

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/12/2020 4:30:42 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Submissions
File Number:	NSD1220/2020
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v MELISSA LOUISE CADDICK & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 16/12/2020 4:30:46 PM AEDT

Registrar

### Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Federal Court of Australia

District Registry: NSW

Division: General

**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

Plaintiff

**MELISSA LOUISE CADDICK and another named in the schedule**

First Defendant

**Mr Grimley's Submissions  
in his Representative Capacity of the First Defendant**

**A. Representative Capacity**

1. Mr Grimley is the brother of the first defendant. The first defendant has been missing since 5.30am on 12 November 2020.<sup>1</sup> She has not been in contact with her family since that time.<sup>2</sup>
2. Mr Grimley is the first defendant's attorney under an Enduring Power of Attorney (**EPOA**) dated 15 September 2016.<sup>3</sup> The EPOA includes authority for the attorney to make decisions as to "financial and personal/health matters".<sup>4</sup>
3. Mr Grimley is also the [REDACTED]  
[REDACTED]  
[REDACTED] consent to Mr Grimley acting in a representative capacity.<sup>6</sup>

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<sup>1</sup> Grimley 8.12.2020 at [7](b).

<sup>2</sup> Grimley [10(b)].

<sup>3</sup> Grimley [1]; AEG-1, p 2

<sup>4</sup> AEG-1, p 8.

<sup>5</sup> Grimley [6].

<sup>6</sup> Grimley [6].

4. Since ASIC commenced these proceedings Mr Grimely has become aware of an issue regarding the validity of the EOPA. The solicitor that witnessed the execution of the EOPA did not tick the box identifying the capacity in which she was witnessing the EOPA nor did she tick the box identifying that at the time that the EOPA was signed that the first defendant appeared to understand the matters stated in clause 8 of the EOPA.<sup>7</sup>
5. Mr Grimley has instructed solicitors to commence urgent proceedings in the Queensland Civil & Administrative Tribunal (**QCAT**) for a declaration as to the validity of the EOPA. The latest indication from QCAT is that the urgent application will be heard on [xx].

**B. Mr Grimley's interest in the proceedings**

6. Mr Grimley has no prior knowledge of the allegations made by ASIC in these proceedings.<sup>8</sup>
7. As a representative of the first defendant, Mr Grimley's interest in the applications are as follows:
  - (a) to seek reasonable variations to the current asset preservation orders including to pay for legal expenses incurred to date and he estimates will be incurred on behalf of the first defendant until at least February 2021, and to enable the ordinary living expenses of the first defendant's household and dependants to be paid until further order of the Court;
  - (b) to obtain copies of, or access to, the books and records seized by ASIC to enable Mr Grimley to verify the living expenses required by the first defendant's dependants and to take further legal advice and to ensure that material outside of the search warrant is returned to him; and
  - (c) to ensure that any order sought by ASIC to appoint a receiver over the property of the first defendant is framed in a reasonable and proportionate manner.
8. Attached to these submissions are the proposed form of order which seeks to give effect to each of the matters in (a) and (b). At the time of preparing these

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<sup>7</sup> AEG-1, p 10.

<sup>8</sup> Grimley [8].

submissions Mr Grimely had not seen the proposed form of order which he understands ASIC will seek to appoint a receiver.

**C. Variations to the asset preservation orders (orders 1 and 2)**

9. On 10 November 2020, Jagot J made *ex parte* orders prohibiting the defendants from removing, dealing with or encumbering their property (among other restrictions) under ss 1323(1) and (3) of the *Corporations Act 2001* (Cth) (“**Act**”) and/or s 23 of the *Federal Court of Australia Act 1974* (Cth) (**Orders**).
10. Paragraph 10 of the Orders prohibits the defendants from removing or disposing their assets. The current order is not capped by reference to the amount of ASIC’s claim against the first defendant. It is, for some reason, unlimited in amount. It may be that the Court considers this ought to be rectified including by ASIC identifying the likely value of its claim.
11. Paragraph 11 of the Orders contains exceptions to the asset preservation orders (a) that the defendants are not precluded from paying or incurring a liability for legal costs associated with the proceeding or any criminal proceedings arising from ASIC’s investigations; and an exception (c)(i) that the defendants may pay ordinary living expenses not exceeding \$800 per week.
12. Whilst the Orders already permit the incurring and payment of legal costs, for the avoidance of doubt, Mr Grimley seeks a variation to allow him to cause to be paid from the first defendant’s assets amounts of \$66,000 (including GST) in legal costs incurred to 15 December 2020; and a further amount of \$50,000 which may be incurred to 15 February 2021.<sup>9</sup> Mr Grimley has instructed his lawyers to carry out various tasks in his representative capacity since the first defendant’s disappearance. Those matters are set out in paragraph [23]ff of his affidavit. It is not presently known whether ASIC opposes the payment of legal costs in these amounts. If so, Mr Grimley will make further submissions at the hearing as to these matters.
13. The first defendant has two dependents: [REDACTED] and her husband (who does not currently work).<sup>10</sup> Although, Mr Grimley has limited access to the first defendant’s materials (given the seizure power of the first defendant’s books

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<sup>9</sup> Grimley [25]-[26].

<sup>10</sup> Grimley [12].

and records which has been exercised by ASIC) he anticipates living expenses for the first defendant's dependents to \$20,922 per calendar month for the period from 10 November 2020 until further order of the Court.<sup>11</sup> The itemisation of those expenses is set out at AEG-1, p 84. The variation sought does not include the mortgage expense for the property at Dover Heights (as there are no payments due on this property until March 2021).<sup>12</sup> The estimate does include food and groceries, school fees, insurances, medical expenses (in particular [REDACTED] [REDACTED], utilities, and the running costs of a property owned by the first defendant at Edgecliff (including loan repayments).

14. Again, it is not known at this stage whether ASIC opposes the variation sought. To the extent it does, the following points of principle may become relevant.
15. There is no question that the Court has power to vary an order made under sec 1323 of the Act: see sec 1323(5). The only question is whether the Court should exercise its discretion to permit the payments to be made.
16. The purpose of an asset preservation order is to protect the interests of persons who might have claims. It is not to punish persons against whom no positive findings have been made one way or the other<sup>13</sup>. The jurisdiction to grant a freezing order is not exercisable simply to preclude a party from dealing with its assets or to prevent it from using its assets to meet ordinary living expenses. It is directed to dispositions intended to frustrate a plaintiff's attempt to seek a remedy at law<sup>14</sup>. The Court must engage in a balancing exercise which includes a balancing of public and private rights;<sup>15</sup> and ensure the orders operate in a manner that is proportionate and not more intrusive than is necessary in the circumstances.<sup>16</sup>
17. A freezing order should include an exception for a defendant to have access to their own assets for living expenses, payments of debts and legal expenses,

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<sup>11</sup> Grimley Affidavit at [13] to [15] being \$21,612 per month, but reduced to \$20,922 per month in the draft orders served on ASIC on 10 December 2020, which reduction accounts for a [REDACTED] [REDACTED] – see Grimley [20] and Koletti [9].

<sup>12</sup> Grimley [14](a).

<sup>13</sup> *ASIC v AS Nominees Ltd* (1995) 62 FCR 504 at 524 (Finn J).

<sup>14</sup> *Break Fast Investments Ltd v Gravity Ventures Pty Ltd* [2013] VSC 89 at [40]- [42] (Vickery J).

<sup>15</sup> *ASIC v Ivey* (1998) 29 ACSR 391 at 394 (Nicholson J); *ASIC v Goel* [2020] FCA 1369 (“Goel”) at [24] (Jackson J).

<sup>16</sup> *ASIC v Adler* [2001] NSWSC 451 (“Adler”) at [7(d)] (Santow J); Goel at [24].

including when made under section 1323 of the Act.<sup>17</sup> Orders commonly refer to “ordinary” living expenses and “reasonable” legal expenses, however there is little authority on what “ordinary” and “reasonable” mean in this context.

18. In *Australian Securities & Investments Commission v Carey (No 21)* [2008] FCA 381, in considering a question of whether a carve-out for living expenses should be reduced, French J (as he was then) observed (at [10]):

*The question requires consideration of the public interest and the legitimate private interests of the individual. That means that the assessment of the allowance is not to be guided solely by what a reasonable person might think the defendant would need to get by. It is a question of the overall balance between the protection of the global assets concerned, having regard to the period under which they will remain subject to the order, and the interests of the person affected.*

19. In *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (“**PCW**”), Lloyd J observed that (at 162-164) (emphasis added):

*The purpose of the jurisdiction is not to secure priority for the plaintiff; still less, I would add, to punish the defendant for his alleged misdeeds. The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should it be successful, by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction: see *Z v A-Z* [1982] QB 558 per Lord Denning and per Lord Justice Kerr.*

*I am not going to attempt to define in this case what is meant by dissipating assets within the jurisdiction or where the line is to be drawn; but wherever the line is to be drawn this defendant is well within it. It could not possibly be said that he is dissipating his assets by living as he has always lived and paying bills such as he has always incurred. I say nothing about the cost of defending himself in these proceedings. The Mareva jurisdiction was never intended to prevent expenditure such as this or to produce consequences such as would inevitably follow if this ex parte order is upheld....*

20. In *Vneshprombank LLC v Bedzhamov* [2019] EWCA Civ 1992, Males LJ followed *PCW* and observed that (at [69]):

*...the cases to which I have referred are consistent in holding that the ordinary living expenses exception is intended to allow the defendant to maintain his pre-freezing order standard of living. There is no suggestion in any of them that it is necessary or appropriate to make a prediction whether he will continue to incur the same level of expenditure or that the*

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<sup>17</sup> *Frijo v Culhaci*, unreported, New South Wales Court of Appeal, 17 July 1998 at 9 (Mason P, Sheller JA and Sheppard AJA); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at [23] (Gaudron J).

*court's approach should be different if there is reason to doubt whether it will be feasible for him to do so. So to hold would therefore be to introduce a novel test which in my judgment would not be justified.*

21. No other assets are available to the first defendant (by her attorney) for payment of living expenses and legal expenses, other than [REDACTED]  
[REDACTED]  
[REDACTED].<sup>18</sup>
22. While the amount being claimed by the first defendant should be assessed based on the circumstances, the amount being claimed is not significantly different to amounts which have been ordered in other cases (for example, the amount of \$17,000 per month was ordered in *Cong v Shen* [2020] NSWSC 945 and the amount of \$4,000 per week was ordered in *Carey*). Similarly, \$250,000 was permitted for legal expenses in *Deputy Commissioner of Taxation v Bollands* [2012] FCA 1050, and \$100,000 per month in *Cong v Shen*.
23. Mr Grimley's proposed variation to the Orders also permits a process whereby ASIC is to nominate an account by which Mr Grimley may withdraw the funds for the purpose of the orders. This is necessary to give practical effect to the variation because Mr Grimley does not presently know which funds of the first defendant presently hold funds which ought to be available for legal costs and living expenses.

**D. Provision of information to Mr Grimley (orders 3 and 4).**

24. Mr Grimley seeks orders that ASIC provide him and his legal and accounting representatives with access to the materials seized by ASIC, and that ASIC otherwise return to Mr Grimley material which is not relevant to their investigation [REDACTED] and which falls outside the search warrant. It is difficult to imagine any such orders could be or would be opposed.

**E. Appointment of a receiver**

25. ASIC's Originating Process at paragraph [12]-[15] seeks orders for the appointment of a receiver or receiver and manager of the "Property" of the first

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<sup>18</sup> : Grimley at [19]; Koletti at [9]

defendant. “Property” is defined in the first part of the Originating Process as “all real or personal property, assets, or interests in property of any kind...”.

26. Mr Grimley neither consents nor opposes the appointment of a receiver. However, he considers that the Court will need to be persuaded by ASIC that the appointment of a receiver is necessary in light of the existing asset preservation orders.
27. This is all the more so in circumstances where the appointment of a receiver is the most intrusive order that can be made under s 1323 of the *Act*, and has been described as an “extraordinary step”.<sup>19</sup> The powers in sec 420 of the *Act* apply to a receiver appointed under s 1323, but the Court can limit the appointee’s powers.<sup>20</sup>
28. Mr Grimley otherwise may wish to make submissions about the form of order proposed by ASIC. A draft order, which was due to be served on 10 December 2020 pursuant to the orders made on 8 December 2020, was served by ASIC at 3:01pm on 11 December 2020 and just as these submissions were being finalised in time to be filed in accordance with the orders of 8 December 2020.

11 December 2020

D.R. Sulan

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<sup>19</sup> *Adler* at [7(b)]; *ASIC v Burke* [2000] NSWSC 694 at [8] (Austin J)

<sup>20</sup> *ASIC v Australian Investors Forum* [2003] NSWSC 130 at [16] (Austin J)