SUPREME COURT OF QUEENSLAND

CITATION:	*Mier & Jonsson v F N Management P/L & Ors* [2005] QCA 408
PARTIES:	**GERARD JOHN MIER and** **ANTHONY JAMES JONSSON** (applicants/respondents) **v** **F N MANAGEMENT PTY LTD** ACN 094 226 829 (first respondent/first appellant) **WILLIAM ANDERSON NASON and** **JANNINE MARGARET NASON** (second respondents/second appellants)
FILE NO/S:	Appeal No 3345 of 2005 SC No 637 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	4 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2005
JUDGES:	McMurdo P, Keane JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed with costs to be assessed on the standard basis** **2. The orders made below are set aside** **3. Instead it is ordered:** **(a) the respondents' application is refused;** **(b) it is declared that the appointment of the respondents as liquidators of the managed investment scheme conducted by the first appellant in connection with Cairns Village Resort Community Titles Scheme 18161 does not authorize the respondents to sell or otherwise deal with either the first appellant's leasehold interest or the second appellants' freehold interest in Lot 99 on BUP 100437, County of Nares, Parish of Cairns;** **(c) the respondents are to pay the first and second appellants' costs of and incidental to the application, including reserved costs if any, to be assessed on the standard basis**

CATCHWORDS: CORPORATIONS - PRACTICE AND PROCEDURE - IN RELATION TO WINDING UP - where the first appellant operated a managed investment scheme that involved the rental of units located on lots within a community titles scheme at a Cairns resort - where the second appellants were the directors of the first appellant - where the owners of the units made them available for rent by the operator of the scheme in return for part of the rental proceeds - where the second appellants were the registered owners of the lot containing, among other things, the resort reception area, restaurant and manager's office - where it was declared by the Supreme Court at Cairns that the managed investment scheme was unregistered and, as a result, was being operated unlawfully in contravention of s 601ED(5) *Corporations Act* 2001 (Cth) - where an application was brought to have the scheme wound up and to have the respondents appointed as liquidators of the scheme pursuant to s 601EE *Corporations Act* 2001 (Cth) - where, in a later application for further orders regarding the winding up, the learned primary judge ordered that the respondents were to have the power to sell the lot owned by the second appellants - where s 601EE(2) *Corporations Act* 2001 (Cth) empowers a court to "make any orders it considers appropriate for the winding up of the scheme" - whether the lot owned by the second appellants could properly be considered to be property of the scheme - whether the sale of the lot owned by the second appellants was "appropriate for the winding up of the scheme"

Corporations Act 2001 (Cth), s 9, s 601ED, s 601EE

Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd [2002] NSWSC 576; (2002) 42 ACSR 240, considered

Australian Securities and Investments Commission v Takaran Pty Ltd [2002] NSWSC 834; (2002) 43 ACSR 46, applied

Ayerst v C & K (Construction) Ltd [1976] AC 167, cited

Crocombe v Pine Forests of Australia Pty Ltd [2005] NSWSC 151; (2005) 219 ALR 692, distinguished

Joye v Beach Petroleum NL (1996) 67 FCR 275, cited

Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour [2004] NSWCA 214; (2004) 49 ACSR 612, considered

Re Crust'N'Crumbs Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76, applied

Re Stacks Managed Investments Ltd [2005] NSWSC 753; (2005) 54 ACSR 466, cited

COUNSEL: H B Fraser QC, with M R Bland, for the appellants
M Jonsson for the respondents

SOLICITORS: Hillhouse Burrough McKeown for the appellants
Williams Graham Carman for the respondents

[1] **McMURDO P:** I agree with Keane JA's reasons for allowing the appeal with costs.

[2] Those reasons make it unnecessary to determine the appellants' alternative submission that the learned primary judge erred in making an order concerning Lot 99 without its mortgagee being at least served with a copy of the application filed by the respondents to this appeal in the Supreme Court at Cairns on 17 February 2005 and the supporting material.

[3] That application was heard in the Supreme Court at Cairns on 8 March 2005 together with an application filed by the appellants in the Supreme Court at Brisbane on 8 February 2005[1] for a declaration that the primary judge's earlier order winding up the managed investment scheme did not authorize the respondents to sell or otherwise deal with the appellants' property. On 22 April 2005 the learned primary judge made orders effectively granting the respondents' application and dismissing the appellants' application. The orders sought by the appellants in this appeal include the order for the declaration requested by them at first instance. For the reasons given by Keane JA they are entitled to that declaration.

[4] I would make the following orders:

1. Appeal allowed with costs to be assessed on the standard basis.
2. The orders made below are set aside.
3. Instead it is ordered:
   (a) the respondents' application is refused;
   (b) it is declared that the appointment of the respondents as liquidators of the managed investment scheme conducted by the first appellant in connection with Cairns Village Resort Community Titles Scheme 18161 does not authorize the respondents to sell or otherwise deal with either the first appellant's leasehold interest or the second appellants' freehold interest in Lot 99 on BUP 100437, County of Nares, Parish of Cairns;
   (c) the respondents are to pay the first and second appellants' costs of and incidental to the application, including reserved costs if any, to be assessed on the standard basis.

[5] **KEANE JA:** On 7 February 2005, the respondents to the appeal were appointed by order of the Supreme Court as joint and several liquidators to wind up the managed investment scheme ("the scheme") associated with the community titles scheme, Cairns Village Resort CTS 18161, pursuant to s 601EE(1) of the *Corporations Act* 2001 (Cth) ("the Act").[2] The scheme was operated by the first appellant ("FN Management"). The second appellants ("the Nasons") are the directors and shareholders of FN Management.

[6] The Cairns Village Resort comprises 256 accommodation units which, under the community titles scheme by-laws, are to be used only for short term occupation. The subject matter of the present proceedings concerns another lot within the community titles scheme which contains a reception area, a manager's office and residence, a shop and a restaurant: this lot will be referred to as lot 99. The Nasons are the registered owners of lot 99 which was acquired by them in 1999. This lot, or more accurately, part of it, was leased by them to FN Management. The fee simple

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1 Transferred to the Cairns Registry by an order of Jones J on 18 February 2005.

2 *Altmann v FN Management Pty Ltd* [2005] QSC 29; SC No 637 of 2004, 7 February 2005; (2005) 52 ACSR 455.

interest in lot 99 is mortgaged to the Bank of Western Australia ("the Bank"). The other lot owners in the community titles scheme complain that the terms of the lease to FN Management are uncommercial in that, in particular, the rent for lot 99 was fixed at a level in excess of its fair market value. They claim that the terms of the lease are an impediment to the future management of the Cairns Village Resort.

[7] On 1 December 2004, it had been declared by the Supreme Court at Cairns that the scheme, which was unregistered, was therefore being operated unlawfully by FN Management in contravention of s 601ED(5) of the Act.[3] It was this declaration which later served as the basis of the order by which the respondents were appointed.

[8] On 22 April 2005, the learned primary judge, on the application of the respondents pursuant to s 601EE(2) of the Act, ordered that the respondents were

> "at liberty to sell [lot 99], (whether by auction or otherwise) free of all leases, mortgages, charges or other encumbrances on condition that all proceeds of sale, after deduction of:
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> (a) the amount or amounts necessary to clear or release any proper mortgage, charge or other encumbrance; and
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> (b) the liquidators' reasonable costs of sale;
>
> be paid into Court in this proceeding pending determination of the manner of distribution of those proceeds."[4]

FN Management and the Nasons were directed to execute all such documents and to do all such things as might be necessary to carry out the order.

[9] Section 601EE of the Act provides relevantly as follows:

> "(1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
>
> …
>
> (c) a member of the scheme.
>
> (2) The Court may make any orders it considers appropriate for the winding up of the scheme."

[10] The terms of the section make clear that a scheme operated in contravention of s 601ED(5) is not a nullity by virtue of that illegality. As Beazley JA, with whom Spigelman CJ and Santow JA agreed, said in *Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour*:[5]

> "The registration requirement for the operation of a managed investment scheme is for the protection of investors. The legislation does not expressly make an unregistered scheme unlawful. Rather it impugns the conduct of the entity responsible for registration by imposing a penal sanction for a contravention of the registration provisions. The members of an unregistered scheme are protected by the provisions whereby the scheme may be compulsorily wound up. There is nothing, therefore, in the scheme of the legislation whereby an implication of an illegality would arise, nor is there anything that

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3 *Body Corporate for Cairns Village Resort Community Titles Scheme 18161 v FN Management Pty Ltd* [2004] QSC 426; SC No 388 and SC No 389 of 2004, 1 December 2004; (2005) 52 ACSR 455.

4 *Mier & Jonsson v FN Management Pty Ltd & Ors*, unreported, Jones J, SC No 637 of 2004, 22 April 2005.

5 [2004] NSWCA 214 at [51]; (2004) 49 ACSR 612 at 621.

> points to a legislative intention that contracts entered into as part of an unregistered scheme are illegal."

The most important consequence of the scheme being unregistered is that, aside from the penalties that may be imposed on those who have operated the scheme in contravention of the legislative requirement to register,[6] the failure to register is sufficient reason, in and of itself, for a court to order that the scheme be wound up.

[11] The learned primary judge based his order in relation to lot 99 on the view that the power conferred on the court by s 601EE(2) was "sufficiently broad to permit the sale of related property if the sale is appropriate for the winding up".[7] It seems clear that his Honour, in speaking of "related property", was referring to the relationship between the property in question and the scheme. There appear to have been two respects in which his Honour perceived the "relationship" between the property and the scheme to be strong enough to justify the order which he made. The first was that FN Management and the Nasons had made "available Lot 99 for the occupancy by [FN Management] in its role of manager of the scheme",[8] and the second was the consideration that:

> "In practical terms the winding up of the scheme will not be effective unless the title of Lot 99 is taken into account, and not merely the management rights. The purpose of Lot 99 in the Community Title Scheme cannot be fulfilled unless it is available for use by the manager as an administrative and reception centre for the resort business. While the ownership of Lot 99 remains in the hands of [the Nasons], the interests of lot owners in having the Community Title Scheme managed can not be realised. That much is made evident by the conduct of [the Nasons] in 2002, where as owners of Lot 99 they raised the rent on the property to non-viable levels. Those circumstances, coupled with the role played by [the Nasons] in the promotion and facilitation of the illegal scheme, compel me to exercise my discretion in favour of the application made by the liquidators".[9]

[12] FN Management and the Nasons had cross-applied for a declaration that the freehold interest in lot 99, the lease of lot 99 to FN Management and various items of plant and equipment were not available for sale by the liquidators in the course of the winding up. The learned primary judge dismissed this application.

[13] FN Management and the Nasons advance, as their principal contention, the argument that the order for sale made on 22 April 2005 exceeded the power conferred by s 601EE(2) of the Act, and that the learned primary judge erred in regarding the order for sale as "appropriate for the winding up of the scheme". The appellants make the valid point that the learned primary judge made no finding that the members of the scheme held any proprietary interest in either lot 99 or the lease

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6 Contravention of the prohibition contained in s 601ED(5) exposes a person to a punishment of up to 200 penalty units or imprisonment for up to five years or both: *Corporations Act* 2001 (Cth), s 1311, Sch 3. A single penalty unit is equivalent to $110: *Crimes Act* 1914 (Cth), s 4AA.

7 *Mier & Jonsson v FN Management Pty Ltd & Ors*, unreported, Jones J, SC No 637 of 2004, 22 April 2005 at [26].

8 *Mier & Jonsson v FN Management Pty Ltd & Ors*, unreported, Jones J, SC No 637 of 2004, 22 April 2005 at [25].

9 *Mier & Jonsson v FN Management Pty Ltd & Ors*, unreported, Jones J, SC No 637 of 2004, 22 April 2005 at [27].

to FN Management. They also submit that the evidence did not permit any such finding to be made. The appellants also complain that the learned primary judge erred in making the orders which he made in circumstances where the Bank had not been served with the respondents' application. The mortgage by the Nasons to the Bank secured repayment of a debt of approximately $940,000. Because of the view I take in relation to the appellants' principal contention, it is unnecessary to deal with this latter complaint.

[14] In order to understand the arguments which arise on the appeal, it is necessary first to appreciate what is involved in "the winding up of the scheme".

The winding up of the scheme

[15] Section 601EE(2) of the Act states only that a court "may make any orders it considers appropriate for the winding up of the scheme". The concept of "winding up", which is synonymous with that of liquidation, has long been central to the law of companies. The precise way in which this process may be undertaken is usually a matter for the legislature.[10] As Lord Diplock said in *Ayerst v C & K (Construction) Ltd*,[11] "the making of a winding up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up". His Lordship went on to point out, however, that the essential characteristics of the winding up process have remained the same since the passage of the *Companies Act* 1862 (UK).[12] In *Joye v Beach Petroleum NL*,[13] the Full Court of the Federal Court approved the statement of McPherson SPJ in *Re Crust'N'Crumbs Bakers (Wholesale) Pty Ltd*[14] that:

> "Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled."[15]

[16] It follows, in my view, that where a statute makes reference, without more, to the "winding up" of an entity, it is referring to the application of a procedure containing these essential characteristics.[16] It follows that s 601EE(2) must be read as empowering a court to make such orders as it considers appropriate in order to apply such a procedure to an unregistered managed investment scheme. It may also be accepted that the terms of the section allow for further orders to be made as needed so long as they are required for the "due conduct and completion of the

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10 See, eg, the specific rules for the winding up of companies and other entities contained in Pt 5.4, Pt 5.4A, Pt 5.4B, Pt 5.5, Pt 5.6 and Pt 5.7 of the *Corporations Act* 2001 (Cth).

11 [1976] AC 167 at 176.

12 *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 176 - 177.

13 (1996) 67 FCR 275 at 287, 290.

14 [1992] 2 Qd R 76 at 78. See also A R Keay, *McPherson The Law of Company Liquidation* (4th ed, 1999) at 1. A similar definition of the winding up of a company was stated by Lord Russell of Killowen in *Russian and English Bank and Florance Montefiore Guedalla v Baring Brothers & Co Ltd* [1936] AC 405 at 433.

15 A similar procedure applies to the dissolution of a partnership: see, eg, *Partnership Act* 1891 (Qld), s 42.

16 Barrett J has recently employed similar reasoning to determine the meaning of the phrase "winding up" for the purposes of s 51(3) of the *Associations Incorporation Act* 1984 (NSW) which provides for the "winding up of an incorporated association … by the Court in New South Wales": *QBE Workers Compensation (NSW) Ltd v Wandiyali ATSI Inc (In Liq)* [2004] NSWSC 1022 at [12]; (2004) 62 NSWLR 117 at 121.

winding up".[17] The necessary corollary is that an order that could not reasonably be seen as advancing this procedure would not be authorised by s 601EE(2).[18] The comprehensive survey of authority undertaken by White J in *Re Stacks Managed Investments Ltd*[19] shows that courts have used the power granted by s 601EE to appoint persons to act as receivers, managers or liquidators with powers commensurate with those that would be possessed by persons fulfilling similar roles in the winding up of a company. Whatever the precise details of the procedure that may be fixed by a court to wind up an unregistered scheme, the understanding of "winding up" adopted above means that a necessary first step must be to determine what should be properly considered to be the property of the scheme.

[17] No different view as to what is involved in the winding up of a scheme is suggested by the observations of Barrett J in *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd*[20] to which the learned primary judge referred, and upon which his Honour relied as indicating the breadth of the power conferred by s 601EE(2) of the Act.[21] Barrett J said:

> "In relation to s 601EE(2) of the Corporations Act, I accept that the powers conferred upon the court are very broad. The concept of winding up, as it is applied by s 601EE to an unregistered managed investment scheme, is not the subject of any explanation or elaboration in the statute. It seems to me, as a matter of general principle, however, that what is contemplated is the realisation of assets of the scheme, discharge of liabilities and distribution of any surplus among beneficiaries or members in an appropriate way. So much is clearly implied by the expression 'winding up', the general meaning of which may be gathered from approaches taken to that general subject under statutes dealing not only with companies but also with partnerships. Those statutory approaches were built on foundations which pre-dated legislation in either area.
>
> Given that s 601EE(2) enables the court to make 'any orders it considers appropriate **for** the winding up of the scheme' (emphasis added), it must be accepted that the court has jurisdiction to settle or prescribe any aspect or element of the basis for winding up or the winding up process which it is necessary to supply because that element cannot be obtained from any other source. In this respect, it is noteworthy that the statute itself does not attempt to lay down the basis for or method of winding up. That is, to my mind, an indicator of intention that the court should be able to act in the comprehensive way I have outlined."[22]

[18] I would add only one caveat. While it is true that the Act does not explicitly lay down a method for the winding up of an unregistered scheme it must be assumed

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17 *Australian Securities and Investments Commission v Takaran Pty Ltd (No 2)* [2002] NSWSC 987 at [12]; (2002) 43 ACSR 334 at 338.

18 It is for this reason that it is probably going too far to say, without qualification, that the powers conferred by the section are "without restriction": Cf *Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd* [2003] QSC 386 at [28]; [2004] 1 Qd R 591 at 597.

19 [2005] NSWSC 753 at [31] - [32]; (2005) 54 ACSR 466 at 473 - 474.

20 [2002] NSWSC 576; (2002) 42 ACSR 240.

21 *Mier & Jonsson v F N Management Pty Ltd & Ors*, unreported, Jones J, SC No 637 of 2004, 22 April 2005 at [26].

22 [2002] NSWSC 576 at [12] - [13]; (2002) 42 ACSR 240 at 243 - 244.

that, in general, a court would be guided by analogies with the law relating to the winding up of companies, partnerships and trusts when deciding on the appropriate procedure for the winding up of a scheme. The best analogy would suggest the procedure to be followed. In my opinion, good reason should be shown before a court would make an order in the winding up of a scheme that did not have a precedent or parallel in the Act, partnership legislation or the law relating to the winding up of trusts. Of course, the best analogy might be thought to be the winding up procedure applicable to a registered scheme. Unfortunately for present purposes, the Act, beyond directing that a registered scheme be wound up in accordance with its constitution,[23] also leaves the detail of the winding up of a registered scheme in the hands of the Court, which may make such orders as it "thinks necessary to do so".[24]

[19] It will be necessary to say something more about the observations of Barrett J in *Commercial Nominees* later in these reasons but, for the present, there are three further points about the winding up of a scheme which may conveniently be made here.

[20] The first point is that a scheme, unlike a company, need not involve the existence of a legal identity separate from that of its members. As I have mentioned, a "scheme" might also take the form of, among other things, a trust. Those categories are not necessarily closed. Nevertheless, the Act postulates the application of the winding up process to "the scheme" regardless of what form the scheme might take. This postulate directs attention to the necessity to recognise that it is the scheme which is to be wound up, and, to that end, to identify the "property of the scheme" which is to be realised and applied in the winding up. It may be, though it is unnecessary to decide for the purposes of this appeal, that the scheme in the present instance, having no capital fund and with the manager holding rental payments on behalf of each of the lot holders, bears a stronger resemblance to a trust than to a company. There are important differences between winding up a trust and winding up a company[25] but, even if one were to be guided by the law of trusts rather than the Act, the first step is still to determine what is the scheme property to be collected and realised.

[21] The second point to be made here is that the function of a liquidator in a winding up in relation to the assets of the scheme is the collection and realisation of the assets of the scheme as at the commencement of the winding up.[26] A liquidator of an entity has no power, unless it is otherwise expressly conferred by statute, to collect and realise, on behalf of that entity, assets which are not the property of the entity for the simple reason that there would be no legal right in existence entitling the liquidator to do so.[27] It follows that, under the Act, the liquidator of a scheme cannot be given the power to collect and realise, on behalf of the scheme members, assets to which the members of the scheme, as such, have no title right or interest.

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23 *Corporations Act* 2001 (Cth), s 601NE.

24 *Corporations Act* 2001 (Cth), s 601NF(2).

25 *Horwath Corporate Pty Ltd v Huie* [1999] NSWSC 583 at [14] - [17]; (1999) 32 ACSR 413 at 415; *Re Stacks Managed Investments Ltd* [2005] NSWSC 753 at [44]; (2005) 54 ACSR 466 at 476 - 477.

26 For example, the liquidator of a company is only empowered to sell or otherwise dispose of the "property of the company": *Corporations Act* 2001 (Cth), s 477(2)(c).

27 It would, for example, be inappropriate to appoint a liquidator or receiver under s 601EE(2) when there was in fact no property available to be realised: See *Burton v Arcus* [2004] WASC 244 at [29]; (2004) 51 ACSR 683 at 690.

[22] The third point is that in the case of the winding up of a scheme, as of a company, partnership or trust, the premise on which winding up proceeds must be that the business or enterprise involved in the scheme is to be terminated, so that when, for example, a company is ordered to be wound up it may continue to carry on business only for the limited purpose of collecting and realising its assets.[28]

[23] Accordingly, in my opinion, it is of primary importance to consider closely the legal incidents of the association between persons and property created by the scheme in order to determine whether lot 99 was scheme property or, to put it another way, an asset of the scheme. I will consider this question before turning to discuss the arguments advanced on the appeal.

The scheme

[24] The Act does not provide a definition of a "scheme". Section 9 of the Act provides, in relation to the term "managed investment scheme", relevantly as follows:

> "***managed investment scheme*** means:
>
> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or …"

[25] The term "scheme property" is defined by s 9 only in relation to a "registered scheme". That definition is as follows:

> "***scheme property*** of a registered scheme means:
>
> (a) contributions of money or money's worth to the scheme; and
>
> (b) money that forms part of the scheme property under the provisions of this Act or the ASIC Act; and
>
> (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
>
> (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
>
> (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d)."

[26] Because the definition of "scheme property" applies only to a registered scheme, it does not apply of its own force in relation to an unregistered scheme, but there can

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[28] See *Corporations Act* 2001 (Cth), s 477(1)(a). Cf *Robert H Barber & Co Ltd v Simon* (1914) 19 CLR 24 at 27; *Thomson v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 765 at 778.

be no doubt that the scheme property of an unregistered scheme is to be identified by reference to the terms of the scheme in relation to the contribution of assets to the enterprise involved in the scheme. I say that there can be no doubt in this regard for three reasons.

[27] First, it is an essential feature of a managed investment scheme, as the definition contained in s 9 of the Act makes clear, that people will contribute "money or money's worth" to the "program or plan of action"[29] constituted by the scheme and that this property will be pooled to produce benefits for those who made contributions. It follows that, if property is to be considered "scheme property", the property in question must have been contributed to the scheme or must have been obtained in connection with such contributions. The absence of any such connection would make it doubtful that the property was really part of, or subject to, the scheme.

[28] Secondly, this notion that the property of a scheme consists only of the contributions of money or money's worth that are made to the scheme or benefits derived from the use of the property contributed to the scheme is explicitly picked up in the definition of the property of a registered scheme contained in the Act. Apart from registration itself, there is little to differentiate between registered and unregistered managed investment schemes. Whereas a company only comes into existence upon registration,[30] a managed investment scheme can exist independently of registration, with registration only being necessary if the scheme meets certain other criteria.[31] Registration is therefore only an incident, rather than the necessary source, of the existence of a scheme. Unlike a company, a scheme does not cease to exist if it is deregistered.[32] The result is that a scheme remains a scheme whether or not it is registered so long as it meets the definition of "managed investment scheme" contained in s 9 of the Act. This suggests that the definition of "scheme property" for a registered scheme must serve as a guide to what should be considered to be the property of an unregistered scheme.

[29] Finally, despite there being no explicit description of scheme property provided by the Act in relation to an unregistered scheme, s 601EE of the Act nevertheless proceeds, as I have noted, on the postulate that there is scheme property to be realised through a process of winding up. In this regard, the Act's predecessors did not define the property of a company, but the courts readily understood that the property to be realised and distributed in a winding up included the property or rights of the company.[33]

[30] Of necessity then, one must look to the terms of an unregistered scheme to ascertain the property interests which have been contributed, or which are otherwise subject,

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29 This phrase has come, in the absence of any statutory definition, to be accepted as the conventional meaning of the term "scheme": See *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129; *Re Aged Care Facility Partnership Scheme; Australian Securities and Investments Commission v Primelife Corporation Ltd* [2005] FCA 1229 at [28]; (2005) 54 ACSR 536 at 544.

30 *Corporations Act* 2001 (Cth), s 119.

31 A scheme will usually be required to be registered if it has more than 20 members or if it has been promoted by a person in the business of promoting managed investment schemes: *Corporations Act* 2001 (Cth), s 601ED(1).

32 *Corporations Act* 2001 (Cth), s 601AD(1).

33 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1033.

to the scheme. In *Australian Securities and Investments Commission v Takaran Pty Ltd*, Barrett J said:[34]

> "The essence of a 'scheme' is a coherent and defined purpose, in the form of a 'programme' or 'plan of action', coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan. In some cases, the scope of the scheme will readily be gathered from some constitutive document in the nature of a blueprint setting out all relevant matters. In others, there may be no writing or such as there is may tell only part of the story leaving the remainder to be supplied by necessary implication from all the circumstances."

[31] As to the "blueprint" of the scheme in this case, the learned primary judge proceeded on the footing, which was common ground, that the central elements of the scheme were documented in the disclosure statement prepared and distributed by FN Management and the letting appointment deed made with each lot holder who entered into the scheme.

[32] The disclosure statement contained the following information:

> "**SECTION 1.0** …
>
> This is a disclosure statement issued by FN Management Pty Ltd ACN 094 226 829 the operator of The Cairns Village Resort. It is a statement by the operator of important information that members of the letting pool ought to know in order to make an informed decision as to whether or not they ought to participate.
>
> This disclosure statement is needed because FN Management Pty Ltd ACN 094 226 829 is putting into place a system of 'management rights' (explained below) which enable owners of resort apartments in Cairns Village Resort to earn income from their resort apartment by letting it to guests of the resort through an on-site manager. A feature of the management rights system is that you may elect to have an external agent manage your resort apartment. If you decide to do this, then you will need to make your own arrangements about rent collection, fees and charges etcetera. This disclosure statement only contains information applicable to those owners of resort apartments who elect to make their resort apartment available to the on-site manager.
>
> …
>
> **1.1 What are management rights?**
>
> Management rights are the business of on-site caretaking and letting of apartments in a strata titled apartment building. It makes sense for apartments to have an on-site caretaker of the common property, and for there to be an on-site letting service for owners who might want to let their property to other people. In the case of the Cairns Village Resort, the management rights system will allow the common property to be looked after effectively and for Cairns Village Resort to be promoted and run in a coordinated manner, as if it was owned in one line.
>
> The management rights system works this way:
>
> …

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[34] [2002] NSWSC 834 at [15]; (2002) 43 ACSR 46 at 51.

(c) The body corporate is entitled to appoint a caretaker to maintain the common property on its behalf. The caretaker is paid a salary by the body corporate to do this work. Where it is necessary, the caretaker may engage a skilled tradesperson to do the work. If this happens, then the cost of the tradesperson must be paid by the body corporate. The agreement between the body corporate and the caretaker is called the 'caretaking agreement'.

(d) The body corporate also has the right to allow an 'on-site manager' to use the reception, back office and foyer to conduct a letting business from the premises. There is no fee payable by either party to the other for this right. The agreement is called the 'letting agreement'.

(e) At an upcoming Extraordinary General Meeting … the body corporate will consider the appointment of FN Management Pty Ltd ACN 094 226 829 under a letting agreement and a caretaking agreement.

(f) At Cairns Village Resort, the reception area forms part of lot 99, which is currently owned by W. & J. Nason as trustees of the Nason Family Trust, an associate of FN Management Pty Ltd ACN 094 226 829. It is better that an associate of FN Management Pty Ltd ACN 094 226 829 owns this lot to enable FN Management Pty Ltd ACN 094 226 829 to be the on-site manager.

(g) The 'management rights' are the caretaking and letting agreements, together with lot 99. Throughout this disclosure statement we will refer to the owner of the management rights as the 'on-site manager'.

As the owner of the management rights, owners of resort apartments may appoint the on-site manager as their agent to let their apartment to a guest of Cairns Village Resort. This is done by both the on-site manager and the owner entering into an agreement called a 'Letting Appointment Deed'. A copy of the letting appointment is attached and the important terms are discussed in this disclosure statement.

…

2.2 What are the key terms of the agreements that make up the management rights?

The agreements which make up the management rights are the caretaking agreement, letting agreement and letting appointment. The key features of them are detailed below:

(a) You are free to terminate the letting appointment by giving the on-site manager 3 months notice. If you do this, then you will be able to appoint an off-site letting agent to let your resort apartment …

(b) You are not required to make any payment on signing or terminating a letting appointment.

…

(d) You may also terminate the letting appointment where the on-site manager is in breach of its obligation under the appointment and the on-site manager fails to fix that breach within 14 days of you telling them about the breach.

(e) Some important obligations placed on the on-site manager include the following:

(i) Run the letting service competently;

(ii) Maintain and staff an office/reception area within the scheme during such hours as are reasonably necessary to properly provide the letting service;

…

(vii) Accept the right of owners to withdraw from the letting appointment on 90 days notice.

(f) A majority of owners who have a letting appointment can agree to remove the on-site manager. If this happens, then the following things must happen:

(i) FN Management Pty Ltd must transfer the management rights to a person of FN Management's choice within 9 months;

(ii) If FN Management Pty Ltd fails to transfer the management rights within 9 months then the owners in the letting pool may nominate a person to whom FN Management Pty Ltd must transfer the management rights (this person must be approved by the body corporate);

(iii) The price for which the management rights are to be transferred must be one of the following:

(A) …

(B) …

(C) …

(iv) The on-site manager can continue to run Cairns Village Resort until a purchaser can be found who is willing to pay the price determined.

2.3 What happens if the on-site manager is removed?

There are two things which reduce the risk of a change in the on-site manager detrimentally affecting the performance of Cairns Village Resort:

(a) Because management rights are like any business, the on-site manager is entitled to sell the management rights at any time subject to obtaining the approval of the body corporate. The body corporate is entitled to reject the proposed sale in circumstances where it reasonably believes the new on-site manager is not capable of running Cairns Village Resort.

(b) If the on-site manager is forced to sell the management rights pursuant to section 2.2(f) of this statement, then the sale will be structured in such a way that the new on-site manager will be given control of all the property it needs to run Cairns Village Resort efficiently and effectively. This is an important safeguard for owners. It is important because the on-site manager should not be in a position where it controls property which inhibit the operation of Cairns Village Resort after its agreements with the body corporate have been terminated.

SECTION 3.0 WHAT RETURNS CAN I EXPECT?

Your returns will be generated by you making your resort apartments available to the on-site manager for letting to paying guests of Cairns Village Resort. Alternatively, you may choose to let your resort apartment yourself, or use an off-site letting agent. The method of calculating returns explained below only applies to you if you appoint the on-site manager.

3.1 Calculating your returns

Your returns will be calculated by following these steps:

(a) Adding rents collected from the use of your resort apartment.

(b) Deducting any authorised expenses …

Money received from guests of Cairns Village Resort who stay in your apartment will be deposited with the on-site manager into a trust account …

The on-site manager will report to you at the end of each month …"

[33] The terms of the letting appointment deeds were essentially in conformity with the terms foreshadowed by the terms of the disclosure statement. There was some variation in the precise terms of the letting appointment deeds over time but these variations were not said to be material.

[34] The terms of the letting appointment deed between Mr Croke, the owner of lots 98 and 117, FN Management and the Nasons are indicative of what was to be found in all of the letting appointment deeds used in the scheme. It contained the following:

"…

E. Lot 99 … is owned by Nason Family Trust. Lot 99 has facilities which are incidental to the operation of management rights at Cairns Village Resort. Lot 99 is included in the definition of the management rights under clause 13.2 of this Deed.

F. The Agent and Nason Family Trust are associated for the purpose of the definition of the Management Rights under clause 13.2 of this Deed.

…

1.1 The Owner appoints the Agent to be the Owners sole agent for the Unit.

1.2 The Agent will let and manage the Unit for the Owner.

…

2.1 The Agent can deduct its commission and entitlements from any money the Agent collects for the Owner.

…

12.1 This letting appointment is for a term of two years. At the end of each term it will automatically renew for a further period of two years on the same terms - with the exception of the schedule that the Agent may update.

12.2 The Agent can end the appointment at any time by giving the Owner three months notice of intention to terminate.

12.3 The Owner can end it:

(a) at any time by giving the Agent three months notice of the Owners intention to terminate.

(b) at any time if the Agent breaches its obligations under the appointment and the Owner tells the Agent that

the Agent is in breach and the Agent fails to fix the breach in 14 days.

13. PROCEDURE FOR FORCED SALE OF MANAGEMENT RIGHTS

13.1 In addition to clause 12, this letting appointment may be terminated by written notice ("a Termination Notice") from a majority of the Unit Owners who have appointed us as their letting agent ("the Letting Pool"). A decision is taken to be a decision of the majority of the members in the Letting Pool where it is evidenced by a majority in writing.

13.2 If we receive a Termination Notice then we must transfer any real or personal property (including contractual rights) held by us or any of our associates to facilitate the operation of the letting business ("the Management Rights") to a person of our choice (other than an associate of ours) within 9 months of receiving the Termination Notice. The transfer is subject to the consent of the Cairns Village Resort Body Corporate according to clause 13 of the Letting Agreement between the Cairns Village Resort Body Corporate and the Agent.

13.3 If we fail to transfer the Management Rights under clause 13.2 within the 9 month period, we must transfer the Management Rights to a replacement operator named in the written notice given by a majority of the Letting Pool at a price specified in the Notice (the "Transfer Notice").

13.4 If we receive a Transfer Notice then we must advise all body corporate members of the name of the person to whom the transfer is to be made. The transfer must take place as soon as practicable, but only after the members of the body corporate have had a reasonable time to consider whether or not to approve the transfer.

13.5 If a majority of body corporate members do not approve the person named in the Transfer Notice then a majority of members in the Letting Pool may then name another person to whom the transfer of the Management Rights is to be made.

13.6 Notwithstanding clause 13.3 and 13.5 we do not have to transfer the Management Rights to the person named in the Transfer Notice if a majority of body corporate members decide and state in writing to us that the person should not be engaged by the body corporate to perform caretaking functions.

13.7 The price that is specified in the Transfer Notice must be one of the following:

(a) the average of two valuations of the Management Rights by independent qualified valuers nominated by the Australian Property Institute (or another relevant independent professional body approved by ASIC); or

(b) the highest bid for the Management Rights (excluding a bid by us or an associate of ours) at an auction of which at least 60 days notice had been given; or

(c) the highest amount tendered (excluding any tender by us or an associate of ours) for the Management Rights following reasonable efforts to market the property for at least 60 days.

> 13.8 In determining if there is a majority of members in the Letting Pool or body corporate members, we and any of our associates and any person nominated as our replacement must not be counted.
> 13.9 For members in the Letting Pool, a majority is based on their entitlement to vote at body corporate meetings.
> 13.9[sic]For body corporate members, a majority is based on their entitlement to vote at body corporate meetings.
> 13.10 A member of the Letting Pool or a body corporate member makes a decision by signing a document that sets out the resolution or decision.
> 13.11 If a member of the Letting Pool incurs any reasonable valuation, auction or marketing costs under these provisions that member is entitled to be reimbursed out of the Sale Price before the Sale Price is paid to the Agent.
> 13.12 In this clause 13 the Agent is referred to as 'us' or 'we'.
> …
> **19. DISTRIBUTION ON SALE OF MANAGEMENT RIGHTS.**
> Should the management rights as defined in clause 13.2 be sold the Agent and Nason Family Trust warrant to the owner that upon the sale of the Management Rights the first priority for distribution of the Sale Price (after payments under clause 13.11 of this Deed and payment of any registered charge over the Agent) will be to discharge the mortgage or any other security over Lot 99."

Property of the scheme

[35] The Court was informed at the hearing of this matter that there is litigation on foot between lot owners and FN Management and the Nasons in relation to the operation of cl 13 of the letting appointment deed and, in particular, over whether the provision for the compulsory sale of the "management rights" includes the leasehold or freehold interest in lot 99. I am conscious that these issues have not yet been litigated, and so say nothing as to the merits of the issues which arise in the other litigation. It is to be emphasised, however, that the provisions for the compulsory sale of the management rights, whatever the true scope of those rights, are premised on the continuing operation of the scheme, rather than its winding up. They are also conditioned upon the determination of a price for the management rights payable to the Nasons by the purchaser.

[36] It appears from the evidence that on two occasions, in July 2002 and in April 2004, the majority of lot owners who were members of the scheme sought to activate the compulsory transfer provisions of the scheme. Whether FN Management and the Nasons breached their obligations under the scheme and whether that gave rights to lot owners, are not matters which fall for determination in this appeal. The issue of present concern is whether, and the extent to which, lot 99 ever became property of the scheme. In this regard, the question is whether the effect of the arrangement evidenced by the scheme documents to which I have referred is that FN Management and the Nasons are to be taken to have "contributed" their interests in lot 99 to the scheme. The competing view is that FN Management and the Nasons agreed only to make lot 99 available while the scheme was a going concern. That is, while lot 99 may have been used for the purposes of the scheme, it was not made over, or "contributed", as scheme property.

[37] In my respectful opinion, it is the latter view which must be accepted. FN Management and the Nasons had no more "contributed" their respective interests in lot 99 to the scheme as scheme property than the lot owners had contributed the fee simple estate in their lots to the scheme. What was contributed to the scheme by the parties to it was the use of their lots under the letting appointment deed while the scheme remained in operation, not some greater interest such as a leasehold or freehold interest. The winding up of the scheme meant the end of its operation by FN Management.[35] The lot owners had originally contributed the right to rent out their lots to the scheme in return for the payment of part of the rental fees that were to be generated as a result. The lot owners did not make their contributions in return for the grant of an interest in lot 99, nor was lot 99 purchased as a result of any contributions that were made by the lot owners. It is difficult to see how the lot owners could have claimed any entitlement to the proceeds of the sale which has been ordered if that sale were allowed to proceed. Equally, it is difficult to see how the lot owners could have made a claim to the proceeds of a compulsory sale under cl 13 of the letting appointment deed even if "management rights" include the leasehold or freehold interest in lot 99. That is in itself a strong indication that lot 99 cannot be considered to be scheme property. This is distinctly not a case like *Crocombe v Pine Forests of Australia Pty Ltd*[36] where the only way the participants in a scheme that was to be wound up could have the interests in land they had purchased as tenants in common vindicated was for the land to be sold and the proceeds of that sale distributed among them.

[38] The compulsory purchase provisions of cl 13 of the letting appointment deed are themselves the clearest recognition that the fee simple interest in lot 99 was not scheme property. It could arguably become scheme property only upon the enforcement of those provisions; and, as I have said, they contemplate the continuing operation of the scheme. Once the business of the scheme ceased upon a winding up, the entitlement of each of the scheme members to receive benefits in return for allowing the rental of their units, which was the essence of the scheme, came to an end; that entitlement certainly did not enlarge to envelop property rights which none of the scheme members had contributed to the scheme.

[39] As I have mentioned, it appears that in July 2002 and April 2004 the owners of a majority of lots using the services of FN Management as letting agent have given a notice requiring the compulsory sale of the management rights. It is argued FN Management and the Nasons did not act in compliance with these notices. It is to be emphasised that the lot owners have not sought, in these proceedings, to litigate the rights and wrongs of these circumstances nor have they sought any order of the court to compel the transfer of the management rights - which arguably may be taken to include lot 99 - in conformity with the letting appointment deed. Rather, the lot owners successfully sought the winding up of the scheme on the footing that its unregistered operation was unlawful.

[40] An order of the kind the subject of the present appeal is not supportable as a means of compelling the compulsory transfer of the management rights in order to vindicate the lot owners' contractual rights, if any, to have a compulsory transfer of lot 99 made to a new manager. It may well be that a claim on the part of lot owners

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35 The operation of the scheme came to an end upon the making of the order that it be wound up. The Act states explicitly that a person should not be taken as operating a scheme because he or she may be taking steps to have the scheme wound up: *Corporations Act* 2001 (Cth), s 601ED(6).

36 [2005] NSWSC 151; (2005) 219 ALR 692.

for such relief would be inconsistent with the order for the winding up of the scheme and the proposition that the scheme is unlawful. However that may be, and whatever other rights are available to the lot owners, the order the subject of the present appeal could only be justified under s 601EE(2) of the Act if it is a mode of realisation of the scheme property.

[41] In this regard, whatever rights may have been claimed to be available to the lot owners as a result of any failure on the part of the appellants to honour their obligations under the provisions of cl 13 of the letting appointment deed, an order under s 601EE(2) cannot, in my view, be used as a means of enlarging the scheme members' rights to the property of FN Management and the Nasons so as to avoid the need to litigate those claims. The lot owners may have rights against FN Management and the Nasons, but s 601EE(2) does not, in my view, afford them the right to expropriate assets which were not contributed to the scheme and so did not become scheme property.

The arguments on appeal

[42] The appellants contend that the broad view taken by the learned primary judge is not supported by the language of s 601EE(2) of the Act which, it is submitted, must be presumed not to authorise the compulsory divestiture of property.[37] The respondents join issue with this contention, arguing that the court is empowered by s 601EE(2) to make any orders it considers "appropriate"; and that this language is indicative of a wide-reaching discretion. In my respectful opinion, those arguments tend unnecessarily to complicate the resolution of the issue for determination. In my view, the issue is simply whether the order "is appropriate for the winding up of the scheme". The resolution of this issue requires the identification of the property of the scheme. Any order made under s 601EE(2) of the Act must be "appropriate" to the facilitation of the realisation and application of the assets of the scheme. However broad an operation is given to the word "appropriate" in s 601EE(2) of the Act, the limits on the power conferred on the Court are fixed by the consideration that the power is concerned with the getting in, realisation and distribution of the property of the scheme.

[43] It will be apparent from what I have written that I disagree with the view of the learned primary judge that lot 99 had been "made available" to the scheme in the sense that a freehold interest had been transferred to the lot owners, or promised in terms which are apt in the events which have happened, to create a beneficial interest in lot 99 in their favour. The use of lot 99 may have been necessary for the carrying on of the scheme but, as I have explained, participation by lot owners in the scheme did not automatically bring with it any interest in lot 99 as opposed to the proceeds obtained from the renting of their units.

[44] The other consideration which influenced his Honour, namely that "while the ownership of lot 99 remains in the hands (of the Nasons) the interests of lot owners in having the Community Title Scheme managed can not be realised", does not establish that the order made was "appropriate for the winding up of the scheme". Considerations as to the continuing provision of the benefits of management such as those which were available under the scheme while it was in force are irrelevant where the scheme is being wound up. The lot owners' interest in the continuing

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37 The appellants relied on *Clissold v Perry* (1904) 1 CLR 363 at 373; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 181, 182 and 185.

management of their lots under the community titles scheme under the management scheme operated by FN Management came to an end with the winding up of that scheme; and any further arrangement by the lot owners of management services for their lots is a matter entirely for those lot owners. It is not a matter which is an aspect of the winding up of the scheme. More importantly, that "interest" on the part of lot owners simply does not demonstrate that lot 99 was an asset of the scheme.

[45] Next it must be said that the role of the Nasons in the "promotion and facilitation of the illegal scheme" was also an insufficient basis for the making of the order. Whatever view was taken of the propriety of the Nasons' conduct was irrelevant to the question of whether lot 99 was scheme property.

[46] To look for some "relationship" between an asset and the scheme which is broader than that between the scheme and scheme property is, in my respectful opinion, to pursue an inquiry for which there is no warrant in the language of the Act. Further, it is an inquiry in relation to which the Act provides no criteria by reference to which it is possible to determine when a sufficient relationship exists.

[47] It is to be emphasised that the observations of Barrett J in *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd*,[38] cited above, and to which his Honour referred, do not support a different conclusion. The observations of Barrett J were concerned explicitly with matters of "process" in relation to the winding up. They are concerned with the means to the end of the realisation and distribution of scheme property; they afford no support for the view that the winding up process may envelop property interests which were not relevantly subject to the scheme.

[48] It follows that, in my opinion, the power conferred by s 601EE(2) of the Act did not authorise the orders made by the learned primary judge because they were not appropriate for the winding up of the scheme.

Conclusions and orders

[49] The appeal should be allowed. The orders made below should be set aside. I agree with the orders proposed by the President.

[50] **DOUGLAS J:** I have had the advantage of reading the reasons for judgment of the President and of Keane JA and agree with them.

[51] The conclusion that one may derive guidance from the definition of “scheme property of a registered scheme” in s 9 of the *Corporations Act* 2001 (Cth) as to what should be considered to be the property of an unregistered scheme supports some further analysis of that definition. Paragraph (a) defines scheme property of a registered scheme to mean, among other things, “contributions of money’s worth to the scheme”. The note to that paragraph says, with my emphasis: “[I]f what a member contributes to a scheme is rights *over* property, the rights *in* the property that the member retains do not form part of the scheme property.” There is no encouragement in that language to go beyond the precise “money’s worth” contributed in determining what was the scheme property.[39]

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38 (2002) NSWSC 576 at [12] - [13]; (2002) 42 ACSR 240 at 243 - 244.

39 The note does not form part of the Act - see s 13(3) of the *Acts Interpretation Act* 1901 (Cth) - but may be considered to confirm that the meaning of the provision is the ordinary meaning conveyed by

[52] Nor does the fact that this was an unregistered scheme support any different analysis of that issue.

[53] The terms of the letting appointment deeds recognised that lot 99 was owned by the Nason Family Trust and that its facilities were incidental to the operation of the management rights. That it was included in the definition of management rights under the forced sale provision in cl 13 of those deeds does not support any view that the Nasons had, either initially or before the winding up order, contributed their ownership rights in the property to the scheme. Rather they had contributed rights over their property.

[54] That the "contributions of money's worth" made by the Nasons in respect of lot 99 were only rights over that property supports the conclusion, both by applying normal principles of construction and in this statutory context, that lot 99 did not become part of the scheme property.

[55] I also agree with the orders proposed by the President.

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the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; see s 15AB(1)(a) of that Act and *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377, 383.