



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 JACKSON

DATE OF ORDER: 10 December 2021

WHERE MADE: Perth

THE COURT ORDERS THAT:

1. For the purposes of today's hearing, and pursuant to s 47B of the *Federal Court of Australia Act 1976* (Cth), Mr Lockhart SC is permitted to deliver oral submissions by way of video link.
2. Pursuant to s 601EE(2) of the *Corporations Act 2001* (Cth) (**the Act**), s 90-15 of Schedule 2 to the Act, rules 2.13(3) and 2.13(5) of the *Federal Court (Corporations) Rules 2000*, s 23 of the *Federal Court of Australia Act 1976* (Cth) and rule 1.32 of the *Federal Court Rules 2011* (Cth):

(a) LOUGHTON PATTERSON PTY LTD as trustee of the Loughton Patterson Unit Trust is joined as the fourth defendant to the proceeding and appointed as the First Representative in the application (**Application**) by Robert Conry Brauer and Robert Michael Kirman in their capacity as joint and several liquidators (**Liquidators**) of the 'Scheme' (described in the orders made by the Honourable McKerracher J on 7 December 2020) and AMS Holdings (WA) Pty Ltd (receivers and managers appointed) (in liquidation) (AMS), and by AMS, in these proceedings to represent itself and all investors (**Investors**) of the Scheme who are entitled to make claims in the winding up of the Scheme and/or AMS, or to make claims as beneficial owners of the assets and property of the Scheme and AMS, and in whose interests it is to contend that the net



proceeds of realisation of the property of the Scheme and AMS should be distributed to the Investors in accordance with:

- (i) the "Pari Passu (b)" distribution method as described in sections 8.8.7 and 8.8.8 of the report dated 23 November 2021 annexed as Annexure "RCB-1" to the affidavit of Robert Conry Brauer sworn 23 November 2021 (**the Liquidators' Report**); or
 - (ii) alternatively, the "Letten Net Investment" distribution method as described in sections 8.8.22 and 8.8.23 of the Liquidators' Report; or
 - (iii) alternatively, the "Letten Formula" distribution method as described in sections 8.8.27 to 8.8.29 of the Liquidators' Report; and
- (b) PHOEBE ANG is joined as the fifth defendant to the proceeding and appointed as the Second Representative in the Application to represent herself and all Investors in whose interests it is to contend that the net proceeds of realisation of the property of the Scheme and AMS should be distributed to the Investors in accordance with either:
- (i) the "Courtenay House Preliminary Dividend" distribution method as described in sections 8.8.12 to 8.8.17 of the Liquidators' Report;
 - (ii) alternatively, the "Letten Preliminary Dividend" distribution method as described in sections 8.8.24 to 8.8.26 of the Liquidators' Report; or
 - (iii) alternatively, the "Courtenay House Formula" distribution method as described in sections 8.8.18 to 8.8.21 of the Liquidators' Report,

together, **the Representatives**.

Costs and expenses of the Representatives

3. Pursuant to s 90-15 of Schedule 2 to the Act, s 601EE(2) of the Act and rule 2.13(5) of the *Federal Court (Corporations) Rules 2000* (Cth):
 - (a) the Liquidators would be acting properly and are justified in paying the legal costs and disbursements of each of the Representatives incurred in or incidental to the Application, calculated at the usual rates of the solicitors and counsel engaged by each of them respectively, in an amount as approved in accordance with paragraphs 3(b) and 3(c) below;
 - (b) the Liquidators would be acting properly and are justified in paying the amounts referred to in paragraph 3(a) above upon the passing of resolutions by



the committees of inspection of the Scheme and AMS approving such payments;

- (c) if the Liquidators do not receive approval from the committees of inspection to pay the amounts referred to in paragraph 3(a) above, then any application by a Representative for approval of legal costs and disbursements on an indemnity trustee basis, is to be referred to a Registrar for determination and approval, and the Registrar's decision in that respect be subject to review in the same manner as a Registrar's decision approving the remuneration of an external administrator;
- (d) rule 1.8, and the provision of rules 9.2(2)(a), 9.2(b), 9.2(c) to 9.2(3), 9.2(4), 9.2(5), 9.2(6)(a), 9.6(b), 9.6(c) and 9.6(e) of the *Federal Court (Corporations) Rules* apply mutatis mutandis to an application for approval of legal costs and disbursements pursuant to paragraph 3(c) above, as if each reference to an 'external administrator' was a reference to the Representative making the application, each reference to a 'creditor' was a reference to an Investor, and each reference to 'remuneration' was a reference to the legal costs and disbursements incurred by the applicant Representative, save that:
 - (i) to the extent any of those rules require the service of documents by the applicant Representative, a copy of the document must also be served on the Liquidators;
 - (ii) to the extent that any of those rules require the service of documents by the applicant Representative on each Investor, service of those documents may be effected by the applicant Representative requesting the Liquidators:
 1. publish, and the Liquidators must publish within 2 business days of receiving any such request, those documents, together with a copy of these orders, on the website maintained by McGrathNicol (Website); and
 2. issue by electronic mail, and the Liquidators must issue within 2 business days of receiving such a request, a notice to all known Investors informing them about the publication of those documents on the Website;



- (iii) any document served in accordance with paragraph 3(d)(ii) above is deemed to have been served on the date it is published on the Website;
 - (iv) for the purposes of rule 9.2(3), the persons who may give to the applicant Representative a notice of objection in accordance with that rule include the Liquidators;
 - (v) for the purposes of rule 9.2(4), the applicant Representative must serve any interlocutory process seeking a determination and any affidavit filed under that rule on the Liquidators; and
- (e) the Liquidators would be acting properly and are justified in paying the amounts approved pursuant to paragraphs 3(b) and 3(c) above from the assets and property of the Scheme.

Notice to Investors and others

4. By 15 December 2022, the Liquidators must:

- (a) provide a copy of these orders to each of the Representatives;
- (b) issue a notice to all known Investors substantially in the form of the notice in Annexure A to these orders;
- (c) cause the notice issued in accordance with paragraph 4(b) above to be published on the Website together with the documents referred to in the notice that are said to be available on the Website; and
- (d) pursuant to s 579J of the Act, give each of:
 - (i) the Plaintiff (Australian Securities & Investments Commission);
 - (ii) the First Defendant;
 - (iii) Giovanni Maurizio Carrello as trustee in bankruptcy of the estate of the First Defendant; and
 - (iv) the known creditors of AMS other than the Investors,

notice of the application and these orders by providing them with copies of the notice issued in accordance with paragraph 4(b) above, the Interlocutory Process and these orders or, alternatively, the details of the Website where copies of those documents can be viewed.

5. Any person not being a Representative who receives notice in accordance with paragraph 4 above and who wishes to be heard on the application must, by 17 January 2022:



(a) file a notice of intention to seek leave to be heard under rule 2.13(1) of the *Federal Court (Corporations) Rules 2000* (Cth); and

(b) serve a copy on the plaintiffs, by their solicitors, Ashurst at Level 10 Brookfield Place Tower II, 123 St Georges Terrace, Perth WA 6000.

6. The matter is listed for a case management hearing on 9 February 2022 at 10am.

General programming orders

7. The Representatives must each file and serve any affidavit(s) on which they wish to rely by 11 February 2022.

8. The Liquidators must file and serve any affidavits in reply and their outline of submissions by 25 February 2022.

9. Each of the Representatives and the Trustee in Bankruptcy of the First Defendant must file and serve any outline of submissions in response to the Liquidators' outline of submissions by 25 March 2022.

10. The Liquidators and the Representatives must each file and serve any outline of submissions in reply to any outlines of submissions filed under paragraph 9 above by 8 April 2022.

11. The Application is to be listed for an interlocutory hearing, on an estimate of four days, on dates to be fixed not before 26 April 2022.

12. The Liquidators, AMS, the Trustee in Bankruptcy of the First Defendant and the Representatives have liberty to apply generally on three days' notice.

13. The costs of the Liquidators and AMS in today's hearing be costs in the winding up of the Scheme.

Date that entry is stamped: 10 December 2021


Registrar



Schedule

No: WAD481/2018

Federal Court of Australia

District Registry: Western Australia

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)
Interested Person	GIOVANNI MAURIZIO CARRELLO AS THE TRUSTEE IN BANKRUPTCY OF CHRIS MARCO
First Defendant	CHRIS MARCO
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
Fourth Defendant	LOUGHTON PATTERSON PTY LTD
Fifth Defendant	PHOEBE ANG





Annexure A

LIQUIDATORS' NOTICE TO INVESTORS

MR CHRIS MARCO
AMS HOLDINGS (WA) PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 164 700 485) in its own capacity and as trustee of the AMS
HOLDINGS TRUST

TAKE NOTICE THAT:

1. On 7 December 2020, the Federal Court of Australia declared that Chris Marco and AMS Holdings (WA) Pty Ltd (**AMS**), in its own capacity and as trustee of the AMS Holdings Trust, operated an unregistered managed investment scheme (**Scheme**) and ordered that, amongst other things:
 - (a) the Scheme be wound up;
 - (b) the winding up of the Scheme be conducted as if the Scheme were a 'company' or 'corporation' 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)) be applied to the winding up (with such modifications as are reasonably necessary in the circumstances);
 - (c) AMS be wound up; and
 - (d) leave be granted for Robert Conry Brauer and Robert Michael Kirman to be appointed as joint and several liquidators (**Liquidators**) of the Scheme and AMS.
2. By Interlocutory Process dated 23 November 2021, the Liquidators and AMS applied to the Federal Court of Australia for orders and directions regarding the manner in which the net proceeds of realisation of the property of the Scheme and AMS should be distributed and for other ancillary orders. The application is made under, amongst other things, s 90-15 of Schedule 2 – Insolvency Practice Schedule (Corporations) to the Corporations Act, s 601EE(2) of the Corporations Act and s 92 of the *Trustees Act 1962* (WA).
3. In essence, the Liquidators have presented the Court with a number of different methods that might be used for calculating the distributions payable to investors from the net proceeds of realisation of the property of the Scheme and AMS, and have asked the Court for directions as to the particular method to use.
4. The choice of distribution method affects investors differently depending on their individual circumstances and claim. Comparatively speaking, depending on which of



the distribution methods is ultimately adopted, an investor may be better off or worse off.

5. On 10 December 2021, the Federal Court of Australia made orders that:
 - (a) certain investors be joined as separate representatives to the proceedings to effectively advocate (for themselves and as a representative of other like investors) for one or more of the distribution methods presented by the Liquidators;
 - (b) any other investor who wishes to be heard on the application must, by 17 January 2022 file a notice of intention to seek leave to be heard under rule 2.13(1) of the *Federal Court (Corporations) Rules 2000* (Cth) and serve a copy on the Plaintiffs, by their solicitors.
6. The final hearing of the application is to be scheduled in due course, but is not expected to be sooner than 26 April 2022.
7. Copies of the Interlocutory Process, the Liquidators' report in support of the application and the orders made on 10 December 2021 are available to be viewed and downloaded from:

<https://www.mcgrathnicol.com/creditors/chris-marco-scheme-ams-holdings-wa-pty-ltd/>

8. Alternatively, investors may request a copy of any of these documents by contacting:

Name: Phoebe Donaldson

Email: marcoinvestors@mcgrathnicol.com

Phone: +61 8 6363 7619

Date: