FEDERAL COURT OF AUSTRALIA

Deppeler, in the matter of Moulamein Grain Co-Operative Limited (in liquidation) (No 3) [2023] FCA 803

File number(s):	VID 506 of 2022
Judgment of:	**O'CALLAGHAN J**
Date of judgment:	14 July 2023
Catchwords:	**CORPORATIONS** – where court made order appointing first and second plaintiffs receivers (**Receivers**) over certain grain held by the third plaintiff, a grain growers' Co-operative – where prior to their appointment Receivers appointed as voluntary administrators of the Co-operative – where Receivers in their capacity as voluntary administrators took steps to preserve grain held by the Co-operative belonging to growers – where Receivers sought to recover remuneration referable to preserving grain in their capacity as voluntary administrators – whether s 425 of the *Corporations Act 2001* (Cth) confers power to fix the amount to be paid by way of remuneration to a court appointed receiver – Held: s 425 applies only to privately appointed receivers – meaning of "instrument" within the meaning of s 425 considered – "instrument" does not include a court order – importance of distinction between court appointed and privately appointed receivers considered – certain cases standing for the proposition that that s 425 of the *Corporations Act 2001* (Cth) gives the court power to fix the remuneration of a court appointed receiver wrongly decided and not followed – whether r 14.24 of the *Federal Court Rules 2011* (Cth) confers power to fix the amount to be paid by way of remuneration to a court appointed receiver – Held: entitlement to remuneration under r 14.24 is limited to work carried out by receivers in that capacity **EQUITY** – where Receivers had an equitable lien over funds generated from sale of grain to recover remuneration for the period prior to their appointment on the basis of the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 – where remuneration referable exclusively to the preservation of grain – declaration granted – determination of remuneration referred to Judicial Registrar, absent agreement between Receivers and interested parties

Legislation:	*Corporations Act 2001* (Cth) ss 425, 436A, 449E, *Insolvency Practice Schedule (Corporations)* Div 60, Subdiv B
	Federal Court of Australia Act 1976 (Cth) s 57
	Federal Court Rules 2011 (Cth) r 14.24
	Apportionment Act 1834, 4 & 5 Wm 4, c 22
	Stamp Act 1891, 54 & 55 Vict, c 39, s 14
Cases cited:	*Amirbeaggi, in the matter of Simpkiss Pty Ltd (in liq)* [2018] FCA 2121
	Australian Securities and Investment Commission v A One Multi Services Pty Ltd (No 2) [2022] FCA 1100
	Australian Securities and Investments Commission v Dawson [2021] FCA 301
	Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Ltd [1999] VSC 500
	Australian Securities and Investments Commission v Letten (No 13) [2011] FCA 1151; (2011) 86 ACSR 174
	Azevedo v Secretary, Department of Primary Industries and Energy (1992) 35 FCR 284
	Computer Accounting and Tax Pty Ltd (in liq) v Professional Services of Australia Pty Ltd (No 11) [2016] WASC 365
	Deppeler, in the matter of Moulamein Grain Co-Operative Limited (in liquidation) (No 2) [2023] FCA 658
	Freeman, in the matter of Blue Oasis Holdings Pty Ltd (in liq) (No 2) [2019] FCA 118
	Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (No 2) [2020] FCA 1424
	In re Lawton Estates (1866) LR 3 Eq 469
	In the matter of Anglican Development Fund Diocese of Bathurst [2015] NSWSC 440
	In the matter of Banksia Securities Ltd (in liq) [2017] NSWSC 540
	In the matter of Say Enterprises Pty Ltd [2018] NSWSC 396
	In the matter of Wine National Pty Limited [2016] NSWSC 4
	Jodrell v Jodrell (1869) LR 7 Eq 461
	Primary Securities Ltd v Willmott Forests Ltd (in liq) (2016) 50 VR 752
	Re Arcabi Pty Ltd (in liq) (2014) 288 FLR 236
	Re B Johnson & Co (Builders) Ltd [1955] 1 Ch 634

	Re The Dominion Insurance Company of Australia Ltd (2013) 276 FLR 338 *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 *Re Western Port Holdings Pty Ltd* [2018] VSC 352 *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 *Shannon v North East Wiradjuri Co Ltd (No 4)* [2012] FCA 836 *Skafcorp Ltd v Jarol Pty Ltd* [2002] NSWSC 1183; (2002) 44 ACSR 138 *State Bank of New South Wales Ltd v Chia* (2001) 50 NSWLR 587 *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; (2015) 108 ACSR 545 *Van Reesema v Australian Growth Resources Corporation Pty Ltd* (1987) 75 ALR 311
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	75
Date of hearing:	3 July 2023
Counsel for the Plaintiffs:	DF McAloon
Solicitor for the Plaintiffs:	Strongman & Crouch
Counsel for the Interested Parties:	RT Zambelli
Solicitor for the Interested Parties:	Holding Redlich

ORDERS

VID 506 of 2022

IN THE MATTER OF MOULAMEIN GRAIN CO-OPERATIVE LIMITED (IN LIQUIDATION) (ABN 90 940 498 384)

NATHAN DEPPELER AND MATTHEW JESS IN THEIR CAPACITY AS LIQUIDATORS OF MOULAMEIN GRAIN CO-OPERATIVE LIMITED (IN LIQUIDATION) (ABN 90 940 498 384)
First and Second Plaintiffs

MOULAMEIN GRAIN CO-OPERATIVE LIMITED (IN LIQUIDATION) (ABN 90 940 498 384)
Third Plaintiff

AGRISK MANAGEMENT PTY LTD (ACN 067 313 722) and others named in the Schedule
Interested Parties

ORDER MADE BY: **O'CALLAGHAN J**

DATE OF ORDER: **14 JULY 2023**

THE COURT DECLARES THAT:

1. The first and second plaintiffs have an equitable lien over the funds generated from the their sale pursuant to the orders made on 28 September 2022 of the grain held by the third plaintiff (**Realised Grain**), to secure the first and second plaintiffs' remuneration incurred in the period prior to 13 September 2022 which was exclusively referable to their preservation of the Realised Grain, including without limitation preparing the application to be appointed as receivers of the Consignment Grain (as defined in the order of the Court dated 13 September 2022) and identifying how best to preserve and realise it (**Pre-13 September Secured Remuneration**).

THE COURT ORDERS THAT:

1. The first and second plaintiffs are justified and acting reasonably in proceeding on the basis that the net sale proceeds generated from the realisation of the Consignment Grain (as defined in the orders made in this proceeding on 13 September 2022) are to be distributed to those parties identified as having delivered Consignment Grain to the

third plaintiff (growers) in accordance with the process identified as the "Specific Method" on page 12 of annexure NLD-28 to the affidavit of Nathan Deppeler sworn on 31 March 2023.

2. The first and second plaintiffs are justified and acting reasonably in:

   (a) proceeding on the basis that the net sale proceeds generated from the realisation of the grain that is described as "Surplus Grain" in the circular that is annexure NLD-28 to the affidavit of Nathan Deppeler sworn on 31 March 2023 can be retained by the third plaintiff and applied for the benefit of creditors of the third plaintiff generally as an asset available in the winding up of the third plaintiff; and

   (b) treating any potential claim by growers to have a direct or proprietary interest in the net sale proceeds described at (a) above as having been abandoned.

3. Pursuant to r 14.24 of the *Federal Court Rules 2011* (Cth), the remuneration of the first and second plaintiffs for acting in their capacity as receivers of the Consignment Grain in the period from 13 September 2022 up to and including 26 March 2023 is fixed in the sum of $219,705.26 (excluding GST).

4. Failing agreement between the first and second plaintiffs and the interested parties on the quantification of the Pre-13 September Secured Remuneration within 14 days of the date of these orders, the quantification of the Pre-13 September Secured Remuneration, and the making of such further orders and directions in connection therewith, be referred to a Judicial Registrar for determination.

5. The interested parties' costs of and incidental to this proceeding be paid out of the net sale proceeds generated from the realisation of the Realised Grain prior to the distribution to growers of that property by the first and second plaintiff on an indemnity basis pursuant to s 43(3)(d) of the *Federal Court of Australia Act 1976* (Cth) and s 90-15(3)(d) of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the *Corporations Act 2001* (Cth).

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

REASONS FOR JUDGMENT

O'CALLAGHAN J

Introduction

1 Following a hearing on 6 June 2023, I published my reasons in *Deppeler, in the matter of Moulamein Grain Co-Operative Limited (in liquidation) (No 2)* [2023] FCA 658 (***Deppeler No 2***). The only order that I made at that time, other than giving the interested parties leave *nunc pro tunc* to intervene, was to list the proceeding for further hearing on 3 July 2023.

2 These reasons necessarily assume some familiarity with *Deppeler No 2*.

3 The interested parties, being growers, were given leave to intervene, because (i) they owned approximately 51% of the Consignment Grain (as defined), and (ii) they are each parties to the non-member storage and handling agreements pursuant to which the Co-operative agreed to store and handle their grain.

4 I listed the matter for further hearing at the time of the publication of my reasons in *Deppeler No 2* because:

(a) having held that the growers who had claims to the proceeds of the so-called "Surplus Grain" were to be taken as having abandoned those claims, the form of the orders proposed by the receivers was insufficient (**issue 2(a)**); and

(b) the written submissions filed after the 6 June 2023 hearing, in respect of the contention advanced by the interested parties about the source of the power of this court to make an order fixing what was referred to as "pre-receivership remuneration" raised an important question about which single judges have expressed divergent views (**issue 2(b)**).

5 I subsequently heard oral submissions on both issues on 3 July 2023.

6 At that hearing, and following brief exchanges with counsel, including counsel for the interested parties, it was agreed that the appropriate order as to issue 2(a) in light of my 20 June 2023 reasons was order 2(b) set out above.

7 It now remains to address issue 2(b).

8 The issue arises because the first and second plaintiffs were appointed as administrators of the Co-operative by a resolution of directors on 15 August 2022; and they were appointed by an order of the court as receivers of the so-called Consignment Grain pursuant to s 57 of the *Federal Court of Australia Act 1976* (Cth) on 13 September 2022.

9 Between those two appointments (that is, between 15 August and 12 September 2022) the first and second plaintiffs went about preserving the Consignment Grain stored by the Co-operative for the benefit of growers.

10 In his 31 March 2023 affidavit, the first plaintiff, Mr Nathan Deppeler, produced as Annexure NLD-29 a report headed "Report to the Court – Remuneration for Receivers' over the Consignment Grain", and deposed at [27]-[30] as follows:

> At page 4 of NLD-28 to this affidavit, the remuneration report [which was sent to creditors] states that a total of $302,211.11 (excluding GST) has been incurred to date (up to and including 26 March 2023) in conducting the Receivership (**Claimed Remuneration**). The report includes details of the work undertaken to which the Claimed Remuneration relates, accompanied by records of the time spent by each staff member on the tasks undertaken.
>
> I have reviewed the time entries of the Receivers and our staff that have given rise to the Claimed Remuneration. Having undertaken that exercise, I consider that the Claimed Remuneration was incurred by staff members of appropriate seniority while undertaking tasks that were appropriate and necessary for the Receivers to discharge their role, such that the Claimed Remuneration is reasonable. The receivership has raised complex issues and risks which are detailed at item 10 on pages 23 to 26 of "NLD-29".
>
> The Claimed Remuneration includes some remuneration relating to work undertaken in the period from 15 August 2022 to 12 September 2022 (**Pre-Appointment Period**), being the period prior to the Receivers being appointed by the Court. That part of the Claimed Remuneration relates to tasks undertaken in connection with the originating process filed on 7 September 2022 in this proceeding. I consider that it is appropriate that the associated remuneration be met from the net proceeds of the Consignment Grain, rather than from the property of the Co-Operative, because the relevant work related solely to preparing the application to be appointed as receivers of the Consignment Grain and identifying how best to preserve and realise the Consignment Grain, including what would be required by the first and second plaintiffs in order to do so, and did not have any connection with the property of the Co-Operative.
>
> The Receivers and our staff undertook other work in the Pre-Appointment Period in connection with the administration of the Co-Operative. The remuneration relating to that other work does not form part of the Claimed Remuneration.

11 The receivers contended that the court derives its power to make an order in their favour fixing their pre-receivership remuneration from three alternative sources:

(a) s 425 of the *Corporations Act 2001* (Cth);

(b) r 14.24 of the *Federal Court Rules 2011* (Cth); or

(c) an equitable lien on the basis of the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171.

12 For the reasons that follow, although some single judge decisions say to the contrary, contentions (a) and (b) must be rejected. Contention (c) is to be accepted.

Section 425 of the Corporations Act

13 Sub-sections 425(1)-(7) of the Corporations Act provide:

> **425 Court's power to fix receiver's remuneration**
>
> (1) The Court may by order fix the amount to be paid by way of remuneration to any person who, ***under a power contained in an instrument***, has been appointed as receiver of property of a corporation.
>
> (2) The power of the Court to make an order under this section:
>
> (a) extends to fixing the remuneration for any period before the making of the order or the application for the order; and
>
> (b) is exercisable even if the receiver has died, or ceased to act, before the making of the order or the application for the order; and
>
> (c) if the receiver has been paid or has retained for the receiver's remuneration for any period before the making of the order any amount in excess of that fixed for that period--extends to requiring the receiver or the receiver's personal representatives to account for the excess or such part of the excess as is specified in the order.
>
> (3) The power conferred by paragraph (2)(c) must not be exercised in respect of any period before the making of the application for the order unless, in the opinion of the Court, there are special circumstances making it proper for the power to be so exercised.
>
> (4) The Court may from time to time vary or amend an order under this section.
>
> (5) An order under this section may be made, varied or amended on the application of:
>
> (a) a liquidator of the corporation; or
>
> (b) an administrator of the corporation; or
>
> (c) an administrator of a deed of company arrangement executed by the corporation; or
>
> (ca) if the corporation is under restructuring--the corporation with the consent of the restructuring practitioner for the

corporation; or

(cb) the restructuring practitioner for a restructuring plan made by the corporation; or

(d) ASIC.

(6) An order under this section may be varied or amended on the application of the receiver concerned.

(7) An order under this section may be made, varied or amended only as provided in subsections (5) and (6).

(Emphasis added).

14 Sub-section 425(8) goes on to set out the matters to which the Court must have regard in determining whether the remuneration sought is reasonable. It is not necessary to set them out here.

15 In my view, s 425 does not apply to court appointed receivers. The section is only available to a receiver who is appointed "under a power contained in an instrument", which necessarily excludes a court appointed receiver because a court order is not an "instrument" within the meaning of s 425. See *In the matter of Anglican Development Fund Diocese of Bathurst* [2015] NSWSC 440 at [11] (Brereton J).

16 Justice Brereton considered the relevant application of s 425 in more detail in *Re The Dominion Insurance Company of Australia Ltd* (2013) 276 FLR 338.

17 In that case, the applicant, Mr Weston, was appointed as the scheme administrator of an insurance company. The scheme document entitled him to remuneration at the rates from time to time recommended by the Insolvency Practitioners' Association of Australia (the **IPA**), which had unfortunately stopped publishing such recommended rates some years earlier. Mr Weston made an application to the Supreme Court of New South Wales seeking approval of his remuneration calculated in accordance with his firm's own internal cost structures (something recommended by the IPA in the absence of published rates), pursuant to an array of alternative provisions, including s 425 of the Corporations Act. His Honour made the following pertinent observations about that provision, at 353 [26]-[28]:

> It is conspicuous that s 425(7) provides that an order under the section may be made, varied or amended *only* as provided in subss (5) and (6); that subs (5) specifies those with standing to *make* an application, and does not include the receiver (to whose position a Scheme Administrator is for relevant purposes by s 411(9) assimilated); whereas standing to apply for a *variation or amendment* of an order made under the section is conferred on the receiver by subs (6) …

> The reason for the section being structured this way is that a receiver's right to remuneration is contractual, arising under the instrument of appointment. The receiver is entitled to that remuneration as a matter of contractual right, unless the court interferes at the suit of a party with standing under s 425(5). There is no need for a receiver to have standing to make such an application. However, where the court does interfere, the receiver is then given standing, under s 425(6), to apply to vary or amend the order so made. The purpose of the section is to allow the court to fix the remuneration of a receiver appointed under an instrument, if the receiver's remuneration would otherwise be excessive: *Re Potters Oils Ltd (No 2)* [1986] 1 WLR 201; *Cape v Redarb* (1992) 107 FLR 362. I respectfully disagree with the view adopted in this respect by Jacobson J in *Shannon v North East Wiradjuri Co Ltd (No 4)* [2012] FCA 836; in expressing the view that the provisions of s 425(5), which made no reference to the standing of a receiver, did not effect the scope of the power under s 425(1) which specifically referred to the power of the court to fix the remuneration of a receiver, his Honour's attention does not appear to have been drawn to subs (7). Although the rules (*Supreme Court (Corporations) Rules 1999* (NSW), r 9.1(1)) assume that a receiver can make such an application, the rules cannot validly confer such standing in the face of the explicit limitation in *Corporations Act*, s 425(7).
>
> Accordingly, in my view, is it not open to the court to fix the Scheme Administrator's remuneration under *Corporations Act*, s 425.
>
> (Emphasis in original).

18 There are a number of provisions in the Corporations Act that draw a distinction between court appointed receivers, who are appointed under an "order", and privately appointed receivers, who are appointed under an "instrument".

19 Sub-section 420(1) of the Corporations Act provides that "[s]ubject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed". That provision applies to all receivers, however appointed.

20 But s 420(2) makes clear that the numerous powers listed in ss 420(2)(a)-(w) are "subject to any provision of the court order by which, or the instrument under which, the receiver was appointed … in addition to any powers conferred by that order or instrument, as the case may be".

21 Section 424 of the Corporations provides:

> **424 Controller may apply to Court**
>
> (1) A controller of property of a corporation may apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller's functions and powers as controller.

> (2) In the case of a receiver of property of a corporation, subsection (1) applies only if the receiver was appointed under a power contained in an instrument.

22 As Master Sanderson said in *Re Arcabi Pty Ltd (in liq)* (2014) 288 FLR 236 at 261 [108]: "I can see no reason why in principle s 424 cannot be utilised to provide an out of court receiver with appropriate protection in their dealings with goods in their custody".

23 Section 419, which is headed "Liability of controller" does not apply to a court appointed receiver, but as Gordon J said in *Australian Securities and Investments Commission v Letten (No 13)* [2011] FCA 1151; (2011) 86 ACSR 174 at 191 [61]: "in so far as s 419(1) of the Act does not apply to a court-appointed receiver, it is not a 'lone horse' within Pt 5.2 of the Act. Sections 424 and 425 of the Act, for example, each apply only to a receiver appointed 'under a power contained in an instrument'".

24 Other cases that support the proposition that s 425 of the Corporations Act gives jurisdiction to the court to fix the remuneration of a receiver appointed pursuant to a power contained in an instrument, but not otherwise, are: *Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Ltd* [1999] VSC 500 at [17] (Gillard J); *Re Western Port Holdings Pty Ltd* [2018] VSC 352 at [21]–[22] (Matthews JR, as her Honour then was); and *Computer Accounting and Tax Pty Ltd (in liq) v Professional Services of Australia Pty Ltd (No 11)* [2016] WASC 365 at [1] (Master Sanderson) (the receiver "was a court appointed receiver and therefore his remuneration is to be assessed by the court not pursuant to [s 425 of] the Corporations Act").

25 I was referred to three cases that support the contrary proposition that s 425 of the Corporations Act gives the Court power to fix the remuneration of a court appointed receiver, namely:

- *Shannon v North East Wiradjuri Co Ltd (No 4)* [2012] FCA 836;
- *Freeman, in the matter of Blue Oasis Holdings Pty Ltd (in liq) (No 2)* [2019] FCA 118; and
- *Australian Securities and Investments Commission v Dawson* [2021] FCA 301.

26 To the extent that statements made in those cases stand for that proposition, they are, with great respect, incorrectly decided.

27 Taking each case in turn.

28 In *Shannon v North East Wiradjuri Co Ltd (No 4)*, Jacobson J dealt with an application by court appointed receivers for payment of their remuneration, purportedly brought pursuant to s 57 of the Federal Court of Australia Act.

29 It is apparent from his Honour's published reasons that: no party appeared to oppose the order sought; the applicant was not represented by counsel; and his Honour published his reasons on the day that the application was heard.

30 Section 57 was obviously a misconceived source of power, because that provision deals with the appointment of receivers by interlocutory order. It was that obvious problem that seems to have led his Honour to say at [2] that the remuneration order "is [instead] properly to be made under s 425(1) of the Corporations Act" and that because s 425(5) "make[s] no reference to the standing of a receiver" it "do[es] not affect the scope of the power under s 425(1) which specifically refers to the power of the court to fix the remuneration of a receiver".

31 But as Brereton J observed in *Re The Dominion Insurance Company of Australia Ltd*, Jacobson J, with great respect, was mistaken, because when s 425(5) is read with s 425(7), it is clear that a receiver is not included in the classes of parties permitted to *make* an application for an order under s 425(1). A receiver may only apply to vary or amend an order under that sub-section, for the reasons his Honour gave at 353 [26] and [27]. See paragraph [17] above.

32 *Freeman, in the matter Blue Oasis Holdings Pty Ltd (in liq) (No 2)* involved an application brought by court appointed receivers for payment of their remuneration pursuant to s 425(1) of the Corporations Act ("and/or" r 14.24 of the Federal Court Rules). Justice Greenwood determined the application on the papers, and held at [9]:

> Section 425(1) of the Act provides that the Court may, by order, fix the amount to be paid by way of remuneration to any person who, under a power contained in an instrument, has been appointed as receiver of property of a corporation. The question of whether an order of a court appointing the receiver is itself "an instrument" for the purposes of s 425 was not put in issue. In any event, it is clear that s 425 is relevantly engaged for the purpose of fixing, that is, assessing and fixing the quantum of remuneration of a receiver appointed by the Court. The "instrument" is the "order": *In the Matter of Say Enterprises Pty Ltd* [2018] NSWSC 396 [6]; *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; (2015) 108 ACSR 545 [28]; *Re Wine National Pty Limited* [2016] NSWSC 4 at [15]; *Re Banksia Securities Limited* [2017] NSWSC 540 at [41]-[42]). The power of this Court to fix a receiver's remuneration can be found in r 14.24 of the *Federal Court Rules 2011*.

33 I have accessed (on the court file) and read the written submission filed by the receivers in support of the application. The submission did not cite any basis for the assertion made in it that s 425 was a relevant source of power.

34 As is apparent from the extract from his Honour's reasons set out above, he was of the opinion that the word "instrument" in s 425(1) includes a court "order" and that s 425(1) thus provides the power to permit the court to fix the remuneration of a court appointed receiver. So far as I can tell, no submission was made by any party to that effect.

35 In my respectful view, and with great respect to the judge, the proposition that an "instrument" within the meaning of s 425 of the Corporations Act includes a court order (appointing a receiver) cannot be sustained.

36 The cases cited by his Honour do not stand for, or address, the proposition. The pin cites to the cases to which his Honour referred as authority for it (*In the matter of Say Enterprises Pty Ltd* [2018] NSWSC 396 at [6] (Brereton J); *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; (2015) 108 ACSR 545 at 553 [28] (Besanko, Middleton and Beach JJ); *In the matter of Wine National Pty Limited* [2016] NSWSC 4 at [15] (Black J); and *In the matter of Banksia Securities Ltd (in liq)* [2017] NSWSC 540 at [41]-[42] (Gleeson JA)) stand for a different, narrow and uncontroversial proposition, namely that in exercising the court's jurisdiction to assess reasonableness of remuneration of a court appointed receiver, when that jurisdiction is enlivened, the court may be guided by the principles in s 425(8) of the Corporations Act which apply to privately appointed receivers. See also, for example, *Australian Securities and Investment Commission v A One Multi Services Pty Ltd (No 2)* [2022] FCA 1100 at [16]-[19] (Downes J), citing *In the matter of Say Enterprises Pty Ltd* at [6] (Brereton J).

37 Although "instrument" is not defined in the Corporations Act, as a matter of ordinary English usage, in the context of s 425 the word means a "formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form". Compare *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284 at 299-300 (French J, as he then was), citing the *Shorter Oxford English Dictionary*.

38 In the context of receivers, the most frequently encountered "instrument" is a mortgage, authorising the appointment of a receiver upon default by the mortgagor. But its ordinary

English meaning includes "any agreement between parties interested in the property over which the appointment is made". Compare *Kerr and Hunter on Receivers and Administrators* (Thomson Reuters, 21st ed, 2020) at 18-1.

39 Of course, like any word in any statute it must take its meaning from the appropriate context. In *In re Lawton Estates* (1866) LR 3 Eq 469 and *Jodrell v Jodrell* (1869) LR 7 Eq 461, it was held that an order of a court under the *Apportionment Act 1834*, 4 & 5 Wm 4, c 22 was not an "instrument" within the meaning of the Act because the Act referred to instruments "executed" by someone. In that context, such an "instrument" could not sensibly be said to include a court order.

40 On the other hand, in *Sun Alliance Insurance Ltd v Inland Revenue Commissioners* [1972] 1 Ch 133, the question was whether a court order was "an instrument executed" in any part of the United Kingdom within the provisions of s 14(4) of the *Stamp Act 1891*, 54 & 55 Vict, c 39. Justice Foster addressed the issue as follows at 147-48:

> In section 122 [of the Stamp Act], which is the definition section, it is provided: "The expression 'instrument' includes every written document" and "The expressions 'executed' and 'execution,' with reference to instruments not under seal, mean signed and signature." Lord Romilly M.R., in *Jodrell v. Jodrell* (1869) L.R. 7 Eq. 461, held that a court order was not an instrument within the meaning of the Apportionment Act 1834 [4 & 5 Will. 4, c. 22]. Megarry J., in *In re Holt's Settlement* [1969] 1 Ch. 100, held that a court order was an instrument within the meaning of the Perpetuities and Accumulations Act 1964, s. 15 (5). Both these cases turned on the provisions of the particular Acts in question. In the context of the Stamp Act 1891, I have no doubt that the court order is a written document and therefore, by definition, an instrument.

41 The Corporations Act, as I have explained above, draws a clear distinction between receivers appointed by order of a court and those appointed privately under an instrument, such as a mortgage. And that is because the distinction is an important one of long standing.

42 As Lord Evershed MR said in *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch 634 at 644 of a privately appointed receiver:

> The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager — as it is said, "out of court" — is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment; and the powers which are conferred upon him, and which I have

> to some extent recited, are … really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security (in this case, as commonly) by the sale of the assets.

43 And as Einstein J said in *State Bank of New South Wales Ltd v Chia* (2001) 50 NSWLR 587 at 625 [867]-[868] about the distinction must be made between a receiver appointed by a court and a receiver appointed privately:

> It is undoubted that a court appointed receiver owes fiduciary obligations to all parties interested in the subject property: *Cape v Redarb Pty Ltd* (1992) 8 ACSR 67 at 78 [(Higgins J)]. The function of such a receiver is to preserve the assets of the company and its potential to earn future profits: *Duffy v Super Centre Development Corporation Ltd* [1967] 1 NSWR 382 at 383-384, per Street J.
>
> The purpose of the appointment of a receiver out of court is somewhat different; they are not appointed for the benefit of the company but for the purpose of realising the security held by the appointer: see *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch 634 at 644, per Evershed MR, *Ostrander v Niagra Helicopters Ltd* (1973) 40 DLR (3d) 161 at 167, per Stark J [(Ontario High Court)]. The appointment of such a receiver is performed by the mortgagee, however, it is invariably the case, and is here the case, that the instrument under which the receiver is appointed provides that the receiver is the agent of the mortgagor. It has been said that the agency is "a very special" and "limited" one: see WRD Stevenson, "Receivers" (1973) 44 Australian Law Journal 438 at 444. The purpose and effect of rendering the receiver the agent of the mortgagor is to relieve the mortgagee from the liabilities which the law casts upon a mortgagee going into possession and to place upon the mortgagor the liability for the acts and defaults of the receiver: *Gaskell v Gosling* [1886] 1 QB 669 at 692-693 per Rigby LJ (dissenting), approved on appeal' *Gosling v Gaskell* [1897] AC 575 at 589, 590, 595, *Visbord v Commissioner of Taxation (Cth)* (1943) 68 CLR 354 at 368, per Latham CJ.

44 His Honour continued at 626 [870], to describe the duties that the general law imposes on a privately appointed receiver as follows:

> To say that a receiver appointed out of court is not, generally, a fiduciary, is not to say that they are in no circumstances a fiduciary nor to say they owe no duties in the conduct of their receivership. Outside of those imposed by Statute, the general law imposes at least three duties upon a receiver. In the first place, the receiver has a duty to the mortgagee to collect and realise the assets of the company for the purpose of discharging the security … In the second place, the receiver holds in trust for the mortgagor, any proceeds from the sale of the company's assets after the satisfaction of the claims of the mortgagee and subsequent creditors [and] …[i]n the third place … the receiver, as the donee of a power, must exercise the powers and duties granted to him or her in good faith and for a proper purpose.

45 On the other hand, as the Full Court (Morling, Spender and Gummow JJ) said about court appointed receivers in *Van Reesema v Australian Growth Resources Corporation Pty Ltd* (1987) 75 ALR 311 at 317:

> It was not disputed in argument before us that the receivers and managers acted in exercise of their powers, not as representatives or agents of the company, but as parties appointed by the court in response to the necessity or desirability perceived by the

court for protection of the parties described in s 573(1) of the Code. In *Burt, Boulton and Hayward v Bull* [1895] 1 QB 276 at 279 Lord Esher MR described the position of a receiver and manager appointed by the court in these terms:

> "What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly. The incidents of his relation to the court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must prima facie be taken to be orders given on his own responsibility and credit."

The source of the court's power is to be found in the Code, but the statute adapts for its purposes the long established general jurisdiction of courts of equity to appoint receivers of property in jeopardy or in contention. Such receivers have been described as virtually representatives of the court and of all the parties with an interest in the litigation wherein they are appointed, so that the possession of the receivers is to be treated as that of the court which appointed them: *Viola v Anglo-American Cold Storage Co* [1912] 2 Ch 305 at 311: *Re Savoy Estate Ltd* [1949] Ch 622 at 635 ; *Davis v Gray* (1872) 83 US 203 at 217-18; O'Donovan *Company Receivers and Managers* pp 294-6; Clark *A Treatise on the Law and Practice of Receivers* 3rd ed vol 2, Chs 12, 13. Further, upon appointment of a receiver by the court, the powers of the directors to deal with the property included in the appointment are suspended and the directors are largely excluded from the conduct and supervision of the business and affairs of the company in relation to that property: *Moss Steamship Co Ltd v Whinney* [1912] AC 254 at 260, 263, 271, *Parsons v Sovereign Bank of Canada* [1913] AC 160 at 167[.]

46 As Brereton J explained in *Re The Dominion Insurance Company of Australia Ltd* at 353 [27], the purpose of s 425 is to allow the court to fix the remuneration of a receiver appointed under an instrument, if the receiver's remuneration would otherwise be excessive. As he also explained, s 425 is structured the way it is because a receiver's right to remuneration is contractual, arising under the instrument of appointment, and she or he is entitled to it as a matter of contract, unless the court interferes at the suit of a party with standing under s 425(5).

47 For those reasons, in my view the proposition that "instrument" in s 425(1) includes an order of a court is clearly wrong, and despite the (somewhat feint) invitation of the receivers to follow the reasoning in *Freeman, in the matter Blue Oasis Holdings Pty Ltd (in liq) (No 2)* at [9], I decline to do so.

48 The final decision that I need to mention is *Australian Securities and Investments Commission v Dawson*.

49 In that case, Anastassiou J said at [4] that "[t]he Receivers' application is made pursuant to s 425 of the Act, which empowers the Court to fix the remuneration of a court-appointed receiver", and made orders fixing their remuneration pursuant to s 425, having regard to all the matters that should be taken into account set out in s 425(8). His Honour also referred at [6] to the fact that the application was also brought under r 14.24 of the Federal Court Rules, but it is apparent from the form of the order made that he did not make the order fixing the remuneration sought pursuant to that rule.

50 In the course of his brief ex tempore reasons, his Honour referred at [9] to "detailed written submissions prepared by Counsel for the Receivers, as well as four affidavits which address the relevant criteria as set out under s 425 of the Act".

51 I have read the written submissions on the court file. As to s 425 of the Corporations Act, counsel submitted as follows:

> **Court's source of power**
>
> 7. The Receivers application is made pursuant to s 425 of the *Corporations Act 2001* (Cth). Whilst s 425(1) empowers the Court to fix the remuneration of a person appointed, pursuant to an instrument, as a receiver of property of a corporation, there is authority supporting the proposition that that power may be exercised in respect of a court- appointed receiver: see *Shannon v North East Wiradjuri Co Limited (No 4)* [2012] FCA 836 at [2]-[3] (Jacobson J).

52 It will be apparent from what I have already said that that submission, and his Honour's statement that s 425 empowers the court to fix the remuneration of a court appointed receiver are, with great respect, wrong. For reasons that I will now turn to, so too is the submission made by the first and second plaintiffs that r 14.24 provides the relevant source of power.

Rule 14.24 of the Federal Court Rules

53 Rule 14.24 provides that "[a] receiver may apply to the Court to have the Court fix the receiver's remuneration".

54 It is not disputed that r 14.24 gives the court power to fix a receiver's remuneration after their appointment by the court.

55 The relevant question here is whether it allows the court to fix the remuneration of a court-appointed receiver in relation to work undertaken prior to their appointment (here, when they were acting in their capacity as administrators). In my view, it does not.

56 In *Amirbeaggi, in the matter of Simpkiss Pty Ltd (in liq)* [2018] FCA 2121, Ms Amirbeaggi was appointed as administrator of Simpkiss Pty Ltd pursuant to s 436A of the Corporations Act. As at the date of her appointment, the company was still trading. Later, the creditors of the company resolved that it be wound-up and Ms Amirbeaggi was appointed as its liquidator. She was also appointed by the court as receiver and manager of trust property. In relation to the court's power to hear and determine Ms Amirbeaggi's application for remuneration in her capacity as administrator, prior to her appointment as a receiver, Markovic J said at [41]:

> The Court has power under r 14.24 of the *Federal Court Rules 2011* (Cth) to fix the remuneration of a receiver. For the period prior to Ms Amirbeaggi's appointment as a receiver the source of the Court's jurisdiction to approve remuneration for a liquidator or administrator who administers trust assets is its inherent jurisdiction: see *Application of Sutherland* [2004] NSWSC 798; (2004) 50 ACSR 297 at [10]; [2004] NSWSC 798 at [10].

57 In my opinion, as the interested parties submitted, and consistently with Markovic J's observation in *Amirbeaggi*, r 14.24 only permits the court to fix remuneration in respect of work done by a receiver in their capacity as receiver, which presupposes their appointment as a receiver. The rule does not confer power to grant or fix remuneration in respect of work done by a receiver prior to their appointment, that is to say, when they were not "a receiver".

58 In that regard, it is useful to mention what Austin J said in *Skafcorp Ltd v Jarol Pty Ltd* [2002] NSWSC 1183; (2002) 44 ACSR 138; about an analogous provision contained in s 449E(1)(b) of the Corporations Act. (See now generally *Insolvency Practice Schedule (Corporations)* Div 60, Subdiv B).

59 It provided:

> (1) The administrator of a company under administration, or of a deed of company arrangement, is entitled to:
>
> (a) such remuneration as is fixed by a resolution of the company's creditors passed at a meeting convened under section 439A, or under section 439A or 445F, as the case may be; or
>
> (b) if no remuneration is so fixed—such remuneration as the Court fixes on the application of the administrator.

60 In that case, the second plaintiff had been appointed administrator of the first plaintiff pursuant to a resolution of directors, under s 436A of the Corporations Act. Prior to the appointment of the second plaintiff, his firm had provided professional services to the first plaintiff, and he sought recovery of his remuneration for those services.

61 Justice Austin said the following at 142 [16] about why s 449E(1)(b) did not provide a power to award such remuneration:

> Nevertheless, the position of the second plaintiff, vis-á-vis the claim for $14,836.80, is distinguishable from the position of a receiver-manager appointed by the Court, who seeks payment for work carried out in that capacity. The second plaintiff had a statutory entitlement to remuneration under s 449E(1) with respect to his work as administrator, but that statutory entitlement was limited, by the words of the subsection, to the work that he carried out in his capacity as administrator of the company under administration.

62 And so it is with r 14.24 – the entitlement to remuneration is limited by the words of the rule to the work carried out by the receivers in that capacity.

63 The receivers drew my attention to, and relied upon, the decision of Yates J in *Hutchins, in the matter of Ardenberg Pty Ltd (in liq) (No 2)* [2020] FCA 1424 at [4], in which his Honour said that the remuneration sought included pre-appointment remuneration and implicitly applied r 14.24 to award remuneration in respect of pre-appointment work, as follows:

> By interlocutory application dated 11 February 2020 … the first plaintiffs seek remuneration pursuant to r 14.24 of the *Federal Court Rules 2011* (Cth) for their work in the period 7 March 2018 to 31 July 2019 fixed in the amount of $978,384.55. There are two components. The first plaintiffs seek $42,472.10 in respect of their work in the period 7 to 15 March 2018, prior to their formal appointment as receivers and managers. The balance is in respect of their work following their appointment as receivers and managers.

64 It is clear from his Honour's brief reasons that the question of whether the rule in fact provided the power to award remuneration in of work prior to the appointment was not argued. To the extent that the passage quoted above might be said to imply that r 14.24 provides such power, in my view no such power exists for the reasons I have given.

Equitable lien

65 The first and second plaintiffs contended in the alternative, and I understood the interested parties in the end to have agreed, that to the extent that the receivers seek to recover reasonable remuneration for the period prior to their appointment as receivers that is referable exclusively

to the preservation of the Consignment Grain, they are entitled to do so, consistently with the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171.

66 In that case the assets of the company were insufficient to meet the amount owing to a secured creditor. The liquidator sought to have his accounts passed and his remuneration fixed, and the secured creditor objected on the basis that the liquidator's remuneration and certain disbursements should not come out of the company's assets in priority to his security.

67 Justice Dixon (as he then was) explained what became to be known as the *Universal Distributing* principle as follows at 174-75:

> If a creditor whose debt is secured over the assets of the company come in and have his rights decided in the winding up, he is entitled to be paid principal and interest out of the fund produced by the assets encumbered by his debt after the deduction of the costs, charges and expenses incidental to the realization of such assets (*In re Marine Mansions Co*). The security is paramount to the general costs and expenses of the liquidation, but the expenses attendant upon the realization of the fund affected by the security must be borne by it (*In re Oriental Hotels Co; Perry v Oriental Hotels Co*). The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realized in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realization just as if they had begun a suit for its realization or had themselves realized it without suit (cf *In re Regent's Canal Ironworks Co; Ex parte Grissell*; and see *Batten v Wedgwood Coal & Iron Co*).
>
> In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realization of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate. The question in the present case is whether the liquidator can charge against the fund passing through his hands as between himself and the person to whom it is payable, so much of the remuneration fixed for work done in the winding up as is referable to the calling in and conversion of the assets producing the fund. I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it.
>
> (Citations omitted).

68 In *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307 at 320 [22], the Court (Crennan, Kiefel, Bell, Gageler and Keane JJ) said that the principle "may be more shortly stated as: a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating

that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor".

69 As Whelan and Santamaria JJA said in *Primary Securities Ltd v Willmott Forests Ltd (in liq)* (2016) 50 VR 752 at 784 [123]-[124]:

> Where the claimant's work has created a fund, the position may be relatively straightforward. The holder of the proprietary interest wishes to take possession of property (the fund) which would not exist at all but for the work of the claimant.
>
> In our view the authorities also make it clear that the principle may apply where the claimant has cared for or preserved an asset, and not simply where the claimant has realised it and created a fund. One circumstance where the principle may apply is where the claimant has acted as a kind of 'stand in', undertaking activities which the holder of the proprietary interest would have had to undertake itself had the claimant not done so. …

70 Upon the basis that the first and second plaintiffs "created a fund" in the manner described by Whelan and Santamaria JJA, the first and second plaintiffs sought the following declaration:

> The first and second plaintiffs have an equitable lien, on the basis of the principle in *Re Universal Distributing Co Ltd* (1933) 48 CLR 171, over the funds generated from the first and second plaintiffs' sale, pursuant to the orders made on 28 September 2022, of the grain held by the third plaintiff (**Realised Grain**), which lien secures their first and second plaintiffs' remuneration incurred in the period prior to 13 September 2022 which was exclusively referable to the first and second plaintiffs' preservation (including caring for, preserving and realising) of the Realised Grain (**Pre-13 September Secured Remuneration**).

71 I am satisfied on the evidence, as Mr Deppeler deposed, that in the period between 15 August and 12 September 2022 he and the second plaintiff "prepar[ed] the application to be appointed as receivers of the Consignment Grain and identif[ied] how best to preserve and realise the [Realised] Grain, including what would be required by [them] in order to do so".

72 In my view, in the circumstances of this case, and in light of Mr Deppeler's evidence to which I have referred, the granting of a declaration along the lines of that sought by the first and second plaintiffs is appropriate including because, consistently with the *Universal Distributing* principle, growers should not be permitted to enjoy the benefits referable to the preservation of the Realised Grain without also meeting the reasonable costs that were incurred by the first and second plaintiffs in doing so.

73 I will not make the declaration in precisely the same terms as that proffered, including because no grain was actually realised until an order was made permitting the sale on 28 September 2022. The appropriate declaration is as follows:

> The first and second plaintiffs have an equitable lien over the funds generated from the their sale pursuant to the orders made on 28 September 2022 of the grain held by the third plaintiff (**Realised Grain**), to secure the first and second plaintiffs' remuneration incurred in the period prior to 13 September 2022 which was exclusively referable to their preservation of the Realised Grain, including without limitation preparing the application to be appointed as receivers of the Consignment Grain (as defined in the order of the Court dated 13 September 2022) and identifying how best to preserve and realise it (**Pre-13 September Secured Remuneration**).

74 Whether and to what extent the remuneration sought to be fixed is so referable, and the question of the reasonableness of the remuneration sought, will be matters for a Judicial Register to decide, failing agreement (see order 4 above).

Disposition

75 Accordingly, I will make the declaration sought substantially in the form proffered by counsel and I will also make each of the additional orders sought by the receivers, to which the interested parties consented.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate:

Dated: 14 July 2023

SCHEDULE OF PARTIES

VID 506 of 2022

Interested Parties

Interested Party:	RIORDAN GROUP PTY LTD (ACN 076 271 148)
Interested Party:	MELALUKA TRADING PTY LTD (ACN 155 534 848)
Interested Party:	ROBINSON GRAIN TRADING CO PTY LTD (ACN 079 213 219)
Interested Party:	CHESTER COMMODITIES PTY LTD (ACN 601 350 430)
Interested Party:	CL COMMODITIES PTY LTD (ACN 623 903 079)
Interested Party:	L MCKENZIE TRADING PTY LTD (ACN 634 132 433)