SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Atlantic 3 Financial (Aust) Pty Ltd (No 2)* [2003] QSC 366
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** **(applicant)** **v** **ATLANTIC 3 FINANCIAL (AUST) PTY LTD ACN 056 262 723** **(first respondent)** **FREDRIC MICHAEL ACKER** **(second respondent)** **GERILYN MARIE POLANSKI** **(third respondent)**
FILE NO/S:	S4426 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27-30 October 2003
JUDGE:	Mullins J
ORDER:	**Subject to:** **(a) the liquidators being satisfied that the purchase price proposed by the second and third respondents of $615,164.43 in the deed which is identified in this order ("the proposed deed") for Mortgage No U562310V ("the mortgage") is not less than the market value of the 18 units which are the subject of the mortgage under the Sentry Alliance Pty Ltd unregistered managed investments scheme;** **(b) recital C of the proposed deed being modified, so that it is clarified that the matters set out in the recital are the assertions of the first respondent;** **(c) the liquidators being satisfied that the second and third respondents will undertake the obligation to pay stamp duty on the proposed deed (when executed) and the consequential transfer of the mortgage, wherever assessed; and** **(d) clause 9 of the proposed deed being omitted;** **it is directed that the liquidators, Gregory Michael**

Moloney and Peter Ivan Felix Geroff, are justified in signing the deed of relinquishment substantially in the form contained in exhibit "GMM-S15" to the affidavit of G M Moloney filed on 16 September 2003 (doc 111).

CATCHWORDS: CORPORTIONS LAW – MANAGED INVESTMENT SCHEME – WINDING UP BY COURT - where directions sought by court appointed liquidators of an unregistered managed investment scheme – whether proposal to purchase the asset comprising the scheme would benefit the investors – directions given

Corporations Act 2001 (Cth)

Mariconte v Batiste (2000) 48 NSWLR 724

COUNSEL: P H Morrison QC and S E Brown for the applicant
R A Perry for the first respondent and Messrs Hewitt, Pegg and Moxon
D J S Jackson QC for the liquidators

SOLICITORS: Australian Securities and Investments Commission for the applicant
Lynch & Company for the first respondent and Messrs Hewitt, Pegg and Moxon
Gadens Lawyers for the liquidators

[1] **MULLINS J**: On 17 July 2003 Fryberg J ordered that 15 unregistered managed investments schemes that were being conducted by the first respondent be wound up pursuant to s 601EE of the *Corporations Act 2001* (Cth). On 1 August 2003 I ordered that Gregory Michael Moloney and Peter Ivan Felix Geroff jointly and severally ("the liquidators") be appointed liquidators to wind up five of the schemes identified in paragraph 2 of that order. Between 27 and 30 October 2003 I heard together five applications made by the liquidators seeking directions in respect of each of these five schemes. It is convenient to deal with one of those applications in advance of the others. That is the application filed on 16 September 2003 (doc 110) relating to the Sentry Alliance Pty Ltd scheme (to which I will refer as "the Sentry scheme"). By that application the liquidators sought directions as to the signing of a deed of relinquishment by the liquidators in the form contained in exhibit "GMM-S15" to the affidavit of Mr Moloney filed on 16 September 2003 (doc 111) ("the proposed deed").

[2] Mr Perry of counsel who was instructed by Lynch & Company to appear on behalf of the first respondent in respect of the five applications was also instructed by that same firm of solicitors to appear on behalf of three investors in the schemes to which those five applications relate, Messrs Hewitt, Pegg and Moxon. Mr Pegg's superannuation fund is an investor in the Sentry scheme and Mr Hewitt is the attorney of a number of investors in the Sentry scheme. Strictly speaking, Mr Moxon had no interest in the application relating to the Sentry scheme, but as all five applications were heard together, there was no need at the hearing to differentiate the interests of each of these investors.

[3] The reasons for the appointment of the liquidators to wind up this scheme are set out in the judgment which I gave in this proceeding on 19 August 2003: *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2003] QSC 265, particularly at paras 63 to 69.

[4] For the purpose of the hearing that resulted in the judgment given on 19 August 2003, and subsequently, the first respondent had and has maintained that there were 14 investors who invested the total sum of $588,400 which was advanced by the first respondent to Sentry Alliance Pty Ltd and secured over 18 strata titled units in a storage unit complex in Victoria comprising 70 units and supported by a personal guarantee from the director of Sentry Alliance Pty Ltd.

[5] After being appointed, the liquidators conducted investigations as to what course of action should be taken in respect of realising the units, as the mortgage was in long term default. The liquidators obtained a report from local agents who had inspected the units and prepared a sales history of the various units.

[6] The agents ascertained that in November 2002 units offered for sale by mortgagee's auction resulted in a sale of 17 units to the same purchaser for $12,187 each and 5 units to Triangle Properties Pty Ltd ("Triangle") for $12,000 each, in January 2003 Triangle purchased 1 unit for $12,000 and in March 2003 Triangle purchased 19 units for $14,387 each. According to those searches, Triangle was the owner of 25 units in the complex. Triangle was incorporated on 5 June 2002 and its directors and shareholders are Dr Acker and Ms Polanski who are the second and third respondents in this proceeding and also the directors of the first respondent. The second and third respondents claim that Triangle is the owner of 27 units in the complex. Both agents recommended that an appropriate marketing campaign be undertaken leading up to auction of the 18 units mortgaged in the Sentry scheme.

[7] Immediately prior to the meeting of investors on 5 September 2003, the liquidators received from Lynch & Company a letter dated 5 September 2003 advising that they acted on behalf of the second and third respondents and that the second and third respondents offered to purchase all the property of the Sentry scheme (mortgages and other securities) for the amount of the principal and interest owing under the securities, as at a date 60 days from 5 September 2003. They noted that the offer represented a full return to investors in the scheme and requested that it be put to the investors at the meeting.

[8] At the meeting the letter of offer from the second and third respondents was read out to the investors. During the discussion about the offer, the second respondent advised that there were no equity investors in the Sentry scheme. Mr Lynch, the solicitor for the second and third respondents who attended the meeting as the attorney of one of the investors, put forward a motion that the liquidators accept the offer put forward in the letter dated 5 September 2003. That resolution was carried unanimously by the investors who were present. According to the records of the first respondent which were relied on by the liquidators for the purpose of this meeting, the investors who were present in person or by proxy held investments in this scheme in the total sum of $455,400.

[9] On 11 September 2003 the liquidators received a letter from Lynch & Company enclosing a copy of the proposed deed which had been signed by the second and third respondents. The deposit of $20,000 had been paid to the trust account of Lynch & Company.

[10] The recitals to the proposed deed contained some inaccuracies, but a fair reading of them makes it clear that the property which is proposed to be purchased under the deed is the first respondent's interest as mortgagee under Mortgage No U562310V ("the mortgage") over the 18 units registered in the name of Sentry Alliance Pty Ltd.

[11] The deed proposes by clauses 1 and 5 that the second and third respondents shall pay the liquidators the sum of $615,164.43 in consideration of the relinquishment by the liquidators of their interests in the property of the scheme. Although the deed does not provide for a transfer of the mortgage to the second and third respondents, that would be the consequence of the liquidators relinquishing their interests in the mortgage and the supporting guarantee which is the property of the scheme. Clause 6 provides that any stamp duty payable upon the deed pursuant to the *Duties Act* 2001 (Qld) shall be paid by the second and third respondents. That is a curious limitation on the obligation to pay stamp duty when the transaction to be effected, as a result of the deed, concerns the mortgage which is over Victorian property. Clause 7 provides that each party to the deed shall bear that party's own legal costs of the preparation, drawing and engrossing of the deed. Clause 9 of the deed provides:

> "Upon the completion of this contract the Liquidators shall deliver all documents concerning the scheme in their possession or power custody or control to Acker and Polanski."

[12] Although the liquidators have not as yet commissioned a formal valuation of the 18 units, based on the information obtained from the local agents and the sales history of other units in the same complex between November 2002 and March 2003 and what Mr Moloney could infer from that as to the likely value of the 18 units, a purchase of the mortgage from the liquidators held over these 18 units for $615,164.43 was, in Mr Moloney's opinion, likely to be significantly beyond the market value of those units.

[13] When Dr Acker was cross-examined, it was put to him that the purchase price under the proposed deed was more than the market value of the units. He responded that it was "just slightly" more than market value. He stated that Triangle had been selling its units in the complex for the sum of $38,000 each and that the sales had been through a licensed real estate agent. It was not apparent from that evidence that those sales had been completed. If the 18 units in the Sentry scheme could achieve a sale price of $38,000 each, the purchase price proposed by the second and third respondents under the proposed deed would be less than the market value of the units.

[14] One of the concerns which the liquidators have about entering into the proposed deed is that they are not confident they have complete records from the first respondent in relation to the Sentry scheme, in view of the complication of the activities of Triangle in relation to raising funds for equity investments in the units in the same complex owned by Triangle. This may mean that there is some confusion about identifying with certainty the investors in Sentry.

[15] It became apparent from both the evidence of Dr Acker and the documents that were tendered in evidence relating to the raising of funds by way of equity investment in storage units at this complex, that letters dispatched to potential

investors (which were sent by the first respondent) made no mention of Triangle and the epitomes of investments which, according to Dr Acker, were issued for the equity investments in the units owned by Triangle referred to the real property descriptions of the units in the Sentry scheme, when they should have referred to the units owned by Triangle.

[16] In his affidavit filed on 21 October 2003 (doc 153) Dr Acker swears that the funds subscribed by the Triangle investors were used to purchase the units in the complex owned by Triangle, none of those funds were used for any purpose associated with the Sentry Alliance scheme and none of the funds were used by the first respondent. Exhibit "FMA-2" to that affidavit lists the investors in Triangle. Curiously the date of investment identified for three of the investors precedes the date of incorporation of Triangle and at least five of the investments were made well in advance of the completion of the first purchases of units in the complex by Triangle.

[17] It is not necessary on this application to determine the identity of each of the investors in Sentry. The effect of the proposed deed is merely to transfer the mortgage to the second and third respondents. That will have the consequence that the funds paid by the second and third respondents for that transfer will comprise the assets of the scheme in lieu of the mortgage and the guarantee. It will then be for the liquidators to implement the usual procedures for establishing the investors and any other creditors who should be paid on the winding up of the scheme. As the facts asserted in recital C (which must be based on the first respondent's records) do not acknowledge that the liquidators will be obliged to follow the usual procedures for identifying creditors, recital C would need to be appropriately modified.

[18] ASIC was concerned about clause 7 of the deed and that it was not clear that the liquidators would have an entitlement to recover their costs, expenses and remuneration relating to the Sentry scheme out of the funds paid for the purchase of the mortgage. Clause 7 of the deed is merely a provision in the deed, as between the liquidators and the second and third respondents, and in no way derogates from the power of the liquidators to recover their costs, expenses and remuneration from the assets of the Sentry scheme.

[19] As the payment of the purchase price under the proposed deed by the second and third respondents would result in those funds being held by the liquidators under the scheme, the inclusion of clause 9 in the proposed deed is misconceived and inconsistent with the obligation that would then ensue for the liquidators to take steps to wind up the Sentry scheme by paying out the funds that then comprise the scheme.

[20] ASIC was also concerned about the prospect that the second and third defendants may be using assets obtained from illegal activities on their part as directors of the first respondent conducting the 15 unregistered managed investments schemes which are the subject of this proceeding, and that the court should not countenance a transaction whereby such assets might be utilised by the second and third respondents. There is no order in place in this proceeding which prevents the second and third respondents from dealing with their assets. ASIC did not seek to prove that the second and third respondents would be using funds derived from illegal activities to make the purchase under the proposed deed.

[21] It was common ground amongst the parties that the court had power to give the directions sought by the liquidators. The liquidators have been appointed by the court to perform duties to enable the winding up in an orderly manner of the Sentry scheme, so that the investors who invested in this unregistered managed investment scheme that was being conducted unlawfully can be repaid whatever funds are recovered by the liquidators under the scheme, after paying out the liquidators' costs, expenses and remuneration attributable to the administration of the scheme. The role of the court in providing directions in an administration of this nature is described by Austin J in *Mariconte v Batiste* (2000) 48 NSWLR 724, 737-738. It is appropriate to provide guidance to the liquidators appointed by the court to this scheme on the propriety or reasonableness of a contemplated exercise of discretion.

[22] Mr Jackson of Queen's Counsel on behalf of the liquidators acknowledged that, if the proposed deed enabled the mortgage to be sold for more than market value, there was a considerable benefit for the investors if the liquidators entered into the deed. The ultimate return to creditors in the winding up of an unregistered managed investment scheme is an important consideration, rather than mere support of the investors for the proposal.

[23] It was common ground that it is not appropriate that findings be made on an application for directions such as this. In any case, the state of the evidence is such that I cannot make any finding about what is the current market value of the 18 units which are mortgaged under the Sentry scheme. If the liquidators do not transfer the mortgage to the second and third respondents for the price under the proposed deed, they will have to sell the 18 units and incur expense in so doing. There is good reason, therefore, for the liquidators to enter into the proposed transaction, if the liquidators are satisfied that the price of $615,164.43 is not less than the market value of the 18 units. The form of the deed would also need some attention in the light of the observations which I have made in these reasons, before the liquidators could be satisfied about entering into the deed.

[24] I am therefore prepared to make directions in the following terms:

Subject to:

(a) the liquidators being satisfied that the purchase price proposed by the second and third respondents of $615,164.43 in the deed which is identified in this order ("the proposed deed") for Mortgage No U562310V ("the mortgage") is not less than the market value of the 18 units which are the subject of the mortgage under the Sentry Alliance Pty Ltd unregistered managed investments scheme;

(b) recital C of the proposed deed being modified, so that it is clarified that the matters set out in the recital are the assertions of the first respondent;

(c) the liquidators being satisfied that the second and third respondents will undertake the obligation to pay stamp duty on the proposed deed (when executed) and the consequential transfer of the mortgage, wherever assessed; and

(d) clause 9 of the proposed deed being omitted;

it is directed that the liquidators, Gregory Michael Moloney and Peter Ivan Felix Geroff, are justified in signing the deed of relinquishment substantially in the form contained in exhibit "GMM-S15" to the affidavit of G M Moloney filed on 16 September 2003 (doc 111).

[25] I will hear submissions from the parties as to the costs of the application.