SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Edwards & Ors* [2004] QSC 344
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (applicant) **v** **PETER ANTHONY EDWARDS** (first respondent) **ARTHUR JAMES ROBINSON** (second respondent) **ONE ACCORD TRADING SERVICE PTY LTD (ACN 094 143 601)** (third respondent) **CARSWORTHY LIMITED (A FOREIGN COMPANY)** (fourth respondent) **EDWARDIAN ASSOCIATES LIMITED (A FOREIGN COMPANY)** (fifth respondent) **COPPERTONE INVESTMENTS LIMITED (A FOREIGN COMPANY)** (sixth respondent)
FILE NO/S:	BS 4272 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2004
JUDGE:	McMurdo J
ORDER:	**1. The managed investment scheme operated by the third and fourth respondents ("*the Carsworthy Scheme*") be would up pursuant to section 601EE of the *Corporations Act* 2001(Cth).** **2. Ian Richard Hall and Martin Russell Brown be appointed under section 1323 of the *Corporations Act* as receivers and managers for the purpose of winding up the Carsworthy Scheme.** **3. The costs and expenses of the receivers and managers (to be calculated in accordance with the usual rates**

charged by the receivers and managers from time to time) be paid out of the assets of the Carsworthy Scheme.

4. **The receivers and managers shall have the powers necessary for the purpose of winding up the Carsworthy Scheme, including, but not limiting to:**

    a. **The general and specific powers identified in section 420 of the *Corporations Act*; and**

    b. **The power to require (by request in writing) any of the respondents or any officer, employee, consultant, banker, solicitor, accountant or agent of any of the respondents to provide reasonable assistance.**

5. **Anything that is required or authorised by the *Corporations Act* or by such orders to be done by the receivers and managers in winding up the Carsworthy Scheme may be done by any one or more of the receivers and managers.**

6. **The managed investment scheme operated by the fifth respondent ("*the Edwardian Associates Scheme*") be would up pursuant to section 601EE of the *Corporations Act* 2001(Cth).**

7. **Ian Richard Hall and Martin Russell Brown be appointed under section 1323 of the *Corporations Act* as receivers and managers for the purpose of winding up the Edwardian Associates Scheme.**

8. **The costs and expenses of the receivers and managers (to be calculated in accordance with the usual rates charged by the receivers and managers from time to time) be paid out of the assets of the Edwardian Associates Scheme.**

9. **The receivers and managers shall have the powers necessary for the purpose of winding up the Edwardian Associates Scheme, including, but not limiting to:**

    a. **The general and specific powers identified in section 420 of the *Corporations Act*; and**

    b. **The power to require (by request in writing) any of the respondents or any officer, employee, consultant, banker, solicitor, accountant or agent of any of the respondents to provide reasonable assistance.**

10. **Anything that is required or authorised by the *Corporations Act* or by such orders to be done by the receivers and managers in winding up the Edwardian**

Associates Scheme may be done by any one or more of the receivers and managers.

11. **The third respondent be wound up pursuant to subsection 461(l)(k) of the *Corporations Act.***

12. **Ian Richard Hall and Martin Russell Brown be appointed as the liquidators of the third respondent.**

13. **Anything that is required or authorised by the *Corporations Act* to be done by the liquidators may be done by any one or more of the liquidators of the third respondent.**

14. **The fourth respondent be wound up pursuant to subsection 583(c)(ii) of the *Corporations Act.***

15. **Ian Richard Hall and Martin Russell Brown be appointed as the liquidators of the fourth respondent.**

16. **Anything that is required or authorised by the *Corporations Act* to be done by the liquidators may be done by any one or more of the liquidators of the fourth respondent.**

17. **The fifth respondent be wound up pursuant to subsection 583(c)(ii) of the *Corporations Act.***

18. **Ian Richard Hall and Martin Russell Brown be appointed as the liquidators of the fifth respondent.**

19. **Anything that is required or authorised by the *Corporations Act* to be done by the liquidators may be done by any one or more of the liquidators of the fifth respondent.**

20. **The sixth respondent be wound up pursuant to subsection 583(c)(ii) of the *Corporations Act.***

21. **Ian Richard Hall and Martin Russell Brown be appointed as the liquidators of the sixth respondent.**

22. **Anything that is required or authorised by the *Corporations Act* to be done by the liquidators may be done by any one or more of the liquidators of the sixth respondent.**

23. **The applicant's costs of and incidental to this application be paid from liquidation of the third respondent in accordance with section 556 of the *Corporations Act.***

24. **Until further order, the second respondent, by himself, his servants, agents or otherwise howsoever, be prohibited from withdrawing, transferring or otherwise dealing with the funds in term deposit account number 4405 5014 4032 held at the**

Caboolture branch of the Commonwealth Bank of Australia without the written authority of the applicant.

25. The originating application is otherwise adjourned to a date to be fixed.

CATCHWORDS: CORPORATIONS – WINDING UP – GROUNDS FOR WINDING UP – OTHER GROUNDS – MISCELLANEOUS GENERAL GROUNDS – where car club where members can borrow the retail price of a car but only pay a discounted price and use difference for investment – where member would allegedly receive high returns on investment so only few repayments needed to receive car – whether a "scheme" – whether contributions pooled or used in a common enterprise – whether managed investment scheme – whether operated in this jurisdiction – whether carrying out of some of the activities amount to operation of scheme – whether winding up is appropriate under s 601EE

CORPORATIONS – WINDING UP – JURISDICTION OF COURT – IN GENERAL – whether the company that operated the scheme should also be wound up – where unregistered foreign company – whether it carries on business in Australia – where it had carried on business – whether part 5.7 body – whether jurisdiction to order winding up – whether just and equitable to order winding up under s 583

CORPORATIONS – WINDING UP – GROUNDS FOR WINDING UP – OTHER GROUNDS – MISCELLANEOUS GENERAL GROUNDS – whether company should be wound up under s 461 on the ground that it was knowingly involved in the operation of the scheme

CORPORATIONS – WINDING UP – GROUNDS FOR WINDING UP – OTHER GROUNDS – MISCELLANEOUS GENERAL GROUNDS – where moneys paid to company by way of unsecured loan – where interest was payable with proviso that borrower would use best efforts to repay lender interest at higher rate – whether contributions pooled or used in a common enterprise – whether managed investment scheme – whether scheme should be wound up under s 601EE – whether just and equitable to wind up operating company under s 583

CORPORATIONS – WINDING UP – JURISDICTION OF COURT – IN GENERAL – where unregistered foreign company – where moneys were paid by subscribing to shares of company – whether nature of enterprise involve more than merely raising capital – whether company carries on business in jurisdiction – whether part 5.7 body – whether jurisdiction to order winding up – whether it offered securities without providing disclosure document as required by s 727 –

whether just and equitable to wind up company under s 583

Australian Securities And Investments Commission Act 2001 (Cth), s 19
Corporations Act 2001 (Cth), s 9, s 583, s 601CD, s 601CL, s 601ED, s 601ED(1), s 601EE, s 708, s 727, s 761A, s 791D, s 820D, s 1371, s 1400
Crimes Act 1914 (Cth), s 5(1)

ASIC v Chase Capital Management Pty Ltd [2001] ACSR 778, cited
ASIC v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561, cited
ASIC v International Unity Insurance (General) Ltd [2004] FCA 1060, cited
Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex Rel. Corporate Affairs Commission (1981) 148 CLR 121, applied
Hope v Bathurst City Council (1980) 144 CLR 1, cited
Luckins v Highway Motel (Carnarvon) Pty Ltd (1975) 133 CLR 164, applied
Kintsu Co Ltd v The Peninsula Group Ltd (1998) 27 ACSR 679, cited
In Re Compania Merabello [1973] Ch 75, cited
In Re Azoff-Don Commercial Bank [1954] Ch 315, cited
Re Lawloan Mortgages Pty Ltd [2002] 2 Qd R 200, cited
Re Norfolk Island Shipping Line Pty Ltd (1988) 14 ACLR 229, cited
Town Investments Ltd v Department of the Environment [1978] AC 359, cited

COUNSEL: C A Wilkins for the applicant
Z Chothia (*sol*) for the first respondent
No appearance for the other respondents

SOLICITORS: ASIC for the applicant
Nicol Robinson Halletts for the first respondent
No appearance for the other respondents

[1] **McMURDO J:** The Australian Securities and Investments Commission applies for orders in relation to what it says were unregistered managed investment schemes, and other conduct which it says contravened s 727 of the *Corporations Law*. The Commission seeks orders for the winding up of the alleged schemes and for the winding up of companies said to have been operating the schemes or involved in the s 727 contravention.

[2] Events relevant to the managed investment schemes occurred both before and after the commencement of the *Corporations Act*. Any relevant provisions of the *Corporations Law* were "carried over" into the *Corporations Act*, so that any relevant contravention of the Law has consequences as if it had been a

contravention of the Act: *Corporations Act* ss 1371, 1400. The provisions relevant to managed investment schemes are the same in the Law and in the Act.

[3] Section 601ED requires a managed investment scheme to be registered in certain circumstances, including where the scheme has more than 20 members. By subsection (5), it provides that a person must not operate in this jurisdiction a managed investment scheme which is required to be registered unless it is so registered. The term "managed investment scheme" is defined by s 9. That definition, in part, is as follows:

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

[4] The Commission's case is that there were two relevant managed investment schemes, which it calls respectively the Carsworthy Scheme and the Edwardian Associates Scheme. It says that the Carsworthy Scheme was operated by two individuals and two companies, being the first to fourth respondents. It says that the Edwardian Associates Scheme was operated by the first respondent and the company which is the fifth respondent. Of those five respondents, only Mr Edwards has appeared in these proceedings, and he resisted only those applications which sought declarations and orders which were in terms of a contravention *by him* of s 601ED. Ultimately, ASIC did not press for any orders or findings to be made against the first respondent. He made no challenge to the Commission's evidence. He apparently conceded that the schemes were operated unlawfully by the third, fourth and fifth respondents, and the Commission submitted that this concession constituted some admission by those parties because of Mr Edwards' directorship of them. However any concession by Mr Edwards, through his counsel, is not one which I would treat as having been made by those respondents, for whom that counsel did not appear. The effective result is that the Commission has been put to proof against the other respondents.

The Carsworthy Scheme

[5] Most of the facts relevant to this alleged scheme appear from an affidavit by an investor, Mr O'Grady. As I have mentioned, none of the evidence is challenged and there is no reason to reject his account. In about June 2000, he learnt through a friend of what was described as a Car Club in which he could participate in this way. He could purchase a new car, borrowing the retail price but paying only a discounted price and using the difference for an investment through the Club. The investor would receive such high returns on the investment that all but a few repayments on the car loan would be funded by them. The investment provided the likely prospect, or so Mr O'Grady and many others must have thought, of providing a new car for ultimately a small fraction of its price or value.

[6] Mr O'Grady was referred by his friend to the second respondent, Mr Arthur Robinson. He met him at Mr Robinson's house at Buderim on the Sunshine Coast. Mr Robinson told him that he acted as a finance and vehicle broker for the scheme, and that through his contacts he was able to arrange attractively discounted prices for cars and finance. Other evidence shows that Mr Robinson was the registered owner until April 2002 of a business name "Diaspo Services" and until 23 October 2001 of another registered business name "One Accord Trading Service". This is to be distinguished from the third respondent, which is One Accord Trading Service Pty Ltd. According to the details of the registration of these names, the business of Diaspo Services was "payment of funds to investors – using clearing of bank account" and the business carried on under One Accord Trading Service was "brokerage in motor vehicles and finance". It is clear that Mr Robinson was indeed a vehicle broker and a finance broker. The nature of the business which he conducted under Diaspo Services is discussed below.

[7] Mr Robinson told Mr O'Grady that the discount he could procure was about 18 per cent of a car's retail price. This amount would then be invested in the Car Club (as he described it) through an offshore company, Carsworthy Limited. This company is the fourth respondent and is registered in Mauritius. Mr Robinson referred to the first respondent, Mr Edwards, as a person who had been successfully operating this Car Club for a number of years. He said that the money would be invested "in" Carsworthy which he described as a company "operated by various people who had contacts and relationships with trading houses and banks", who would arrange investments which would deliver high returns", high enough to pay all lease or loan repayments other than a "bedding-in" period of four payments by Mr O'Grady. He also said that the returns would be high enough to then repay to Mr O'Grady his (18 per cent) capital investment at the end of his car repayments. He said that this capital was "guaranteed by the companies we invest in, and the money never leaves the bank so it is never at risk. It is used as trading collateral for the bank trading program." He then added that "we can't guarantee the returns but the scheme has been operating successfully now for a number of years, and the people who first entered the scheme have been receiving their regular repayments".

[8] Mr Robinson then gave Mr O'Grady two documents for his signature. The first was on the letterhead of the trading name "One Accord Trading Services", and was headed "Expression of Interest". Details were inserted of Mr O'Grady's name and address and of the car which he wished to buy. The second document was headed "Non-Circumvention and Non-Disclosure Agreement". It was stated to be an

agreement between "the applicant", identified as Mr O'Grady, and One Accord Trading Services. The document contained a number of clauses apparently intended to restrict disclosure of any transaction or dealings as Mr O'Grady had discussed with Mr Robinson. But the document does not assist in the identification of a scheme or of its terms.

[9] Mr Robinson told Mr O'Grady that Car Club members should use a certain financier and a certain car dealer in the purchase of the car. Mr O'Grady then negotiated that finance and purchase. The ultimate price for the car was $57,600 which the dealer's documents show was calculated by allowing Mr O'Grady a discount of approximately $8,000. Mr Robinson then sent to him further documents for his signature. The first was headed "Application Declaration Form". It was addressed to Carsworthy Limited, which was described as the "Provider". It was completed on behalf of Mr O'Grady's company as the applicant. It contained terms as follows:

> " TO: CARSWORTHY LIMITED hereinafter the "*Provider"*
>
> FROM: BUILDMASTERS PTY LTD hereinafter the "*Applicant"*
>
> I/We the *Applicant* hereby make a formal application to the *Provider's* Vehicle Repayment Program.
>
> I/We acknowledge and understand that the *Provider* shall be entering into a Private Placement Agreement which is a Contractually Capital Guaranteed Program Secured 100% by Selective instruments for a fixed payment of profit. The Provider is not implying and or offering an undertaking and or guarantee of any yield and or profit from the Private Placement Program.
>
> The *Applicant* understands and acknowledges that they are to make the first (4) four monthly instalment payments of any Loan Contract that is entered into by the parties to this application. After the fourth instalment payment has been made by the *Applicant*, the *Provider* will by best endeavour make all instalment payments including the payment of any residual value remaining in the referred to loan. At the end of the term of the loan period and after all instalments and payments of the loan have been made then full ownership will be transferred to the *Applicant* unencumbered.
>
> The *Provider* reserves the right to not pay the residual payment in full if and when the *Applicant* seeks to dispose of the vehicle prematurely and or outside the terms of the referred to loan agreement. The *Applicant* shall contact the *Provider* to negotiate the terms and conditions under which this matter will be settled, between the parties.
>
> The *Provider* reserves the right to expel any applicant at any time from the referred to program. The non-disclosure and non-circumvention agreement must be adhered to at all times.

> The *Parties* agree to execute all documents without exception, and be bound by the terms and conditions of this Application Declaration and all associated documentation including the Non-Circumvention and Non-Disclosure Agreement."

The document did not define or indicate the meaning of its expressions "Private Placement Agreement", "Contractually Capital Guaranteed Program", "Selective Instruments" and "Private Placement Program".

[10] The next of these documents received for Mr O'Grady's completion was headed "Form Letter Requesting Information". It was also addressed to Carsworthy Limited. By its terms, Mr O'Grady's company requested "specific confidential information and documentation about the *Provider's* Vehicle Repayment Program". There were then terms indicating some intention by Carsworthy Limited to avoid a suggestion that it had solicited Mr O'Grady's provision of funds. It described the transaction as "strictly one of private placement" to be distinguished from "the sale of securities".

[11] The third document in this set was headed "Banking Co-ordinates", which contained details of a bank account in Hong Kong in the name of Carsworthy Limited to which Mr O'Grady or his company was to transfer the relevant funds, which were specified as USD 10,373.

[12] Mr O'Grady, through his company, acquired the car by lease through CBFC Leasing Pty Ltd. The car was sold to the financier for the discounted price which Mr O'Grady had agreed with the dealer. Mrs O'Grady then caused $10,372.99 to be transferred from his company's bank account to the Carsworthy Hong Kong account. This was converted to USD 5,427.15. The amount transferred corresponded with the number of dollars inserted in the "Banking Co-ordinates" document, except of course that the amount in that document was wrongly stated to be in American dollars. The documents I have described were completed by Mr O'Grady and sent to Mr Robinson.

[13] Thereafter Mr O'Grady paid the first four lease payments, each in the amount of $1,221, after which the next four payments were made from amounts received by him from an account entitled "Mr Arthur Robins" with the description "Carsworthy". These were payments for which the registered business name of Diaspo Services was apparently relevant. Mr Robinson's activities included the receipt of funds from Mr Edwards or Carsworthy and the distribution of them to Australian investors in the scheme. After these payments, there was a payment he received in the following month from an account entitled "One Accord Trad" with the description "Carsworthy". That was the last payment he received from this Car Club. Thereafter he had to make his own lease payments. The result for Mr O'Grady was that having sent $10,372 to the Hong Kong account, he received in total five payments each of $1,221, a total of $6,105.

[14] In June 2001, at which point he had received four lease payments from Carsworthy, he sought to buy another car through this Car Club. He contacted Mr Robinson who

told him that "we have closed the Car Club off to new members. We can't accept any more people". From the following month, he began to receive correspondence from Carsworthy signed by Mr Edwards warning of delays in payments. The correspondence sheds no light upon what had been done with the funds of Mr O'Grady or any other like "member". In a letter dated 13 July 2001 addressed to "Dear Participant", Mr Edwards wrote:

> "This is a letter to bring you up to date with how the program is going at the present time. We have been making payments now for some 7-8 months and things have been travelling along smoothly enough to achieve this as you are well aware. This has been a large administration exercise and with changes to trading guidelines in recent times we have had difficulty with the placements, timeframes and returns as well as some other more complex issues such as source of funds and origin of funds. This is required for this type of program and we simply cannot give these at present. …
>
> At present we don't know when the funds for August payments will arrive as I explained earlier things have tightened up for us considerably over the past few months.
>
> This basically means that you will need to plan ahead to make this payment from your own resources until the situation is settled. …"

[15] An email sent by "Carsworthy" on 5 December 2001 said that "Arthur and Peter" (probably a reference to Mr Arthur Robinson and Mr Peter Edwards) were in Europe where they had been "able to secure some excellent opportunities for the new year" so that there would not be the "problems that are associated with the US currency movement at present". It advised that:

> "In regards to current programmes, we have been advised yesterday that the facilitator believes that some headway has been made with the banks and the transfers should be made soon …
>
> We must stress that we are not the facilitators of this trade, and therefore are not privy to all paperwork and discussions. …
>
> In the meantime if the bank transfers arrive, payments will be made."

[16] On 20 December 2001, another email sent by Carsworthy said to investors such as Mr O'Grady:

> "The program payments that we have been waiting on for months are still causing frustration. Even though significant headway has been made, we are advised that some necessary bank clearances still have not been received. We have been advised by the trustee that although these are expected shortly, it will be the middle of January now before he expects to make four dispersals of all capital and gain. … We are very confident that next year will bring the stability that is needed to make this programme work effectively."

[17] On 19 February 2002, Mr Robinson sent an email to Carsworthy investors which said, amongst other things:

> "Carsworthy management has advised us that they are seeking to procure a loan that would enable the return of capital to all participants. This will ease pressure for everyone. …
>
> The loan application has been made and verbal approval has been given. Once final approval has been given and the funds are available Carsworthy will make the necessary arrangements to transfer these funds."

[18] On 28 March 2002 another email to investors advised that:

> "we are still awaiting information from Carsworthy on the progression of the loan application … Funds being returned from Asian contracts are still tied up with banks. …"

[19] On 25 April 2002 Mr Edwards emailed investors saying that:

> "… A number of participants have called their funds back and this is why I have been organising the loan to pay all the capital back to all of the people. The choice was either the loan or pull the programs all apart to give these people back their capital and give up. This would have meant that all your patience and all our efforts would have been in vain. I believe the loan was the right decision and I stand behind it 100%.
>
> Currently the loan is still awaiting two final documents and some fees."

[20] On 23 July 2002, Mr Robinson, describing himself as "facilitator" wrote "to all members of the Carsworthy Car Repayment Plan". He wrote on the letterhead of One Accord Trading Services. He said:

> "This letter will attempt to inform all of the investors in the Carsworthy plan as to the whereabouts of the invested funds, when returns are expected, and the future expectations of the plan.
>
> The type of programs that the car funds are invested in are obviously high yield, and because of this they tend to be programs that operate offshore and are not easy for the management of Carsworthy to control and/or always obtain concrete information about. …
>
> There is reason to believe that repayments will once again be made in the very near future with many of the investments promising a return, even this month. Carsworthy have advised us however, that their first priority will be to return all capital before repayments are made. The return of capital will be made in priority, favouring those who have received the least payments, to receive the first returns and

> then others who have received more payments to follow soon afterwards …
>
> Carsworthy are involved in 9 different investment programs and are part of a much larger investment group.
> …"

[21] On 8 August 2003, Mr Robinson sent another email which said that:

> "The car investments represent approximately 2.3 million Aust. dollars of a total investment pool of approx $25 million. The car investments were made to a company called "Carsworthy". This company is one company aligned with three or four others all participating in the same investments all tied together with the same principal and controller(s)."

[22] After Mr O'Grady wrote to Mr Edwards demanding repayment in August 2003, Mr Edwards replied in a letter dated 12 September 2003 by saying, amongst other things:

> "The security of the Capital was given to our organization by the company receiving the funds. At this time we have been assured by the directors of the particular organization concerned that our funds are secure and whilst we are frustrated at the lack of return on these funds we still have a confidence relating to their security."

[23] I have set out this correspondence in some detail because it constitutes some evidence that there was a scheme, and with the features required to make it a managed investment scheme. Clearly from the documents I have extracted, the investor such as Mr O'Grady was told practically nothing as to the particular investments which were to produce such extraordinary returns for his benefit. In many respects what was told to investors was so general as to be meaningless and it gives the strong impression that the intention was to tell investors as little as possible. However what was said supports findings that there was something in the nature of a scheme, and that it involved the pooling of contributions or the use of those contributions in some common enterprise. On any view, investors were told that the prospect of a payment by Carsworthy to them or for their benefit was dependent upon the success of investments made with their money. It was not a case where Carsworthy agreed unconditionally to make the lease or loan repayments regardless of the outcome of the investments. And the correspondence is to the effect that any relevant investments were made for the benefit of a group of participants such as Mr O'Grady. There is no indication that Mr O'Grady's payment was intended to be kept, or was kept, separately from other moneys and was the subject of a distinct investment. So, for example, there is Mr Robinson's statements in his letter of 23 July 2002 that some participants would be paid before others and that priority would be given to the return of capital before "repayments" (that is moneys for car repayments) would be made. This is inconsistent with the notion that there was a separate investment on behalf of each participant.

[24] There is then an affidavit sworn by an investigator employed within the applicant, according to which in the period from 22 August to 30 August 2001, more than 220 investors transferred funds to bank accounts maintained by Carsworthy, which funds totalled AUD 2,401,806. Her affidavit exhibits copies of bank statements for accounts of Carsworthy maintained in Hong Kong. Of course they show the movements of funds, but they shed no light on the destinations of payments made from those accounts except insofar as they can be identified by other documents as payments to Club members through Mr Robinson's business. The affidavit refers to an examination conducted by the deponent of Mr Edwards under s 19 of the *ASIC Act*, in the course of which Mr Edwards is said to have made statements in terms of "the Carsworthy Scheme". One of those statements, as its effect is described in the affidavit, was that:

> "The funds from investors would be pooled into the Carsworthy bank account in Hong Kong and invested on behalf of investors who would look to receive a benefit from those investments. The investors did not have any day to day control of those funds."

It will be seen that this evidence is in terms closely corresponding with the definition of a managed investment scheme. Of itself it is of little weight. Statements were also attributed to Mr Edwards to the effect that some of the funds were to be invested in a certain company belonging to a Mr Conroy and a Mr Giles, and that the documentation that went to investors such as Mr O'Grady was prepared by Mr Conroy. The investigator also refers to an examination of Mr Robinson conducted under s 19, but this sheds no light on the application of moneys such as those paid by Mr O'Grady.

[25] That being the extent of the evidence, the question then arising is whether it shows that more probably than not, there was a managed investment scheme.

[26] The term "scheme" is not defined. But in this context, there is often applied the statement by Mason J. In *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129 that "… all that the word 'scheme' requires is that there should be 'some programme, or plan of action'"[1]. The documents and correspondence I have extracted above together with the further evidence that comes from the investigator's affidavit, establishes that there was a scheme in this sense.

[27] The definition of managed investment scheme then requires the scheme to have three features, the first of which is that people contribute money as consideration to acquire rights to benefits produced by the scheme. That feature is established here. The second is that contributions are to be pooled or used in a common enterprise to produce financial benefits for the people holding interests in the scheme, that is those who have contributed money to acquire rights to benefits produced by the scheme. According to what was represented to Mr O'Grady and no doubt to many others, both before and after the relevant contribution was made, the contribution was intended to produce financial benefits. It was intended to result in the

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[1] See eg *ASIC v Chase Capital Management Pty Ltd* [2001] WASC 27; 36 ACSR 778 at [57]; *ASIC v Pegasus Leveraged Options Group Pty Ltd & anor* [2002] NSWSC 310; 41 ACSR 561 at [26].

successful endeavours by Carsworthy to make the relevant car payments for contributors. The question is whether the scheme had a feature that contributions were to be pooled or used in a common enterprise to produce that benefit. As I have discussed, the documentary evidence is to the effect that there was such a pooling for use in a common enterprise or enterprises. This may not have been so clear to an investor at the outset, having regard only to the terms of the documents which an investor signed before making the contribution. But if it was not already clear from the references to a "program" and "selective instruments" in those documents, it became clear enough from the various communications from Mr Edwards and Mr Robinson. In addition, there was the representation by Mr Robinson[2] to the effect that "the money never leaves the bank so it is never at risk. It is used as trading collateral for the bank trading program", which is consistent only with the use of a contributor's funds in common with those of others. Against that, there is nothing to indicate that when Mr O'Grady made his investment, he was made to believe that his funds would be kept distinctly from those of other investors in what after all, was described as the "Car Club". Although contributors were told very little as to what would be done with their contributions, I find that they participated in a scheme in which they understood, or they should have understood, that their funds would be at least to some extent pooled or used in common in an effort to produce the extraordinary rates of return which would be required to provide the represented benefits.

[28] The third required feature, which is that members do not have day to day control over the operation of the scheme, is clearly established.

[29] In my conclusion therefore, there was in the Carsworthy scheme as I have described it, a managed investment scheme as defined in s 9 of the *Corporations Act*.

[30] On the basis of the investigator's evidence, the scheme plainly had more than 20 members. Therefore it was a managed investment scheme which s 601ED(1) required to be registered. This scheme was not registered.

[31] The prohibition within s 601ED(5) is of the operation in this jurisdiction of an unregistered managed investment scheme. The term "operate" in this section refers to the acts that constitute the management of or carrying out the activities that constitute the scheme: *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 at 574; *Re Lawloan Mortgages Pty Ltd* [2002] 2 Qd R 200 at 218. In this case, some of the activities constituting the scheme were carried out within the jurisdiction but some were not. Within the jurisdiction, discussions and negotiations preceding a member's contribution were conducted, and such payments that were made to members were made through Mr Robinson's business (and on one occasion) the third respondent. But any pooling or use in a common enterprise of funds occurred outside Australia.

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[2] See paragraph [7] above

[32] The term "operated in this jurisdiction" is defined in section 9 as having its meaning as defined in chapter 7 of the Act. Within that chapter, the term is defined in s 761A as follows:

> "Operated in this jurisdiction:
>
> (a) in relation to a financial market, has a meaning affected by section 791D; and
> (b) in relation to a clearing and settlement facility, has a meaning affected by section 820D."

By section 791D, a financial market is taken to be operated in this jurisdiction if it is operated by a body corporate that is registered under chapter 2A, but by subsection (2), it is further provided that this "does not limit the circumstances in which a financial market is operated in this jurisdiction for the purposes of this Chapter". Section 820D is a provision in substantially the same terms in relation to a clearing and settlement facility. The result of these provisions is that the term "operated in this jurisdiction" when used in relation to a managed investment scheme in s 601ED(5) refers to the operation by a body corporate registered under chapter 2A as well as to what constitutes an operation in the jurisdiction according to the ordinary meaning of those words. ASIC submits that the Carsworthy Scheme was operated by the conduct of at least Mr Edwards, Mr Robinson, One Accord Trading Service Pty Ltd and Carsworthy Limited. If One According Service Pty Ltd was an operator of the scheme, then because it is a company registered under chapter 2A, it would appear that at least on that basis this was a scheme operated within the jurisdiction.

[33] The issue of whether One Accord Trading Service Pty Ltd was an operator of the scheme again involves the question of whether the carrying out of some but not all of the activities of the scheme amounted to an operation of the scheme. Ultimately then the question is whether those activities which were carried out in Australia, and in particular by Mr Robinson as well as the third respondent One Accord Trading Service Pty Ltd, were of themselves sufficient to amount to an operation of the scheme.

[34] The concept of the operation of a managed investment scheme does not require the identification of but one place, as that place where the scheme is operated. Nor does it require the identification of but one operator: see eg *ASIC v Pegasus Leveraged Operations Group Pty Ltd*. The question then is not whether this jurisdiction is *the* place where the scheme was operated but whether it was *a* such place. That involves a question of degree, and a consideration of the nature and extent of the activities carried on within the jurisdiction in the context of the scheme as a whole. In this case, there was some system within the jurisdiction for the payment through Mr Robinson's business of investors, just as there was a system in the jurisdiction for the provision of documents to potential investors and for their admission to the scheme. I infer that the references to "Arthur" in the correspondence I have set out above is a reference to Mr Robinson. It therefore appears that Mr Robinson's involvement was probably more extensive than simply conducting the pre-contract dealings with people such as Mr O'Grady and dispersing funds to investors through a local bank account. And that correspondence also includes emails written by Mr Robinson himself. From that evidence, I conclude that Mr Robinson's activities

were such as to amount to an operation of this scheme. As much if not all of his activity occurred within Australia, including the canvassing of potential investors and the processing of payments to them, I conclude that this scheme was operated within the jurisdiction.

Orders for the Carsworthy Scheme

[35] The originating application sought declarations that the first to fourth respondents operated the scheme, as a managed investment scheme in contravention of s 601ED(5). At the hearing ASIC did not press for that relief. What is sought are orders for the winding up of the scheme and for the winding up of One Accord Trading Service Pty Ltd and Carsworthy Limited. But I have concluded that Mr Robinson's activities amounted to an operation of the scheme, because it was necessary to characterise his activities in determining whether the scheme was operated within the jurisdiction. It is unnecessary to consider whether his activities made him an operator, or whether they involved only an operation by Carsworthy as his principal.

[36] Section 601EE provides that if a person operates a managed investment scheme in contravention of s 601ED(5) the court may make any orders it considers appropriate for the winding up of the scheme. It is appropriate to order the winding up of this scheme. Very little information has been provided to participants as to what was done with their funds. The prospect of some dividend cannot be excluded although it seems remote. But there is no prospect of any orderly winding up of the scheme by those who have been involved with it. I will not make a declaration that Mr Edwards was an operator of the Scheme in the circumstance where ASIC did not press for that relief. It is sufficient to say that he was closely connected with the operation of the scheme. He has appeared by counsel at this hearing but has offered no submission to the effect that he or others connected with the operation of the scheme are in a position to effect an orderly winding up, or that any order for winding up of the scheme would be futile or otherwise inappropriate. Orders will be made for the winding up of the scheme together with ancillary orders for the appointment of receivers and managers as sought by the draft order handed up by ASIC during the hearing.

[37] If the scheme is to be wound up, the case for a liquidation of the company that operated it is compelling, as Owen J said in *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at [93][3]. Carsworthy Limited is not registered under Division 2 of Part 5B.2. But if it is a "Part 5.7 body", there is a power under s 583 of the Act to order that it be wound up. Section 9 relevantly defines a Part 5.7 body as meaning:

> "(a) A registrable body that is a registrable Australian body and
> …
> (b) A registrable body that is a foreign company and:
>
> (i) is registered under Division 2 of Part 5B.2; or

[3] Followed by Davies AJ in *Australian Securities and Investments Commissions v Pegasus Leveraged Options Group Pty Ltd* at [98]

(ii) is not registered under that Division but carries on business in Australia; or

(c) A partnership, association or other body (whether a body corporate or not) that consists of more than five members and that it is not a registrable body."

The term "registrable body" is defined by the same section to mean "a registrable Australian body or a foreign company". Carsworthy Limited is a foreign company as defined in s 9, because it is a body corporate incorporated outside Australia and is not a corporation sole or an exempt public authority. It is a registrable body then because it is a foreign company, and it can be a Part 5.7 body only if it is within paragraph (b) of the definition of that term. Because it is unregistered, it can be a Part 5.7 body only if it is within paragraph (b)(2) of that definition by which a registrable body which is a foreign company, but which is unregistered, is a Part 5.7 body if it "carries on business in Australia".

[38] The business of Carsworthy was the operation of this scheme, the so called "Car Club". To some extent, Mr Robinson's activities were for his personal benefit, through the commissions he derived as a motor vehicle broker and probably as a finance broker. But he also acted on behalf of Carsworthy in several ways as I have described. At least through Mr Robinson, Carsworthy Limited carried on business in Australia. It is plainly established that Carsworthy's conduct in Australia, at least through Mr Robinson, involved "a succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain": *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 at 178.

[39] However the scheme is no longer operated and there is no evidence Carsworthy Limited still carries on business at least in Australia. Is it nevertheless a Part 5.7 body in the sense that it is an unregistered foreign company which "carries on business in Australia"? In s 9, the reference to carrying on business is expressed in the present tense. Can a company be a Part 5.7 body, considered as at the hearing of an application under Part 5.7, if it no longer carries on business here but once did as an unregistered foreign company? That question was recently answered in the affirmative by Lander J in *Australian Securities and Investments Commission v International Unity Insurance (General) Ltd* [2004] FCA 1060. As His Honour pointed out, one of the circumstances which would allow for a Part 5.7 body to be wound up is that it has ceased to carry on business in this jurisdiction[4], which confirmed his view that:

> "a company does not necessarily cease to be a Pt 5.7 body in subs (b)(ii) of the definition if it ceases to carry on business in Australia. It remains a Pt 5.7 body for the purpose of a winding up order under s 583 if the ground relied upon is that it carried on business in Australia but has ceased to carry on business."

In the present case, the ground relied upon is not that it has ceased to carry on business in Australia (although that ground is apparently established) but that it is

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4 s 583(c)(i)

just and equitable that it should be wound up[5]. It is my view that whichever ground is relied upon, Carsworthy is a Part 5.7 body for which a winding up order can be made.

[40] Division 2 of Part 5B.2 deals with the registration of foreign companies. A foreign company must not carry on business in this jurisdiction unless it is registered or it has applied to be registered and the application has not been dealt with: s 601CD(1). Once registered, the foreign company must lodge a written notice, if it ceases to carry on business in this jurisdiction, within seven days of doing so: s 601CL(1). If a registered foreign company does cease to carry on business here, its name can be struck off the register, whereupon it ceases to be registered under that Division: s 601CL(5), (7). By s 601CL(6), it is provided that the striking off from the register of the name of the foreign company does not affect the power of the court to wind it up. What is the source of the power to wind up such a body, that is a deregistered foreign company? There is a power within s 601CL(14) to appoint a liquidator of the foreign company in the circumstance where a registered foreign company commences to be wound up, or is dissolved or deregistered, in its place of origin. But that is a power in relation to a registered foreign company rather than in relation to a deregistered company. The court's power to wind up a deregistered company, as indicated by s 601CL(6) must derive from s 583. It is only Part 5.7 (which includes s 583) which empowers the court to wind up a body which is not a "company" (meaning a company registered under this Act[6].) Because the deregistered company could be wound up only under Part 5.7, a deregistered foreign company must be a Part 5.7 body as defined. It could be wound up as a Part 5.7 body only if paragraph (b) of the definition is read as referring to a foreign company that has been registered under Division 2 of Part 5B.2 or to an unregistered foreign company that has carried on business in Australia.

[41] Once a registrable body that is a foreign company becomes registered under Division 2 of Part 5B.2 or carries on business in Australia, it becomes a Part 5.7 body which is thereafter susceptible to an order for winding up, regardless of whether it subsequently becomes deregistered or ceases to carry on business in Australia. Once it becomes a Part 5.7 body it has effectively submitted to the jurisdiction conferred by the Act for its winding up[7]. Such an interpretation of the definition of a Part 5.7 body is clearly beneficial to the operation of Part 5.7. The contrary interpretation would enable a foreign company, which carried on business here illegally by being unregistered, to avoid an order for winding up in Australia by ceasing its business here just ahead of a winding up application. Especially where an expressed circumstance for winding up is the cessation of business in Australia, it is difficult to see that such a limitation upon the operation of Part 5.7 was intended.

[42] The result is that Carsworthy Limited became a Part 5.7 body by being an unregistered foreign company carrying on business in Australia. Once it became a

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5 s 583(c)(ii)

6 Definition of "company" in s 9

7 per Harmer "Report for Australia" in Fletcher (ed), *Cross-Border Insolvency: Comparative Dimensions* (British Institute of International & Comparative Law, London, 1990), p 46 as quoted in Keay *McPherson The Law of Company Liquidation* (4th Edition) p 688

Part 5.7 body, it was amenable to the operation of Part 5.7, and it remains so amenable although it has ceased to carry on business here. It is therefore a body which may be wound up under s 583.

[43] It has been suggested that, beyond the satisfaction of the conditions for jurisdiction to wind up a foreign company which are prescribed by the statute, there are other essential conditions of the court's jurisdiction, such as what the Third Edition of *McPherson*: *The Law of Company Liquidation* described as "prerequisites to the assumption of jurisdiction to wind up a foreign company", in which it is suggested at 463-464 that "a natural and necessary requisite for the exercise of jurisdiction" is "the existence of some commercial subject matter on which the order can operate", an expression which derives in this context from *In Re Azoff-Don Commercial Bank* [1954] Ch 315 at 333 as cited by Megarry J in *In Re Compania Merabello* [1973] Ch 75 at 87. They were decisions under which the relevant legislation was in terms corresponding with s 315 of the *Uniform Companies Act* 1961. Under those statutes, the court's power was to wind up any "unregistered company", which included a foreign company. Within the statute itself, there was no prescribed nexus between that company and the place governed by the statute. Hence those provisions had required courts to search for some nexus to be necessarily implied, and the judgment of Megarry J details the various tests formulated in the cases decided to that point. But within the *Corporations Act*, as with the *Corporations Law* and also the preceding *Companies Codes*[8], there was a prescribed nexus between the foreign company and this jurisdiction. Under the *Codes*, the foreign company had to be one which was registered or required to be registered as a foreign company[9], and under the *Corporations Law* and now the Act, the nexus is found within the definition of a Part 5.7 body. Once it is determined that a foreign company is a body so defined, there is jurisdiction to order its winding up upon proof of a relevant ground. Matters such as the presence or otherwise of assets or creditors within this jurisdiction are relevant considerations to the exercise of the discretion to order winding up, but they do not go to jurisdiction. That is how they were characterised by Young J in *Re Norfolk Island Shipping Line Pty Ltd* (1988) 14 ACLR 229 and by Santow J in *Kintsu Co Ltd v The Peninsula Group Ltd* (1998) 27 ACSR 679 at 686.

[44] In this case, there is a large number of Australian creditors with, in total, substantial claims against the company. Little is known of the present financial position of Carsworthy. The respondent Edwards who was a consultant for Carsworthy and who says that he received $77,000 in commissions from Carsworthy, is an Australian as is of course the respondent Robinson. It cannot be said that a winding up of Carsworthy would be futile in that there is no prospect of recovering any assets. Notably, Edwards through his counsel made no such suggestion.

[45] I conclude that an order should be made for the winding up of Carsworthy Limited.

Winding up of One Accord Trading Service Pty Ltd

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8 ss 469-470

9 469(1)

[46] The connection between this company and the Carsworthy scheme, if at all, is said to arise in two ways. The first is that this company made some payments to participants in the scheme in July and August 2001. The second is that, according to Mr Robinson's evidence in a s 19 examination, Mr Edwards purchased $500,000 worth of shares in an Australian Company called Permo-Drive Technologies Ltd, and put those shares into the name of this company. The evidence establishes that the company holds 500,000 shares in Permo-Drive Technologies Ltd.

[47] One Accord Trading Service Pty Ltd is a local company for which the operation of Part 5.7 is not relevant. The question here is whether it is just and equitable that the company be wound up. The suggested basis for that is that I should find that the company was either an operator of the Carsworthy Scheme or that it holds the shares in Permo-Drive, which could be an asset of that scheme.

[48] This company's directors were Edwards and Robinson. In making the payments to participants which it did in July and August 2001, it knew that those payments were being made in respect of moneys invested by those persons with Carsworthy and I would infer that the company knew that it was thereby assisting in the operation of the scheme. ASIC submits that if this company did not itself contravene subsection 601ED(5) by operating the Carsworthy scheme, it is just and equitable that it be wound up because it aided Carsworthy Limited to contravene that provision or it was knowingly concerned in its contravention[10]. In my view it is unnecessary to determine whether One Accord Trading Service Pty Ltd itself was an operator of the scheme. By processing the payments to participants in July and August it assisted in the unlawful operation of the scheme in circumstances where I would infer, on the balance of probabilities, that it knew of the facts constituting the principal offence of the operation of an unregistered scheme. There is no evidence as to the financial position of this company and whether it has or has ever had any business apart from what it did in July and August 2001 for this scheme. It is likely to be beneficial to the winding up of the Carsworthy Scheme that this company be wound up. Although the evidence as to its involvement is not strong, the public interest involved in the orderly winding up of this unlawful scheme strongly favours an order for the winding up of this company if that would not work an injustice to innocent parties. There is no indication that anyone other than Mr Edwards and Mr Robinson, or some entity associated with them, would be prejudiced by an order for its winding up. Its shareholders appear to be entities associated with Edwards or Robinson. It has of course been duly served and offers no resistance to the order.

[49] I conclude that the third respondent One Accord Trading Service Pty Ltd should be wound up.

Edwardian Scheme

[50] The fifth respondent is Edwardian Associates Limited which is a company domiciled in Western Samoa. At no time has it been registered in Australia. As its name suggests, it is a company which has at all times been controlled by the first

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[10] So as to make it a party to an offence by the operation of s 5(1) of the *Crimes Act* 1914 (Cth) which was then in force.

respondent Edwards. The applicant's case is that this company and Edwards operated a managed investment scheme in contravention of s 601ED.

[51] According to the affidavit of the ASIC investigator, Edwards said, when examined under s 19, that potential investors were canvassed in investment meetings or seminars held within Australia, through Australians appointed by the company as so called "fund gatherers". Mr Edwards said that moneys were then paid by investors to a bank account kept by the company in Hong Kong, in which such receipts were pooled in order to produce some financial return for the investors, who did not have day to day control over their funds. Some investors did receive some returns but overall there were some millions of dollars of investors' funds which have not been repaid. Mr Edwards said that there were at least USD 8 million of funds sent to the company. Fund gatherers were paid on a commission basis.

[52] The terms upon which moneys were invested with this company were somewhat different from those of the Carsworthy scheme. In relation to this scheme, there is no evidence from an investor, such as Mr O'Grady for the Carsworthy scheme, which identifies the documents with which investors were provided and which were intended to express the terms of the investment. However exhibited to the ASIC investigator's affidavit are certain loan agreements, recording loans to Edwardian Associates Limited which would appear to be representative of the terms upon which moneys were invested. They are in relevantly identical terms[11]. They recorded a transaction whereby money was paid to Edwardian Associates Limited by way of an unsecured loan for a term of 12 months and 90 days. Interest was payable at 7% per annum but with the proviso that the borrower, Edwardian Associates, agreed to "use its best efforts to conduct its business in such a manner as to pay the lender interest at a higher rate". No interest was payable for the first 90 days of the loan. According to these documents, save for the lender's promise to try to pay a higher rate than the agreed 7%, the transactions were simply ones of unsecured loans. In contrast, the Carsworthy investments were on the basis that Carsworthy would make certain investments with the funds, although those investments were not at all well described or identified. Carsworthy did not agree to repay any sum but agreed only to use its best endeavours to make payments of car loans or car leases and to then repay the original investment. The documents in Carsworthy referred to the program, and an individual investor's status as a member of that program. It was also described as the "Car Club".

[53] The investigator's affidavit also refers to an examination under s 19 of a fund gatherer, a Mr Chora. According to the affidavit, Mr Chora said that Edwards promised to "pay him 1% of all money returned from the scheme to investors he had recruited". (These are the investigator's words and are not said to have been the precise words used by Mr Chora when examined). Mr Chora is also said to have described what happened at a meeting of investors at a Brisbane hotel in mid 2003, by which time the funds had not been repaid. At that meeting, Mr Robinson is said to have told investors that funds had been applied or placed in certain ways. But there is no evidence of what, if anything, investors were told before they paid over their moneys.

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[11] Exhibits NW 43, NW 44, NW 47 and NW 48 to the affidavit of N.A. Wren filed 17 May 2004

[54] Ultimately then the most reliable indication of the terms of the investments with Edwardian Associates, and the nature of any scheme involved, is the loan agreement which seems to have been commonly used to define the terms of an investment. As I have said, save for the unusual provision whereby the borrower agreed to pay a higher interest rate if it could, the agreement is simply one for an unsecured loan and the investment would not appear to be one in respect of a managed investment scheme. However this interest provision is consistent with Edwardian Associates endeavouring to make a return on an investment of the funds deposited with it, by acting in the interests of the depositor. Of course, the enforcement of the promise to try to pay a higher rate of interest would be problematical. But this term does indicate that deposited funds were to be applied by Edwardian Associates in the interests of depositors directly, that is that they would benefit according to how much was derived from the investment of depositors' funds. And I infer that investors must have been told that there were substantial prospects of their receiving more than the minimum interest rate of 7% per annum. Such an interest rate was not so high that unsecured deposits made with an overseas entity could have been attracted to this extent, without some expectation by investors that they would receive more than this minimum rate of interest.

[55] Ultimately I am persuaded that this was a managed investment scheme as defined by s 9. It involved the pooling of contributions made by investors, for their use in a common enterprise, to produce benefits being a return on the funds invested, in circumstances where the depositors did not have day to day control over the operation of the scheme. In effect, the moneys deposited under transactions of loan were to be invested for the benefit of all depositors, with a view to providing each depositor with the maximum return on the investment.

[56] Again, as with the Carsworthy scheme, any pooling or use in a common enterprise of funds was something which occurred outside Australia. As with the Carsworthy scheme, the question is whether those activities which were carried on in Australia in relation to the scheme were of themselves sufficient to amount to an operation of the scheme. Having regard to the evidence as to the extensive marketing of the scheme and the procurement of funds within Australia, I conclude that the scheme was operated within this jurisdiction in contravention of s 601ED(5). It is appropriate that similar orders be made for the winding up of the scheme as will be made for the Carsworthy scheme.

[57] The extensive conduct of attracting funds from investors, by which there was an operation of the scheme within Australia involved the carrying on of business within Australia by Edwardian Associates Limited. It follows that as an unregistered foreign company which carried on business here, it became and remains a Part 5.7 body which is able to be wound up pursuant to s 583. For similar reasons given in relation to Carsworthy, it is just and equitable that the company, as well as the scheme which it operated, be wound up. There are unpaid investors within Australia whose claims total millions of dollars. Moreover, it plainly appears that the shares held by One Accord Trading Service Pty Ltd in Permo-Drive Technologies Ltd were purchased by the application of funds from the bank account of Edwardian Associates Limited. In the case of this company then, there is at least a substantial likelihood of its having assets within the jurisdiction.

Coppertone Investments Limited

[58] This company, which is the sixth respondent, is registered in Mauritius. The case against it is that it contravened s 727 of the *Corporations Law* by making an offer of securities, which had required disclosure to investors under Part 6D.2, and without a disclosure document having been lodged. Within a 12 month period (from 15 June 2000) more than 220 investors subscribed for shares in this company by providing almost AUD 5 million. I infer that as these funds were paid in Australian dollars, more probably than not they were all paid from Australia and in consequence of offers received within Australia[12]. I also infer that there was not any or such an incidence of "sophisticated investors", as referred to in s 708(8), as to affect the s 708 threshold. In what appear to be the documents routinely provided to persons subscribing for shares in response to these offers, as exhibited to Mr O'Grady's affidavit, there is no provision for information which would identify a person as a sophisticated investor. Accordingly the thresholds defining small scale offerings which do not need disclosure, as expressed within s 708, were exceeded.

[59] What is proscribed by s 727 is the offering of securities, and s 700(4) provides that this Chapter 6D (of which s 727 is part) applies to offers of securities that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs. The evidence plainly establishes that offers of securities, being shares in this company, were received in Australia. Mr O'Grady, through his superannuation fund, was also an investor in Coppertone. His and other evidence shows that there was a continuous and systematic program to raise funds in Australia for Coppertone on this basis. It seems clear then that the offer of securities being shares in Coppertone required a disclosure document and that offers were made without such a document having been lodged with ASIC. There was a contravention by Coppertone Investments Limited of s 727.

[60] The applicant then seeks an order for the winding up of Coppertone on the just and equitable ground. If there is jurisdiction to make that order, it would appear that it should be made. Large amounts of money were procured unlawfully from investors in Australia who, at least at present, have lost their funds. Again however the question is whether there is jurisdiction to wind up this company, involving the issue of whether it is a Part 5.7 body. It has never been registered in Australia so that it is a Part 5.7 body if it has carried on business here.

[61] In its case however, it is not so clear that its conduct did involve the carrying on of a business. In each of the cases of Carsworthy Limited and Edwardian Associates Limited, the company carried on business by the operation of a managed investment scheme. By operating that scheme to the extent that it did within Australia, it carried on business here. In the case of Coppertone Investments Limited, the moneys paid were by way of subscription for shares in the company itself. It is not immediately clear then that the offering of its shares is itself the carrying on of any business. Ordinarily, there is a distinction between the raising of capital by a company, by offering and issuing its shares, and the application of that capital in the conduct of its business.

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12 So that there is no relevant exception under s 708(5)

[62] The question of whether the company's conduct within Australia involved the carrying on of a business is a question of fact: *Luckins* at 186. Because it is a factual question, its answer is the result of all of the circumstances of the particular case. The factual question is addressed not only by reference to the context of the particular statute[13] but also with an understanding of the particular nature of the enterprise which constituted the company's business. In *Town Investments Ltd v Department of the Environment* [1978] AC 359, Lord Diplock said at 383:

> "The word 'business' is an etymological chameleon; its suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindley LJ pointed out in *Rolls v Miller* (1884) 27 Ch D 71, 88 embraced 'almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business'".[14]

In *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8, Mason J said that the word "business" denoted "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis".

[63] The particular terms in which shares in Coppertone were offered and subscribed for make this an unusual case and have led me to the conclusion that the company did carry on business in Australia. One of the standard documents provided in the offering of Coppertone's securities was a so-called "Client's Letter of Intent". By that document the investor requested Coppertone Investments Limited as the Provider to proceed with the "Privately Placed Portfolio" for "a share of profit". It recorded an understanding that "we will receive entitlements to profit generated from the 'Privately Placed Portfolio' on an agreed basis as and when the transactions are competed". Another document was headed "Application Form". It recorded an application for the allotment of shares but it further provided that "we understand that (Coppertone) shall be entering into Private Placed Portfolios and/or Bank Trading Programs, Contractually Capital Guaranteed, Secured 100% by Selective Instruments for a share of Profit Return as and when the transactions are completed" and that "the term of the Contractually Guaranteed Program is for twelve months". It then stated that: "we understand that Contractual Obligations will be positioned to receive entitlements of Profits Generated from a Privately Placed Program on a monthly basis as and when the transactions are completed. The program shall be for a Yield Return (share of profits) only, determined on market performance, with the initial capital 100% Guaranteed and fully redeemable after twelve months". Then there was a document entitled "Shareholders Agreement for Purchase of Shares to Enter 'Private Placement Capital Guaranteed Program'", which was a form of agreement between the investor and Coppertone. It provided for "the client" (being the shareholder) to enter "into Private Placed Portfolios and/or Bank Trading programs … for a Share of Profit Returns as and when the transactions are completed". By Clause A7, it was not possible to "place the *Client's* funds into the abovementioned Private Placement Programs within ninety (90) days of the date that this agreement is activated, then such funds will be returned to the *client's* nominated bank account within a reasonable period that shall

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13 *Luckins* at 178 per Gibbs J

14 As applied in *Pioneer Concrete Services Ltd v Galli* [1985] VR 675 at 705 and *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at 18

not exceed thirty (30) days". It referred to Coppertone and its consultant (whom I infer from other evidence was Edwards) as "the Provider". By Clause B2, it was agreed that the Provider would "act as the *client's* private consultant, in the *client's* endeavours to place funds into the abovementioned Private Placement Program". Then by Clause C under "Terms and Conditions", it was agreed that the client granted approval to the Provider to "negotiate with the necessary business contacts of the *Provider* to facilitate the placement of funds into the abovementioned Private Placement Portfolios and/or Bank Trading Programs …" Under the heading "Payments" by Clause A it was agreed that the Provider was to "make all payments due to the *client* as per the *client's* instructions … within 10 banking days of the *Provider* receiving a profit payment into the company's bank account".

[64] The documents thereby made provision not simply for a subscription for and issue of shares in Coppertone Investments Limited. They provided for the investment of moneys paid, for the specific benefit of the individual shareholder, and for the payment of income, not by way of dividends or generally from the profits of Coppertone Investments Limited, but as a return of the profits from the specific investment of the shareholder's funds. Consistently with that, investors such as Mr O'Grady received statements for the year ended 30 June 2001 showing an amount for "accrued profits re-invested" added to "original share capital invested" to give the investors' "capital account balance". That amount for accrued profits, credited to the shareholder, was derived after deducting an amount of a "management fee" apparently due to Coppertone Investments Limited.

[65] The result of this is that the business of Coppertone Investments Limited involved the investment of specific sums deposited with it for the benefit of the depositor, so that profits less a management fee were credited against a depositor's capital account. This was notwithstanding that the depositor received, at the same time, an issue of shares. Moreover the investment had an agreed duration of 12 months, the parties having agreed that the shareholders' agreement would not be terminated within that time. I do not suggest that the overall structure of this investment is internally consistent. But the nature of Coppertone's enterprise, or at least as it was represented to be, was somewhat different from a company which was simply raising capital by issuing shares for the conduct of its own business. Under this regime, a shareholder's funds were treated as some discrete sum which was distinctly managed by the "Provider" on the shareholder's behalf.

[66] In these circumstances, the conduct of offering securities was in the context of carrying on Coppertone's business, by which it received and invested funds on behalf of the person to whom the securities were offered. The procurement of funds was a step in the conduct of Coppertone's business, rather than simply the raising of capital for the purpose of then carrying on business. As that conduct occurred within Australia, Coppertone carried on business here and accordingly it is a Part 5.7 body.

[67] I conclude therefore that it should be wound up.

Other orders

[68] The applicant seeks a further order in these terms:

> "Any costs and expenses of winding up the Carsworthy Scheme, the Edwardian Associates Scheme, the fourth respondent, the fifth respondent or the sixth respondent which are unable to be recovered from the assets of those respective schemes or companies be paid from the assets of the third respondent with the same priority as the costs and expenses of winding up the third respondent."

This order has the obvious potential to distort the proper distribution of any assets in the winding up of the third respondent. It is conceivable that the process of winding up these schemes and companies will reveal that there is some basis for treating them all as effectively part of the same undertaking but that is not at all established at present. This order will not be made.

[69] At the hearing I issued an interim injunction to preserve a term deposit, in a sum slightly in excess of $1 million, which was standing to the credit of the second respondent, Mr Robinson with the Commonwealth Bank of Australia. Mr Robinson has claimed no beneficial entitlement to these funds. In the course of his s 19 examination, he said that he obtained the funds from a bank account in the name of a company called JCL Holdings. He said that he is a director of that company which is registered in Delaware. Its bank account was in Indianapolis. He further said that the money was sent to that account by Edwards, prior to which it was held in a bank account in Kuala Lumpur for about a year. The evidence does not throw any further light upon the persons or entities entitled to the funds but it is inherently likely that it was an entity associated with Mr Edwards. There is then some real prospect that the entity is one of the respondents in these proceedings. The funds ought to be further preserved until the liquidators, who will be the same for each of the respondents and the schemes, have had an opportunity to investigate the entitlement to the funds. Accordingly the respondent Robinson should be restrained until further order from dealing with them. Of course it is open to the liquidators, Mr Robinson or any other person to apply to vary that injunction to permit the moneys to be otherwise applied.

[70] Lastly, the applicants sought an order that these orders are to be "without prejudice to the applicant's ability to later seek declarations against the first and second respondents that one of them operated the Carsworthy Scheme or the Edwardian Associates Scheme". For reasons earlier given, no such declarations will be made in this judgment. It is appropriate to leave open the applicant's claim for that relief by ordering that the originating application be otherwise adjourned.