SUPREME COURT OF QUEENSLAND

CITATION:	*Lawloan Mortgages Pty Ltd v Lawloan Mortgages Pty Ltd* [2002] QSC 302
PARTIES:	**LAWLOAN MORTGAGES PTY LTD** **ACN 066 587 068** (applicant) **LAWLOAN MORTGAGES PTY LTD** **ACN 066 587 068** (respondent)
FILE NO/S:	S 2972 of 2002
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	2 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2002
JUDGE:	Holmes J
ORDERS:	**1. The winding up of the schemes be undertaken by the applicant with the supervision of Messrs. McIntosh and Park** **2. Orders as per the draft provided by the applicant** **3. Parties to be heard as to costs**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – WINDING-UP – WINDING-UP BY COURT Where the applicant seeks declarations in relation to nine loan arrangements conducted via its contributory mortgage lending business – where the applicant seeks that should a winding-up order be made in respect of the loans, it be appointed for that purpose – where ASIC intervenes in the application to seek that the winding-up be carried out by an independent liquidator – whether the remaining loans constitute one "managed investment" scheme as defined by s9 of the *Corporations Act* or nine such schemes – whether the applicant has 'operated' the investment scheme or schemes or whether it has 'taken steps to wind up' the scheme or schemes pursuant to s 601ED(6) of the *Corporations Act* – whether the winding-up should be conducted by the applicant itself under the supervision of registered liquidators.

Corporations Act 2001 (Cth)
Queensland Law Society Rules 1987

Australian Securities & Investment Commission v Chase Capital Management Pty Ltd (2001) 36 ACSR 778
Australian Securities & Investment Commission v Knightsbridge Managed Funds Ltd [2001] WASC 339
Australian Securities and Investments Commission v Koala [2002] NSWSC 451
Australian Securities & Investment Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561
Australian Securities & Investment Commission v Takaran [2002] NSWSC 834
Australian Softwoods Forests Pty Ltd v Attorney-General (NSW) (1981) 148 CLR 121
Beckwith v R (1976) 135 CLR 569
Interstate Mortgages and Investments Pty Ltd v Australian Securities & Investment Commission, unreported NSWSC 22 July 2002
Re Crust 'n' Crumbs Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76
Re Southern Cross Airlines Holdings Limited (in liq) [2000] 1 Qd R 84

COUNSEL: Mr O'Donnell QC with Mr Perkins for the applicant
Mr Douglas QC with Mr Roney for ASIC
Mr Bain QC for the contributors

SOLICITORS: Dibbs Baker Gosling for the applicant
Gadens Lawyers for ASIC
Murrell Stephenson for the contributors

Background

[1] Lawloan Mortgages Pty Ltd, as its name suggests, is a corporate vehicle through which a firm of solicitors (Elliott & Harvey) has conducted a contributory mortgage lending business. Of some 754 loans it has managed, only nine remain on foot. It seeks certain declarations in relation to the nine remaining loan arrangements, or, should a winding up order be made in respect of them, asks that it be appointed for that purpose. The Australian Securities and Investment Commission (ASIC) has intervened in the application, and seeks a winding up to be carried out by an independent liquidator. A number of contributors to the applicant's loan arrangements sought, and were granted, leave to intervene. Those contributors support the applicant's position as to its remaining in control of bringing the loans to conclusion.

[2] At the time the applicant commenced its mortgage lending business in 1995, it was governed by the requirements of the *Queensland Law Society Rules* 1987. On 1 July 1998, Chapter 5C, which deals with managed investment schemes, was

inserted into the *Corporations Law*. It was common ground that the type of arrangement promoted by the applicant would meet the definition of "managed investment scheme" in s 9 of the *Corporations Act*; but there was this difference between the applicant and ASIC: the former submitted that each of the loans arranged by it met the definition, while ASIC maintained that it was the lending scheme as a whole which was the managed investment scheme.

[3] Part 5C.1 of the Chapter provides for registration of managed investment schemes. In particular, s 601 ED(1)(b) requires registration of a managed investment scheme if "it was promoted by a person……who was, when the scheme was promoted , in the business of promoting managed investment schemes." It was accepted that the mortgage loan arrangements in question here were promoted by the applicant, which itself fell within the s 601 ED(1)(b) description.

[4] After the introduction of Chapter 5C, the lending business associated with Elliott & Harvey was conducted by a public company as a registered scheme under that chapter. The loans which the applicant continued to administer were not registered, but it had the benefit of provision made by ASIC to relieve small industry supervised schemes from the operations of Chapter 5C. Using its power under s 601QA(1)(a), ASIC issued, in February 2000, a class order exempting such schemes from the provisions of the Chapter, on the basis that such schemes would be finalised by November 2001. In August 2001, ASIC granted an extension of the class order until 28 February 2002, expressing its intention that steps be taken "to plan for the conclusion of the scheme by that date". Pursuant to those orders the applicant was thus entitled to operate the loans (or each of them) as an unregistered management investment scheme until 28 February 2002.

[5] The applicant takes the position that each of the nine loans is a separate mortgage lending scheme, and seeks a declaration in respect of each scheme that, by reason of the operation of s 601ED(6)(b), it is not being operated by the applicant as a managed investment scheme (that is, because the applicant is, on its contention, merely taking steps to wind up each scheme). If any or all of the schemes are to be wound up under s 601ED(5), the applicant seeks orders that it undertake the winding up, with the retention of experienced liquidators to advise and supervise it in that process.

The issues

[6] The issues, then, on the application are these:

1. Whether the remaining nine loans constitute one "managed investment scheme" as defined by s 9 of the *Corporations Act* or nine such schemes.

2. Whether the applicant has operated the scheme or schemes since 1 March 2002 (when the ASIC class order ceased in effect) or whether it has merely taken steps to wind it or them up. The latter entails consideration of what the expression "taking steps to wind up" as used in 601ED(6) of the *Corporations Act* means.

3. If the scheme or schemes is or are being operated in contravention of s 601ED(5), there is no argument that it or they should not be wound up; the issue is as to who should be appointed to carry out the winding up. Here ASIC argues that the applicant is unsuitable because of conflict of interest,

mismanagement and inappropriate conduct in dealing with investors. The applicant on the other hand argues that it has the advantage of familiarity with the loans; that its involvement will be cheaper; that the interests of investors can be protected by appointment of liquidators as supervisors of the winding up; and that the majority of investors wish the appointment of the applicant to conduct the winding up.

The loan scheme(s)

[7] The applicant's sole director and shareholder was Michael Harvey, who was also the principal of a firm of solicitors, Elliott & Harvey. Elliott & Harvey invited potential investors to contribute funds to be pooled for advance to borrowers on security at relatively high interest rates. When a loan was sought, the firm advised possible contributors of what was known of the borrowers, the conditions applicable to the proposed loan, the security available and its value, and invited contributions. Investors were told that the loan would be managed by the applicant as the vehicle for Elliott & Harvey.

[8] The applicant as trustee was the lender and mortgagee in respect of the properties offered as security. It charged investors a fixed percentage of principal in management fees, payable monthly. Monies advanced by investors were paid by them to the trust account of Elliott & Harvey pending disbursement. According to Mr Harvey, he supervised the applicant's mortgage lending business with the assistance of Ms Kerrie Guy, also an employee of Elliott & Harvey. The firm had little to do with the management of the loans if they were paid out in the ordinary course, but would step in as the applicant's agent to undertake management and realisation of assets if the loans fell into default.

The loan to Hotel & Motel Resort Brokers Pty Ltd

The setting up of the loan

[9] In November 1996 investors were invited to contribute to a loan to Hotel & Motel Resort Brokers Pty Ltd in the amount of $1,470,000, to be secured by a mortgage over Bungunyah Manor Resort, valued at $2,550,000. The resort consisted of a historic homestead with a restaurant and bar, associated motel-style units and other facilities appropriate to holiday and conference accommodation. The term of the loan was 12 months, and interest was payable at 18 per cent reducible to 13 per cent for prompt payment. The applicant charged a 1 per cent management fee. The loan was guaranteed by Adrian McFie.

[10] In November 1997, when the principal became repayable, the borrower sought a further advance to take the amount of the loan to $1,650,000. The security was valued afresh at $2,550,000. The guarantors were now McFie, and one Clint Savage. The interest rate on the renegotiated loan was 11.5 per cent with a 5 per cent late payment penalty. The management fee remained at 1 per cent per annum.

[11] The loan was rolled over again in 1998 for a further 12 months with, at this stage, Randall McFie and Adrian McFie as guarantors. As was later discovered, Mr Randall McFie had, only a matter of months previously, been discharged from bankruptcy and he became bankrupt again in November 2001. It appears from a

memorandum of fees rendered to the applicant that there was a further variation of mortgage in mid-1999.

Establishment, brokerage and legal fees charged to the borrower

[12] When the loan was set up, Elliott & Harvey rendered an account to the applicant including costs of $20,000, which was, I infer (consistent with the practice in other cases) to be recouped from the advance. When the loan was restructured in 1997, a further $20,000 was charged in professional legal costs for variation of the loan facility. At the same time the borrower was required to meet the costs of Elliott & Harvey in respect of a default in payment from June 1998 to October 1998, in an amount of $3,346.20. In June 1999, a further account including $16,500 for professional legal costs was rendered to the applicant for the costs of a variation of the bill of mortgage. There is no documentation of any brokerage or establishment fee charged in respect of this loan, although in other cases fees of between 2 and 3 per cent were charged and paid from the advance.

Default and realisation attempts

[13] The borrowers ceased to pay interest from February 2000, and the principal due for repayment on 26 November 2000 was not paid. The applicant entered into possession of the resort property in April 2000. After various unsuccessful attempts at negotiating a sale, the property was auctioned on 6 March 2002, but failed to reach the reserve. After auction, a contract was entered into for its sale at $1,100,000, but the purchaser was unable to complete and a deposit of $110,000 was forfeited.

The current position

[14] Meanwhile the property continued to be operated as a resort. In the ten months from 3 April 2000 to 31 January 2001, according to a Profit & Loss Statement tendered, its net loss was $40,024. An Income & Expenditure Statement for the period between 1 February 2002 and 30 June 2002 showed an excess of expenditure over income of $23,543. Mr Harvey said that the turnover of the business had improved in recent months, and it was now able to meet its operating expenses.

[15] As at 15 July 2002, unpaid interest totalled $404,250. There was a total of $86,815 in outlays outstanding. That figure included the wages of an employee of Elliott & Harvey who was acting as manager of the resort. The estimated legal costs of Elliott & Harvey not yet billed were between $120,000 and $150,000, with a further estimate of costs of proceedings against the first valuer at $25,000. Outstanding management fees were $38,500; they continued to accrue at $1,375 per month.

[16] It should be noted here that in the course of his evidence Mr Harvey said that if the applicant were appointed to wind up the scheme it would not charge management fees unless investors recovered principal and interest at the lower rate applicable (that is, the rate for prompt payment; 12 per cent in this case). Similarly, Elliott & Harvey would not charge legal fees unless contributors recovered principal and interest at the lower rate, although outlays would be charged.

[17] Mr Harvey said proceedings against the original valuer (to whom notice of possible action had been given) were contemplated, depending on what price was ultimately received from the property. A valuation carried out in February 2002 assessed the

value of the property at $1,290,000. It remains on the market. The real estate agent in charge of its marketing had suggested that it be left for a few months before being actively marketed again.

The investors' views

[18] Of the 12 investors in this loan, 11 had intervened to support the applicant. The value of their collective share of the loan was $1,600,000. Mr Brian O'Loughlin, a director of one of the intervenors, Timshell Nominees Pty Ltd, which had invested, as trustee, amounts of $70,000 and $40,000, Dr Russell Langley who had contributed $90,\000 on his own account and managed a second investment of $90,000, and Mr Patrick Luttrell, who had invested $55,000, swore affidavits. Mr O'Loughlin expressed his approval of the applicant's management of this and other loans to which his company had contributed, and his fear that a liquidator would, if appointed, absorb in fees the contributors' equity in the loans. Dr Langley's views were to similar effect. Mr Luttrell gave evidence in person. He had invested in a number of loans with Lawloan held with the applicant and presently had current investments in this loan ($55,000) and two others (Oceansand and Oceanbend). He was content with his dealings with the applicant and with the marketing of the various properties once default occurred. He had had an unhappy experience with a liquidator in another mortgage lending operation involving a solicitor.

[19] The investor which did not intervene, CDC (Aust) Limited, had contributed $50,000 It was represented by Mr Dorevitch, a director. Mr Dorevitch considered that the property should have been sold much more quickly after default even if a loss of capital were to be sustained.

The loan to Lambglen Pty Ltd

The setting up of the loan

[20] In May 1997 five investors contributed to a loan to Lambglen Pty Ltd. The amount of the advance was $248,000, to be secured by first mortgage over one lot of land at Canungra (valued at $160,000) and three lots at Beaudesert (valued at $$285,000). In addition, a mortgage debenture was given over the borrower's assets. The loan was guaranteed by Mr Kenneth Heibonn, a director and shareholder of Lambglen Pty Ltd. The term of the loan was 12 months, but it was rolled over for a further year. Interest was to be charged at 17 per cent reducible to 12 per cent for prompt payment, and the applicant charged a further 1 per cent management fee.

Establishment, brokerage and legal fees charged to the borrower

[21] Elliott & Harvey charged the applicant $6,750 by way of professional costs in &Associates, but the amount is not known.

Default and realisation attempts

[22] The principal was not paid on the due date of 2 May 1999, and the borrower ceased to pay interest from 2 July 2000. The applicant entered into possession, and one of the four properties under mortgage was sold, leaving a balance of $166,500 outstanding. In September 2000 a statement of claim was issued for the principal and arrears of interest against the borrower and the guarantor. The applicant lodged

caveats over two other properties registered in the name of the guarantor. In January 2002 notice was given to the valuer of the property of a possible claim for negligence. As one avenue of recouping the unpaid principal, the applicant expended $11,835 on putting tracks through the properties to enable timber collection, but it proved that the cost of extracting the timber made the notion unviable.

The current position

[23] As at 16 July 2002, the outstanding principal, $166,500, remained unpaid. Some $46,148.21 was outstanding in interest, which was continuing to accrue at $1,562.50 per month. Legal costs incurred up to October 2001 had been assessed at $20,200, with a further estimate of costs subsequently incurred but unassessed at between $2,000 and $4,000. Future legal costs required to finalise the loan were estimated at $10,000. Arrears of the one per cent management fee chargeable by the applicant amounted to $4,897.91 and were accruing at the rate of $138.75 per month. There was an amount of $16,854.17 outstanding by way of outlays. Further outlays in an amount of $30,000 for an advertising campaign and the cost of litigation were anticipated.

[24] In May 2002, Elliott & Harvey advised investors that an offer had been made by the Bill Matthews group, whose vehicle was Advanced Assets (Australia) Ltd, to acquire the mortgage for the amount of $200,000, together with an issue of shares of an indeterminate value in a public company yet to be listed. Four out of the five contributors had voted to accept the proposal. It should be noted, however, that documentation of the Advanced Assets offer is scant and short of detail. A letter exhibited to Mr Harvey's affidavit seems to contemplate a package of offers for the properties securing the Lambglen, Paradise Village and Aged Care Lodges loans, and is unspecific as to the amounts offered. The letter also proposes that any deposit be refundable in any event.

The investors' views

[25] Of the five investors in the loan, four were among those given leave to intervene in support of the applicant's position, their contribution representing $134,320 of the principal of $166,500 outstanding. Of the intervenors, Timshell Nominees Pty Ltd, had invested $33,750.00; I have already adverted to the views expressed by its director, Mr O'Loughlin, in his affidavit. Mr John Lauder, a director of John Lauder & Associates Pty Ltd which had invested $40,300 directly and a similar amount as trustee of a superannuation fund, also swore an affidavit expressing his view that the applicant should continue in control of the loans. The investor which did not intervene was CDC (Aust) Limited. Mr Dorevitch, its director, expressed some disquiet as to the failure to act more quickly on the loan once it fell into default, and as to the expenditure on the timber tracks without approval from investors and before it was established that the timber was worth logging. A letter exhibited to Mr Dorevitch's affidavit shows that investors named Walsh complained to the applicant about the expenditure on the tracks; but Mr and Mrs Walsh have joined the group of intervenors, and have written letters expressing their firm support for the retention of the applicant's services. One infers they were satisfied with whatever explanation they were given about the tracks or did not think that it was a concern which outweighed the advantage of the applicant's continued involvement with the loan.

The loan to Goldforth Pty Ltd

The setting up of the loan

[26] On 14 April 1998 $538,000 was advanced to Goldforth Pty Ltd on the security of first registered mortgages over 13 vacant rural blocks at Gayndah valued at $406,000, two vacant rural blocks at Kippenduff valued at $100,000 and 14 vacant rural residential blocks at Glen Innes in New South Wales valued at $554,000; and second registered mortgages over a property at South Townsville valued at $400,000 and another resort property at Townsville valued at $2,800,000. Five different valuers had undertaken the various valuations. The loan was guaranteed by Mr Adrian McFie, Ms Bernadette Bakker and Bankstate Pty Ltd. The interest rate was 18 per cent reducing to 12 per cent for prompt payment, and the term of the loan was 12 months. The management fee was 1 per cent per annum.

[27] When the loan became due for repayment on 14 April 1999, the borrower indicated that it expected to sell its properties and pay out the loan in the next couple of months. Agreement was reached to extend on a month by month basis.

Establishment, brokerage and legal fees charged to the borrower

[28] Elliott & Harvey rendered an account for professional legal costs in connection with the advance in an amount of $8,000. It also charged by way of outlays an amount of $12,000 representing an establishment fee for the loan payable to Nerang Legal Services Pty Ltd. Mr Harvey described the company as his "family's corporate trustee of [his] Nerang service company". He and Kerrie Guy were its directors, and its shareholders were his wife and he. No brokerage fee was shown.

Default and realisation attempts

[29] Default in payment occurred in February 2000, and notices of default calling up the principal were served. The investors having agreed to a monthly roll-over, interest continued to be paid until 14 March 2001. The Kippenduff blocks of land were sold, reducing the principal outstanding to $530,000. The Gayndah lots were listed for sale with a local real estate agent but no offers had been received. Two valuers had been instructed in September 2000 to assess the values of the property as at February 1998 and had arrived respectively at figures of $80,000 and $92,500 for them. A similar process had been undertaken in respect of the Glen Innes properties, arriving at valuations of $183,600 and $185,000. An offer of $100,000 for the 20 Glen Innes lots, received from the Bill Matthews Property group, had been rejected.

The current position

[30] In September 2000 the original valuers of the Glen Innes property were put on notice of a possible negligence claim, and on 21 February 2002 proceedings were instituted. A claim and statement of claim had also been filed in respect of the guarantor, Adrian McFie. Ms Bakker was bankrupt and Bankstate Pty Ltd under external administration.

[31] As at 16 July 2002, $77,733.33 was outstanding in interest, with a further $4,858.33 accruing on a monthly basis. Management fees of $7,066.66 were outstanding and continuing to accrue at $441.66 per month. Legal costs were estimated at $45,000 - $65,000, with a further $50,000 to be incurred if action proceeded against he valuers, and, in that event, another $50,000 in outlays. There had, shortly before the hearing, been an offer to buy three of the Glen Innes blocks for $20,000.

The investors' views

[32] In this case all five investors in the loan had intervened to support the applicant. They included John Lauder & Associates Pty Ltd, and Dr Langley; the views of the latter and Mr Lauder in their affidavits were as expressed in relation to earlier loans.

The loan to Oceansand Pty Ltd

The setting up of the loan

[33] In July 1998 an amount of $2,200,000 was advanced to Oceansand Pty Ltd on the security of a first registered mortgage over the 'Willows' golf course in Townsville and a second registered mortgage over a hotel property in Townsville owned by Westplain Pty Ltd. (The first mortgage on the latter secured an amount of $1,300,000, leaving, on the valuation given, equity of $700,000.) In addition a first registered bill of sale was taken over the plant and equipment relating to the 'Willows' golf course business, and registered mortgage debentures were given over the assets of Oceansand Pty Ltd, Westplain Pty Ltd and Lakeward Pty Ltd. The 'Willows' golf course had been valued at $4,750,000 and the hotel property at $2,000,000. The loan, which was to fund the acquisition and upgrading of the 'Willows' golf course, was guaranteed by Ms Bernadette Bakker and Westplain Pty Ltd. Interest was 18 per cent, reducing to 13 per cent for prompt payment, with a management fee of 1 per cent per annum. The term of the loan was 12 months, but it was rolled over for a further year until the end of July 2000.

[34] During the course of the loan, part of the property was subdivided and sold, with the proceeds being paid in reduction of the loan; the result was that the principal outstanding was reduced to $1,840,000. In November 1999, however, the borrowers sought an increase of the loan to $1,900,000, to which the contributors agreed.

Establishment, brokerage and legal fees charged to the borrower

[35] Nine thousand dollars was paid to Elliott & Harvey as legal professional costs on the setting up of this loan, with a further $35,000 paid to Nerang Legal Service Pty Ltd. A brokerage fee of $44,000 (two per cent of the amount of the advance) was paid to Ranala Pty Ltd. Mr Barry McNeil, a consultant to Elliott & Harvey, was a director of the company and its shareholders were members of his family. Ranala had also borrowed from the applicant, which held a charge over its assets.

Default and realisation attempts

[36] Interest ceased to be paid from 27 February 2000, and the principal was not repaid. Default notices were issued. In late 2000 an attempt was made to sell the golf course by tender. No acceptable offers were received. In July 2001 an agreement was entered into with a prospective purchaser, Gusdote Pty Ltd, for a 'put and call'

option. Under that agreement, Gusdote was given a call option (exercisable for five months from the date of the deed) to purchase the property, while the applicant had a put option (exercisable for eight months) to require Gusdote to proceed with the purchase upon, *inter alia,* approval of a proposed development allowing for further subdivision and the building of a conference centre. In the interim, Gusdote took possession under a lease agreement, and undertook to pay all rates and other charges, as well as maintaining the golf course and buildings.

[37] In January 2002 the put and call option deed was varied to extend the time for submission and approval of the development to 23 February 2002. It redefined the development requiring approval to cover a second stage of development, while the call option and put option exercise periods were extended respectively to 23 March 2002 and 24 July 2002.

The current position

[38] Some $570,000 in interest was outstanding as at 16 July 2002, and continued to accrue at the rate of $19,000 per month. The estimated legal costs of Elliott & Harvey were between $70,000 and $75,000, while management fees stood at $47,490.90 and continued to accrue at $1583.33 per month. Earlier outlays in the form of auction and marketing costs and an interest subsidy to investors had been reimbursed from rent paid by Gusdote. It was estimated there would be a further $15,000 in legal costs.

[39] On 16 July 2000, the applicant exercised its put option, and Gusdote entered a 30 day contract at the purchase price of $2,075,000. A deposit of $570,000 was paid, and the contract in fact settled on 20 September 2002 (between hearing and judgment), resulting in a full return of principal to investors. After payment of outlays an amount of $77,000 remained for distribution.

The investors' views

[40] Twenty-two of the 23 investors, accounting for $1,850,000 of the loan value, were in the group of intervenors. Of the investors who supported the applicant, affidavits were put in evidence from Mr Bruce Cohen, a director of Wygreen Pty Ltd, an investor of $30,000; Dr Russell Langley, who had contributed $60,000 and managed another investment of $110,000; Mr O'Loughlin, director of Timshell Nominees which had invested $50,000; Mr David Joseph, director of Kensdarl Pty Ltd which had, as trustee, invested $75,000; and Mr Luttrell, who had contributed $20,000. All attested to their satisfaction with the way that the loan had been managed and their desire that a liquidator not be appointed. Two expressed a concern that the fees of a liquidator would be far more expensive.

[41] The investor who did not join with that group was Mrs Williams, who had invested $50,000. She provided an affidavit, as did her husband. In May 2002, when Gusdote Pty Ltd had been unable to obtain finance to pay the full purchase price of $2,075,000, a proposal had been put to investors. It entailed Gusdote's purchasing the subdivided part of the land for $750,000, and entering a separate contract being entered for the golf course at $1,325,000 on an initial deposit of $50,000, with the balance of the purchase price secured by a first registered mortgage over the golf course and a second registered mortgage over the subdivided land. That proposal was put to investors subject to satisfactory valuations of both parcels of land. It gave rise to some heated correspondence between Elliott & Harvey and

Mr and Mrs Williams as to its appropriateness. The concern of the Williams was that the value of the property would be substantially reduced by what they perceived as the sale at under value of a valuable part of the subdivided area, leaving the less saleable golf course to realise what they regarded as an unachievable price. As well as their dissatisfaction with the fact that the proposal had been made, the Williams expressed concern at the delay in the sale of the property.

The loan to Paradise Village Pty Ltd

The setting up of the loan

[42] In November 1998, an amount of $290,000 was advanced to Paradise Village Pty Ltd on the security of a first registered mortgage over vacant land at Bundaberg, valued at $450,000, and a mortgage debenture given by the borrower. Interest was to be paid at 17 per cent per annum, reducing to 12 per cent for prompt payment, with a management fee of 1 per cent. The term of the loan was 12 months. It was guaranteed by Bill Thompson and David Thompson.

Establishment, brokerage and legal fees charged to the borrower

[43] Elliott & Harvey charged $9,500 as professional legal costs for arranging and completing the loan. Brokerage fees of two per cent of the loan amount ($9,000) were charged and paid to Ranala Pty Ltd.

Default and realisation attempts

[44] The loan fell into default in June 1999. An unsuccessful attempt to sell the property by tender was made in November 1999. In early 2000, the applicant outlaid monies - council application fees at $3250, surveyor's fees of $4,502 and advertising fees of $2,742 - to obtain subdivisional approval in an attempt to enhance the value of the property, and endeavoured to market it. In September 2001 a contract for sale of the security property was entered for the price of $370,000 but did not proceed. The deposit was only $100, because other contracts with the prospective purchaser, Wigwam Pty Ltd, had been entered in respect of two other properties securing loans in default; a substantial deposit was paid only in respect of one of those contracts. An action for specific performance was brought against the purchaser. An action was also brought against the valuers; it was settled for $100,000, which was distributed to the contributors, reducing the principal debt to $190,000. Both guarantors appear to be bankrupt.

The current position

[45] As at 6 July 2002, $92,766.64 was outstanding in interest, which was further accruing at the rate of $1,741.66 per month. Legal costs to August 2001 had been assessed at $36,665, with a further estimate in the period to April 2002 of between $5,000 and $7,000. Management fees were outstanding from June 1999 in an amount of $7,707.99 and were continuing to accrue at $158.33 per month. Outlays of $33,436 (expenditure on consultancies to obtain subdivision approval, marketing, and the action against the valuer) were outstanding. In June 2002 an offer (already referred to in the context of the Lambglen loan) was made by the Bill Matthews property group to acquire the mortgage for $200,000, with the suggestion of issue of in the yet-to-be listed public company as additional consideration. As already

observed, that proposal is limited in detail, and, even if it comes to fruition, will not result in a full return of capital to investors after outlays are recouped.

The investors' views

[46] There were 10 investors in the group which contributed to this loan. Of them, six, entitled to $124,500 of the figure presently outstanding, intervened. Mr Donald Wyeth, trustee for a superannuation fund which had contributed $26,225, swore an affidavit as to his confidence in the applicant, and his opposition to the appointment of a liquidator. Like Mr Luttrell, he had had an unhappy experience with the costs of a liquidator appointed to another scheme in which he had funds invested.

[47] Of those who did not join in the group intervening, one Mr Mckie had written to Elliott & Harvey in May 2002 asking what action had been taken against the guarantors of the loan. He also queried an earlier statement that professional legal fees would not be charged by the firm until recovery had occurred, as against a later letter dated 9 May 2002, which proposed retention of $15,000 from the offered amount of $200,000 together with a further deduction for $37,000 in outlays. Elliott & Harvey's response to Mr Mckie was to the effect that legal costs now stood at $60,000 to $70,000, and it was reasonable that some part of that figure be retained. It is, as Mr Mckie pointed out, somewhat difficult to reconcile the two positions. However, on Mr Harvey's indication to the court that legal fees would not be charged until recovery of principal occurs, it appears that the second position would not be maintained.

[48] Another of the four investors who have not intervened is Ms Marion Thorn. She has expressed concern about delays in the sale of the secured property, the incurring of costs in obtaining approval of subdivision, and the settlement of the action against the valuer for $100,000 without consultation with the investors. She has also complained of what she has described as unsatisfactory answers to questions asked by her of the applicant, and what she regards as misinformation given to her by Elliot & Harvey in the context of whether a liquidator should be appointed. In respect of the last, she refers to a letter of 26 November 2001 which was accompanied by a notice indicating that no deficiency in repayment of principal and interest was expected, provided Wigwam Developments Pty Ltd completed the contract, and to a further letter of 23 April 2002 from Elliot and Harvey, estimating the costs of a liquidator in relation to the entire loan scheme at $300,000 to be apportioned between the loans with a further $30,000 payable in respect of each particular loan. Mrs Thorn seems to have read that as meaning that the liquidator would charge $330,000 for winding up the particular loan she was involved in.

[49] Mrs Thorn has also expressed dissatisfaction with the details of the Bill Matthews group proposal to acquire the mortgage as set out in Elliott & Harvey's letter of 9 May 2002, because of the proposal that Elliott & Harvey recoup outlays of $37,000 and take legal fees of $15,000, resulting in only an 85.5% return of principal to investors. (As already noted, Mr Harvey has now indicated that Elliott & Harvey will not charge fees prior to reimbursement to principal and interest at the lower rate.) She adverts also, without enthusiasm, to the proposal for the issue of shares by the purchaser, to be held until tradeable by the applicant as

trustee for the investors. As a result of these matters, she now supports the appointment of a liquidator.

The loan to Aged Care Lodges Australia Pty Ltd

The setting up of the loan

[50] In April 1999, an amount of $422,000 was advanced to Aged Care Lodges Australia Pty Ltd on the security of a first registered mortgage over land at Bundaberg known as the Coral Cove Estate, on which the borrower hoped to build an aged care facility, and a floating debenture charge over the borrower's assets. The property was valued at $650,000. The loan was guaranteed by Mr Alan Rodgie, Australian Consolidated Mines Pty Ltd and Cycads of the World Pty Ltd. The interest rate was 17 per cent reducing to 12 per cent for prompt payment, and the management fee 1 per cent. It was known at the time the loan was entered that Mr Rodgie had entered a Part X arrangement under the *Bankruptcy Act* in 1975, that he had entered another Part X arrangement in April 1990, and that he had been bankrupt during the period between June 1990 and June 1993.

Establishment, brokerage and legal fees charged to the borrower

[51] Elliott & Harvey charged an amount of $8,440, which was described as "professional legal costs and application fees for arranging and completing the loan", and an identical amount of $8,440 (amounting to two per cent of the loan) was charged as brokerage fee. It seems probable from the unamended form of the loan offer and the borrower's response that the broker was Ranala Pty Ltd.

Default and realisation attempts

[52] The loan fell into default in respect of both repayment of principal and interest payments in June 1999. An attempt to sell by tender later that year was unsuccessful. The applicant took steps to obtain approval for subdivision of the land. In September 2001, a contract of sale was entered with Wigwam Pty Ltd for $530,000. As was the case with the Paradise Village contract with the same purchaser, the deposit was only $100, the contract was not completed, and proceedings were issued for specific performance. The defendant had lodged a defence and counter-claim alleging that it had entered another contract (in relation to the Coolum loan discussed later) in respect of which it had paid the sum of $589,000, but when that contract had not proceeded had requested that that sum be applied to the Coral Cove contract. On the basis of that pleading it sought repayment of the sum of $589,000, or, alternatively, application of it to effect settlement of the Coral Cove contract.

The current position

[53] As at 16 July 2002 the principal of $422,000 remained outstanding. Arrears of interest were $143,128.33, and were accruing at $3,868.33 per month. Legal costs as assessed stood at $27,900 up to August 2001, and costs incurred since that time were estimated at a further $5,000 to $7,000. Management fees were outstanding in the sum of $13,011.66, and were accruing at $351.66 per month. $45,186.80 in outlays were outstanding, with further anticipated outlays of $16,000 in relation to

marketing and surveyors' fees. It was anticipated that the proceedings against the valuer (to whom notice of possible action had been given) would incur legal costs of $50,000, and another $27,000 in outlays.

[54] As at the time of trial, Mr Harvey said that one offer for the property at an amount of $400,000 had been received from the Bill Matthews Group (already mentioned as part of a package of offers) and another at $475,000 from the McDermott Property Group. If those offers did not result in contracts the applicant would continue to market the property, probably taking it to auction. Advice had been taken in respect of an action against the valuers and it was anticipated it would succeed. Of the guarantors, Mr Rodgie was bankrupt and the two companies were insolvent.

The investors' views

[55] Seven of the eight investors in this loan, accounting for $397,000 of the principal outstanding, were among the interveners. Mr Eugene Jones, father and attorney of an investor who had contributed $100,000, expressed on affidavit his satisfaction with the way he had been kept informed and his preference for the applicant remaining in control of the conclusion of the loan. Mr and Mrs Morrell had, in February 2000, expressed concern at the mortgagor's early default, the apparent over-statement of the valuation and Mr Rodgie's bankruptcy. Nonetheless they had joined in the intervening group.

[56] **The loan to Oceanbend Pty Ltd and Cove Resort Pty Ltd**

The setting up of the loan

[57] In May 1999, $12,700,000 was advanced to Oceanbend Pty Ltd and Cove Resort Pty Ltd. The interest rate was 18 per cent reducing to 13 per cent for prompt payment, and the term of the loan 12 months. The management fee was 2 per cent. There were seven guarantors: Darrell Loane, Linda Loane, Venola Pty Ltd, Ballane Pty Ltd, Raven Pty Ltd, Oceancurve Pty Ltd and Dobay Pty Ltd. Security for the loan included first registered mortgages over Clarke's Cove in the Whitsunday region, which was land on which the borrowers planned a resort development, and a motel property at Kingscliff in New South Wales. The Whitsunday land had been valued at $5 million and the motel at $2.12 million. A second registered mortgage was given over land at Nerang; floating debenture charges were given over the borrowers' assets; a bill of sale was taken over the chattels, goodwill and equipment of the motel property; and a life insurance policy on the life of Darrell Loane was assigned. The property over which the second registered mortgage was given (a professional centre and restaurant complex) had an "anticipated" valuation of $3.4 million.

Establishment, brokerage and legal fees charged to the borrower

[58] The borrower in this case was charged an establishment fee of $100,000, payable to Elliott & Harvey, for arranging the loan and a further $41,000 described as "professional legal costs and application fees for arranging and completing the loan".

Default and realisation attempts

[59] The loan was extended to 7 August 2000 with the investors' consent. Interest was paid on that date, but not thereafter. Real estate agents were appointed to sell the Kingscliff motel and Clarke's Cove properties by tender. In December 2000 the motel was sold for $1.95 million. A contract for the sale of Clarke's Cove produced a deposit of $50,000, but did not complete. The applicant brought an action for specific performance against the purchaser. An application was made for summary judgment, but was successfully resisted by the defendant, who alleged that a compromise had been reached with a member of the applicant's staff. The property in Nerang over which the second mortgage had been taken was sold by the first mortgagee with no surplus. The debenture charges over the company assets did not produced any return. Notice of possible legal action had been given to the valuer involved. Darrell Loane was bankrupt.

The current position

[60] As at 16 July 2002, $2.867 million remained outstanding. Arrears of interest were $662,190.82 and were accruing at $26,280.83 per month. Outlays thus far had been recouped from the sale of the motel property, but further outlays involved with marketing the Clarke's Cove property were anticipated at $50,000, and legal costs at $50,000. Elliott & Harvey's legal costs were estimated at between $75,000 and $100,000. The 2 per cent management fee amounted to $110,841.50, and was accruing at $4,778.33 per month. The Bill Matthews Group had made an offer of $2.9 million for the property.

The investors' views

[61] There were 59 investors in the Oceanbend loan, of whom 54, accounting for $2,730,650 of the outstanding principal, had intervened in order to support the applicant. Mr Joseph, director of Kensdarl Pty Ltd, which had as trustee invested $12,200; Mr Cohen of Wygreen, which had invested $61,000; Dr Langley, who had contributed $152,500 and managed a further investment of $79,300; Mr Gavin Aikman, director of a company which had contributed $51,850 and Mr Luttrell who had, with his wife, invested $12,200. The views of most of those investors have already been mentioned. Mr Aikman, an accountant, similarly was satisfied with the management of the applicant and did not wish a liquidator to be appointed; having, he said, concern about the costs that a liquidator would incur.

The loan to Young

The setting up of the loan

[62] In March 1999 a loan of $1.75 million was made to Mr Alfred Young. The security was by way of first registered mortgage over a number of rural properties, "Sunnyside", "Texas", "Brinerville", "Darkwood" and "Kalang", and a bill of sale over plant, equipment and motor vehicles. The properties together were valued at $5,377,500. The interest rate was 17 per cent reducing to 12 per cent for prompt payment, the term 12 months, and the management fee was 1 per cent.

Establishment, brokerage and legal fees charged to the borrower

[63] The borrower was required to pay $15,000 as Elliott & Harvey's professional costs, and a further $20,000 as establishment fee to Nerang Legal Services Pty Ltd. Brokerage of three per cent ($52,500) was paid to Ranala Pty Ltd.

Default and realisation attempts

[64] The principal was not repaid at the end of the 12 month term, and notices of default were served; but interest payments were maintained until September 2001. The Texas and Sunnyside properties were sold for $280,000 and $385,000 respectively. The principal outstanding was reduced accordingly to $1,137,500.

[65] The three unsold properties were twice put to auction unsuccessfully. However, in respect of the remaining properties, an agreement was reached with a timber company and with the mortgagors, under which the timber getter was given logging rights, its interest being registered as a *profit a prendre* on the titles to the properties. The *profit a prendre* was for a five year term, and a minimum quantity of timber was required to be removed per annum. Royalties were specified in a schedule to the agreement.

The current position

[66] The first four monthly payments of royalties, amounting to about $44,000, were used, according to Mr Harvey's affidavit, to meet Forestry Department licensing requirements, by remedying road works and so on, but for the three following months, up to and including July 2002, payments of about $70,000 had been received. The timber getter had forecast an income for the calendar year of $400,000.

[67] As at 16 July 2002, $39,843 was outstanding in interest with a further $10,427 per month accruing. $8,531.25 was outstanding in management fees. There were outstanding outlays of $963.75, other outlays for marketing the properties having previously been reimbursed from the sales. It was anticipated that expenditure of another $50,000 in legal costs would be required. Management fees were accruing at $947.91 per month.

The investors' views

[68] There were 42 investors in the Young loan, of whom 41 had intervened, their contributions amounting to $1,105,000. Of the group of investor interveners Mr David Joseph, a director of Kensdarl Pty Ltd, which had invested $26,000 in the loan to Mr Young, had provided the affidavit already referred to, supporting the applicant's continued management of the loan.

The loan to Coolum Beach Club Properties Pty Ltd

The setting up of the loan

[69] In January 1998, $5,300,000 was advanced to Coolum Beach Club Properties Pty Ltd. The security was a first registered mortgage over a hotel property at Marcoola Beach on the Sunshine Coast, a debenture over the borrower and a bill of sale over its assets. A valuation of the hotel at $11,660,000 had been obtained. The loan was for a period of 12 months. Interest was payable at 18 per cent reducing to 12 per cent for prompt payment with a 1 per cent management fee. The guarantors were a Mr Neil Carrington and a Mr Gordon Trembath.

[70] By the due date for payment of principal in January 1999, the principal outstanding had been reduced to $2,187,000. The loan was extended for a further 12 months. A valuation obtained in July 1999 assessed the value of the property at $9,820,000. In

September 1999 a further $4,000,000 was advanced on the security of a first mortgage over the resort, now known as the Discovery Beach Hotel Resort and Conference Centre, with an additional guarantee from Mr Barry McNeil. The term of the fresh advance was 12 months and the interest rate was 17 per cent reducing to 12 per cent for prompt payment. The management fee was 2 per cent per annum. Although the principal was once again reduced, the borrower was permitted to draw against that credit to the amount of $580,000 in May 2000, returning the principal outstanding to $4,000,000.

Establishment, brokerage and legal fees charged to the borrower

[71] There is no documentation of what legal fees were charged by Elliott & Harvey in respect of this loan. By this time, however, a practice seems to have developed of charging two per cent of the loan by way of professional costs and establishment fee. If the same practice were followed here, the amount would have been $80,000. Fees of $12,000 were charged in May 2000 when the loan was redrawn.

Default

[72] The principal was not repaid in September 2000. In October 2000 the borrower entered a contract for the sale of the property, but when that came to nothing, in April 2001 the applicant listed the property for sale. In June 2001 a contract was entered with Wigwam Developments Pty Limited for a purchase price of $5,890,000. $589,000 was paid by way of deposit and was distributed to investors. The contract did not, however, settle.

The current position

[73] As at 16 July 2002, $4,000,000 remained outstanding. The arrears of interest were $360,000, accruing at $40,000 per month. There are estimated legal costs of between $150,000 and $200,000 with a further $35,000 as the estimate of what would be incurred to finalise the loan. The outstanding management fee was $59,999.94 and it was accruing at $6,660.66 per month. Another contract of sale was entered in mid-2002, the sale price being $5.7 million and the anticipated date of settlement 31 August, 2002. Immediately prior to giving judgment I was informed by affidavit of Mr Harvey that the contract had become unconditional. However, it had been extended until 15 November 2002 with the prospect of a father extension to 6 December 2002, on proof of delays in financing, on the basis that the purchaser would pay an additional consideration of $50,000. Mr Harvey said that if the contract settled, the investors would receive principal in full and at least the lower rate of interest outstanding.

The investors' views

[74] All 51 of the investors in the Coolum loan had intervened, supporting the applicant's position. Mr Joseph of Kensdarl Pty Ltd, which had invested $210,000, Mr Lauder of John Lauder & Associates Pty Ltd which had invested $160,000, Dr Langley who had invested $250,000, and Ms Jean Colley who had contributed $40,000, swore affidavits as to their desire that a liquidator not be appointed.

One Managed Investment Scheme or Nine?

[75] "Managed investment scheme" is given the following meaning in s 9 of the *Corporations Act*:

> " 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)."

There are certain exceptions which are not relevant here.

[76] The loan arrangements offered by the applicant were, taken collectively, "a scheme", a "program or plan of action"[1]. That scheme had the feature of people contributing money as consideration to acquire rights to benefits produced by it, that is the return of interest; thus the requirements of sub-paragraph (i) of the definition were met. Clearly enough, the members did not have day-to-day control over the scheme's operation; sub-paragraph (iii) is satisfied. Turning to the stipulations of sub-paragraph (ii), the first issue is whether there was to be a pooling of contributions, or their use in a common enterprise, in order to produce benefits.

[77] Within the loan scheme in this case, there were subsets of contributors who invested in individual loans. In the case of each loan, contributions were pooled in the Elliott & Harvey trust account for disbursement as a single payment to borrowers, but there was no broader pooling of funds as between the various loans. The contributions of the investors in each sub-set, once pooled, were used to produce benefits for its members, but were not capable of producing, and were not intended to produce any benefit for the larger set of investors in the applicant's mortgage lending scheme as a whole.

[78] It is significant that, in sub-paragraph (ii), the definite article precedes in each case the nouns "people" and "members". The sub-paragraph specifies *the* people, *the* members holding interests; in other words, the benefits produced by the pooling of funds in a given scheme must be capable of flowing to all, not a sub-set, of the members in the scheme. In the present case, the absence of the pooling of contributions, or their use "in a common enterprise", to produce financial benefits for the members holding interests in the applicant's general mortgage lending scheme at large, as opposed to the pooling of contributions in each individual loan for the benefit of the members of that particular loan arrangement, prevents the mortgage lending scheme as a whole from meeting the terms of sub-paragraph (ii)

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1 *Australian Softwoods Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129.

of the definition. It has not, therefore, all of the features necessary to render it a "managed investment scheme". The individual loan arrangements, on the other hand, do in each case amount to a scheme possessing the three prescribed features.

[79] My conclusion differs from that reached in *Australian Securities &Investments Commission v Chase Capital Management Pty Ltd*[2], in which Owen J considered that there were two schemes, notwithstanding that each involved a number of investments, each with a distinct group of investors. It is to be noted that, in that case, the issue was not whether the individual investments should be characterised as schemes, as opposed to the overall arrangement, but rather whether the arrangements amounted to managed investment schemes at all. And the circumstances of the present case can be distinguished from those in *Australian Securities & Investments Commission v Knightsbridge Managed Funds Ltd*[3], in which a number of mortgaged lending arrangements were characterised as a single scheme. There the monies to be advanced in all loans were placed into a single cash management account which attracted interest on the total funds, subsequently shared among investors pro rata. As Pullen J observed, "Pooled monies therefore produced 'financial benefits' in a direct sense". In the present case there was no such feature; no interest accrued on the funds for the short period they were held in the Elliot & Harvey trust account.

Was the applicant "operating" the schemes?

[80] Section 601 ED(5) creates the following prohibition:

> "A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered."

The provision is particularly significant in this case, because operation of a managed investment scheme in contravention of the sub-section is a prerequisite for a winding up application to the court under s 601EE(1):

> "**[Unregistered schemes]** 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:
>
> (a) ASIC;
> (b) the person operating the scheme;
> (c) A member of the scheme."

There are, however, qualifications to what constitutes operation of a scheme for the purposes of s601 ED(5), in the sub-paragraph which follows it. Of particular importance is this exemption:

> "**601ED(6) [When person not operating a scheme]** For the purpose of subsection (5), a person is not operating a scheme merely because:
>
> ……..
>
> (b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.

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2 (2001) 36 ACSR 778.
3 [2001] WASC 339.

[81] The meaning of the word "operate" as used in s 601ED(5) was considered by Davies AJ in *Australian Securities and Investments Commission v Pegasus Leveraged Option Group Pty Ltd*[4]:

> "**[55]** The word "Operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. The term 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. The *Oxford English Dictionary* gives these relevant meanings:
>
> 5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work.
>
> 6. To cause or actuate the working of; to work (a machine, etc). Chiefly US
>
> 7. To direct the working of; to manage, conduct, work (a railway, business, etc); to carry out or through, direct to an end (a principle, an undertaking, etc) orig US."

[82] In *Australian Securities and Investments Commission v Koala*[5], Barrett J took the view that where the trustee and manager of the scheme continued to have contact with investors, and regarded themselves as playing a continuing role in relation to them, the scheme was being operated in the broadest sense, although the specific activity for which it was set up was no longer being carried out.

[83] In ordinary circumstances "operate" would, as Austin J observed in *Interstate Mortgages and Investments Pty Ltd v Australian Securities & Investment Commission*[6], be

> "wide enough to encompass … activity by way of winding down and realisation of security … because that activity is a natural part of the operation of such a scheme."

However, I cannot agree with the conclusion his Honour then expressed in relation to s 601ED(6), that because it is expressed to apply "for the purpose of sub-section (5)" it has no relevance to whether a person is operating a scheme for the purposes of permitting an application for winding up under s 601EE(1). Sub-section 601EE(1) requires not merely operation of a managed investment scheme but such operation in contravention of ss 601ED(5). Inevitably, as it seems to me, if the conclusion is reached that a person is not operating a scheme for the purposes of ss (5) merely because they are taking steps to wind up the scheme, there can be no contravention of s 601ED(5) and hence no trigger for the operation of s 601EE(1). It is necessary, therefore, in determining whether the scheme is being operated for the purposes of s 601ED(5) to consider whether what the applicant has done is merely to take steps to wind up the scheme.

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4 (2002) 41 ACSR 561 at 574.
5 [2002] NSWSC 451
6 Unreported, NSWSC, 22 July 2002.

[84] Mr O'Donnell SC for the applicant, argued that winding up covered a broad range of activities. I adopt gratefully his list of examples, illustrated with authorities:

(a) any step taken in getting in or realising assets, such as litigation in order to realise a chose in action: *Joye v Beach Petroleum* at 287G, 290C – E, *Elfic v Macks* (2001) 181 ALR 1 at [175], [188];

(b) entering into a lease of property the subject of the winding up: *Re G A Listing & Maintenance Pty Ltd* (1994) 15 ASCR 308 at 311, *In re The Premier Permanent Building Society* (1890) 16 VLR 643 at 645;

(c) carrying on a business: *Great Eastern Electric Co* (1941) Ch 241 at 245-6;

(d) purchasing a property (with a view to subsequently selling it in the winding up process): *Re Bairnsdale Food Products Ltd* (1948) VLR 264 at 268, *Re Skender; ex parte Trevor* (1996) 67 FCR 441 at 444-5;

(e) selling property on deferred terms: *Re Mineral Securities Australia Ltd (in liq)* (1973) 2 NSWLR 207 at 225-8.

[85] The activities undertaken by the applicant by way of marketing of properties, entering the *profit a prendre* agreement in respect of the Young loan, operating the resort in respect of the Hotel & Motel Resort Pty Ltd loan, and entering into a lease of the golf course in respect of the Oceansand loan as well as its actions against guarantors, valuers and non-performing parties to sale contracts are all activities a liquidator might quite reasonably undertake in the course of winding up the scheme affairs. The real question is whether activities properly undertaken in the course of a winding up are what is meant by the expression "taking steps to wind up the scheme".

[86] In *Australian Securities & Investment Commission v Takaran*[7] Barrett J considered a not dissimilar set of circumstances to the present, involving a contributory mortgage lending scheme. In that case the corporate vehicle, which like the applicant here, had acted as trustee and as mortgagee in respect of the mortgages entered, had instituted proceedings against valuers in five instances where properties sold after default had returned less than the amount secured on them. The issue was whether the taking of actions against the respective valuers constituted operation of the managed investment scheme, or was conduct protected by s 601ED(6)(b). His Honour considered the scheme of Part 5C.9 (which applies to registered schemes) in relation to winding up, and also referred to this passage from the judgment of McPherson SPJ in *Re Crust'n' Crumbs Bakers (Wholesale) Pty Ltd*[8] in relation to when winding-up commenced under the Corporations Law*:*

> "What is meant by 'winding up in this context? In my opinion it does not comprehend steps or proceedings taken for the purpose of obtaining an order that the company be wound up. Winding up is a

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7 [2002] NSWSC 834.

8 [1992] 2 Qd R 76.

> 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, comparable to an administration in equity, that begins or 'starts' with an order of the court. However it is not the court order itself that 'winds up' the company; the order does no more than direct that the company be wound up, which is then carried into effect by an officer of rhe court, the liquidator, who does the things that I have identified in order to liquidate the company's assets and wind up its affairs. In referring to 'winding up' or to the company being 'wound up', and to the manner and the incidents of doing so, s 601 therefore speaks not of proceedings aimed at obtaining an order of court to wind up the company but of the process that ensues from and follows such an order. Leaving aside the case of a successful appeal, winding up thus 'starts' when, and not before, an order to wind up is made appointing a liquidator."

[87] Barrett J concluded that winding up was a process initiated by an identifiable event; and, by analogy, for unregistered schemes requiring registration it was a regime put into place by an order made under s 601EE(1). Consequently he concluded that the reference to "steps to wind up" in s 601ED(6)(b) was to be read as a reference to steps taken in the course of a winding up ordered by the court under s 601EE.

[88] That conclusion is not, I think, without difficulty. The first question is whether the use of the expression "*steps* to wind up" should not be given some significance; it would, after all, have been a simple matter for the legislature to have provided exemption for persons "winding up the scheme in pursuance of an order made under s 601EE(2)". Should the expression "steps to wind up the scheme" be taken to refer to steps to obtain a winding up order? That approach would be consistent with the use of the same expression in s 601NC(1), which enables a responsible entity of a registered scheme to "take steps to wind up the scheme". There the steps referred to are formal steps preliminary to winding up. But a similar use of the expression does not sit easily in 601ED(6)(b), because the only formal steps to wind up contemplated in Part 5C.1 are those involved in application to the court under s 601EE(1). There would seem little point in preserving from contravention of 601ED(5) a person making application under s 601EE(1), when that person must already be in contravention of ss 601ED(5) in order to make the application at all. I conclude therefore that any attempt to give a meaning to the words consistent with their use in s 601NC(1) is doomed to failure, and the expression must refer to steps taken in a winding up, rather than steps taken to obtain a winding up. But that leaves for decision the question of whether the winding up referred to must, as Barrett J concluded, be the result of a formal order.

[89] The applicant argued against any limiting of the meaning of the words "taking steps to wind up the scheme" on this basis: contributory mortgage lending schemes such as these were lawfully operated up until 17 December 1999. To impose a narrow interpretation of the expression is, correspondingly, to expand the activities contravening s 601ED(5), which carries a significant penalty: 200 penalty units or imprisonment for five years. That argument has considerable force. On Barrett J's construction, the manager of a scheme who had not managed to finalise its winding up by 28 February 2002 would inevitably be in breach of the sub-section if he attempted to do so thereafter, but, paradoxically, could not apply for a winding up

order without being in breach. Generally, penal provisions should be given a restrictive construction: "ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences."[9]

[90] But the construction of a penalty provision in the context of provisions designed to protect the public will not necessarily be so restrictive[10]. The clear intention of Part 5C.1 is to provide protection for investors through registration of schemes; and one means of ensuring that protection is to prohibit, as s 601ED(5) does, the further operation of managed investment schemes requiring registration. The difficulty of construing s 601ED(6)(b) as the applicant suggests is that, where steps were being taken which were properly characterised as winding up – no matter how ineptly, or with what disastrous consequences, such steps were being performed – there would be no capacity in ASIC or a member of the scheme to apply for a winding up. And the potential harshness of a wide effect given to s 601ED(5) is ameliorated somewhat by the existence of the power under s 601QA(1)(a), and its exercise by ASIC, to allow a reasonable period for windings up (two years in fact). Having regard to the purpose of Part 5C.1, I conclude that the construction adopted by Barrett J must be correct. It follows that the applicant is operating the schemes, not merely taking steps to wind them up, and is in contravention of s 601ED(5).

Who should be appointed to conduct the winding up?

[91] The applicant argued that any winding up should be conducted by itself under the supervision of registered liquidators. On 8 July 2002, it appointed Mr Lachlan McIntosh and Mr John Park, accountants and members of the firm Clout & Associates, as supervisors of the loan schemes. The deed of appointment confers on the supervisors powers to review the applicant's actions in relation to each loan and the conduct of the winding up; to make inquiries for the purposes of advice to the applicant and to advise ASIC separately of such advice; and to report to ASIC on any matter of concern in the winding up, including any negligence, breach of trust or illegal conduct on the part of any past or present officer of the applicant, any investor, borrower or any other person associated with the scheme. However, it specifically exempts the supervisors from any obligation to conduct a historical review of the conduct of the schemes.

[92] The applicant proposed an order which would entitle it to exercise powers similar to those of a liquidator with respect to a company with exception of obtaining credit, but would require it to obtain the written consent of the supervisor before entering into contracts to realise property commencing or discontinuing litigation or distributing funds. It also would require the applicant to forward a quarterly report to investors, the supervisor and ASIC on the state of the winding up. The supervisor's obligations under the order were those contained in the deed.

[93] Mr McIntosh had undertaken a review of the applicant's strategies for realisation of the properties and had prepared a report, the effect of which, in summary, was that in his opinion the applicant had made reasonable attempts to realise each property,

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9 *Beckwith v R* (1976) 135 CLR 569 per Gibbs J at 576.

10 See, for example, *Waugh v Kippen* (1986) 160 CLR 156, in which penalty provisions designed to promote industrial safety brought into conflict the principles by which remedial and penal provisions are to be construed: "the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker." (at p. 384)

and had followed a course appropriate to a mortgagee exercising power of sale. He proposed that the investors in each loan should now receive a report setting out the alternatives for recovery with a recommendation. For that purpose current valuations, marketing submissions from real estate agents and suggestions from property workout specialists as to possible enhancement of the securities should be obtained. It would then be a matter of giving investors the option of immediate or delayed realisation.

[94] The applicant argued that its appointment to manage the winding up of the loans, with Mr McIntosh and Mr Park as supervisors, would give the investors the best of both worlds: the combination of its familiarity with the security properties and their experience. It would be cheaper, avoiding the high hourly costing rate of liquidators, and would avoid the depressing of sale prices for the securities by the "fire sale" effect of known liquidators' sales.

[95] Mr Douglas QC, for ASIC, argued in support of the appointment of an independent liquidator on a number of grounds. Firstly, he submitted that investors might have rights of action against the applicant and Elliott & Harvey, because of the taking and payment by them of undisclosed fees in respect of the arrangement of the loans, and because of negligence in the entry and management of the loans. Secondly, he suggested that the applicant and Elliott & Harvey, having been committed by Mr Harvey to refrain from recovery of management fees and legal fees in respect of each loan until the principal and lower rate of interest on that loan had been repaid in full, would have an incentive to hold the security properties in each case in the hope of an improving market, rather than undertaking prompt and realistic realisation. Both these matters, Mr Douglas submitted, gave rise to a potential for conflict of interest and made appointment of an independent liquidator vital. Professional liquidators could also be expected to manage the winding up more competently than the applicant had done. The costs of winding up by liquidators were not shown to be greater than those of the scheme proposed by the applicant taking into account both the supervisors' fees and the applicant's management fees; and the applicant and Elliott & Harvey stood to gain significant amounts by way of those management fees and legal fees if they continued to be in charge of the winding up of the loans. As to the support of investors for the applicant, Mr Douglas pointed to incidents of selective information being provided to them and instances in which pressure was brought to bear on minority investors.

[96] ASIC advocated the appointment of Mr Gregory Maloney, a member of the firm Ferrier Hodgson as liquidator. He had provided a number of affidavits, and he gave evidence. Mr Maloney was critical of the applicant's delay in realising the properties. It was unrealistic, he considered, to postpone realisation of securities in the hope of a full return of principal and investors. To do so was merely to postpone the proper commercial result.

[97] Mr Maloney also made some specific criticisms of the applicant's management. He suggested that the Coolum Beach contract had allowed an excessively long period for due diligence, tying the property up for a six month period, and incurring holding and management costs. He was concerned whether the improvement in capital value to be gained by continued trading of the Bungunyah Manor property securing the Hotel & Motel Resort Brokers' loan justified the risks involved, although he did concede that if a business showed potential for improvement it would be rational, after a proper assessment, to seek to build it up before sale. And

he expressed some cynicism about the various offers made by the Bill Matthews property group relevant to the Lambglen, Paradise Village, Aged Care Lodges and Oceanbend loans. He agreed in cross-examination that if he were appointed as liquidator to wind up the schemes he would perform the Coolum and Oceansand contracts, would assess the returns from the sale of timber on the property securing the Young loan before deciding whether to continue to take the benefits of the agreement or to put the properties on the market; and that he would adopt a marketing strategy similar to that proposed by Mr McIntosh of consulting with agents and property workout specialists in developing an appropriate strategy for the remaining loans.

Conflict of Interest

[98] There was no suggestion that the applicant in its position as trustee for the investors was in anything but a fiduciary relationship with them. And although Elliott & Harvey was the applicant's solicitor, rather than the investors', that firm made direct approaches to investors in soliciting funds for investment and invited completion of an "Elliott & Harvey loan application", describing the applicant as its "contributory mortgage company … a vehicle used to advance, manage and monitor this loan". In all the circumstances I would regard the firm of Elliott & Harvey and its principal, Mr Harvey, as also having assumed a fiduciary position in relation to the investors.

[99] There was an obligation to disclose the payment of fees to Elliott & Harvey and Nerang Legal Services Pty Ltd, given the role of Mr Harvey in each of those entities, and, at least for the period that Ranala Pty Ltd was the applicant's debtor, also a duty to disclose benefits to it from the loan arrangements. Mr Harvey attempted to defend the failure to make disclosure by asserting that the applicant and his firm had acted in accordance with Queensland Law Society guidelines, and that brochures forwarded to investors made it clear that charges or fees would be paid by the borrower.

[100] As to the first, Rule 87 of the *Queensland Law Society Rules* set up a series of requirements for contributory mortgage lending by practitioners. It dealt with the keeping of a mortgage register, trust account matters, necessary consents and authorisations and procedures on default; but it did not touch on disclosure requirements beyond the provision of a "summary of mortgage" to lenders setting out details of the parties, amount advanced, rate of interest and so on. A prudential lending manual circulated by the Law Society contained a schedule of information to be provided to lenders. It made no reference to fees or commissions, although it did have an open paragraph in which were to be inserted "any other special conditions or circumstances …".

[101] Two versions of the brochure provided by Elliott & Harvey to prospective lenders were tendered. The first advised that in the event of default the lender would be paid his or her original investment together with interest, including default interest, before deduction of legal expenses from the sale proceeds. The second was more equivocal, advising that sale proceeds would be applied against investment interest including default interest and legal expenses and costs of sale without any specification as to the order of deduction. Each brochure contained this statement,

> "It costs you nothing to enter a First Mortgage Investment. All legal costs and expenses are paid by the borrower at all stages of the investment."

Similarly a *pro forma* letter of offer sent to prospective investors contained the statement:

> "No charges or fees are payable by you as these will all be paid by the Borrower."

[102] Mr Harvey said that in addition to the provision of the information contained in the brochures clients were also advised if they inquired of the amount of fees paid to entities associated with the applicant. A number of contributors had done so. There was, however, no disclosure of any document recording such conversations. Mr Luttrell was unaware of the existence of Ranala Pty Ltd. He could not recall being told of brokerage fees payable to it in respect of the Oceansand or Oceanbend loans or establishment fees payable to Elliott & Harvey or Nerang Legal Services in respect of those loans. He thought he had been told of legal professional fees and outlays payable to Elliott & Harvey on the Oceansand and Hotel & Motel Resort Brokers loan. But, he said, if it were to prove that fees were being charged up front on the establishment of a loan without informing investors he would regard them as business fees and that would not affect his view as to the appropriateness of the appointment of the applicant to wind up the loans. On all the evidence, however, it seems to be most unlikely that the majority of investors understood the proportions of the benefits flowing to associates of the applicant such as Elliott & Harvey, Nerang Legal Services and Ranala Pty Ltd from the setting up of the loans.

[103] The investors were, in my view, entitled to know more than that there existed some form of fee which would be met by the borrower. They were entitled to be informed, without it being left to their inquiry, precisely how the firm of Elliott & Harvey, any company related to the applicant by common directorship or shareholding, and any company in a debtor-creditor relationship with it would benefit from the transaction they were being invited to enter. That required at the least that the amounts of fees to be taken by them be disclosed. What was specified or not specified in the Law Society's material could not affect that position.

[104] Mr Douglas made the point about this state of affairs that it not only raised questions about the propriety of the applicant and its principal, and whether, for that reason the applicant should remain as manager, but also created the potential for conflict in the continuing management of the loans. The investors, he submitted, would have rights to recover undisclosed fees from the applicant and Elliott & Harvey, and it would fall to a liquidator to advise them, and possibly to seek to recover those funds as monies held on constructive trust for the investors.

[105] Mr Douglas also suggested that the applicant had been disingenuous in failing to reveal the fees charged by Elliott & Harvey and, indeed, suggesting the absence of any such fees in its dealings with ASIC. Regular reports were furnished as to default resolution steps in relation to each loan. Under a heading "Principal Sum, Interest, Default Costs and Expenses" the schedule provided in each case said:

> "Elliott & Harvey have not charged any legal fees for representing Lawloan Mortgages Pty Ltd and its contributors in this loan for the legal work, travelling expenses and staff resources expended."

[106] Mr Douglas argued that that was patently untrue, because fees had been charged by Elliott & Harvey. Mr Harvey's answer was that the statement in the respective schedules was a reference to the non-charging of fees during the period of default, and as such was correct. As to this, I accept Mr Harvey's explanation. The heading of the relevant part of the schedules itself makes it clear that the costs referred to therein are "Default Costs and Expenses", and the context in which the statements as to fees appears is, in each case, an outline of expenditure during the default period.

[107] Another area of conflict arose, Mr Douglas said, in relation to possible action by the investors against the applicant and Elliott & Harvey for negligence in the making and conduct of the loans. He referred to the Hotel Motel & Resort Brokers Pty Ltd, Goldforth Pty Ltd and Oceansand Pty Ltd loans, the first of which was guaranteed by Mr Randall McFie and the second and third by Ms Bernadette Bakker. They were also directors of the respective companies. Apparently partners, both were bankrupted on their own petition in November 2001; and Mr McFie had previously been bankrupt until April 1997 only months before the Hotel & Motel Resort Brokers Pty Ltd advance. Similarly, one of the directors and guarantors of Aged Care Lodges Pty Ltd, Mr Rodgie, had previously been bankrupt and his principal asset, equity in private companies, was of uncertain value.

[108] In all but three of the loans, proceedings were contemplated or had been commenced against valuers because of what was perceived as poor valuation advice, leading to shortfalls, actual or anticipated, in the realisation of securities. There were thus live questions about the value of the securities on which money was advanced, and the worth of borrowers and guarantors, against a background of glowing recommendation of the loans by Elliott & Harvey. In the circumstances there was, Mr Douglas argued, potential for legal action against the applicant and Elliott & Harvey in relation to the manner of discharge of their duties at the time of the original advances.

[109] Mr Douglas also made a number of criticisms of the way in which the loans had been managed, suggesting again that the investors might have rights against the applicant. He raised as a general adverse feature the fact that four of the loans had been in default since 1999 and five since 2000, and pointed to particular instances of what he said was poor management of loans in default. In the case of the Hotel & Motel Resort Brokers' loan, the applicant had permitted the business to run at a loss, and had failed to meet the market in order to sell the property. In respect of the Lambglen loan, a vague proposal to acquire the mortgage was put to contributors without adequate information to assess it, and without notification of ASIC. There was an appearance of conflict between the duty owed to investors in the Goldforth loan and the duty owned to the Oceansand investors in this way: when monies were advanced to Oceansand, an amount of $6,000 was, at the direction of a director common to the two companies, transferred to meet arrears of interest in the Goldforth loan.

[110] In relation to Oceansand, Mr Douglas pointed to the proposal to sell the subdivided portion of the land separately at a time when no independent valuation of the different parcels of land had been obtained, and there was an existing obligation in the purchaser to proceed with the purchase of both lots. There was, Mr Douglas said, legitimate ground for concern that the purchaser's interests were being preferred to those of the investors. And in the Oceanbend and Cove Resort loan,

there was the allegation of a compromise entered by a staff member of Elliott & Harvey, which was capable of giving rise to a conflict of interest between the applicant and the investors in the litigation.

[111] I think Mr Douglas is correct in pointing to what is at least the potential for action by investors against Elliott & Harvey and the applicant in respect of both the taking of undisclosed fees and the recommendation to lenders of investment in the loans. That is not to say that such breaches of duty or negligence would be made out; what is to the point here are the implications of the possibility, both as giving rise to a continuing conflict in the further management of the loan, and as reflecting on the competence of the applicant and its solicitor as managers. I will deal with the second aspect later.

[112] As to the first issue, Mr Douglas' premise was that it was necessary that independent liquidators be appointed so that investors could be apprised of their rights against the applicant and Elliott & Harvey, if any, and be furnished with all relevant information. However, I do not think it can be part of the responsibility of a liquidator to advise investors of possible rights against the scheme administrator or its solicitors, much less to seek to recoup any undisclosed fees. In *Re Southern Cross Airlines Holdings Limited (in liq)*[11] the Court of Appeal held that a liquidator was not under a duty to inform contributories to a company in liquidation of their rights against former directors. A similar conclusion must be reached here.

[113] Nor do I accept the proposition that any fees charged without proper disclosure should be regarded as assets to be got in in the course of winding up the scheme, being held on constructive trust by the applicant. The function of a liquidator, in a scheme such as this, is to recover as best he can from realisation of assets the monies advanced by investors. Some investors may have rights in respect of monies paid over by the borrowers once the advance was in their hands because those payments had the quality of a secret fee. But such fees cannot, in my view, be characterised as scheme assets; it is incidental that they were, as it happened, paid from advances made to borrowers.

[114] That conclusion is reinforced by the fact that the fees met from the advances may be recoverable by some but not other investors, depending on the extent to which they were informed. It is difficult to regard as scheme assets rights which some investors have, but others do not. And it would be an odd situation where part of a liquidator's functions in winding up a scheme was to act on behalf of some investors but not others in seeking to recover fees. Such a pursuit of individual investor's rights would be a considerable departure from the function of winding up the scheme as a whole. I do not, in short, think it follows that there must be a conflict of interest in the applicant winding up the loans because of the possibility of action ultimately being taken against it by some investors.

[115] In practical terms, the concern as to whether investors will have access to information relevant to their interests, should the applicant be permitted to continue in the management of the loans, is met, in my view, firstly, by the involvement of the supervisor with a reporting function and secondly, by the applicant's undertaking to permit investors to examine relevant files. The appointment of an

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[11] [2000] 1 Qd R 84.

independent liquidator is unlikely to improve on that state of affairs given, as I have concluded, the absence of any particular duty to advise or take action for investors.

[116] The next area of possible conflict that Mr Douglas pointed to is this: Mr Harvey had undertaken that Elliott & Harvey would not seek to recover legal fees, and the applicant would not seek to recover management fees, until all of the principal in any loan had been returned to borrowers together with interest at the lower rate. The consequence of that, Mr Douglas contended, was that the applicant would be loath to proceed with a sale that would not assure return of its fees. Against that proposition, Mr O'Donnell argued that the applicant had in a number of instances been prepared to recommend sales which would not return principal, pointing to the instances of the Hotel & Motel Resorts, Paradise Village, Goldforth and Oceansand loans.

[117] It is to be noted however, that those recommendations preceded Mr Harvey's commitment to the court in relation to not charging legal fees or management fees; and earlier assurances that legal fees would not be charged until recovery in full seem not always to have been adhered to, as the correspondence in the Paradise Village loan demonstrates. On the other hand, I consider there is in reality a substantial disincentive to the applicant to prolong the loans, given that to do so will incur the additional expenses of attempts to market and continued communication with investors, which may never be recouped. I do not think, in sum, that this concern is a very substantial one.

[118] There does remain a real possibility for conflict in the carriage by the applicant of the Oceanbend litigation, in which the defendant asserts that a compromise was entered by a member of the applicant's staff, although Mr Harvey says that the allegation is completely without substance. Whether the litigation proceeds will no doubt depend on whether the property is sold and at what price. Clearly there should be full disclosure to investors of the nature of the defence and its implications, and they should be given the opportunity to decide whether they wish Elliott & Harvey to continue to represent them in the action. But the possibility of a conflict in this regard is not so serious in my view as to warrant disqualification of the applicant from involvement in winding up the loans on that ground alone.

The applicant's management of the loans and realisation of securities

[119] The criticisms made by Mr Douglas in submissions and Mr Maloney in evidence are of course also relevant to the question of whether the applicant has demonstrated sufficient competence to be permitted to continue in charge of the loans. On the whole, while there may be questions about whether all of the loan arrangements should have been entered on the information available, I do not think that the evidence indicates any serious mismanagement by the applicant of the security realisation process. I was very much impressed by the evidence of Mr McIntosh and his view as to the appropriateness of the steps taken by the applicant. Mr Maloney, while raising some questions, did not suggest substantial disagreement with the course adopted thus far.

[120] There is, as Mr Maloney says, some reason for doubt as to whether negotiations with the Bill Matthews Group will come to fruition; but the proposed course of specialist assistance with property improvement and marketing with the assistance of Mr McIntosh seems appropriate. And although the past performance of the

applicant in disclosure and in entry of the loans may have been wanting in some respects, it is of some significance, in my view, that Mr Harvey and the firm of Elliott & Harvey are now under considerable pressure to perform well in relation to the winding up of these loans, because of the spotlight placed on them in these proceedings and because of their desire to continue in the contributory mortgage business through its registered vehicle. I do not think, therefore, that there is serious cause for concern as to mismanagement of the loans if the applicant continues in its role, with the supervision of the liquidators.

Manager with supervisor, or liquidator - advantages and disadvantages

[121] Mr Moloney spoke of limits on the effectiveness of supervision from his own experience in supervising the winding up of an unregistered investment scheme. He had found his ability to access the books and records of the scheme which remained with the operator was significantly curtailed; and if there were any non-compliance in production of books and records, there was no alternative to seeking court orders. In contrast, as a liquidator he would have immediate access to books and records. Mr McIntosh, on the other hand, said he had thus far had no difficulty in obtaining documents he had sought from the applicant; and he envisaged operating as supervisor from an office at the applicant's premises. Mr McIntosh struck me as someone not easily to be thwarted or misled; and there is nothing in the evidence of the applicant's dealings with investors or ASIC to raise a concern of suppression of documents. I do not, therefore, regard the question of access to documents as determinative of which form of winding up is to be preferred.

[122] The applicant raised as a disadvantage of appointing a liquidator the likelihood of a market place perception that bargains were to be had when the properties were being sold: the "fire sale" effect. Mr Maloney, on the other hand, said, in effect, that the forced circumstances of the property sales were probably already well known in the market place. I think that may well be correct; and again, I do not think this argument adds much to the decision as to appointment. Of some significance, however, is a point made on behalf of the applicant as to its, and to a lesser extent Mr McIntosh's, advantage in having already a familiarity with the security properties and their history. A liquidator is likely to require time and to incur further costs in order to come to grips with the information.

[123] Mr McIntosh had estimated his fees in supervising at about $60,000. He was prepared to accept that figure as the limit on his fees, subject to allowance for GST and outlays. His estimate of a liquidator's costs in relation to all nine loans was between $500,000 and $600,000; but he pointed out that the amounts involved would vary, and could be as low as $400,000, depending on whether current offers or contracts proceeded. He had allowed in those figures for the time and cost entailed in the liquidator's involvement in litigation against valuers in a number of the loans. He said that the assistance of people such as property specialists would be required whether a supervisor or a liquidator was involved in the winding up. It was put to him that because of his undertaking to limit his fees at $60,000 there would be an incentive for him to wind down as quickly as possible. He rejected the suggestion that he would act other than in investors' interests, and I accept his evidence in that regard.

[124] Another official liquidator, Mr Raymond Richards, had also reviewed material in relation to the loan schemes with a view to arriving at the likely costs of supervision

and winding up by a liquidator respectively. He estimated that supervision would cost between $50,000 and $75,000, while the cost of a liquidation would be between $400,000 and $500,000. One of the loans he had taken into account in this process had in fact been resolved, and he accordingly reduced his estimates in relation to liquidation and supervision by $30,000 and $5,000 respectively.

[125] Mr Maloney proposed to charge IPAA rates current as at 2000. His view was that a liquidator's costs were likely to be in the vicinity of $200,000; that amount would include the cost of realising the securities and reporting to investors. His estimates of fees did not include any allowance for costs of conducting litigation against valuers or guarantors. If there were litigation he would require the approval of the court and of investors, and it would be necessary to retain external solicitors. He considered that the estimate of $60,000 as the cost of a supervisor was understated, from his own experience in supervision of a winding up of an unregistered investment scheme. In that capacity he was required to prepare a quarterly report, and found it necessary to undertake a large amount of work to gather sufficient information in order to report and to form a view as to the best interests of investors.

[126] It is likely that litigation will ensue in some loans, and allowing for the costs of that, Mr McIntosh's estimate of a liquidator's costs is probably closer to the mark. It is true that legal costs and management fees chargeable by the applicant and Elliott & Harvey could add very substantial amounts to the costs of winding up; but unlike the situation with a liquidator, the investors have at least the assurance of recovering principal and interest at the lower rate before those charges are made. On the whole, I think that there would be significant financial advantage to the investors in the applicant's continuing in management of the loans, given a situation in which they are assured of return of principal and interest before charging of management fees and legal fees, and given Mr McIntosh's undertaking to charge no more than $60,000.

The views of investors

[127] It is, of course, the case that an overwhelming majority of investors supported the continued management of the loans by the applicant. As Mr Bain QC for the investors pointed out, 158 of the 168 natural persons and entities involved in the loans had intervened. They represented 93.5 per cent by number of contributors and almost 97 per cent by value of what was outstanding. Some twenty-three of the intervenors, including some, but not all of those who wore affidavits, had written letters exhibited to an affidavit by their solicitor, expressing in powerful terms their support for the applicant. Mr O'Donnell QC for the applicant pointed out that of the three investors who had sworn affidavits relied on by ASIC, Mr Dorevitch had in January 2002 voted in support of Lawloan continuing to manage the Lambglen loan. Mrs Williams' concerns about the management of the Oceansand land had been overtaken by events. To the extent that Mrs Thorn expressed concern as to Elliott & Harvey's proposal to take legal fees as well as outlays on the sale of the Paradise Village property, that concern could be expected to be alleviated by the undertaking not to charge such fees before the return of principal and interest at the lower rate.

[128] On the other hand, Mr Douglas suggested that the views of those in favour of continued management by the applicant might, at least in part, be the product of misinformation. On 13 June 2002 Elliott & Harvey sent letters to all investors

urging them to obtain separate representation by the solicitors presently acting for the intervenors in order to support the applicant and oppose ASIC's application for the appointment of a liquidator. The letter was accompanied by copies of letters sent by Mr Luttrell and a Mr Cleary expressing indignation at ASIC's approach, and by three newspaper articles. One of those articles concerned ASIC's successful application against a majority vote of investors for the appointment of an independent liquidator to the scheme operated by Bell Securities Pty Ltd. A second dealt with an extremely high level of legal and liquidator's costs arising out of the liquidation of Karl Suleman Enterprises Pty Ltd, and the third with the costs of the liquidator in the winding up of the run out mortgage business of a solicitor, Mr Triscott. All were, no doubt, designed to produce some consternation at the prospect of a liquidator's charges. The accompanying letter asserted that ASIC was determined to proceed with its application to appoint a liquidator "despite consistent progress with the sale of the properties".

[129] Mr Douglas also pointed to the unauthorised release by the applicant of dissenting investors' details to other investors supportive of the applicant. On 17 June 2002, after affidavits by Mrs Williams and her husband and Mrs Thorn were served on the applicant, Elliott & Harvey, under the hand of Kerrie Guy, wrote to all investors other than Mrs Williams, Mrs Thorn and Mr Dorevitch, providing their contact details. The letter advised that the three had voted to appoint independent liquidators and suggested that investors might "wish to discuss the matter" with the Williams and Mr Dorevitch. Mrs Williams, Mrs Thorn and Mr Dorevitch had signed an authorities allowing release of their details to other investors in loans in which they were contributors, but not to investors in other loans. Notwithstanding, their details were provided to all investors.

[130] The results were not serious. Mr Dorevitch received some telephone calls from other investors, including one from Mr Luttrell, and has expressed annoyance at the general dissemination of his contact details. Mr Luttrell also telephoned Mr Williams concluding the conversation by saying words to the effect, "When we have all lost our money I will give you a ring and discuss it with you". Mr Luttrell said it was a joke; Mr Williams took it as a threat.

[131] The release of those investors' contact details, without their clear consent, to all other investors was entirely inappropriate. Mr Harvey said that it was a mistake, resulting from a misunderstanding of the authorities which had been given. However that may be, the suggestion that contributors in favour of the applicant's appointment to wind up the loans should contact the three who had sworn affidavits against that proposal can readily be construed as an invitation to bring pressure to bear as Mr Douglas suggested.

[132] Other correspondence from the applicant to investors was not quite so inflammatory. Its earlier letter to investors, of 23 April 2002, seeking views as to whether they wished the appointment of a liquidator, was considerably more balanced. It gave the estimate of liquidator's costs already referred to in connection with Mrs Thorn's concerns, which was consistent with Mr McIntosh's evidence, but also referred to ASIC's view that an advantage to the appointment of a liquidator would be the liquidator's ability independently to consider whether action should be taken against the applicant or Elliott & Harvey in relation to losses. It invited investors to consider whether they wished a copy of the material filed in court setting out the views of both ASIC and the applicant. It was generally fairly

dispassionate in tone. It is a pity that as the hearing approached matters became considerably more heated and that earlier balance did not prevail.

[133] On 27 June 2002, ASIC wrote to all investors setting out its reasons for seeking an independent liquidator, and expressing its view that investors had been misinformed as to the likely costs of a liquidator. Elliott & Harvey put its case in response in relatively measured tones in a letter of 12 July 2002. It seems to me that, with the input from both sides of the debate, investors were likely to have been alive to the various issues canvassed here, with the possible exception of the question of non-disclosure of fees. Certainly those investors who swore affidavits, both as intervenors and for ASIC, appeared to be relatively sophisticated investors. It was not suggested that they were unrepresentative of the investors as a whole. I do not think it likely that any of the investors supporting the applicant were under any serious misapprehension as to the relative merits of the its continuing to manage the loan, compared with the appointment of a liquidator. Their views as to how the funds they have invested can best be recouped must carry considerable weight.

[134] Having regard to all the considerations I have discussed, it seems to me that the most cost effective outcome would be the appointment of the applicant to wind up the loan schemes with an appropriate safeguard in place in the form of supervision in the form of Mr McIntosh and Mr Park. Although many of the criticisms by ASIC have force in respect of the applicant's and Elliott & Harvey's conduct in the past, the formulation of a winding up order can hardly be driven by punitive considerations. The applicant has managed the loans in default appropriately to date and retained the confidence of most of the investors.

[135] I do not think ASIC's argument that there should be a regime of general application for winding up of such schemes involving the appointment of an independent liquidator is compelling. The better approach in my view is a flexible one with a view to the best outcome. And, while there is undoubtedly a public interest in investor protection, that may better be achieved by using the sanction in s 601ED(5) against contravention, rather than penalising the investors in these schemes by imposing on them a form of winding up which the majority do not want and which is likely to produce a less satisfactory outcome.

[136] I propose therefore, to order the winding up of the schemes to be undertaken by the applicant with the supervision of Messrs. McIntosh and Park. I will make the order in the form of the draft provided by Mr O'Donnell, headed "One Scheme for Each Loan", subject to any submission as to the details.

[137] I will hear the parties as to costs.