SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Comcash Australasia P/L & Ors* [2004] QSC 479
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (applicant) **v** **COMCASH AUSTRALASIA PTY LTD** ACN 104 319 664 (first respondent) **RICHARD CLAYTON JACKSON SHARLAND** (second respondent) **MICHAEL JOHN MUCKAN** (third respondent)
FILE NO/S:	S11198 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2004
JUDGE:	Douglas J
ORDER:	**Further submissions as to the form of the orders**
CATCHWORDS:	CORPORATIONS - Corporate Finance - Interests Other than Shares or Charges - Offer or Issue to Public - Generally - Managed investment schemes - What constitutes - Proceedings seeking declarations of statutory breaches and consequential orders - Against a company, its managing director and a co-signatory to the company account - Investors were offered low interest loans and a percentage of profits in return for rolling over their superannuation into a self-managed superannuation fund and investing that superannuation in joint ventures with a company in the Commonwealth of Dominica – Money invested was deposited into a specific bank account and was used indiscriminately - Only investments made were loans back to investors - Consideration of three characteristics of "managed investment scheme" within Corporations Act 2001 (Cth), s 9 - Moneys invested were paid as consideration for rights to benefits produced by scheme - Investors were to receive rights to interest produced by scheme of pooled

borrowings - Members did not have day-to-day control over operation of scheme – Accordingly, each investor invested in managed investment scheme - The first and second Respondents were not merely agents or employees pursuant to ss 601ED(6) - Consequential breach of s 911A established – also misleading and deceptive conduct established, pursuant to ss 1041E, 1041F(1)(a), 1041F(1)(b), 1041H

CORPORATIONS - Winding Up – Generally - Other Cases - Managed investment scheme - Proceedings seeking order that scheme be wound up pursuant to s 601EE - In interest of investors and in public interest that scheme be wound up

CORPORATIONS - Winding Up - Winding Up by Court - Grounds for Winding Up - Other Grounds - Court of Opinion That Winding Up Just and Equitable pursuant to Corporations Act 2001 (Cth), s 461(1)(k) – Where the Court makes an order for the winding up of a managed investment scheme pursuant to s 601EE, the case for the liquidation of the company involved is compelling

CORPORATIONS - Management and Administration - Directors and Other Officers – Disqualification - Other Cases – Where the respondent had contravened the Corporations Act 2001 (Cth) in at least four ways whilst being a director, the Court was justified in disqualifying the respondent for 25 years, pursuant to s 206E

ASIC v Enterprise Solutions 2000 Pty Ltd [2003] 1 Qd R 135, applied
WA Pines Pty Ltd v Hamilton [1981] WAR 225, applied
ASIC v Drury Management Pty Ltd [2004] QSC 068, considered
ASIC v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403, considered
ASIC v Hutchings [2001] NSWSC 522, considered
ASIC v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561, considered
ASIC v Young (2003) 173 FLR 441, considered
Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, considered

COUNSEL: R M Derrington for the applicant
No appearance for the first respondent
The second respondent in person
The third respondent in person

SOLICITORS: Michael Burnett for the applicant Australian Securities and Investments Commission

[1] The Rue de Paris coffee shop in Park Rd, Milton, a suburb of Brisbane, is yet to achieve the fame of Edward Lloyd's coffee house in Tower St, London. But, just as, more than 300 years ago, Mr Lloyd provided the venue for his clientele of ships' captains, merchants and rich men to carry on their business of insuring ships and their cargoes, so, about one year ago, did the Rue de Paris unwittingly provide a venue for the discussion of "investments" by the management and employees of Comcash Australasia Pty Ltd, a company with a name that is unlikely to last much beyond the delivery of this judgment.

[2] Comcash is a company whose agents approached people who wanted to try to access their superannuation entitlements earlier than would be the case legally. It did so by targeting those in financial difficulties and inviting them to invest their superannuation in a "joint venture" in the Commonwealth of Dominica. They were encouraged to establish their own self-managed superannuation funds and to place their entitlements from other funds into the self-managed funds. The trustees of those funds would then deposit the accumulated funds into an account called "SMC Australia" with Suncorp-Metway Ltd operated by Richard Sharland and Michael Muckan.

[3] The representations by Comcash's agents were that the funds in the SMC Australia account would be invested in joint ventures with a company called SMC Corporation in the Commonwealth of Dominica and were to generate between 6% and 11% return per annum. Importantly the participants were told they could borrow a proportion of the sum "invested" from SMC Corporation, typically at 2.5% interest for 25 years.

[4] Richard Sharland, otherwise known as Richard Stagg, was the key promoter of the scheme. He caused Comcash to be acquired, was its primary shareholder and first director and appointed the other directors. Mr Sharland held himself out as Comcash's managing director and recruited agents for the promotion of the scheme. One of his aides and agents was Michael Muckan. Mr Sharland also arranged the creation of a web page to promote the scheme and provided information for that site. He gave lists of names to agents to contact in attempts to sell the scheme and held staff meetings each night at his headquarters in the coffee shop, the Rue de Paris.

[5] When an agent signed up an investor Mr Sharland would send the investor a letter of offer. The parties later signed the following documents that were designed to give effect to the arrangement: a joint venture agreement, a loan agreement, a confidentiality agreement and a promissory note. Mr Sharland signed the relevant documents on behalf of Comcash, helped create those documents and paid the agents. Sometimes the agents' payments were made in kind; they were given motorcycles. He and Mr Muckan were the signatories of Comcash's bank accounts including the SMC Australia account, while Mr Sharland controlled the administration and transfers of its money and gave instructions to its accountants.

[6] There have been no joint ventures discovered in the Commonwealth of Dominica. Nor is there evidence to show that any of the investors' money was invested there or elsewhere overseas. Some of the money was lent from the SMC Australia account to some investors but most of it has been spent by Mr Sharland with some having gone to Mr Muckan. There is no evidence to show that SMC Corporation existed in

the Commonwealth of Dominica or elsewhere or that it has made any loans. In most cases the investors have not received the loans they expected.

[7] Comcash received $1,090,126 from investors. That money has been dissipated with more than $682,544 going in "other withdrawals", including $338,889 going to an account in the name of Stagg, one of Mr Sharland's aliases.

[8] When the Australian Securities and Investments Commission became aware of Comcash's activities it investigated them and then sought interlocutory relief from this Court in December 2003. Further interlocutory orders were made and this is the application for final relief. Mr Sharland and Mr Muckan appeared unrepresented but did not give or call evidence and made only limited submissions about the allegations against them.

[9] There are several orders sought by ASIC including a number of declarations, injunctions and mandatory orders, the winding up of Comcash and the disqualification of Mr Sharland from managing corporations for a period this Court considers appropriate. They require me to consider:

- whether the respondents, Comcash, Mr Sharland and Mr Muckan, were operating an unregistered managed investment scheme contrary to s 601ED(5) of the *Corporations Act* 2001 (Cth) ("the Act");
- whether they carried on a financial services business without holding an Australian Financial Services Licence contrary to s 911A of the Act;
- whether they have provided financial services in relation to superannuation interests within the meaning of the *Superannuation Industry (Supervision) Act* 1992 (the "SIS Act"); and
- whether Mr Sharland and Mr Muckan personally or by their agents contravened s 1041E, s 1041F and s 1041H of the Act.

[10] The alleged contraventions of s 1041E, s 1041F and s 1041H require me to consider whether Mr Sharland and Mr Muckan made misleading statements, statements that were reckless as to whether they were misleading or dishonestly concealed material facts, or engaged in misleading or deceptive conduct or conduct likely to mislead or deceive in respect of applications for or the disposal of financial products and dealing in or in relation to financial products respectively**.** I also have to consider whether Mr Sharland breached an enforceable undertaking he gave ASIC on 8 April 2002 by promoting and inducing persons to invest in an unregistered managed investment scheme.

Unregistered "managed investment scheme" – s 601ED(5) of the Act

[11] The definition of "managed investment scheme" is provided by s 9 of the Act:

> "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

(b) a time-sharing scheme;"

[12] Managed investment schemes are regulated under Chapter 5C of the Act. Section 601ED of the Act provides that a managed investment scheme must be registered if it has more than 20 members or it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes. Section 601ED also prohibits the operation of a managed investment scheme which ought to be registered and is not.

[13] The funds provided by investors in this case were not invested in accordance with the "scheme" promoted to them or otherwise.[1] Instead, the circumstances suggest that a fraud was committed.

[14] It might be argued that the matter should, therefore, be treated by the court as a fraud rather than a "scheme", "programme, or plan of action"[2] in relation to a managed investment. In other words it would not be a case where the contributors actually acquired rights to benefits produced by the scheme in spite of the objective effect of the scheme documentation. The use of the words "whether the rights are actual ... or not" in para. (a)(i) of the definition is against such an argument and the authorities suggest that schemes run by promoters who deliberately squander the investments trusted to them are nevertheless treated as "managed investment schemes"; see, for example, *ASIC v Hutchings* [2001] NSWSC 522 and *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561. Similarly, where schemes appear to be nonsensical, see *ASIC v Young* (2003) 173 FLR 441, 445-446 at [22]-[25].

[15] As the Court of Appeal said in *ASIC v Enterprise Solutions 2000 Pty Ltd* [2003] 1 Qd R 135, 143 at [6]:

> "The rights which the investors acquire when they pay money in are rights to have the scheme operate in accordance with the agreements they have made and to be paid monies due ... Of course, participation may produce no benefit for an investor, but loss only: it would, however, be perverse to read the expression "to acquire rights to benefits produced" as excluding from the definition any scheme of investment which is not bound to produce benefits."

[16] The appropriate course, therefore, is to look at how the scheme was promoted and determine objectively whether it is a "managed investment scheme" as defined by the characteristics set out in s 9 of the Act. The operators' conduct whether fraudulent or not and their intentions are only of secondary relevance to this question.

What was the Scheme?

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[1] See paragraph 19 of the affidavit of Hall filed 30 January 2004.

[2] See per Mason J in *Australian Softwood Forest Ltd v A-G (NSW)* (1981) 148 CLR 121, 129.

[17] There is a high degree of consistency in the deponents' evidence relating to this "scheme". Investors were to gain access to their own superannuation by creating a self-managed superannuation fund. The superannuation in the fund would then be transferred to the SMC Australia account, with Suncorp-Metway in Brisbane.[3] That superannuation was then to be invested in joint ventures with "SMC Corporation" in the Commonwealth of Dominica. The investors were to receive a percentage of the profits earned by the joint venture. SMC Corporation would then lend a percentage of the superannuation invested back to the investor typically at a rate of 2.5% p.a. for a period of 300 months.

[18] The statutory definition of a managed investment scheme is set out above. There are several elements.

Section 9(a)(i) - people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme.

[19] Investors were told that in return for giving their superannuation to SMC Corporation for investment in a joint venture, they would receive a low interest loan and 50% interests in joint ventures which would generate a return of between 6 and 11% per annum.[4] The promised return satisfies this element of the definition.

Section 9(a)(ii) - Contributions are to be pooled or used in a common enterprise.

[20] In *ASIC v Young*, Muir J defined the concept of "pooling" at [43] as importing "contributions to a discernible fund the moneys in which are to be used in an identifiable way to provide prescribed benefits to the contributors". It has been said that it is enough that either the promoters declared that the contributions would be pooled or that the scheme could only be given effect if the contributions were pooled or if the funds were in fact pooled, per Jones J in *ASIC v Drury Management Pty Ltd* [2004] QSC 068 at [24]. This element is satisfied by the facts that investors were informed that the joint ventures would be made up of funds provided by other investors[5], investors were told to deposit their superannuation into one "SMC Australia" account, which would be used to transfer the funds to SMC Corporation in Dominica.[6] The funds were in fact pooled in the SMC Australia account. Also the funds typically invested by each investor would not have been enough to finance a significant joint venture on their own and it was implicit that the funds would be pooled; see *ASIC v Drury Management Pty Ltd* at [23].

[21] Alternatively, there was a common enterprise between each investor and SMC Corporation recorded in the joint venture agreements. The common enterprise need not be an enterprise in common with other investors, but may be an enterprise common to the investor and the promoter: *WA Pines Pty Ltd v Hamilton* [1981] WAR 225, 228, 236.

Section 9(a)(iii) - The members do not have day to day control over the operation of the scheme.

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[3] See Ex JMM-03 to the affidavit of Morgan.
[4] See the affidavits of Mr Gerrie at 11(e) and Mr Hesling at 14(e).
[5] See para 20(f) of the affidavit of Ms Rayson, Mr Lewer (para 8) and Mr Gerrie (para 4),
[6] See Ex "JMM-03" to the affidavit of Mr Morgan sworn 5 February 2004.

[22] While each joint venture agreement seems to nominate a specific joint venture company to be acquired by the venture, the substance of the arrangement was that the operator of the scheme would choose the company to be acquired and control the funds invested once they were deposited into the SMC Account; see *ASIC v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403, 415 at [18] where the investors' ability to direct that no bets be placed on a particular day did not mean that the investors had day to day control over the operation of the scheme. There was no challenge to that conclusion in the appeal reported as *ASIC v Enterprise Solutions 2000 Pty Ltd* [2003] 1 Qd R 135.

[23] Therefore, the scheme was a "managed investment scheme".

Requirement for Registration – Section 601ED(1)

[24] Registration is required for a scheme that has more than 20 members. That more than 20 separate investors signed up to the scheme is evidenced by Mr Hesling who states that he alone helped sign 30 people.[7] See also the affidavit of Ms Rayson at para. 31 who says that 61 people deposited funds into the SMC Australia account. Therefore the scheme was required to be registered.

[25] It might be argued that each new joint venture agreement was a new scheme and therefore, there is no evidence that more than 20 members existed for any one scheme. Each of the joint venture agreements in evidence lists a different company as the company to be acquired by the joint venture. The better view is that the investment scheme was one scheme with differing investment projects in the Commonwealth of Dominica. Nevertheless, even if each joint venture is considered to be a scheme of its own then each scheme was promoted by Mr Sharland (or by his associates) and he was clearly a person in the business of promoting the schemes under s 601ED(1)(b). On either view, the scheme was required to be registered.

Section 601ED(5) – Breach of the Prohibition

[26] The scheme was not registered and therefore there was a breach of the prohibition on operating unregistered schemes by the person or persons who operated the scheme.

Section 601ED(6) – Agents/Employees not Prohibited

[27] If the respondents were acting merely as agents of SMC Corporation then s 601ED(6) provides that they were not operating the managed investment scheme in contravention of s 601ED(5). The term 'agency' connotes an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. That the respondents were acting as mere agents is supported by the following evidence:

- SMC Corporation was a party to each joint venture agreement in evidence;
- SMC Corporation signed loan agreements[8];
- A draft deed of agreement between Comcash and a proposed new entity, Comcash Central Queensland stated that Comcash was a joint venture agent for SMC Corporation[9];

[7] See paragraph 23 of his large affidavit sworn 3 December 2003.

[8] See the affidavits of Mr Gerrie and Mr Fraser (the loan agreements with Messrs Hesling, Morgan, Bero and Lewer were signed by Comcash).

- Sharland was a director and representative of Comcash;
- Muckan was merely a representative of Comcash.

[28] However, the confusion regarding the relationship (if any) between the respondents and SMC Corporation can be overcome by applying a purposive interpretation to s 601ED(6). The purpose of the provision is consumer protection so the actual operators of the scheme will be caught by the provision, not just those the scheme propounds to be the operators.

[29] That Mr Sharland was in substance an operator of the scheme is supported by the following evidence:

- He was in control of: documentation; recruiting, providing instructions to and remunerating representatives; and, most importantly, the funds invested by clients;
- He was invariably described by representatives who promoted the scheme as the managing director and the person in control of the operation;
- He signed documents on behalf of SMC Corporation; and
- He admitted to having spent large amounts of the invested money on his own personal expenses.[10]

[30] That Comcash was in substance an operator of the scheme is supported by the following evidence:

- Mr Sharland was a director of Comcash, acted as its managing director and was therefore its governing mind;
- Documents and correspondence sent to investors contained the Comcash letterhead;
- Comcash signed as principal to certain loan agreements, actually provided one loan[11] and was described as a finance company[12]; and
- Comcash's website discussed how it could provide low interest finance "working in conjunction with offshore specialists"[13]

[31] That Mr Muckan was in substance an operator of the scheme is supported by the following evidence:

- He worked as a promoter of the scheme[14];
- He received a significant amount of money obtained from the scheme (at least $27,000)[15];
- He was a long-time associate of Mr Sharland (see the affidavit of Mr Manthey)
- he may have signed a loan agreement on behalf of SMC Corporation (see the affidavit of Fraser, ex PSF14);
- he had a business name registered in his name, "Self Managed Capital Australia" (the first three initials are significant) and the nature of the business was said to be "self managed super funds"; and
- he was a signatory to the "SMC account", along with Mr Sharland.

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[9] See ex LDR-16 to the affidavit of Ms Russell.
[10] See Ex IRH1 to the Affidavit of Mr Hall sworn 30 January 2004.
[11] The loan agreements with Mr Hesling, Mr Morgan, Mr Bero and Mr Lewer were signed by Comcash, and Morgan actually received his loan.
[12] See ex LDR-16 to the affidavit of Ms Russell.
[13] See exhibits JMM-15 and JMM-16 to the affidavit of Mr Morgan.
[14] See the affidavit of Mr Hesling at para. 56.
[15] See para. 26 of ex IRH-1 to the affidavit of Mr Hall.

[32] That SMC Corporation was not in substance the operator of the scheme (or an operator at all) is supported by the following:

- There is no evidence of money from the scheme being invested in the Commonwealth of Dominica in circumstances where one would expect to see evidence of a flow of money to that country and to SMC Corporation or evidence of control by that entity if it were the true operator of the scheme. In these circumstances, where no evidence as to the existence or role of SMC Corporation has been led by the respondents a *Jones v Dunkel* inference applies;
- Mr Sharland, on the evidence, appeared to control the SMC account and payments from that account were made as "loans" to investors, "remuneration" for the promoters of the scheme and personal payments to Mr Sharland himself.[16]

[33] In s 601ED(5) the word "operate" is not used "to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme"; see *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561, 574 at [55] per Davies JA adopted in *ASIC v Drury Management Pty Ltd* at [28].

[34] *ASIC v Pegasus Leveraged Options Group Pty Ltd* provides an example of a situation where the sole director and directing mind of the company behind the scheme was involved in its day to day operations and supervised others in their performance and was found to be operating a scheme, and was not merely an agent or employee for the purposes of s 601ED(6). However, for s 601ED(6) to be given its proper meaning, "operators" who are only acting in that capacity as agents or employees of another person should not be caught by the provision.

[35] The affidavit evidence of the various representatives supports the position that they all worked at the direction of Mr Sharland. There is little evidence of Mr Muckan directing how the scheme should be operated or promoted. The fact that Mr Muckan was a co-signatory to the SMC Australia account, a registered business name holder, a promoter and possible signatory to a document on behalf of SMC Corporation may not establish anything more than that he acted at the direction of Sharland. It appears he was then a close associate of Mr Sharland in a similar way to the other promoters of the scheme. This is particularly evident when one considers the evidence that Mr Sharland actively encouraged and facilitated the promoters of the scheme setting up related companies[17] and taking shareholdings and office-holdings in Comcash[18]. Other promoters of the scheme also signed on behalf of SMC Corporation or Comcash.[19]

[36] It has not been established that Mr Muckan did much more than act in accordance with the directions of Mr Sharland in much the same way as the other promoters of the scheme. Only a relatively small sum was traced to Mr Muckan's personal account from the SMC account. This is consistent with payments being made to a promoter of the scheme. On the other hand he was a signatory to the account and held what appears to have been a relevant registered business name. That suggests

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[16] See the affidavit of Mr Gerrie.
[17] See para. 35 of the affidavit of Mr Russell.
[18] See Mr Hesling at paras 36 and 39.
[19] See "G. Watkins" as signatory on ex PSF13 to the affidavit of Mr Fraser; see also ex MPL5 to the affidavit of Mr Lewer where a letter of offer is signed by Mr Hesling on behalf of Comcash.

he had a role as more than a mere agent and, in the absence of evidence to the contrary from him, it is legitimate to infer that he too operated the scheme.

[37] Therefore, I am satisfied that all the respondents contravened s 601ED(5).

Carrying on an Unlicensed Financial Services Business – s 911A

[38] Section 911A requires a person who carries on a financial services business to hold an Australian financial services licence. The provision of a financial service is described by s 766A to s 766E. The reasons advanced by ASIC for arguing that the respondents were carrying on a "financial services business" without a licence included that they were dealing in interests in managed investment schemes that were not registered.

[39] Dealing in a financial product includes issuing a financial product under s 766C(1)(b). The definition of "issue" in s 9 of the Act includes making available interests in a managed investment scheme and, otherwise, "circulate, distribute and disseminate".

[40] Comcash was a signatory to loan agreements and of those agreements in evidence at least one loan was actually provided.[20] When one looks at the evidence regarding the Comcash website it becomes evident that it was in the business of providing low interest loans. As discussed above, Comcash, Mr Sharland and Mr Muckan operated the managed investment scheme with Mr Muckan acting at least as a representative/promoter who actually brought in customers.[21] By providing loans to investors from their own funds sourced in the manner I have described it seems to me that the respondents were making available interests in managed investment schemes.

[41] Therefore the respondents are in breach of section 911A. It cannot be argued that Mr Sharland and Mr Muckan are exempted by section 911B because, amongst other things, their "principal" did not have a licence.

Dealing in Superannuation Interests

[42] ASIC originally also wished to investigate whether, by operating and/or promoting the managed investment scheme, the respondents were dealing in a "superannuation interest", as defined by the SIS Act, and therefore were carrying on a financial services business in contravention of s 911A of the Act (or at least were threatening to do so). "Dealing" includes arranging for another person to dispose of their "superannuation interest"; s766C(2) of the Act. Because of a lack of precise evidence that the relevant superannuation funds from which the investors funds were sourced were regulated funds under the SIS Act they did not pursue such declaratory relief.

[43] It is more probable than not that, having regard to the common practice of Australian employers paying the superannuation entitlements of their employees to regulated superannuation funds, the scheme involved dealing in "superannuation

[20] See ex JMM-12 and para 24 of Morgan.
[21] See Hesling at para 56 and Bero at paras 6-12

interests" or at the very least, threats to do so.[22] In my view it is a fact of which I may take judicial notice; see *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 per Gleeson CJ at 478, [64].

[44] No declaration is sought by the applicant that this has occurred. However, a permanent injunction is sought by the applicant in subparagraphs 2(e)-(i) of the application restraining the respondents from dealing in various ways with "superannuation interests" as defined by the SIS Act. Grounds for such an injunction arise from either s 1324 of the Act or s 315 of the SIS Act on the basis that there has been an actual or threatened contravention of those Acts respectively. In those circumstances the Court may grant an injunction on such terms it thinks fit. The applicant has asked the Court to infer an actual or threatened contravention for the purposes of granting the injunction.[23]

[45] The injunctive relief sought is appropriate on the basis of a threatened contravention of s 911A of the Act. There is no need to examine possible contraventions of the SIS Act.

Misleading and Deceptive Conduct

[46] That misleading and deceptive conduct and false representations have occurred as complained of in para. 34 of ASIC's written submissions is not contested. This is so even if Mr Muckan did not know about the deception. It is enough for these purposes that Mr Muckan acted as a promoter as discussed earlier.

ASIC Act

[47] As each of the respondents was involved in the promotion and/or operation of the scheme, each has contravened s12DA and s12DB(1)(a) of the ASIC Act. For completeness, the respondents may also have contravened s12DF.

[48] The Court may grant injunctions restraining the respondents from engaging in the impugned conduct pursuant to s. 12GD.

Corporations Act – Sections 1041E, 1041F, 1041G, 1041H

[49] Similarly, Mr Sharland and Comcash have contravened sections 1041E, 1041F(1)(a) and 1041F(1)(b); see para. 36 of ASIC's submissions.

[50] Only one clear instance of Mr Muckan acting as a promoter has been identified in the evidence; see the affidavit of Mr Bero. Mr Hesling also states that Mr Muckan acted as a promoter. However, the evidence does not demonstrate that at the time that Mr Muckan acted as a promoter of the scheme he knew or ought reasonably to have known that what he was promoting was false. At best there is a suspicion that that was the case principally because he was a co-signatory to the SMC account. By itself that is not conclusive. Mr Sharland may have required an associate to have access to the account to do his bidding but this does not necessarily mean that Mr Muckan knew or should have known of the deceptions. Therefore, it cannot reasonably be inferred that Mr Muckan had the necessary knowledge or reckless

[22] See the affidavits of Fraser (para 2), Bero (para 3) and Lewer (para 2) for commonly known funds from which investors withdrew.

[23] See transcript T17/56-T18/12 and T25/54-28/13.

lack of knowledge to have contravened sections 1041E, 1041F(1)(a) and 1041F(1)(b). I would not reach such a conclusion merely in reliance on his failure to give evidence.

[51] However, all of the respondents have contravened section 1041H for the same reasons as they contravened sections 12DA, 12DB and 12DF of the ASIC Act. There is no need to show a guilty intention.

Breach of Enforceable Undertakings – s93AA, ASIC Act

[52] In the circumstances and on the findings I have made it is clear that Mr Sharland committed the breaches of the enforceable undertaking complained of in para. 40 of ASIC's submissions. ASIC only seeks declarations in respect of cll. 2.1(d) and 2.4(d) of the undertakings dealing with the promotion of schemes. Where there is a breach of a term the Court, pursuant to s.93AA(4) of the *Australian Securities and Investments Commission Act* 2001 (Cth), may also make an order directing the person to comply with that term of the undertaking.

Disqualification of Mr Sharland as Company Director

[53] Section 206E of the Act provides:

> "(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
>
> (a) the person:
>
> (i) has at least twice been an officer of a body corporate that has contravened this Act while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
>
> (ii) has at least twice contravened this Act while they were an officer of a body corporate; or
>
> (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate."

[54] Mr Sharland was a director of Comcash from 4 April 2003 until at least 3 December 2003.[24] While Mr Sharland was a director he contravened the Act at least in the following ways:

- managing a corporation while disqualified (a bankrupt); see s 206A;[25]
- operating an unregistered managed investment scheme; see s 601ED(5);
- carrying on a financial services business without a licence; see s 911A; and
- misleading, deceiving and making false representations; see s 1041E, s 1041F(1)(a), s 1041F(1)(b) and s 1041H.[26]

[55] In the circumstances a disqualification for a period of 20 years as submitted by Mr Derrington for ASIC is justified.

Winding Up of Comcash on the Just and Equitable Ground – s 461(1)(k)

[56] This relief is not pursued at this stage because the application to wind up the company had not been advertised.

Orders sought

[57] ASIC has asked the Court for a number of declarations and orders. I am satisfied that I should make the orders essentially in the terms sought in the draft order handed up by Mr Derrington with the exception of three of the declarations dealing with Mr Muckan. I shall settle the precise form of the orders on the delivery of these reasons.

[24] See ex JRR-1 to the affidavit of Ms Rayson sworn 4 December 2003.
[25] See ex JRR-2 to the affidavit of Ms Rayson sworn 4 December 2003.
[26] This is supported by the various affidavits of promoters/investors which demonstrate clearly that the scheme was being run by Mr Sharland between April and December 2003.