SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Groundhog Developments Pty Ltd & Ors* [2011] QSC 263
PARTIES:	**IN THE MATTER OF: GROUNDHOG DEVELOPMENTS PTY LTD ACN 095 870 545** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (applicant) v **GROUNDHOG DEVELOPMENTS PTY LTD ACN 095 870 545** (first respondent) and **MALCOLM WAYNE ANDREW** (second respondent) and **ENTERPRISE MANAGEMENT SYSTEMS (AUSTRALIA) PTY LTD ACN 094 252 632** (third respondent) and **MAUREEN CATHERINE BUCKETT** (fourth respondent)
FILE NO/S:	S 4772/01
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2011
JUDGE:	Dalton J
ORDER:	**1. Paragraph 1 of the orders made on 3 and 18 September 2001 are vacated nunc pro tunc insofar as they restrained the Liquidators appointed by order of 28 February 2003 (the Liquidators) from withdrawing money from, or otherwise dealing with funds held in bank accounts held with the Commonwealth Bank of Australia Limited, BSB number 064 138, Account numbers 1025 6134, 0124 7289 and 1025 5537;**

2. Remuneration and expenses of the Liquidators are approved in an amount of $259,885 up to and including 6 June 2011;

3. The Liquidators may pay $229,917 from the funds they hold on behalf of the first and third respondents in satisfaction of such of their fees and expenses as have not been paid to date;

4. After paying such of their own fees and expenses as are approved by the court, the Liquidators may distribute all funds held on behalf of the first and third respondents on a pro rata basis to satisfy the claims of those persons who are named in exhibit IRH-14 to the affidavit of Ian Richard Hall filed on 3 December 2010, and to Mr Stephen Andrew.

5. Directions that:

(a) By 10 October 2011 the Liquidators file and serve on the Australian Securities and Investments Commission any further affidavit material and submissions upon which they rely to obtain approval of remuneration and expenses;

(b) On or before 17 October 2011 Australian Securities and Investments Commission file any further affidavit material and submissions in this matter appertaining to the material filed in accordance with direction (a) above;

(c) If either the Liquidators or the Australian Securities and Investments Commission contend that a further oral hearing in this matter is necessary they state that, and the reasons for that contention, in the material filed in accordance with paragraphs (a) and (b) above;

(d) The hearing of the application filed 10 December 2010 is otherwise adjourned to a date to be fixed.

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where the company in liquidation ran an unregistered investment management scheme – where there were two classes of investors – where mixed funds held by the liquidators were insufficient to meet the claims of the investors – direction that the liquidators should distribute funds rateably – direction that the liquidators should distribute funds to only one class of investors

CORPORATIONS – WINDING UP – LIQUIDATORS – REMUNERATION – IN WINDING UP BY COURT – GENERALLY – where the company in liquidation was a corporate trustee on a resulting trust – where the liquidators' fees were time costed – where the liquidation has taken eight years – whether the remuneration claimed was fair and reasonable

Corporations Act 2001 (Cth)

13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq) (1999) 30 ACSR 377; [1999] FCA 144
Australian Securities and Investments Commission v Australian Foods Co Pty Ltd & Anor [2005] WASC 110
Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd & Ors [2001] QSC 082
Computer Machinery Co Ltd v Drescher [1983] 1 WLR 1379
Conlan v Adams [2008] WASCA 61
Re Crest Realty Pty Ltd (No 2) (in liq) (1977) ACLR 502; [1977] 1 NSWLR 664
Re Dalewon Pty Ltd (in liq) (2010) 79 ACSR 530; [2010] QSC 311
Re GB Nathan & Co Pty Ltd (in liq) (1991) 5 ACSR 673; (1991) 24 NSWLR 674
Re Solfire Pty Ltd (in liq) (No 2) (1998) 16 ACLR 1156; [1997] QSC 167
Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96

COUNSEL: K E Downes for the applicant
No appearance for the first respondent
No appearance for the second respondent
No appearance for the third respondent
No appearance for the fourth respondent
S Robb for ASIC

SOLICITORS: Blake Dawson for the applicant
No appearance for the first respondent
No appearance for the second respondent
No appearance for the third respondent
No appearance for the fourth respondent
ASIC appearing

[1] **DALTON J:** This proceeding was begun in 2001 by ASIC to restrain the respondents who were operating an unregistered investment management scheme. In 2003 an order was made appointing liquidators to the first and third respondents and to the investment scheme. The liquidators now approach the court seeking directions pursuant to s 479 and s 601EE of the *Corporations Act* 2001 (Cth) (the Act) as to the distributions they propose. They also seek approval of their remuneration pursuant to the order appointing them.

Distribution

[2] The nature and effects of a direction made pursuant to s 479(3) of the Act are discussed in *Re GB Nathan & Co Pty Ltd (in liq)*.[1] I am satisfied this is an appropriate case in which to make such an order. The respondents solicited money from two classes of people. The first class can be called Groundhog Investors. So far as the liquidators have been able to ascertain, around 160 Groundhog Investors responded to invitations on the letterhead of the first respondent to invest in unit trusts of which the first respondent would be trustee and the third respondent would be administration manager. Groundhog Investors were told that funds raised would be lent to a company registered in the United States of America which would invest in property. So far as the liquidators can ascertain, around $3.6 million was invested by Groundhog Investors. This money was deposited into a bank account held by the first respondent with the Commonwealth Bank. The one exception is an investor, Mr Andrew, who deposited monies into an account held with the Commonwealth Bank by the third respondent, the EMS account.

[3] The liquidators' enquiries show that almost all the funds in the Groundhog bank account were paid to third parties overseas and are irrecoverable. The exception is an amount of $89,400 paid into the EMS account. At the time the liquidators took control of the Groundhog bank account it contained only $19. The EMS account, on the other hand, contained an amount of $526,890. During March and April 2001 a large number of payments were made from the EMS account, each in the sum of $1,000. These amounts were paid to Groundhog Investors, purportedly as interest on their investments. The result is that, although money belonging to Groundhog Investors was paid into the EMS account, Groundhog Investors as a group received almost 10 times that amount by way of these "interest payments".

[4] The second group of investors can be called Bank Investors. The liquidators have identified 114 people who invested around $1.7 million with the third respondent, supposedly to purchase memberships of overseas banks. Money received from Bank Investors was either paid to the EMS account or into another account named the Butler Hardy Trust Account. Most of the Bank Investors' money ($1.58 million) was paid into the EMS account. In addition, at some point an amount of $9,222 was paid from the Butler Hardy account into the EMS account pursuant to orders made in the Federal Court. The liquidators have not found any evidence that the banks in which memberships were sold existed.

[5] Someone named Nick Petroulias contacted the liquidators in 2003 and 2004 to assert that he acted for a group of people who entered into partnerships with the third respondent. Essentially it was asserted by Mr Petroulias that the third respondent appointed the people for whom he acted as master agents to sell memberships of the overseas banks in which the Bank Investors were induced to invest. The liquidators found no financial evidence to support Mr Petroulias's claims.

[6] Upon assuming control of the first and third respondents, the liquidators found three bank accounts. Two contained nominal sums and the third contained $526,890. Investigations have not revealed any further assets and the liquidators now stand possessed of these original funds, which, together with interest, amount to about

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1 (1991) 24 NSWLR 674, 677 ff.

$740,000. The records kept by the respondents were poor and incomplete so that it is not possible to form a comprehensive view of the financial dealings of the respondents. After some investigations the liquidators sought approval from the creditors, in May 2003, to conduct further investigations in an effort to trace monies which were apparently sent overseas. Approval was not granted for such investigations. Having regard to the material before me, it seems likely that such an exercise would have been futile.

[7] In summary, the funds the liquidators hold have been contributed by numerous investors in fraudulent schemes. The funds held are insufficient to meet the claims of all the investors. The records of the respondents are so poor that there is no means of accurately identifying the whereabouts of the funds of any of the Groundhog Investors and the vast majority of the funds of the Bank Investors. Funds in the Groundhog bank account and the EMS account were mixed funds.

[8] While it may be possible to discover the whereabouts of some of the Bank Investors' money, any attempt to do so would involve time and expense well beyond what could be justifiable given what little remains of the total amount invested with the respondents. For practical purposes, it is impossible to identify any particular money as being that of any particular investor. In these circumstances the appropriate course is for the liquidators to make a rateable distribution of funds.[2]

[9] The liquidators propose to distribute funds only to Bank Investors, and to treat Mr Andrew as a Bank Investor because, unlike all the other Groundhog Investors, his money was paid to the EMS account. I think that this decision is sensible, pragmatic and, bearing in mind the impossibility of accurately tracing funds, just. There is no evidence to establish the claims made by Mr Petroulias. In relation to the Groundhog Investors, there is no doubt that their investments were received by the first respondent and, but for the amount of around $89,000, are irrecoverable. That amount of $89,000 was paid into the EMS account. However, as a group, Groundhog Investors have received almost 10 times that amount by way of "interest payments" from the EMS account. The Bank Investors will receive a small proportion of their investment back from the monies remaining in the EMS account. That group of investors as a whole has subsidised "interest payments" to the group of Groundhog Investors. In these circumstances, it seems to me that while the liquidators' solution is commercially pragmatic, it is also sufficiently just as between these groups of investors. While individual investors may be disadvantaged by payment on the basis proposed by the liquidators, it will be virtually impossible to determine who those investors are. I will make directions to that effect.

[10] I should record that orders were made on 10 December 2010 and 7 March 2011 to ensure that all persons interested in the outcome of this application had notice of it and I am satisfied that it has been brought to the attention of those people in compliance with those orders. No one but ASIC appeared at the hearing of the application. ASIC's attitude was to support the proposal of the liquidators.

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2 *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd & Ors* [2001] QSC 082 [13].

Remuneration

Liquidators of a Corporate Trustee

[11] Because the funds were paid to the respondents for an investment purpose which has failed, the funds are to be regarded as being held on a resulting trust for the investors.[3] Where liquidators are appointed as officers of a company which is a trustee, questions arise as to whether the liquidators' expenses and remuneration can be paid from trust assets. The relevant principles are set out by Finkelstein J in *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq)*[4]: it is only costs which are attributable to the administration of trust property which are able to be recovered from trust assets. That having been said, when a company in liquidation acted as trustee, much of a liquidator's work can be characterised both as work related to the administration of trust assets and as work related to the winding up of the company – see Needham J in *Re Crest Realty Pty Ltd (No 2) (in liq)*[5]. Work "solely concerned with the winding up and not with the administration of trust assets cannot ordinarily be charged against" trust assets.[6] The liquidators are required to estimate what part of their costs and expenses are attributable to the administration of trust property for the purpose of an application such as this.[7]

[12] There was little work to be undertaken by the liquidators in this case which was not concerned with the administration of the resulting trusts of investors' monies. I am satisfied that reasonable steps have been taken to exclude from the current claim fees (of the liquidators and their lawyers) which relate solely to the winding up.

Evidence that Remuneration Fair and Reasonable

[13] The procedure of approving a liquidator's remuneration and outgoings is a summary one.[8] The rules of evidence are ordinarily not strictly observed.[9] The court must determine for itself whether or not the remuneration claimed is fair and reasonable and the fact that there is no-one who objects to the claim (as in this case) does not detract from the court's duty in this regard.[10] Should the liquidators fail to provide adequate material to enable the court to decide whether or not the claim is reasonable, the court should not make an order.[11] It has been said that the material the liquidators should present to the court is similar to that of a bill of costs in taxable form provided by a solicitor.[12]

[14] In this case the court order appointing the liquidators required that they charge in accordance with a scale of fees and charges, essentially time-costing. The liquidators swear they have charged in accordance with that scale, and I accept that. The liquidators say that the scale is considerably out of date. I would have more sympathy had the liquidation not continued for an unexplained, and in my view,

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3 Above [13].
4 (1999) 30 ACSR 377, 383 ff. See also McMurdo J in *Re Dalewon Pty Ltd (in liq)* (2010) 79 ACSR 530 [11] ff.
5 [1977] 1 NSWLR 664, and the discussion of that in *13 Coromandel*, p 385.
6 *13 Coromandel* (above) p 385.
7 Above, 385.
8 *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96, 102.
9 Above, p 102.
10 *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379, 1385; cited in *Venetian* (above) p 102.
11 *Venetian*, above, p 103.
12 *Re Solfire Pty Ltd (in liq) (No 2)* (1998) 16 ACLR 1156, 1164.

unjustifiable length of time. Liquidators do not discharge the onus of showing that their costs are fair and reasonable merely by proving that their staff spent a certain amount of time performing work described in very broad terms. There must be material before the court which shows that the work undertaken was appropriate and necessary. In *Venetian Nominees Pty Ltd*, above, the Full Court of Western Australia criticised the material put before the court by the liquidator in that case:

> "This document was in very general terms. It identified in an all-embracing fashion certain tasks that were performed, but did not specify who performed them, and how long each task took. Furthermore, many of the tasks were described in such a way that it was impossible to discern why they were necessary, what precisely was involved in performing them, and what level of complexity or responsibility attached to them. The descriptions tended more to conceal this kind of detail rather than reveal information essential to the court's function of determining whether the remuneration charged was fair and reasonable. Typical examples of the descriptions were the following:
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> '• Discussions and correspondence to Smith Broughton and Sons regarding retention of plant and equipment pursuant to lien to satisfy outstanding fees and disbursements.
> • Liaise with Marsh and McLennan, Insurance Brokers regarding insurance of WNP assets …
> • Discussions with Mr Darren Smith regarding Mr Caratti's request to replace three tyres on equipment held at Smith Broughton, discussions with Mr Kevin Pollock regarding the same and correspondence to Mr John Caratti confirming conditional access to vehicles so as to preserve the value of WNP assets.
> • Discussions and correspondence with and to Smith Broughton regarding termination of provisional liquidation and retention of equitable lien over assets.
>
> …'" – p 104.

[15] The liquidators must put evidence before the court which allows the court to make up its own mind as to whether or not the work undertaken was appropriate or necessary: *Australian Foods Co Pty Ltd*.[13] There the material placed before the court was a very general description of tasks – paragraphs [10] and [11] – together with a very detailed schedule of time-costing information – [12]-[16]. While information was provided at a level of generality and a level of great specificity, Sanderson M said this:

> "Having said that, the weakness of the process is immediately obvious. Nowhere in Mr Honey's affidavit is there any indication of what he and his staff were actually doing. That is not to say that an adequate description is not provided of the time spent by each individual. The question, rather, is what were Mr Honey and his colleagues attempting to achieve. That is nowhere explained. Nor is it explained how it is that such significant costs were incurred in such a relatively short period of time. The mechanism and the process

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13 *Australian Securities and Investments Commission v Australian Foods Co Pty Ltd & Anor* [2005] WASC 110 [8].

> which led to the incurring of those costs is explained; but the overall purpose behind the actions of the receiver remains unclear."

[16] In *Australian Foods* Sanderson M was satisfied that the material before him was sufficient for the first stage of the process he was undertaking. I am not undertaking a staged process, but making a final assessment of whether the remuneration and expenses claimed should be approved.

[17] It has been recognised by Australian courts that a time-costing basis for determining remuneration can be appropriate, and having regard to the order appointing the liquidators in this case, they had no option but to apply for approval of remuneration on a time-costing basis. Nonetheless, as McLure JA said in *Conlan v Adams*:[14]

> "Mindful of the disadvantages associated with time-based costing, courts in England and Australia have identified the object to be achieved and criterion to be applied in determining what is reasonable remuneration when faced with a time-cost remuneration claim: *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] BCC 324; *Re Korda; in the Matter of Stockford Ltd* (2004) 140 FCR 424; [2004] FCA 1682. Ferris J said in *Maxwell*:
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> > 'In my judgment it is vital to recognise three things in this field. First, time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against cost. Secondly, time spent is only one of a number of relevant factors … The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done.'
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> The other relevant factors identified by Ferris J were the complexity of the case, the extra responsibilities of the liquidator, the effectiveness of the liquidation and the value and nature of the property involved in the liquidation.
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> The word 'value' in this context does not mean the net financial benefit to the creditors. Rather, it means the value of the services rendered by or on behalf of the liquidator which in turn is addressed by the question whether the time was reasonably expended in the circumstances of the particular liquidation."

[18] In *Conlan v Adams* McLure JA thought the right course if an applicant for remuneration had not established a prima facie case to any portion of his claim was to dismiss the application or adjourn it to allow the applicant to supplement the evidence. Otherwise, I should determine what amount I consider on the evidence is fair having regard to my views of the value of the work performed, i.e. how necessary and appropriate it was.[15]

[19] On the hearing of this matter I flagged my concern to counsel for the liquidators that I felt the sworn descriptions of work by the liquidators, and their lawyers, were too general to enable me to have any real understanding of what work was performed

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14 [2008] WASCA 61 [39].

15 *Conlan v Adams*, above, p 533.

and why it was necessary or appropriate. On the other hand, information in the time-costing schedules exhibited to those affidavits was far too detailed to allow me to have any real understanding of what the liquidators aimed to achieve and how they went about that, in order to judge the reasonableness of the type of work performed, and the value of that work. As an example of generality, the "high level summary of work performed" attached to the liquidators' main affidavit made statements such as that between 28 February 2003 and 31 January 2010, i.e. over seven years, one of the tasks undertaken by the liquidators was, "review requirements of court order with Blake Dawson Waldron, obtaining legal advice as to appropriate method of winding up, preparation for application to court." At the other end of the scale, very large spreadsheets were produced which summarised the time recording of employees of the liquidators. These contained many hundred entries which were quite meaningless in trying to understand what was the substance and purpose of the work performed by the liquidators over time.

[20] Counsel for the liquidators sought 14 days in which to file further affidavit material and submissions to address my concerns. I allowed that to occur, and received further affidavit material – a fifth affidavit from the liquidators and a third from the solicitors – dealing with their claims to remuneration, and further submissions from the liquidators. These new affidavits did allow more understanding of the nature and value of the work than what had gone before.

Size and Nature of Liquidators' Task

[21] The liquidators were appointed on the last day of February 2003. Two weeks later they had identified the three bank accounts which held funds of the respondents and transferred the amounts in those accounts to accounts under their own control. The amounts totalled a little under $527,000. Most of the funds have been invested in term deposit accounts since then. Some money has been retained in a bank account for easy access.

[22] There has been only one meeting of creditors. That was held on 19 May 2003. It lasted not quite one-and-a-quarter hours. Three resolutions were put to the meeting. Each of them sought the meeting's view on undertaking further investigations. In each case the creditors voted against the liquidators doing anything further. It is evident from the minutes of that meeting that by then the two classes of claimants discussed above had been identified, as had the only assets the liquidators have ever recovered. The liquidators advised the meeting that it was their preference to distribute the funds on hand to claimants. That was more than eight years ago.

[23] All the documents associated with the liquidation fit into 10 archive boxes. Of those, the core documents are contained in 18 lever-arch folders. That is, it is by no means a big liquidation in terms of documents. The liquidators say that they sought these records from various sources, they name five or six. They say that they located the directors of the first and third respondents so that they could serve requests for them to complete reports as to the affairs of those respondents. As well, they located two persons of interest to be interviewed. They wrote to the banks who had received funds from the EMS account, but they declined to assist. They tried, but failed, to ascertain the existence of the overseas banks into which Bank Investors' funds were supposed to have been invested. By May 2004 the liquidators had received the proofs of debt in the liquidation. There were 129. These were analysed. The liquidators say that there are records of about 200

telephone calls and emails to and from claimants. Given that the liquidation has lasted over eight years, I do not consider this a large number. The liquidators have released seven communications to claimants over the eight years – most of these are updates. Again, I do not consider this a great number of communications or to have involved a great deal of work.

[24] The liquidators received communications from Mr Petroulias and investigated his claims, including writing letters to firms said to represent partnership claimants and making an FOI application to the Australian Taxation Office. It seems that dealings with Mr Petroulias were at an end by mid-2004.

[25] The liquidators made attempts to trace funds in and out of the EMS account and the Butler Hardy account. I accept this was a relatively substantial task.

[26] In summary, the liquidation was small and uncomplicated. All the identifiable assets were got in by April 2003, and by May 2003 the creditors had voted against making any further enquiries. Any matters involving Mr Petroulias were finalised by 2004. By this stage the work of liquidating the companies and scheme was virtually over, as one might have hoped given its nature. Remarkably, the liquidations did not come to an end then, over six years was spent essentially preparing for this application.

Delay and Preparation for this Application

[27] Preparation for this application began in November 2004. There is nothing in the material to explain why it took nearly seven years to come to court. Preparation of the main affidavit sworn on this application (the Liquidators' first affidavit) seems to have occupied most of this time. It was some 32 pages of text, followed by over 4,000 pages of exhibits. Its preparation began in November 2004 and finished in May 2010. The reason for the volume of exhibits was said to be the liquidators' duty to put all material facts before the court on an application such as this. It is excessive and wasteful to have exhibited such volumes of primary documents to the affidavit. The liquidators could quite easily have deposed to having perused various classes of documents and drawn various conclusions. For example, over 1,000 pages of exhibits comprise the documents supplied by Mr Petroulias to the liquidators which, on examination, the liquidators concluded did not establish a claim. There were two other exhibits of over 1,000 pages which were quite unnecessary.

[28] The liquidators summarised matters relating to the preparation of their first affidavit as follows:

> "…
>
> (a) review initial draft application, affidavit and other documents for the purposes of this Application (November 2004);
>
> (b) prepare additional material for Application (January to April 2005);
>
> (c) queries to lawyers as to material then being prepared (April 2005);
>
> (d) provision of material to lawyers for purposes of Application (May 2005)

(e) provide further material and information to lawyers (July 2005);

(f) considering lawyers' request material and analysis of claimants proofs of debt (August 2005);

(g) further information and analysis of claimants proof of debt provided to lawyers (December 2005);

(h) lawyers provide feedback and queries on proof of debt information, and requests for revised analysis (January 2006);

(i) provide further material to lawyers (February 2006);

(j) provide fee material and proof of debt further detail to lawyers (October 2006);

(k) revised draft affidavit material received from lawyers (March 2007);

(l) provide further material for draft affidavit (April 2007);

(m) provide additional material for draft affidavit (May 2007);

(n) provide complete records support reconciliation exercise to lawyers (June 2007);

(o) further feedback from lawyers on contents of remuneration claim (June/July 2007);

(p) receive and review revised affidavit prepared by lawyers including consolidated exhibits based on instructions received to date (November 2007);

(q) affidavit sent to counsel to be settled (22 November 2007);

(r) additional information requested by counsel through Blake Dawson Waldron (March 2008);

(s) consolidate outstanding enquiries and taking steps to address them (July 2008);

(t) provide additional material to lawyers for draft affidavit (October 2008 to March 2009);

(u) request for information from lawyers (May 2009);

(v) provide additional material to lawyers for draft of First Affidavit (June 2009);

(w) obtain and consider counsel advice on revised draft of First Affidavit (July 2009);

(x) prepare further material in response to requests from Counsel (August 2009);

(y) provide lawyers with the Petroulias records for inclusion into my First Affidavit (September 2009);

(z) updating annexures and other information to enable execution copy to be delivered (December 2009);

(aa) review draft affidavit (January to March 2010);

(bb) First Affidavit (10 volumes and 4,101 pages) executed (May 2010)."

[29] Both the time spent, and the inefficiency in achieving any useful result, is extraordinary and unjustified. During this time the creditors of the respondents have been held out of what little money remains of their investments. In terms of assessing the reasonableness of the fees of both the liquidators and their lawyers, the gross inefficiency displayed in terms of time must necessarily impact upon costs incurred. There are obvious matters, such as the law having to be updated twice after the initial advice was provided, (see below at [41]). No doubt throughout this long process, some of the staff at both the liquidators' office and the solicitors' office changed more than once. Both the liquidators and the solicitor swear that they have excluded time which was consequent on changes in staff. While time earmarked as handover time, and time spent reading to familiarise new staff with the relevant files, might be identifiable on timesheets, I very much doubt that all time lost because new staff members were working on the matter could be adequately identified and eliminated from the liquidators' and the solicitors' bills. Furthermore, even if only one staff member from the solicitors' firm or the liquidators' office worked on the matter from beginning to end, there is no doubt that much more time would necessarily be spent where months, and sometimes years, passed between consideration of material relevant to the preparation of the application and main affidavit of the liquidators. Staff members must have spent time re-familiarising themselves with the detail of both the accounting and legal work which fed into the application and the affidavits supporting it after delays of this length.

[30] Not only this, but the main affidavit produced was excessive in the material it exhibited and, so far as it dealt with the liquidators' claim to remuneration, was not sufficient to enable me to understand the work performed for the purpose of this application.

[31] When one looks at the amount of time and cost which has gone into preparing for this application, as compared to the time and cost which was spent in liquidating the companies and scheme, a real sense of disproportion is evident.

Liquidators' Fees Claimed

[32] Using the categorisation of work presented in the fifth affidavit filed by the liquidators in this matter, I deal with the specifics of the amounts claimed by the liquidators for their fees:

(a) The liquidators claim $8,745.70 in respect of 60 hours spent organising the one meeting of creditors which took place in May 2003. I allow that amount in full.

(b) The liquidators claim $68,796.40 as amounts for "general investigations" from the time of appointment until the completion of the liquidators' first affidavit (May 2010). I reduce that amount by one-third, having regard to the fact that the liquidation ought to have been finalised in the first half of 2005 and that the value of work charged on a time-costing basis must necessarily be reduced by this marked inefficiency – see my comments above. I allow $45,864.27 for this item.

(c) In respect of work done receiving and adjudicating proofs of debt, the liquidators claim $6,670.20. I allow this amount in full.

(d) In respect of time spent dealing with creditor enquiries and communications, the liquidators claim the amount of $14,217.70. I reduce that amount by one-third. If the liquidation had been finalised promptly, there would no doubt have been many less follow-up enquiries and updating communications to attend to. The list of communications published to all creditors is mostly updates. In reducing this amount by only one-third, I make allowance for the fact that the majority of time-consuming enquiries and communications would have occurred at the beginning of the liquidation, with creditors introducing themselves and putting their cases to the liquidators. I allow the amount of $9,478.46.

(e) The liquidators claim the amount of $21,406.70 as the amount which has charged, "associated with ongoing investment of funds secured from the EMS account". This has involved investing in a term deposit and opening a bank account which has not been the subject of many transactions. When the fifth affidavit of the liquidators is consulted as to what work was performed for the amount charged, one learns that BAS statements and ASIC accounts were prepared. Monthly reconciliations of the bank account were conducted and quarterly reconciliations of the term deposit were conducted. I reduce the amount claimed by three-quarters. The reduction is in large part to take account of the fact that the liquidation ought to have been finalised about six years before it was. I also have some scepticism as to the necessity and value of the work of tending so closely to this one very simple investment. I allow the amount of $5,350.

(f) The liquidators claim an amount of $63,903.40 as relating to work done to prepare this application, and "reporting to creditors generally." I cannot see that the amount claimed is justifiable when the description of work involved is examined. Time was spent preparing the liquidators' first affidavit over the period November 2004-May 2010. I have explained my views about the inefficiency and waste involved. There were directions made by the court leading up to the hearing of this application, as to notification of creditors and service, etc. Instructions from the liquidators and affidavit material as to service were necessary to comply with those directions. As well, three relatively short supplementary affidavits were prepared as to the substance of the application over that time. Notification to creditors produced some enquiries to the liquidators which needed to be answered. The liquidators swear that this work included instructions to enable their solicitors to file an affidavit as to their fees, which are claimed as outgoings (see below). I cannot imagine that much time could justifiably be claimed in that regard. I allow half the amount claimed, $31,951.

(g) The liquidators claim an amount of $29,044.60 for preparation of remuneration schedules. These were the lengthy spreadsheets which I have criticised as being too specific to give any real notion of the necessity for, or value of, work performed. They are exhibited to the liquidators' first affidavit. Essentially they are schedules of information compiled from the timesheets kept by the employees of the liquidators. My conclusion is that there was little value in the work so far as it was for the purpose of supporting the claim for remuneration. These schedules fulfilled a second function in that they showed the parts of the work which were not related (wholly or partly) to the

administration of the trust funds, but were solely related to the winding up. An analysis to identify this work was necessary to be performed by the liquidators and to that extent some of the time spent preparing these schedules was usefully spent, although I imagine a more efficient way of identifying time spent on non-trust activities could have been found than the preparation of these very large schedules.

The distinction between time spent on trust matters, as opposed to winding up matters, was not originally observed by the liquidators' staff. After legal advice was taken, at some point (unspecified) during the eight years of the liquidation, staff were instructed to make this distinction in recording their time, and all time recorded previously was re-analysed to make this distinction. Solicitors and counsel were involved in this matter from 2003. It does not seem fair or reasonable to charge the general body of creditors for work which was effectively correcting an omission which should reasonably have been identified early on. It is impossible to be precise about what proportion of time was spent correcting the omission because the affidavit material is imprecise. For all the above reasons I allow an amount of $5,000.

(h) The liquidators claim an amount of $9,000 as fees paid for taxation advice to PricewaterhouseCoopers. This amount was claimed as a disbursement. In truth, the invoice was simply provided by a separate division of PricewaterhouseCoopers (for whom the liquidators work). The invoice reveals that $5,000 was spent obtaining tax advice, "in relation to taxation issues surrounding the Groundhog Investment scheme" and that the remaining $4,000 was spent having the specialist tax division of PricewaterhouseCoopers lodge tax returns for the third respondent over five years and check the notices of assessment issued by the Australian Taxation Office.

Given that the only income earned was that on a term deposit, I cannot see why specialist taxation expertise was necessary. This was a matter I particularly raised during the hearing of the application. Counsel appearing for the liquidators could not explain why expert tax advice was necessary. While a considerable number of words are devoted to an explanation in the affidavits filed subsequently, they do not shed a great deal of light on the topic. I still am unable to see why specialist advice was necessary. There is nothing about the companies or scheme liquidated that I see as so out of the normal run of liquidators' work as to need special advice. The necessity is not explained.

As to the payment for tax returns to be lodged, this seems to me something which could easily have been managed at far less cost by an accountant employed in the liquidators' office, possibly the person who spent their time reconciling the bank account on a monthly basis. In any case, had the liquidation been finalised in a timely way, five or six fewer tax returns would have been necessary. I allow no part of this claim.

(i) Disbursements of $29,968.27 already paid are claimed. This amount consists in roughly equal measure of solicitors' fees paid to Blake Dawson and disbursements such as bank fees, statutory and similar charges, and amounts paid to the Australian Taxation Office. I allow these disbursements but note in considering the reasonableness of the legal fees claimed (below) that allowance has already been made for $14,935 in solicitors' fees.

(j) The liquidators claim an amount of $4,343.04 for advertising costs. I allow this.

[33] In total I approve liquidators' fees and disbursements already paid in the amount of $147,370.94.

Legal Fees Incurred by the Liquidators

[34] The material as to the liquidators' claim for unpaid legal fees is, notwithstanding an additional affidavit filed since the hearing, not as clear as it should be. The supplementary submissions which accompanied the affidavit material filed after the hearing show a claim for an amount of $267,439.68 in relation to unpaid legal fees. Like the affidavit material originally filed by the liquidators, the affidavit material originally filed by the solicitors was of little assistance in understanding at any meaningful level what tasks were undertaken by the lawyers and why they were perceived as necessary. After the hearing, the solicitors filed a third affidavit which exhibits a schedule containing a narration of work performed for each of the financial years over which this liquidation has spanned. I shall refer to that document as the solicitors' schedule.

[35] The solicitors' schedule does contain information which is more useful in assessing the necessity for the work performed and the value of that work than the material previously filed by the solicitors. However, it does not total $267,439.68, but $282,395.27, if I assume that disbursements are to be added to fees in order to achieve the total claimed, which I think is probably the case, although this is nowhere stated. Perhaps the amount of $14,935 is to be subtracted from the amount of $282,395.27 claimed in the solicitors' schedule, the material is not clear, and a comparison of the invoices rendered and exhibited to earlier material does not assist. In fact it reveals that, contrary to what is sworn in the solicitors' third affidavit, the amounts on the invoices exhibited to the earlier affidavits do not tally with the amounts claimed in the solicitors' schedule, whether disbursements are included or not. Even if the amount of $14,935 is subtracted from $282,395.27, a total of $267,460.27 is obtained, again, not the amount claimed. Despite the volume of material and submissions produced the reason for this is not clear. The material does not provide the assistance it ought to provide. In these circumstances, having already given the liquidators a chance to supplement the material, I do the best I can with what they have produced. I use the scheme of the solicitors' schedule in assessing the claim.

[36] The solicitors engaged by the liquidators charged $22,738 in the year ending June 2003. I allow that claim. The solicitors' schedule provides sufficient detail for me to accept that the fees in respect of this first financial year are reasonable, and that the work performed was appropriate.

[37] The solicitors charge $29,566 for the year ending 30 June 2004. A deal of the work described in the solicitors' schedule in relation to this year relates to consideration of avenues open to the liquidators to trace monies, including through international bank accounts, and to potential claims against third parties open to the liquidators. Yet in May 2003 the creditors voted not to investigate such avenues. In light of this I reduce the amount claimed by one-third, to $19,711.

[38] Further, it seems that the amount of $14,935 was paid in this year, see paragraph 20 of the liquidators' second affidavit filed 17 March 2011, and doing the best I can to reconcile the amounts claimed in the solicitors' schedule with the amount claimed for legal fees, it seems that this payment is not taken into account in the solicitors' schedule. I therefore allow $4,776 in respect of fees claimed in the year ended 30 June 2004.

[39] Almost all the legal fees incurred after this time are to prepare this application. The only exception according to the narrations in the solicitors' schedule is that in the year ending 30 June 2009 the solicitors became involved in discussing "taxation law concepts" with the PricewaterhouseCoopers tax accountants, who gave the advice mentioned at (h) above. The solicitors also provided a formal advice. In that year (30.06.09) $11,336 was billed, it is impossible to know how much of that related to the taxation advice. As discussed above, no comprehensible explanation has been given as to why the advice was necessary. I make the assumption from the narration for this year that half the amount of $11,336 related to this tax advice, and disallow $5,668 in consequence. I note that the narrations on the invoices are not of assistance in this regard.

[40] Using the amount of total fees claimed and unpaid, $267,439.68, and subtracting $43,037[16] shows that $224,402.68 is claimed in relation to the preparation of this application. This amount is for the time period ending three days before the application was heard. It does not include counsels' fees or solicitors' fees on the application itself. This amount is not a fair and reasonable charge for the work involved in bringing this application.

[41] The material does not allow me to identify particular work which was misguided, inefficient or unnecessary, because it is not sufficiently particular. It is possible to identify work which had to be repeated because of the excessive delay in the matter. For instance, in the year ending 30 June 2007 it was necessary to update research which had been carried out some three to four years earlier on legal matters relevant to the application. The solicitors' schedule also states that, in the year ended 30 June 2007, advice was necessary in relation to amendments to the *Corporations Act* which commenced in December 2007 (sic). In the year ended 30 June 2011 the case law as to applications of this type once again was required to be updated.

[42] Further, the excessive delay in the matter must have produced inefficiencies which have contributed to the costs being unreasonably high, as discussed above. However, there must be more than this to account for the quantum of costs. The description of drafts of the liquidators' first affidavit travelling from the liquidators to counsel, and back again several times, see paragraph [28] above, are borne out by the narrations in the solicitors' schedule, in fact more such detail is added. There is nothing which allows me see why it was necessary to seek instructions from the liquidators, and advice from counsel so many times. Even then, and despite its great volume, the material produced was insufficient to allow me to determine the matters relevant to this application.

[43] The liquidation itself was not complex. The distributions proposed are not complex; there is some law involved in the matter, but nothing out of the ordinary. It is true that directions were required to ensure that persons with an interest were

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[16] (a) $22,738 for year ended June 2003; (b) $14,631 for year ended June 2004, i.e. $29,566 less $14,935, and (c) $5,668, in relation to taxation advice.

notified, but I cannot see why the matter was put on the commercial list, rather than simply being dealt with in the applications list for this purpose. The matter was put on the civil list for hearing, rather than being heard in the applications list, but it was over in a morning. The application should really have been a simple matter where the liquidators explained to the court their conclusions as to ownership of the monies recovered and put before the court some straightforward material as to what they had done in reaching those conclusions so as to justify their costs. Instead the making of this application took on a life of its own, lasting for more than six years, about three times as long as the work of liquidation, and costing much more than the work of the liquidation. I allow the amount of $85,000 as fair and reasonable value for the legal work performed in bringing this application.

[44] In total I approve $112,514 of unpaid disbursements, making a total of $259,885 together with the amount at [33] above.

Vacation of Orders

[45] The liquidators sought that orders made on an interlocutory basis in 2001 ought to be vacated, to a limited extent. With an eye to preserving what remained of investors' funds, various interlocutory orders were made early in the history of this matter. On 3 September 2001 Mullins J made orders that:

> "4. Until further order, the first respondent, its servants or agents, not withdraw moneys from or otherwise deal with funds held in [the Groundhog bank account].
>
> 5. Until further order, the third respondent, its servants or agents not withdraw moneys from or otherwise deal with funds held in [the EMS account] …"

[46] These orders were continued by an order of Mackenzie J dated 18 September 2001. These orders were made before the liquidators were appointed. One of the liquidators swears that when he was appointed, in accordance with his normal practice of prudence, he transferred the amounts standing in both the Groundhog bank account and the EMS account into new bank accounts to ensure that nobody associated with the company was able to access the funds. Technically therefore there was a breach of Mullins J's order, although at the time the receivers were not aware of its provisions. It seems sensible to make orders vacating the orders of Mullins J and Mackenzie J so far as is necessary to excise from their operation the liquidators' actions in transferring monies to new accounts as described.

ASIC's Attitude to this Application

[47] ASIC appeared on this application. As to the remuneration sought by the liquidators its only submission was:

> "As to the remuneration and out of pocket expenses sought by the Liquidators:
>
> (a) ASIC is satisfied that the remuneration and out of pocket expenses are not excessive having regard to the rates of PricewaterhouseCoopers, and the Insolvency Practitioners Association of Australia's now redundant schedule of fees;

(b) ASIC is satisfied that the Liquidators have adequately demonstrated the remuneration and out of pocket expenses sought are justified;

…"

[48] This submission made no reference to the evidence. After I expressed concerns at the hearing of this matter and allowed the liquidators, and ASIC, further time to supplement their submissions ASIC made the following written submission.

"1. With regards to the material filed by the Liquidators up to and at the hearing of their interlocutory application on 9 June 2011, and the Liquidators' supplementary outline of argument and further affidavits filed 24 June 2011, ASIC is satisfied that the Liquidators have adequately substantiated their claims to remuneration and out of pocket expenses.

2. However as noted at the hearing on 9 June 2011, ASIC has not undertaken the exercise of assessing in forensic detail the time costed accounts of the Liquidators' and their solicitors' work. Nor has ASIC actively monitored the Court appointed Liquidators. ASIC respectfully submits that this is in line with ASIC's responsibilities once a Court ordered liquidation has commenced.

3. ASIC submits that absent any concerns regarding a liquidator's conduct, it is not ASIC's responsibility or duty to actively monitor official liquidators who, as officers of the Court, have an obligation to undertake their duties in a timely and efficient manner.

4. ASIC accepts that the liquidation the subject of this application has taken a considerable amount of time. ASIC is alert to any implication that there may be utility in imposing a further duty or obligation on ASIC to actively monitor every liquidator that ASIC has caused to be involved in a liquidation or administration. ASIC submits that the imposition of such a duty or obligation would see an unreasonable burden placed on ASIC's finite resources.

5. Should ASIC be called by the Court to consider a discrete question arising from the supplementary material provided by the Liquidators, ASIC will further assist."

[49] It will be recalled that ASIC originally commenced these proceedings in 2001. The liquidation revealed that over $5.3 million was invested in the unregistered investment management scheme. It will be remembered that around $527,000 was recovered, now around $740,000 allowing for interest. The amount claimed for remuneration and expenses, to date, in this application was $532,331. As explained above, my view is that the remuneration claim did not withstand scrutiny.

Orders

[50] I order that:

(a) The orders made on 3 and 18 September 2001 are vacated nunc pro tunc insofar as they restrained the Liquidators appointed by order of 28 February 2003 (the Liquidators) from withdrawing money from, or otherwise dealing with, funds held in bank accounts held with the Commonwealth Bank of Australia Limited, BSB number 064 138, Account numbers 1025 6134, 0124 7289 and 1025 5537;

(b) Remuneration and expenses of the Liquidators are approved in an amount of $259,885 up to and including 6 June 2011;

(c) The Liquidators may pay $229,917 from the funds they hold on behalf of the first and third respondents in satisfaction of such of their fees and expenses as have not been paid to date;

(d) After paying such of their own fees and expenses as are approved by the court, the Liquidators may distribute all funds held on behalf of the first and third respondents on a pro rata basis to satisfy the claims of those persons who are named in exhibit IRH-14 to the affidavit of Ian Richard Hall filed on 3 December 2010, and to Mr Stephen Andrew.

[51] I direct that:

(a) By 10 October 2011 the Liquidators file and serve on the Australian Securities and Investments Commission any further affidavit material and submissions upon which they rely to obtain approval of remuneration and expenses;

(b) On or before 17 October 2011 Australian Securities and Investments Commission file any further affidavit material and submissions in this matter appertaining to the material filed in accordance with direction (a) above;

(c) If either the Liquidators or the Australian Securities and Investments Commission contend that a further oral hearing in this matter is necessary they state that, and the reasons for that contention, in the material filed in accordance with paragraphs (a) and (b) above;

(d) The hearing of the application filed 10 December 2010 is otherwise adjourned to a date to be fixed.