SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Edwards & Ors* [2009] QSC 360
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:	13 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2009, 13 October 2009 and 28 October 2009
JUDGE:	McMurdo J
ORDER:	**The application is dismissed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – APPLICATIONS TO COURT FOR DIRECTIONS OR ADVICE – where it is not established that the source of the funds held by the liquidators is from investments through or in the schemes being wound

up – where entitlement to those funds would be very expensive to establish – whether the funds should be distributed on a pro rata basis to the unsecured creditors

Corporations Act 2001 (Cth), s 479(3), s 556, s 601EE(2)

ASIC v Commercial Nominees (2002) 42 ACSR 240, cited

ASIC v Enterprise Solutions 2000 Pty Ltd [2001] QSC 82, cited

ASIC v Takaran (No 2) (2003) 21 ACLC 12, cited

ASIC v Tasman Investment Management Ltd (2006) 59 ACSR 113, cited

Australian Securities and Investments Commission v Edwards & Ors [2004] QSC 344, cited

Bastion v Gideon Investments Pty Ltd (in liq) (2000) 35 ACSR 466, cited

Clayton's Case (1816) 1 Mer 572, cited

Editions Tom Thompson v Pilley (1997) 77 FCR 141, cited

Graf Holdings & Parer Holdings [1999] NSWSC 217, cited

Lake Coogee Estate Management Pty Ltd v ASIC [2009] FCA 471, cited

Mier v FN Management Pty Ltd [2006] 1 Qd R 339, cited

Re Hallett's Estate (1879) 13 Ch D 696, cited

Sportman's Leisure and Hobby Warehouse Pty Ltd (in liq) [1990] 2 Qd R 93, cited

COUNSEL: K E Downes SC, with B Le Plastrier, for I R Hall and M R Brown, Receivers and Liquidators
No appearance for any other party

SOLICITORS: Blake Dawson for I R Hall and M R Brown, Receivers and Liquidators
No appearance for any other party

[1] On 8 October 2004 I appointed Mr I R Hall and Mr M R Brown as liquidators of the third, fourth, fifth and sixth respondents. Mr Brown has since resigned as liquidator of the third respondent. By the same order I appointed them receivers and managers of two unregistered managed investment schemes, called the Carsworthy Scheme and the Edwardian Associates Scheme. I ordered those schemes to be wound up and Mr Hall and Mr Brown, whom I will call the liquidators, were given such powers as were necessary to do so.

[2] The circumstances which resulted in those orders are set out in that judgment[1] and it is unnecessary to detail them here. As I there said, there were differences between

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1 *Australian Securities and Investments Commission v Edwards & Ors* [2004] QSC 344.

the schemes but each involved the payment of funds by the investor to the scheme operator on terms which were poorly defined and under which the investor had effectively no idea as to how the funds would be applied. It was expected that they would be invested in some way overseas, for what were represented to be very high rates of return. There was a pooling of the funds of the investors in the sense required for it to be a managed investment scheme. The Carsworthy Scheme was operated through the fourth respondent which was a company registered in Mauritius. Recent inquiries of the relevant authority in Mauritius have failed to discover whether the company remains registered. The Edwardian Associates Scheme was operated through the fifth respondent, a company then domiciled in Western Samoa. It was deregistered in that country in 2002.[2]

[3] At the same time, I made an interlocutory order in relation to funds then held in the name of the second respondent, Mr Robinson, in an account with the Commonwealth Bank at its Caboolture branch in a sum slightly in excess of $1,000,000. As I then said, Mr Robinson claimed no beneficial entitlement to the funds and had said that he had obtained them from a company called JCL Holdings, which was registered in Delaware. He had said that he was a director of that company and that the funds had been sent to its account in Indianapolis by the first respondent, Mr Edwards. I noted that the evidence at that time did not otherwise indicate the persons or entities entitled to the funds but that it was inherently likely that it was an entity associated with Mr Edwards and there was a prospect that it was one of the respondents in these proceedings.[3]

[4] The present application concerns those funds. In 2005, Mr Robinson agreed to pay them to the liquidators and they have held them since. They seek directions as to how the funds should be applied.

[5] The application is made pursuant to s 479(3) and s 601EE(2) of the *Corporations Act* 2001 (Cth) ("the Act"). It is made under s 479(3) in their capacity as liquidators of these companies. They apply under s 601EE(2) insofar as they are responsible for the winding up of the schemes. It is well established that the court is empowered under that section to give directions for the winding up of the scheme just as it may give directions under s 479(3): *ASIC v Commercial Nominees*;[4] *ASIC v Takaran (No 2)*;[5] *ASIC v Tasman Investment Management Ltd*;[6] *Lake Coogee Estate Management Pty Ltd v ASIC*.[7]

[6] As Cooper J said in *Sportman's Leisure and Hobby Warehouse Pty Ltd (in liq)*,[8] the purpose of a provision such as s 479(3) is to enable a liquidator both to obtain advice and to protect his or her position as to personal liability in the administration of the winding up. According to the preponderance of authority, as Lindgren J described it in *Editions Tom Thompson v Pilley*,[9] the direction to the liquidator does not constitute a judgment which determines the rights and liabilities of creditors or

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2 That was no bar to the winding up order, which was made up because the company had carried on business in Australia and there was evidence that it had assets within the jurisdiction: [2004] QSC 344 at [57].

3 [2004] QSC 344 at [69].

4 (2002) 42 ACSR 240 at [13].

5 (2003) 21 ACLC 12 at [11]-[12].

6 (2006) 59 ACSR 113 at [20].

7 [2009] FCA 471 at [9].

8 [1990] 2 Qd R 93 at 98.

9 (1997) 77 FCR 141 at 147. See also *Graf Holdings & Parer Holdings* [1999] NSWSC 217 at [33].

contributories. In *Bastion v Gideon Investments Pty Ltd (in liq),*[10] Austin J said of a liquidator's application under s 479(3) in relation to a company which had conducted business as a trustee:

> "The directions are sought by the applicant as liquidator under s 479(3). No direction is sought by the company in liquidation under s 63 of the Trustee Act 1925 (NSW). I should note the very limited scope of the protection that directions made under s 479(3) will give in the present circumstances. The directions will not determine as between the company and the investors whether there is a trust or any particular person is a beneficiary or any particular assets are held by the company in trust for the investors, and will not protect the company or liquidator from any claims by persons who do not receive a distribution but are able to establish that they should have been recognised as beneficiaries. As McLelland J pointed out in the *G B Nathan* case (at NSWLR 781), the significance of the directions is only that if the liquidator acts in accordance with them and has made full and fair disclosure of the material facts, he will be protected from claims by unsecured creditors or contributories in respect of any alleged breach of his duties as liquidator."

[7] Section 601EE(2) permits the court to make any orders it considers appropriate for the winding up of the scheme. In *Mier v FN Management Pty Ltd,*[11] Keane JA (with whom McMurdo P and Douglas J agreed) said that this power was limited in that it must be used to promote a process of winding up which involves the collection and realisation of the scheme assets and the distribution of the proceeds to the persons entitled.[12] In that case, an order purportedly made under this provision was set aside because it dealt with property which was not the property of the scheme. Similarly, in *ASIC v Tasman Investment Management Ltd,*[13] Austin J held that s 601EE(2) does not "authorise a distribution of surplus assets of an unregistered scheme otherwise than to those entitled to the assets, in proportion to their entitlements".

[8] So whilst the orders which are sought would not determine the rights of investors in the scheme or of creditors of one or more of these companies, the orders should not dispose of the funds to persons who have no proprietary entitlement to any part of them.

[9] Since their appointment, the liquidators have collected a large volume of material, much of it from ASIC from its inquiries which had resulted in its application for the orders made in 2004. The liquidators have identified bank accounts held by the fourth, fifth and sixth respondents, in each case in Hong Kong. They have bank account statements, for some relevant periods, for two accounts in the name of the fourth respondent and another two accounts in the name of the sixth respondent. They also have a bundle of telegraphic transfer applications and receipts showing the payment of funds from investors to these accounts. The liquidators hold no bank account statements for the two accounts they have identified as held by the fifth respondent. The bank statements show withdrawals, but the disposition of those funds cannot be ascertained. Mr Hall says that on present information, it is

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10 (2000) 35 ACSR 466 at 476.
11 [2006] 1 Qd R 339.
12 [2006] 1 Qd R 339 at 347.
13 (2006) 59 ACSR 113 at 120.

impossible to identify the persons, entities or other bank accounts to which such funds were paid.

[10] There is no documentary evidence which connects any of these Hong Kong accounts to the account of the company called JCL Holdings. In Mr Hall's opinion, even with a substantial expenditure to investigate the movement of funds by Mr Edwards through accounts in many countries, it is unlikely that documentary evidence could be obtained by which funds from one or more of these Hong Kong accounts could be traced to the JCL Holdings account and thereby to the monies presently held by the liquidators. In his opinion the expense involved in attempting to do so would reduce the present funds "by a significant amount to the detriment of all creditors". He says that investigations carried out by the liquidators and their staff have been thorough but that the further investigations which might be undertaken would be very expensive and likely to be futile.

[11] The liquidators propose to make the following distributions if so directed:

(i) first, in payment of their remuneration, costs and expenses of and incidental to the winding up of the four companies and of the Carsworthy Scheme and Edwardian Associates Scheme (including the costs of and incidental to this application);

(ii) second, in payment of any priority debts and claims in the winding up of those companies in accordance with s 556 of the Act; and

(iii) third, on a *pro rata* basis among those persons who have produced evidence judged by the liquidators to establish an entitlement to claim as an unsecured creditor of any of the four companies or either of the two schemes.

[12] There is no opposition to orders in those terms. In particular there is no opposition from ASIC, Mr Edwards or Mr Robinson, each of whom was served with the material. Mr Edwards makes no claim for monies, either for himself or on behalf of some other person or entity. Further, the liquidators have sent to each of the investors (listed on Mr Hall's spreadsheet of persons who have claimed to have invested in either of the schemes or in the sixth respondent) a copy of their application and other documents, by which the investors have been informed of the liquidators' proposal. The liquidators have given public notice of that proposal by an advertisement in "The Australian" newspaper. In addition, notice was given to the Commissioner of Taxation. Those notices invited anyone who wished to be heard to give a notice of appearance to the liquidators. No investor or other person appeared at the initial or subsequent hearings.

[13] Mr Robinson has told the liquidators that he believes that the funds are derived from the operations of one or more of these respondent companies. The liquidators place little weight upon that statement.

[14] This application was made upon the premise that these funds have come from investors in one or both of the schemes or in the sixth respondent. Upon that premise, it is said that the funds had become so intermixed that no part of the money now held could be attributed to a particular investor, whether by the application of

the rule in *Clayton's Case*[14] or the principles from *Re Hallett's Estate*.[15] I accept that if the funds from each investor had been received on trust for the investor then it would be open to the court to apportion the fund between these three classes of investors (Carsworthy, Edwardian Associates and Coppertone) in the proportion of their respective claims: Jacob's Law of Trusts in Australia, 7th edition at [2709]. To the cases there cited can be added the decision of Chesterman J in *ASIC v Enterprise Solutions*,[16] which concerned the application of the funds of an unregistered managed investment scheme. After noting that in that case the poor state of the records made it impossible to trace individual investors' monies and that any attempt to do so would involve considerable time and expense and be unlikely to produce a reliable result (as here), Chesterman J concluded:

> "[14] The purposes for which the investors paid money to the respondents cannot be achieved. The solicitation of their money was unlawful and the operation of the schemes has been brought to an end. Less than 10% of the moneys paid have been recovered. Whatever were the terms on which the respondents held moneys paid by investors in the present circumstances the receivers hold the recovered moneys on resulting trusts for the investors. The trust fund being inadequate for reimbursement in full and there being no means of identifying any particular fund as being the moneys of any particular investor the appropriate order is for a rateable distribution."

[15] Again upon that same premise, if the investors' funds were trust monies, their claims would prevail over that of Mr Robinson, who claims to be a creditor with priority as a former employee. It would be wrong to direct the liquidators to pay Mr Robinson as the application proposes. In that circumstance, as the liquidators now accept, the proposed distribution of the funds would not be according to s 556 of the *Corporations Act.*

[16] Alternatively, if the investors' contributions are not trust monies, but again upon the premise that they related to one or more of the schemes or the Coppertone investment, the investors would be unsecured creditors of the respective companies through which they had invested. Nevertheless I would accept that because there was a pooling of the funds and it would be impossible to attribute any part of the funds to a particular company, the money held by the liquidators could be distributed in proportion to the respective investments through those three companies, save that under that alternative, if Mr Robinson can make out his claim to be a creditor as an unpaid employee, the burden of that would fall upon the investors in the Carsworthy scheme, rather than upon all investors as the liquidators propose.

[17] However, the premise that the source of the funds must be from investments through or in one of the fourth, fifth and sixth respondents is not established. This question was affected by the liquidators' receipt of information received by the liquidators after the return date of this application. In particular the liquidators have

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14 (1816) 1 Mer 572.
15 (1879) 13 Ch D 696.
16 [2001] QSC 82.

recently received information which demonstrates a real possibility that these funds are not the result of any investments through or in any of the respondent companies.

[18] PricewaterhouseCoopers received an email from a Mr Paul Duncan, attaching a spreadsheet which was a list of persons and entities which the covering email said was a "Coppertone list". But one entry contained the words "paid to Rock directly". An employee of PricewaterhouseCoopers then spoke to Mr Duncan and received subsequent emails from him. There is an extensive diary note of this discussion with Mr Duncan which is in evidence. As there recorded, Mr Duncan said that he had invested in a further scheme associated with Mr Edwards which was referred to as "Rock". He said that he had invested US$200,000 in this scheme and some of his family and friends had made similar investments. Like Mr Edwards' other schemes, this had failed and there were many disaffected investors, some of whom had paid for their own investigation into what had happened to their funds. Mr Duncan said that monies for this scheme were originally deposited to an account in Vanuatu and then invested by Mr Edwards in Singapore, before being moved to Kuala Lumpur and then to Delaware. Again according to Mr Duncan, this was the last of Mr Edwards' schemes. As for the connection with Delaware, the diary note of this conversation with Mr Duncan records this information from him:

> "• The transfer of the scheme to Delaware occurred by the establishment of a company called "Delaware JC [JC stands for Jesus Christ] LLC". 1 lump sum of money ($1.3M AUD) was transferred into the Delaware company's account, representing all investor deposits received into accounts in Singapore and Kuala Lumpur. Most but not all of this money was then transferred out in one transaction.
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> • The PI [private investigator engaged by some investors] obtained a copy of the consultancy agreement between the scheme and a corporate services agency that established the Delaware company, under the Delaware equivalent of freedom of information laws. Paul [Mr Duncan] has seen this document but the PI [private investigator] did not allow him to make a copy of it.
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> • Through this consultancy agreement, the corporate services agency somehow managed to gain control of the Delaware company's bank account. Control of this account though was subsequently handed back to Edwards' business partner. Edwards did not become a signatory to the account, but Arthur Robinson did."

[19] In an email of 1 October 2009 from Mr Duncan to PricewaterhouseCoopers, Mr Duncan said that after investing in Coppertone with his own funds, he introduced friends and family to Mr Edwards who said that they should invest their funds to a new scheme called Rock Investments International Limited. He said that Mr Edwards and his associates had a company called Dynamus Limited in Vanuatu, which operated through the office of a law firm there. The funds were sent to the trust account of that firm, pooled and paid to Rock Investments International Limited. Mr Duncan attached documents which provide some evidence of those facts. His email continued that the company "Rock" was probably incorporated in the British Virgin Islands and was ostensibly controlled by two individuals in

Queensland whom he named. The existence of this company is evidenced by another document which he attached, which is a copy of a letter from the Standard Chartered Bank in Hong Kong referring to a credit balance of USD $1,715,240 held for that company in February 2001. Mr Duncan contends that this account must have included his investment in this company, as distinct from his earlier investments in Coppertone. Again according to his email, Mr Duncan came by this documentation in Mr Edwards' house in Buderim when his parents-in-law were minding Mr Edwards' house whilst he was overseas.

[20] Again according to Mr Duncan, the funds held by Rock Investments International Limited in that Hong Kong account were moved to Singapore and then to Kuala Lumpur. Most significantly, Mr Duncan said that the funds were moved from Kuala Lumpur to Delaware "to an entity called something like JC something LLC …" He said that a private investigator retained by a group of investors had provided him with information as to this Delaware company, including that Mr Edwards, Mr Robinson and another person had travelled to Delaware to establish the company. Mr Duncan's email concluded:

> "This is my case for having the funds included in the Peter Edwards related wind-ups. The Rock entity didn't make it on to the Supreme Court list in 2004 [apparently a reference to these proceedings] but it was operated in exactly the same way and doing the same activities as the ones that did."

[21] On 16 October 2009 PricewaterhouseCoopers received an email from Mr Schwantler saying that he had invested in "Dynamus which ended up with Coppertone/Peter Edwards" and that he was interested to receive something back from the funds in question. Mr Schwantler said that he was referred to PricewaterhouseCoopers by Mr Duncan. A diary note by the PricewaterhouseCoopers employee of his subsequent conversation with Mr Schwantler records that Mr Schwantler said he was a resident of the United States who had invested in "Dynamus", he had not heard of Rock Investments International Limited and that he had invested in Dynamus "through a bank or lawyer in Vanuatu, and that 'Edwards had transactional control over that entity'".

[22] An affidavit by a solicitor for the liquidators refers to his review of the transcripts of interviews conducted by ASIC in the course of its investigations leading to these proceedings. There are two references to "Rock" in a transcript of an interview with the second respondent, Mr Robinson. In those passages, Mr Robinson was asked to recall the names of other companies in some way associated with Mr Edwards or the schemes and he answered:

> "There was Carsworthy, Coppertone, which you already know about. There was a company called Edwardian and there was a company called The Rock. I am not aware of any other companies."

He also said that:

> "Carsworthy was only one of three or four companies and this was sort of a generic update for people who invested with Carsworthy, The Rock, Edwardian, Coppertone, they were all – they're all together basically."

The solicitor refers to his recent conversation with an employee of ASIC who informed him that she was involved in the investigations which led to these

proceedings and that ASIC was aware of allegations that persons had paid monies to an entity called Rock Investments International Limited, but had not specifically investigated those claims and had no current plans to do so. She advised that ASIC was unable to

> "definitively say whether there were any other activities in which Messrs Robinson, Edwards or others were involved which might have given rise to other similar schemes or investments, or whether funds from other sources may have been co-mingled with the funds in the chain of bank accounts …"

He was also informed that ASIC's position remained that it did not oppose the directions sought by the liquidators and did not propose to make any submissions.

[23] The information provided by Mr Duncan, of course, does not prove that these funds belonged to any of the companies mentioned by him. However, his information, considered with Mr Robinson's examination and Mr Schwantler's information, demonstrate a real possibility that the funds in question are the remnants of investments outside either of the two schemes which are being wound up or the sixth respondent, Coppertone. Mr Duncan, who was an investor in Coppertone, said that he had made a distinct investment in this further and later scheme and there is some documentary evidence to support his claims.

[24] Significantly Mr Duncan has identified the Delaware company as the recipient of funds invested in the "Rock" scheme. Of course, his evidence is not in a form which would prove the facts which he has put forward. But, considered with other evidence, it goes far enough to indicate the likelihood that the fundraising activities of Mr Edwards and Mr Robinson were not limited to the companies which are being wound up. On all of the information presently available, it cannot be concluded that more probably than not, the funds held by the liquidators belonged to one or more of the respondent companies. On the present material, it appears to be more likely that they derive from this other scheme.

[25] The liquidators' proposal was a considered and practical one. But the information recently received by them after the filing of this application precludes an inference that the subject funds have come from one or more of the three companies under their control. It may be that further investigations into this other scheme would not add to the presently available information. But if it cannot be inferred that the funds belonged to the companies in question, they should not be distributed as the liquidators originally proposed. Accordingly, I decline to give the directions which are sought.