right to travel freely include:
- (a) the fact that the investigation being carried out by ASIC cannot be properly or effectively conducted in the absence of the person;
 - (b) the importance of the person in the ongoing investigation, the character of the potential offences or contraventions, whether the person has a base overseas and the stage at which the investigation is at; and
 - (c) whether there is evidence that, by examination of the person, which may be thwarted if the person flees Australia, ASIC is likely to improve the chances of the aggrieved persons retrieving their moneys; *Australian Securities and Investments Commission v Johnston* [2009] FCA 1276 (*ASIC v Johnston*), at [10]-[12] (Siopsis J).
- (footnotes incorporated into text)
- 18 As to the ex parte nature of this application, again, adopting the submissions of the plaintiff:
30. Such orders ought only to be made on an ex parte basis where there are good reasons for doing so. Good reasons include when a scam is first discovered, and it is necessary to prevent the money that has been received by the defendants being dissipated immediately or when to alert the defendants that the acts as about to fall mean that they have time to disperse: *Australian Securities and Investments Commission v Karl Suleman Enterprises Pty Ltd* [2001] NSWSC 1079, at [3] (Young CJ in Eq).
31. In *Adler*, Santow J observed that consideration of ASICs public interest role will also affect the court’s approach when an urgent ex parte application is made by ASIC in that, while the justification for ex parte relief would ordinarily be centred around whether – around there being a significant risk of dissipation of assets, there may be exceptional circumstances where the evidence for this may still be in the process of collection and very brief ex parte orders to maintain the status quo are still justified: *Adler* (2001) 38 ACSR 266, at [7(e)] (Santow J).
- ...
64. Section 12GF of the ASIC Act provides that a person who suffers loss or damage by conduct of another person that contravenes, inter alia, s 12CB may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. In addition, s 12GM(2)(c) provides that the Court may make compensation orders in enforcement proceedings commenced by ASIC for contraventions of various provisions,

including s 12CB.

65. Section 1041I of the Corporations Act provides that a person who suffers loss or damage by conduct of another person that contravenes, inter alia, s 1041G, may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. Section 35 of the *Penalties and Sentences Act 1992* (Qld) provides that the Court may make restitution or compensation orders against a person convicted of an offence under the Criminal Code.

(footnotes incorporated into text)

CONSIDERATION

19 In its submissions, ASIC quite properly raised a number of matters with the Court which, had the defendants been before the Court, they may well have raised. The first of those matters that ASIC brought to the attention of the Court was that the first defendant wrote to ASIC responding to Commsec's complaint saying that he paid the clients' bills at their request and that all the trading transactions occurred between the share trading accounts and the bank accounts. Other than that, he said "no money leaves the share trading accounts." In response, ASIC submitted that this is not supported by the evidence that is available.

20 The second matter that ASIC brought to the Court's attention that might have been the subject of submissions by the defendants, had they been present, is that the first defendant states that some of his clients are elderly clients and have asked him to pay their bills. That is why he would say he has authority on their bank accounts. He would also say that there have been occasions where, because they do not have card facilities or sufficient funds, he would pay the money from his own card and reimburse himself when funds become available. To that, the applicant responded, or submitted, and I accept, there is no evidence in support. In any case, this would not explain why the defendants have transactions whereby money has transferred from Commsec to the accounts of the defendants to another client's account.

21 The third issue which ASIC brought to the Court's attention is that, as is deposed to in Mr Crawford's earlier affidavit, one of the first defendant's clients had stated that any withdrawals were made from their account with their knowledge and that they did not engage the first or second defendants as authorised representatives for share trading. To that, ASIC submitted, and I accept, that is only one client who has made such a representation, and it is unclear whether they would be aware of the full extent of the first defendant's conduct. Further, as ASIC has correctly submitted, there is asymmetry between the information which is within the

knowledge of the defendants and that which would be within the knowledge of the relevant client and, therefore, little weight should be placed upon this evidence.

22 In relation to the matters raised by the first defendants, as deposed to in the later affidavit of Mr Crawford, the first defendant said that he is not trading as a “financial services representative” of the second defendant. ASIC further submitted that its brief review of the documents so far can confirm that that was the case. However, ASIC further submitted that, based on Mr Crawford’s conversations and correspondence referred to above, it is more likely that Mr Prakash has, in fact, been acting as a financial planning advisor and the questions are, whether he is doing so as an authorised representative, is it within the scope of his licence and, if not, in what capacity is it being done.

23 The fifth matter that was brought to my attention in relation to matters that might be raised by the defendants had they been present in Court is that there is currently no clear evidence of flight risk or dissipation of assets. However, in that regard, the principles referred to above apply. As ASIC submitted, the key consideration is that the continued presence in Australia of the first defendant is necessary for the proper conduct of ASICs investigations. The investigations are at a very early stage and Mr Prakash is the only person who can provide the information that is required. Further, ASIC submitted this is a case not unlike that of *Guo*, in which Button J made interim orders restricting travel, despite there being no evidence of imminent flight risk.

24 To the extent that the defendants might seek to rely upon the letter from one of the first defendant’s clients in which he apologises for undertaking “additional” trades and guarantees the value of the relevant investments, the applicant submitted, and I accept, that this is an admission of engagement in unauthorised trading and that an apology or guarantee in that regard is irrelevant.

25 Another matter brought to the Court's attention was as to the intermingling of clients' funds by the paying of clients' bills. ASIC submitted or acknowledged that they were aware that there may be a risk that clients would suffer if they were relying on Mr Prakash to pay their bills. ASIC submitted and I accept that this possibility can be dealt with by making interim orders sought, with a view in the near future to appropriate carveouts.

26 At this point, there is insufficient information to know the extent to which the accounts are being intermingled, and this may well be a matter in respect of which ASIC can engage with

the first defendant to come up with a proposal as to what a suitable carveout might be. Prior to orders being made under section 1323(1)(a), an investigation must be being conducted under section 13 of the ASIC Act, as I have already said. That condition is satisfied. The current clients of the first and second defendants are aggrieved persons within the meaning of the Corporations Act and may well have additional claims against the defendants in common law and equity.

27 For the reasons that follow, the orders sought by ASIC ought to be made.

28 First, CommSec intends to lift the suspension and close the defendants' accounts. The first defendant is likely to have access to the funds involved.

29 Second, the first defendant has just become aware of the investigation and may be minded to act in a way which might harm the interests of aggrieved persons.

30 Third, any claims by aggrieved persons may, on the basis of ASICs analysis, so far exceed the amounts currently held in their accounts such that any dissipation of assets may exacerbate the position of such aggrieved persons in terms of their ability to recover their losses.

31 Fourth, based on the financial analysis so far, the exercise of tracing funds possibly misappropriated by the defendants is already complex and, were the defendants permitted to further deal with their assets, that may become even more challenging.

32 Fifth, while there is no current evidence of the first defendant being a flight risk, given the potential consequences of the alleged conduct, including criminal prosecution, and the centrality of Mr Prakash to ASICs investigations, this is a case in which the public interest favours the making of the urgent ex parte orders.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Meagher.

Associate:



Dated: 28 March 2024

SCHEDULE OF PARTIES

QUD 168 of 2024

Defendants

Fourth Defendant: PROVEST ENTERPRISES PTY LTD

Fifth Defendant: SUPER FUNDS AUSTRALIA PTY LTD