

SUPREME COURT OF QUEENSLAND

CITATION: *Re Equititrust Ltd* [2011] QSC 353

PARTIES: **EQUITITRUST LTD**
ACN 061 383 944
(applicant)
v
**THE MEMBERS OF THE EQUITITRUST INCOME
FUND AND THE EQUITITRUST PRIORITY CLASS
INCOME FUND**
(respondents)

FILE NO: BS 10478 of 2011

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 and 23 November 2011

JUDGE: Applegarth J

ORDERS: **Orders for two registered schemes to be wound up pursuant to s 601ND of the *Corporations Act 2001 (Cth)*, for the appointment of a person to take responsibility for ensuring that each registered scheme is wound up and for the same person to be appointed as a receiver of the property of each scheme.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where company applied to Court for the winding up of two registered schemes of which it was the responsible entity and for the appointment of a temporary responsible entity – where circumstances of urgency exist due to impending lapse of insurance for officers of company – where directors indicated that they would resign upon lapse of insurance – where the administration of the schemes had broken down and the schemes’ purposes could no longer be accomplished – where the company was in breach of the *Corporations Act 2001 (Cth)* and of conditions of its financial services licence – whether the Court had jurisdiction to appoint a temporary responsible entity – whether the Court should order the winding up of the schemes – whether the Court should appoint a receiver to the property of each scheme

Corporations Act 2001 (Cth) s 601FA, s 601FN, s 601FP, 601ND, s 601NF, s 1101B

Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd [2001] WASC 339 cited
Capelli v Shepard (2010) 264 ALR 167; [2010] VSCA 2 cited

Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76 cited

Joye v Beach Petroleum N.L. (1996) 67 FCR 275 cited
Mier v FN Management Pty Ltd [2006] 1 Qd R 339; [2005] QCA 408 discussed

Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2) [2008] WASC 232 cited

Re Rubicon Asset Management Ltd (2009) 74 ACSR 346; [2009] NSWSC 1068 discussed

Re Stacks Managed Investments Ltd (2005) 219 ALR 532; [2005] NSWSC 753 discussed

Westfield Management Ltd v AMP Capital Nominees Ltd [2011] NSWSC 1015 cited

Yunghanns v Candoora No. 19 Pty Ltd (No 2) (2000) 35 ACSR 34; [2000] VSC 300 cited

COUNSEL: P L O'Shea SC and J W Peden for the applicant
A S Martin SC and G M Drew for certain members
D R W Tucker (solicitor) for a member, Tucker SF Pty Ltd
T P Sullivan SC and S R R Cooper for the Australian Securities and Investments Commission intervening
D D Keane instructed directly by Lion Advantage Ltd, an applicant for appointment as a temporary responsible entity (21 November 2011)
J W Peden for the applicant and Mr Mark McIvor (23 November 2011)

SOLICITORS: Nyst Lawyers for the applicant
Piper Alderman for certain members
Tucker & Cowen for Tucker SF Pty Ltd
Australian Securities and Investments Commission for the intervener
Nyst Lawyers for Mr Mark McIvor (23 November 2011)

- [1] On Monday, 21 November 2011 I made certain orders following a hearing which was held on short notice and in circumstances of urgency. These are my reasons for making those orders. The circumstances of urgency included the fact that two insurance policies covering officers of Equititrust Ltd (the company) were due to expire at 3.00 pm that day. They were unlikely to be renewed and alternative insurance could not be sourced. In those circumstances, the recently-appointed directors of the company were not prepared to remain on the board and proposed to resign shortly before 3.00 pm.

- [2] By an originating application filed on 15 November 2011 the company sought the following two orders:

- “1. The Equititrust Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001;
2. The Equititrust Priority Class Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001.”

It also sought an order pursuant to s 601FN of the *Corporations Act* (Cth) 2001 (“the Act”) that:

“Equititrust Limited be replaced as the Responsible Entity of the Equititrust Income Fund and the Equititrust Priority Class Income Fund (**‘Funds’**) by a temporary Responsible Entity, with that entity to wind-up the Funds and take steps to call a meeting of members to ratify its appointment”.

The company also sought an order pursuant to s 601NF that a committee consisting of Mr Jeff McDermid, Mr Paul Vincent and Mr Nick Combis be appointed to take responsibility for ensuring that the funds are wound up in accordance with their constitutions and that appropriate directions be made to effect that winding up.

- [3] Upon the hearing of the application the company initially sought only an order pursuant to s 601FN of the Act that it be replaced as the responsible entity of the two funds. However, it submitted that if I did not appoint a temporary responsible entity to replace it, I should order that the funds be wound up.
- [4] The Australian Securities and Investments Commission (ASIC) intervened in the proceeding and made an oral application for the appointment of a receiver to the funds pursuant to s 1101B of the Act.

The application for the appointment of a temporary responsible entity

- [5] There was a jurisdictional impediment to the making of an order under s 601FN for the appointment of a temporary responsible entity. That section entitles ASIC or a member of a registered scheme to apply to the Court for the appointment of a temporary responsible entity of a scheme under s 601FP if the scheme “does not have a responsible entity that meets the requirements of s 601FA”. Section 601FA requires the responsible entity of a registered scheme to be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme. At the time of the company’s application and at the time of the hearing it met both of these requirements. The fact that it was in breach of the terms of its financial services licence and faced the prospect of having that licence terminated or suspended did not alter the fact that it still held its licence.
- [6] This jurisdictional impediment was, in part, the result of the company seeking from ASIC and obtaining an adjournment until 22 November 2011 of a hearing to show cause why its licence should not be terminated.
- [7] Counsel for ASIC helpfully drew my attention to Regulation 5C.2.02 of the *Corporations Regulations* 2001 (Cth), although the company did not make any

application under that regulation. For the reasons given by ASIC, it is questionable whether that regulation provides a source of power for the Court to appoint a temporary responsible entity other than in the circumstances provided for in s 601FL or s 601FN.

- [8] In the result, the Court's power to appoint a temporary responsible entity upon an application under s 601FN was not invoked.
- [9] This makes it unnecessary to address the question of whether the appointment of a temporary responsible entity was in the interests of the members, and a contentious issue as to whether the replacement of the company by such an entity would result in a reconversion of subordinated units held by the company in its own right, and a decrease in the value of units held by other members.

The application under s 601ND to wind up the funds

- [10] The company submitted that if I did not appoint a temporary responsible entity to replace it as the responsible entity for each fund, then I should make the orders sought in paragraphs 1 and 2 of its originating application for each of the funds to be wound up pursuant to s 601ND. ASIC supported this application. So did a member of the Equititrust Income Fund, Tucker SF Pty Ltd. The only opposition to making orders under s 601ND came from seven members for whom Mr Martin SC and Mr Drew of counsel appeared. The basis for that opposition was to enable members to call a meeting and to vote upon a proposal to wind up the Income Fund pursuant to s 601NB of the Act.
- [11] It is necessary to outline certain factual matters by way of background to explain why I reached the conclusion that it was just and equitable to make an order directing the responsible entity to wind up each fund, and why I considered that such an order should be made promptly rather than delayed for some uncertain period to allow the members to vote on a resolution to wind up the Income Fund.
- [12] The company is the responsible entity of three managed schemes, two of which are registered. The third, being the Equititrust Premium Fund ("EPF"), is not registered and is not required to be registered under the Act. The two registered managed investment schemes are known as the Equititrust Income Fund ("EIF") and the Equititrust Priority Class Income Fund ("EPCIF"). The EIF has some 1,400 members and net assets in excess of \$100,000,000. The EPCIF has only five members, all apparently associated with the company's sole shareholder, Mr McIvor. EPCIF holds 13,636,478 units in the EPF.
- [13] As its name suggests, the EIF was intended to be an "income fund" which provided monthly interest payments on most investments and the redemption of capital. Where a member invests for a period of 12 months the entitlement to redemption arises on the anniversary of the allotment of units after a request is made to redeem. The fund no longer achieves its purposes. The fund has been frozen since October 2008 in that no redemptions of units have been permitted since then. Since April 2011 the fund has ceased paying interest to members.
- [14] The company was beset by discord between directors and the company's sole shareholder, Mr McIvor, during 2011. It is unnecessary to describe fully the nature of the discord. An application was brought by the superannuation fund of a former director, Mr Tucker, seeking an order for the winding up of the EIF. The

application was adjourned on the basis of certain undertakings, given by Mr McIvor to the Court, not to seek to appoint any new director or remove any existing director from the board of the company without giving notice to the existing board and to ASIC, and seeking leave of the Court. These undertakings were given on 27 October 2011 in circumstances in which the company had been placed in the hands of a newly appointed board of directors. The newly appointed board comprised Mr Paul Vincent, Mr Jeff McDermid, Mr Troy Bingham and Mr Warwick Powell. Mr Vincent is a Fellow of the Institute of Chartered Accountants, and has 30 years experience as a Chartered Accountant. He and his fellow directors familiarised themselves with the operations of the company and considered how the funds might best be wound up. The new board considered the best realisation strategies.

- [15] On 12 October 2011 a differently constituted board had unanimously resolved:
- (a) that Equititrust Limited as the responsible entity of the Equititrust Income Fund considers that the purpose of the Equititrust Income Fund cannot be accomplished (within the meaning of s 601NC(1) of the *Corporations Act*).
 - (b) that Equititrust Limited as responsible entity of the Equititrust Income Fund take steps to wind up the Equititrust Income Fund within the meaning of s 601NC(1) and in accordance with its constitution.
 - (c) that the chief executive officer prepare notices to give to members of the scheme and to ASIC in accordance with s 601NC(2) of the *Corporations Act*.

A similar resolution was passed the same day in respect of the EPCIF, namely that its purpose cannot be accomplished and that it should be wound up.

- [16] The new board would have preferred to continue with the process of winding up that had been instigated, being a process provided for under s 601NC of the Act. However, the expiry and non-renewal of insurance policies on 21 November 2011 prompted them to have the company apply for winding up orders pursuant to s 601ND.

- [17] Mr Vincent, in an affidavit sworn on 18 November 2011, assessed the approximate financial position of the company as at 31 October 2011 as follows:

- “a. ETL [Equititrust Ltd] has assets in its own right worth approximately \$26,498,000;
- b. ETL has liabilities in its own right in the approximate sum of \$26,470,000;
- c. ETL has assets that it holds for the EIF in the approximate sum of \$120 million;
- d. ETL has liabilities in its capacity as responsible entity for the EIF in the approximate sum of \$9 million;
- e. ETL has therefore net assets in the EIF in the approximate sum of \$111 million;

- f. ETL has liabilities in its capacity as Responsible Entity for EPF in the approximate sum of \$12.5 million;
- g. ETL has assets that it holds for the EPF of approximately \$13 million;
- h. ETL has therefore net assets in the EPF in the approximate sum of \$0.5 million.”

[18] The company has borrowings on its own behalf and also on behalf of the funds. The secured lenders include the Commonwealth Bank, the National Australia Bank and the Bank of Scotland International. The borrowings are secured by various real property mortgages and charges over assets of the company in its own right and also over assets of the funds. The total borrowings are approximately \$17 million, owed by EIF as to \$9 million and by EPF (the unregulated fund) as to \$8 million. The company’s assets and liabilities are more fully summarised in Mr Vincent’s affidavit sworn on 18 November 2011. That affidavit was supplemented by an affidavit sworn on 21 November 2011 which corrected paragraph 6 of the earlier affidavit by stating that the company in its capacity as responsible entity for the EPCIF holds 13,636,478 units in the EPF.

[19] Importantly for present purposes, according to Mr Vincent’s assessment the EIF has net assets of about \$111 million.

[20] Based upon his work as a director since his appointment, Mr Vincent was “clearly of the view that the Funds should be wound up”. His reasons were summarised as follows:

- “a. the Funds have been frozen since October 2008, in that no redemptions of units have been permitted since then;
- b. since April 2011, the Funds have ceased paying interest on the units to members of the Funds;
- c. the disharmony between Mr Tucker and Mr Kennedy on the one hand and Mr McIvor on the other hand over the past 12 months or so, as more fully described in the affidavits of Mr Tucker, Mr Kennedy and Mr McIvor filed in BS9534/2011, has destabilised the Funds to such a degree that it is extremely unlikely that the Funds could regain the possibility of resuming trading;
- d. the vast majority of the loans owed to ETL as responsible entity for the EIF are in default and require intensive management so as to maximise the value realisable from those loans;
- e. as indicated in paragraph 8 of my earlier affidavit, I have received widespread support from members for the winding up and no objections. I am aware of an indication, by correspondence from Piper Alderman as solicitors for a number of members who have mooted a potential class action against ETL and its former directors, that there may be some opposition

to the winding up, but I have not yet seen the details of any such opposition and am accordingly unable to comment on the reasons for such opposition; and

- f. against this background, it is clear to me that the purpose for which each of the EIF and EPCIF were established can not be accomplished.”

- [21] Mr Vincent and his fellow directors reached the conclusion that it is in the best interests of members of the EIF and the EPCIF that each fund be wound up forthwith.
- [22] It is unnecessary to canvass the board’s preference for the appointment of a temporary responsible entity pursuant to s 601FP to enable the winding up to proceed subject to oversight by a committee. Mr Vincent’s affidavit indicated that if a responsible entity was not able to be appointed to replace the company as the responsible entity by Monday, 21 November 2011, then the board recommended that an independent insolvency practitioner be appointed to wind up each fund in accordance with the provisions of its constitution.
- [23] The assessment by Mr Vincent and his fellow-directors of what is in the best interests of members of each fund was undertaken in difficult circumstances. I accepted the considered view of the new board that it was in the best interests of members of each fund that each fund be wound up forthwith.
- [24] As noted, the only opposition to such an order was advanced by counsel on behalf of a small number of members who, according to their Notice of Appearance, hold units in the EIF totalling \$2,433,743.11. Those members also obtained leave to file an application seeking a variety of orders including a declaration that certain notices given pursuant to s 601NC of the Act were invalid and an order pursuant to s 252E(1) of the Act that a meeting of the members of the EIF be called to consider and vote on an extraordinary resolution directing the responsible entity to wind up the EIF. I took into account the submissions made on behalf of these members as to the desirability of allowing the members to meet and consider a resolution to wind up the EIF. I was not in a position to make any assessment of the merit of a submission made by Mr Tucker to the effect that the opposition to an order to wind up the funds forthwith was to achieve some collateral advantage in connection with foreshadowed proceedings against the company and its former officers. I declined these members’ application to adjourn the company’s application and decided to make orders directing that each fund be wound up pursuant to s 601ND because such a course appeared to be in the best interests of members of the funds. Any advantage in allowing the members to vote on a resolution to wind up the EIF at a yet-to-be convened meeting at some uncertain future date was outweighed by the disadvantages associated with delaying orders for the winding up of each fund.
- [25] In addition to the matters supporting a winding up forthwith identified by Mr Vincent is the fact that the board intended to resign prior to 3.00 pm on Monday, 21 November 2011 in the event that the company was unable to obtain insurance coverage. Such a course would leave the company without directors unless and until Mr McIvor obtained a release from the undertakings given in relation to the appointment of directors. There is evidence from former directors of the company that Mr McIvor does not wish the company to properly pursue a winding up of the

funds. There was no proposal for directors who were independent of Mr McIvor to be appointed as directors. The task of winding up the funds, including the recovery of loans upon which there has been default, should be undertaken by an independent person who is appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and any orders made under subsection 601NF(2).

[26] Part 5C.9 of the Act creates a framework for the winding up of registered schemes. In general terms, a registered scheme may be wound up:

- (a) as required by the scheme's constitution pursuant to s 601NA;
- (b) at the direction of members after a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme, as envisaged by s 601NB;
- (c) pursuant to s 601NC, if the scheme's purpose is either accomplished or cannot be accomplished after the responsible entity gives members of the scheme and ASIC the written notice provided for in s 601NC(2) and if no meeting is called within 28 days of the responsible entity giving the notice to the members;
- (d) pursuant to s 601ND, by order of the Court either on the ground that the Court thinks that it is just and equitable to make an order directing the responsible entity to wind up the scheme or because of an unsatisfied judgment against the responsible entity in its capacity as the scheme's responsible entity.

[27] The company resolved in accordance with s 601NC that the funds should be wound up. Winding up under s 601NC could not commence until 25 November 2011 at the earliest, being 28 days after certain notices were given to members. However, a number of members requested a meeting of members to consider the proposed winding up of the EIF and to vote on an extraordinary resolution directing that the fund be wound up pursuant to s 601NB of the Act.

[28] In short, the company's proposal that the funds be wound up pursuant to s 601NC had been overtaken by events, and such a winding up would not commence until some uncertain future date, depending upon the calling of a meeting and the validity of certain notices. A winding up at the direction of members in accordance with s 601NB could not commence until the calling of a members' meeting to consider and vote on such a resolution. The date upon which such a meeting would occur was uncertain and the pending resignation of directors made uncertain the means by which such a meeting would be held. All parties, including ASIC, appeared to agree that the funds should be wound up. I was not persuaded that there was any particular advantage to the members of the fund by a delay in the commencement of the winding up of the funds. The circumstances that had arisen by 21 November 2011 made it appropriate to direct that each fund be wound up forthwith.

[29] Section 601ND(1)(a) authorises the Court to order that the responsible entity of a registered scheme wind up the scheme if the Court thinks it is "just and equitable to make the order". The principles concerning the winding up of companies on the

just and equitable ground inform the application of this provision.¹ A registered scheme may be wound up on the just and equitable ground because the administration and original arrangement have broken down.² The Court may wind up a registered scheme on the just and equitable ground if it is in the public interest to do so.³

[30] The evidence before me, particularly Mr Vincent's evidence, and the parties' submissions persuaded me that it was just and equitable to make orders directing the applicant, as responsible entity, to wind up each fund. The principal reasons for that conclusion are those contained in Mr Vincent's affidavit and which I have earlier quoted. They may be summarised as follows:

- (a) The administration of the funds has broken down and the funds' purposes cannot be accomplished;
- (b) Repayments to investors have been frozen since October 2008 and the funds ceased making monthly interest payments to members on 1 April 2011;
- (c) Disharmony and disputes between members of the board of the company and Mr McIvor prior to the recent appointment of new board members destabilised the administration of the funds with the result that it is extremely unlikely that the funds could resume trading;
- (d) The vast majority of the loans owed to the company as responsible entity for the EIF are in default and require proper management so as to maximise the realisation of funds for the benefit of members;
- (e) The company is in breach of the conditions of its Australian financial services licence, including by a failure to lodge audited accounts, and the company was also likely to be in breach of the conditions of its licence upon the expiry of necessary insurance coverage;
- (f) The members of the recently appointed board were due to resign prior to 3.00 pm on 21 November 2011, whereupon the proper administration of the funds would be jeopardised;
- (g) The appointment of an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2) appears to be in the best interests of members of each fund;
- (h) The winding up of the EIF appears to have received widespread support from members, and no member contended that the funds should not be wound up.

¹ *Capelli v Shepard* (2010) 264 ALR 167 at 190, [2010] VSCA 2 at [104]; *Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 at [124]; *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2)* [2008] WASC 232 at [44].

² *Capelli v Shepard* (2010) 264 ALR 167 at 186, [2010] VSCA 2 at [86]; *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [63].

³ *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [64]; *Re Rubicon Asset Management Ltd* (2009) 74 ACSR 346 at 351, [2009] NSWSC 1068 at [23].

[31] For these reasons, I made orders on the afternoon of Monday, 21 November 2011 pursuant to s 601ND of the Act that:

- (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999; and
- (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999.

Appointment of a person to take responsibility for the winding up of the funds

[32] Section 601ND empowers the Court, by order, to direct the responsible entity to wind up the scheme. Section 601NE provides that the responsible entity must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if, among other things, the Court makes an order directing it to wind up the scheme. Section 601NF provides:

“601NF Other orders about winding up

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme’s constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of
 - (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.”

[33] In the circumstances that presented themselves on 21 November 2011, including the jurisdictional impediment to the appointment of a temporary responsible entity pursuant to s 601FN and the pending resignation of recently appointed members of the company’s board, I considered it necessary to appoint a person to take responsibility for ensuring that each fund was wound up in accordance with its constitution and any orders made under subsection 601NF(2). No party argued against such a course. The pending resignation of the company’s directors made it necessary to appoint an independent person to take responsibility to wind up each fund. The parties accepted that an independent insolvency practitioner be appointed to wind up each fund. Different persons had indicated their preparedness to be

appointed. After hearing submissions I decided to appoint Mr David Whyte, who is an experienced insolvency practitioner.

Powers conferred by s 601NF

[34] Given the time constraints that applied in hearing the application and making appropriate orders on Monday, 21 November 2011, I was not in a position fully to consider that day the extent of the powers conferred upon Mr Whyte by virtue of his appointment to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and the extent of the Court's power to make orders pursuant to s 601NF(2) to facilitate the performance of his responsibility to ensure that each fund is wound up in accordance with its constitution. Having heard submissions, my provisional view was that orders might be made pursuant to s 601NF(2) directing that Mr Whyte act as a receiver of the property held by the company as:

- (a) responsible entity of the EIF; and
- (b) responsible entity of the EPCIF

However, I deferred making any orders pursuant to s 601NF in this regard so that I might consider relevant authorities concerning the power to make such orders pursuant to s 601NF.

Appointment of a receiver pursuant to s 1101B of the Act

[35] Soon after the commencement of the hearing on 21 November 2011, ASIC made an oral application pursuant to s 1101B of the Act for an order appointing a receiver of the property of each fund. The evidence and submissions indicated that the company had contravened the Act and one condition of its Australian financial services licence, and that upon the expiry of its insurance coverage would have contravened another condition. In the circumstances that I have earlier related concerning the need to appoint a person to take responsibility for ensuring that the funds were wound up, and in the absence of a specific order that Mr Whyte act as a receiver of the property of each fund, I made an interim order under s 1101B appointing him:

- (a) a receiver of the property of EIF; and
- (b) a receiver of the property of EPCIF

until 4.00 pm on Wednesday, 23 November 2011 or further earlier order. I was satisfied that such an order would not unfairly prejudice any person, and that such an order was in the interests of the members of each fund.

Further orders

[36] I have now had an opportunity to consider whether in lieu of a further order pursuant to s 1101B, or in addition to an order made under that section, Mr Whyte should be ordered pursuant to s 601NF to act as a receiver of the property of each fund and whether an order should be made as to the powers which he has to act as receiver.

[37] I have set out the text of s 601NF above. The exercise of the power to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(2) may arise for consideration in a wide variety of circumstances. For example, the originating application in this matter envisaged the appointment pursuant to s 601NF of a capable and competent temporary responsible entity pursuant to s 601NF to wind up the funds and for a committee consisting of Mr McDermid, Mr Vincent and a partner of Mr Vincent to be appointed to s 601NF to oversee the winding up. In other circumstances a responsible entity will not exist or will not be capable of winding up the registered scheme under the oversight of a person appointed pursuant to s 601NF. Section 601NF(1) contemplates such situations. One such situation is where the responsible entity “has ceased to exist”. As ASIC submits, in such a case, unless a person appointed under s 601NF is empowered to deal with the assets of the scheme, that person will have no means to effect the winding up and the appointment would be rendered meaningless.

[38] The terms of s 601NF(1) by which the Court may, by order, appoint a person “to take responsibility for ensuring” a registered scheme is wound up may be thought to necessarily carry with the appointment the authority to do such things as are necessary to wind up the registered scheme in accordance with its constitution and any orders made under subsection (2). McPherson SPJ (as his Honour then was) in *Re Crust ‘N’ Crumb Bakers (Wholesale) Pty Ltd*⁴ stated that:

“Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled.”

This statement has been approved by the Court of Appeal in *Mier v FN Management Pty Ltd*⁵ and by the Full Court of the Federal Court in *Joye v Beach Petroleum N.L.*⁶ Accordingly, an appointment pursuant to s 601NF may be said itself to authorise the appointed person to cause assets to be collected, realised and other steps taken so as to wind up the scheme in accordance with its constitution and any orders made under s 601NF(2). In general terms, the constitution of the EIF provides for the winding up to involve the conversion of the funds’ assets to money and, after the payment of debts, the payment to members in proportion to the amount of the members’ interests in the scheme.

[39] Depending upon the circumstances of a particular case, the responsibility for ensuring that a registered scheme is wound up may involve the appointed person ensuring that the responsible entity undertakes these kind of tasks. In other circumstances, for example, because the responsible entity has ceased to exist or is incapable of doing these tasks, the appointed person may need to undertake them or engage someone else to do so.

[40] The nature and extent of the powers which s 601NF confers upon an appointed person by virtue of his or her appointment is not clear from the terms of the statute. The matter is not clarified or illuminated by the Explanatory Memorandum to the

⁴ [1992] 2 Qd R 76 at 78.

⁵ [2006] 1 Qd R 339 at 347, [2005] QCA 408 at [15].

⁶ (1996) 67 FCR 275 at 287, 290.

Managed Investments Bill 1997 (Cth) which simply stated in respect of proposed s 601NF (which is in identical terms to s 601NF as enacted) that:

“The Court may make other such orders as it sees fit.”

But the section, as enacted, is not in such simple terms. Instead, it provides for the appointment of a person pursuant to s 601NF(1), and goes on to provide that the Court may “by order” give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so. I note that subsection 601NF(2) is not simply a power to give directions.⁷ It contemplates the Court making orders, not simply directions. The orders that might be made under s 601NF(2) are not confined to directions about winding up the scheme in accordance with its constitution. The section does not specify all of the circumstances under which it may be necessary to give directions, but the circumstances include the fact that the provisions in the scheme’s constitution are inadequate or impracticable.

- [41] The terms of s 601NF might be contrasted with the terms of s 601EE(2) in respect of unregistered managed investment schemes. Section 601EE(2) provides in such a case that the Court may make “any orders it considers appropriate for the winding up of the scheme.”
- [42] In *Re Stacks Managed Investments Ltd*,⁸ White J compared s 601NF(2) with s 601EE(2) and considered the authorities in relation to s 601EE(2). Section 601EE(2) was said to empower the Court “to fashion the winding-up process.”⁹ By contrast, s 601NF(2) gave power to make directions about how a registered scheme is to be wound up, where the winding up may already be on foot and should be provided for by the scheme’s constitution.
- [43] In that matter the plaintiff wished to have insolvency practitioners appointed as persons to take responsibility for ensuring that the scheme was wound up. The plaintiff sought the conferral of a wide range of powers on such persons. These included the power to conduct examinations in the same way that liquidators of companies have those powers. White J observed that the plaintiff had adapted the provisions of the *Corporations Act* dealing with the winding up of companies to the circumstances of the scheme. The plaintiff contended that powers could be conferred on the responsible persons, obligations imposed on third parties, and rights of creditors restricted to bring the winding up of the scheme into line with the winding up of companies.¹⁰ His Honour observed that Part 5C.9 provides for the winding up of a registered scheme in accordance with its constitution and any order the Court might make under s 601NF(2). Where the scheme is a trust, what is envisaged by the winding up of a scheme is the realisation of its property, the payment by the responsible entity of liabilities incurred on behalf of the scheme or the retention by it of funds with which to meet its liabilities, the ascertainment of the members’ entitlements, and the distribution of the trust assets to the members in accordance with their entitlements.¹¹ The winding up of a trust was said to be quite a different thing from winding up a company, with the liquidation of a company being a matter governed by statute. His Honour observed that none of the detailed

⁷ cf. the power of a Court to give directions under a provision such as the *Trusts Act 1973*, s 96 (Qld).
⁸ (2005) 219 ALR 532, [2005] NSWSC 753.

⁹ *Ibid* at 541, [37].

¹⁰ *Ibid* at 537, [19].

¹¹ *Ibid* at 542, [42].

provisions of the *Corporations Act* that relate to the liquidation of a company applied to the winding up of a scheme.

- [44] The facts of that case are materially different to this proceeding. The plaintiff in that case sought the appointment of registered liquidators to provide the expertise which the plaintiff did not have in handling administrations. White J observed that the responsible entity was entitled under s 601FB to appoint those persons as its agents, or otherwise engage those persons, to do what the plaintiff was authorised to do in connection with the scheme. There was no necessity for an order under s 601NF(1). His Honour observed that such an order might be necessary if the plaintiff were failing in its duty to wind up the scheme, but there was no suggestion of that.
- [45] As to the proper scope for orders to be made under s 601NF(2), White J noted that the power was limited to giving directions about “how a registered scheme is to be wound up”. It did not authorise the Court “to confer additional powers upon a responsible entity to which third parties would be made subject, or to interfere with the rights which third parties would otherwise enjoy.”¹² His Honour went on to conclude that Parliament deliberately did not apply the regime for the winding up of companies to the winding up of registered schemes and that he did not read the power to give directions in s 601NF(2) “in the wide way for which the plaintiff contends as, in effect, permitting the court, by order, to impose a new legislative regime on the winding up of a particular scheme, and thereby affecting the rights of and imposing duties on third parties.”¹³ I respectfully agree with these conclusions.
- [46] It is necessary, however, for me to consider whether s 601NF authorises the making of orders which are of a different kind.
- [47] In *Re Rubicon Asset Management Ltd*,¹⁴ McDougall J was likewise concerned with the scope of the power to make orders pursuant to s 601NF(2). The matter in issue was a direction that the costs of winding up be borne by the responsible entity. The power to give such a direction was found to exist. The direction was not one which would take away any right that a third party had, or would subject a third party to any form of compulsory process for production of documents or examination. The order sought by the plaintiffs in that case was made. McDougall J noted that in *Re Stacks Managed Investments* White J gave as an example of what was authorised by s 601NF(2) “the making of directions of a kind which would be made in an administration suit for the purpose of settling the entitlements of members”. McDougall J stated that White J was not intending to give an exhaustive account of the width of the statutory power. Like McDougall J and White J, I do not propose to canvass the full extent of the power to give directions under s 601NF(2). My present concern is whether s 601NF authorises the Court by order to give a direction about how a registered scheme is to be wound up by giving a direction that the person to take responsibility for ensuring that the registered scheme is wound up has the power to act as a receiver of the property held by the company as responsible entity of the fund.

¹² Ibid at 544, [52].

¹³ Ibid at 545, [55].

¹⁴ (2009) 74 ACSR 346, [2009] NSWSC 1068.

[48] In *Mier v FN Management Pty Ltd*¹⁵, Keane JA (as his Honour then was, and with whom McMurdo P and Douglas J agreed) was concerned with the power conferred by s 601EE(2) in relation to the getting in, realisation and distribution of the property of an unregistered managed investment scheme. Because the Act did not explicitly lay down a method for the winding up of an unregistered scheme, Keane JA stated that it must be assumed that, in general, the Court would be guided by analogies with the law relating to the winding up of companies, partnerships and trusts when deciding on the appropriate procedure for the winding up of a scheme. His Honour went on to observe that the best analogy might be thought to be the winding up procedure applicable to a registered scheme and continued:

“Unfortunately for present purposes, the Act, beyond directing that a registered scheme be wound up in accordance with its constitution, also **leaves the detail of the winding up of a registered scheme in the hands of the Court**, which may make such orders as it ‘thinks necessary to do so’.”¹⁶ (emphasis added)

[49] In *Capelli v Shepard*¹⁷ the Victorian Court of Appeal made a passing comment in the context of a submission that the Court might give directions about whether the scheme property included certain trees. The Court did not think it appropriate to exercise the power under s 601NF(2) as suggested. Its first reason was that the question was not in terms raised in the appeal. Its second reason was that the Court was “not at all confident that a power such as this might be used to affect rights to property.” The Court observed that it “may be that ‘directions as to how a registered scheme is to be wound up’ are limited to procedural rather than substantive matters.” The Court did not develop this point or attempt to define the difference between procedural and substantive matters.

[50] I am not concerned with an application of the kind that White J rejected in *Re Stacks Managed Investments Ltd*. The application does not seek an order that would give the person appointed pursuant to s 601NF(1) powers in relation to the property of third parties. The application does not seek to adapt and impose detailed provisions dealing with the winding up of companies to the circumstances of a registered scheme.

[51] I am concerned with a question of whether s 601NF authorises the person who I have appointed to take responsibility for ensuring the funds are wound up to act as a receiver of the property of each fund. There may be doubt as to whether the appointment itself confers such a power. It may be thought necessary to make an order pursuant to s 601NF(2) directing the appointed person to act as receiver since such an order is one which gives directions about “how a registered scheme is to be wound up”. Such an order will be made only if the Court thinks it necessary to do so. For example, the occasion to make such an order may arise if the responsible entity is either unable or unwilling to wind up the scheme, or itself to appoint a person to collect the property of the scheme, realise it and otherwise undertake the winding up of the scheme in accordance with its constitution.

[52] I am satisfied that in an appropriate case s 601NF(2) gives the Court power, by order, to give directions that the person appointed to take responsibility for ensuring

¹⁵ [2006] 1 Qd R 339, [2005] QCA 408.

¹⁶ Ibid at 348-349, [18] (footnotes omitted).

¹⁷ (2010) 264 ALR 167 at 197, [2010] VSCA 2 at [146].

a registered scheme is wound up act as a receiver of the property of the scheme. The Court may exercise the power if it thinks it necessary to do so and one such circumstance might be if the property of the scheme was in jeopardy because the responsible entity was unable or unwilling to collect the property, realise it and do the other things necessary to wind up the scheme.

- [53] The present application is concerned with property that is held on trust. The person that I have appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution is required to ensure that a trust is wound up, but cannot necessarily rely upon the responsible entity itself to perform that task. In the analogous situation of a private trust in which trustees fail to get in trust property, a receiver may be appointed on the application of one of the trustees or of any beneficiary where the appointment is required for the safety of the trust property (the basis of the jurisdiction being the jeopardy of that property).¹⁸ The Court may appoint a receiver of trust property where that is necessary for the well-being of the trust.¹⁹ The Court will appoint a receiver of trust property where that property is in jeopardy through misconduct, waste, improper disposition, breach of a trustee's duty or the unsuitable character of the trustee.²⁰ The case in favour of appointment of a receiver must be a strong one but in assessing the risk to the trust the Court will apply a qualitative judgment.²¹ In my view, the exercise of the power conferred by s 601NF(2) to order that the person who has been appointed to take responsibility for ensuring that the registered scheme is wound up act as a receiver of the scheme's property should be exercised with a similar caution, and only where a strong case is made out for the need for such an order.
- [54] Having now had the opportunity to consider the authorities cited to me at the hearing on 21 November 2011, I consider that s 601NF(2) provides a source of power to make an order giving directions that Mr Whyte act as a receiver of the property of each fund.
- [55] On the morning of Wednesday, 23 November 2011, I heard submissions as to whether it is appropriate to extend Mr Whyte's appointment as a receiver pursuant to s 1101B and to make a similar order pursuant to s 601NF(2). I decided to make such orders and my reasons for doing so follow.
- [56] In this matter the Court has directed the responsible entity, namely the company, to wind up each scheme. In the circumstances earlier outlined, it was necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2).
- [57] The appointment of a receiver of the property of each fund pursuant to s 1101B on ASIC's application and also pursuant to s 601NF(2) was supported by ASIC, and the members of the funds for whom Mr Martin SC and Mr Tucker respectively appeared. On this morning's hearing it was opposed by the company and by Mr McIvor for whom Mr Peden of Counsel appeared. Following the resignation of Mr

¹⁸ *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 47, [2000] VSC 300 at [66]; J.D. Heydon and M.J. Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (Chatswood: LexisNexis Butterworths, 2006) at 625, [2305].

¹⁹ *Ibid.*

²⁰ *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 52, [2000] VSC 300 at [84].

²¹ *Ibid.*

Vincent, Mr McDermid, Mr Bingham and Mr Powell at 2.50 pm on Monday, Mr McIvor as sole shareholder of the company appointed himself, his wife Ms Stacey McIvor and Mr Ross Honeyman as directors.

- [58] Whereas on Monday, 21 November, the company did not oppose the appointment of Mr Whyte as a receiver of the property of the funds, it now does so. Mr Peden submitted on its behalf and on behalf of Mr McIvor that there was no need to appoint Mr Whyte as a receiver pursuant to s 1101B(1) or s 601NF(2).
- [59] ASIC made submissions as to why there was such a need. ASIC's submissions were adopted by Mr Martin SC on behalf of the members he represents. Mr Tucker also supported Mr Whyte's appointment as a receiver for essentially the same reasons.
- [60] ASIC placed particular reliance upon the affidavits upon which it previously relied, and on its previous submissions in this proceeding and in proceeding BS9694 of 2011, being a proceeding which it brought against the company. In summary, ASIC submits that there is no dispute that the company is in breach of a condition of its Australian financial services licence—that it hold a minimum amount of net tangible assets (“NTA”)—and has breached provisions of the Act requiring the company to lodge audited financial reports for each fund and audited reports of its compliance with the compliance plans for both funds. The affidavit material upon which ASIC relies, particularly an affidavit of Ms Gentles, and ASIC's written submissions detail the circumstances of these breaches.
- [61] ASIC was sufficiently concerned by the company's breaches of its licence and breaches of sections of the Act that it issued a Notice of Hearing under s 915C of the Act requiring the company to show cause as to why its licence should not be cancelled. Prior to that hearing it brought proceedings against the company, as did Tucker SF Pty Ltd. The material upon which ASIC relied included the matters that I have earlier addressed, and also identified substantial concerns as to how the company operated or proposed to operate each fund, the instability of the company's board and Mr McIvor's ability to change the board of the company at any time and without notice.
- [62] The affidavit of Ms Gentles is a substantial document, and contains material which justified ASIC's concern that Mr McIvor may not deal with the assets of the EIF in the best interests of members. The material relied upon by ASIC that supported its concern in this regard included documents that recorded the concerns of the board of the company in September and October 2011 about Mr McIvor's conduct. This included the then board's view that Mr McIvor “was responsible for making all of the current problem loans”. It also included claims that he had demonstrated extremely poor judgment in recent times (evidenced by emails attached to an affidavit filed in proceedings brought against the company by a borrower that had acquired a unit in the EIF and commenced proceedings to wind up the company). It included the directors' view that Mr McIvor had continued to deal on an unauthorised basis with some borrowers. Mr McIvor was said to be in ongoing conflict with the board and senior management and to have made a series of threats against staff.
- [63] Exhibits to Ms Gentles's affidavit provided evidence from a former chairman, a former director and a former CEO of the company about the exercise by Mr McIvor

of his ability to change the company's personnel and directors without notice and without consultation.

- [64] ASIC sought relief in the proceedings that it brought against the company and submitted on that occasion that such relief was appropriate in circumstances where:
- (a) the company was, by its own admission, in breach of the NTA requirements imposed by its licence;
 - (b) the company had failed, despite specific requests by ASIC, to notify ASIC of its current NTA position;
 - (c) the company had failed to lodge audited financial reports allowing ASIC to make an assessment of its financial position;
 - (d) the company had breached provisions of the Act in failing to lodge audited financial reports and audited reports of its compliance with compliance plans for both funds;
 - (e) the board of the company had been in a state of upheaval, with Mr McIvor apparently focused on ways to develop the assets of EIF, rather than simply proceeding with an orderly winding up.

These matters were said to pose an increased risk that the company might seek to operate the EIF in a manner which was not in the best interests of members.

- [65] On 27 October 2011, Martin J made consent orders in relation to the operation of the EIF and the EPCIF on ASIC's application.
- [66] In the application brought by Tucker SF Pty Ltd there were many allegations of misconduct by Mr McIvor. Mr McIvor's affidavit sworn 26 October 2011 stated that in respect of Mr Tucker's numerous allegations against him:

"I am deliberately not responding to those allegations as I do not consider them relevant to the present application. My response to those matters will occur in the fullness of time. By not responding to them in this affidavit I should not be taken as accepting the correctness of what Mr Tucker has said."

I am not in a position to resolve the allegations made by Mr Tucker against Mr McIvor.

- [67] The concerns raised by ASIC include concerns based upon facts, about which there is no dispute, relating to the company's failure to comply with the conditions of its licence and the requirements of the Act.
- [68] Mr McIvor gave undertakings to the Court on 26 October 2011 that he would not appoint a new director to the board of the company, or remove a director or seek to remove a director from its board without giving seven days' notice to the existing board and to ASIC, and seeking the leave of the Court after expiry of that notice. He also gave an undertaking that he would not seek to interfere with the conduct of the board in its business and the discharge of its responsibilities on the basis that it was clear that he was entitled to put properly documented proposals before the

board for its consideration. Mr McIvor stated that he gave these undertakings to “safeguard any concerns which may be held regarding the independence of the Board and Board members being subject to influence”.

[69] Following the resignation of the directors on Monday, I released Mr McIvor from these undertakings so that the company would have directors. There is no indication that Mr McIvor will not remain a director of the company. There is no indication that he intends to resign as a director and replace himself with other directors who are clearly independent of him. There is no evidence that independent directors would be prepared to assume such a role, and with the expiry of relevant insurance policies there is every reason to suppose that independent directors would not be willing to accept appointment in the absence of the kind of insurance cover that Mr Vincent and his fellow directors were unable to obtain.

[70] The matters raised by ASIC in the proceedings commenced by it, and also in these proceedings, raise serious concerns about the ability of the company while it remains under Mr McIvor’s control, and while he remains a director:

- (a) to operate each fund in a manner that will comply with the Act and the conditions of its Australian financial services licence; and
- (b) to act in a manner which is in the best interests of the members of each fund.

I am not persuaded that the company will wind up the funds in a manner that is in the best interests of their members. On the contrary, the matters relied upon by ASIC and the members who support the appointment of Mr Whyte as a receiver raise a strong case that the appointment of a receiver is necessary to ensure that each scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(1).

[71] Whereas the company on Monday did not oppose the making of orders for the appointment of a receiver, it now submits that such an appointment is premature and unfairly prejudicial to the interests of members. It and Mr McIvor submit that I should not assume that there will be problems in the orderly conduct of the winding up that I have ordered, that the company should be given the opportunity to wind up each scheme in accordance with its constitution and that Mr Whyte should only be appointed as a receiver if and when problems arise. They submit that it is not in the interests of members for Mr Whyte as receiver to assert control over the property of the funds and that the property of the funds should be left in the control of the company as a responsible entity, subject to the responsibility that Mr Whyte has by virtue of his appointment pursuant to s 601NF to take responsibility for ensuring that each scheme is wound up in accordance with its constitution.

[72] I do not accept this submission. I conclude that the best interests of most members of the funds, and the winding up of each scheme in accordance with its constitution, will be served by the appointment of Mr Whyte as a receiver. Such an appointment will avoid confusion and possible disputes over the control of property. Placing the property of the funds under the control of Mr Whyte as a receiver is likely to facilitate its realisation and the winding up of each fund for the benefit of its members. The appointment of Mr Whyte as receiver does not preclude him from having employees of the company (past, present and future) undertake tasks that are required to wind up each fund. As I mentioned more than once during the course of

argument, the best interests of members would appear to be served by relying upon the knowledge, skill and experience of persons who are familiar with the company's affairs, including persons who have taken steps to realise its property in the best interests of members. I am not, however, persuaded that the property of each fund should be left under the control of the company, subject only to the oversight of Mr Whyte by virtue of an appointment under s 601NF(1). The company's history of non-compliance with its statutory obligations, breaches of the conditions of its licence and the evidence pointed to by ASIC in relation to Mr McIvor present a strong case for the appointment of a receiver of each fund's property. The orderly conduct of the winding up of each fund will be facilitated by clarification of the fact that Mr Whyte is not only responsible for ensuring that each scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2), but that he has the power to do so, including the power of a receiver to take control of the property to which he has been appointed receiver and to deal with that property in a way that facilitates the winding up of each fund in a manner, and within a timeframe, that realises the property of each fund in the best interests of members.

- [73] I am not satisfied that Mr Whyte will be able to ensure that each fund is wound up in a timely, efficient and cost-effective manner unless he is appointed as a receiver of the property of each fund. I consider that it is in the interests of the members that the property of the funds be under his control.
- [74] In general, the circumstances that made it necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under s 601NF(2) also persuade me that it is in the best interests of each fund that the same person be appointed as receiver of its property. I am persuaded that the appointment of a receiver is necessary for the well-being of the property which is held on trust by the company, and to ensure that the winding up of each fund occurs in accordance with its constitution and any orders made under s 601NF(2).
- [75] Mr Peden also submitted that I should not appoint Mr Whyte as a receiver because such an order would cut across the legislative framework governing the winding up of a registered scheme. I do not agree with that submission.
- [76] First, insofar as an appointment as receiver pursuant to s 1101B(1) is concerned, the company's contravention of the Act and its contravention of conditions of its Australian financial services licence justify the appointment of a receiver in the circumstances. There is nothing inconsistent with the legislative framework for the winding up of a registered scheme in exercising a power conferred under s 1101B. Such an order may aid the winding up of a registered scheme.
- [77] Secondly, I do not consider that the legislative framework of Part 5C.9 precludes the appointment of a receiver pursuant to s 601NF(2) if it is necessary to do so. I have concluded in the circumstances of this matter that an order giving a direction that Mr Whyte be appointed as receiver of the property is necessary.
- [78] I raised during argument the issue of whether it was necessary for Mr Whyte to be appointed as a receiver pursuant to s 1101B(1) and also pursuant to s 601NF(2) of the Act. However, the parties supporting his appointment favoured such a course, and I intend to make such orders. To the extent that there may be some doubt concerning the extent of the Court's power to appoint a receiver pursuant to

s 601NF(2), I consider that the best interests of the members will be protected by making an order under s 1101B(1) of the Act. Even with an appointment as receiver under s 1101B(1), I think that it is necessary also to appoint Mr Whyte as a receiver pursuant to s 601NF(2). Such an appointment makes clear that one source of his power to act as receiver is s 601NF(2). It is appropriate that, in carrying out his responsibility for ensuring that the registered scheme is wound up in accordance with its constitution, he have powers that are sourced in the section of the Act that imposes that responsibility. Further, the possibility exists that in the future the Court may rescind or vary the order made under s 1101B, or suspend its operation, pursuant to s 1101B(11). If that occurs Mr Whyte should continue to have the powers and responsibilities associated with appointment as a receiver pursuant to s 601NF(2).

- [79] Mr Whyte's appointment as receiver should not be perceived to be based solely upon the contraventions by the company which attract the operation of s 1101B. It should be clear that Mr Whyte is also being appointed a receiver of the property of each fund because such an appointment is thought necessary to facilitate the performance of his responsibility for ensuring that each scheme is wound up in accordance with its constitution. The winding up of each fund will be facilitated by an order that indicates that one purpose of the appointment of Mr Whyte as receiver of the property of each fund is to facilitate the fund being wound up in accordance with its constitution. Mr Whyte, in discharging his responsibilities which arise by virtue of his appointment under s 601NF(1), will have the power to receive the property of each fund, and the directors of the company, its employees and third parties should understand that a source of the power which he is given to facilitate the responsibility imposed upon him by s 601NF(1) is s 601NF(2). He should have the power of a receiver and the order should state that one source of that power is an order made under s 601NF(2).
- [80] If I had acceded to the submissions made by the company and Mr McIvor this morning and not appointed Mr Whyte as a receiver, then there would have been scope for dispute and disagreement between Mr Whyte and individuals in control of the company, including Mr McIvor, concerning the control of the property of each fund. I consider that the appointment of Mr Whyte as a receiver will reduce the scope for such disputes.
- [81] In short, an order pursuant to s 601NF(2) directing that Mr Whyte be appointed as a receiver of the property of the EIF and a receiver of the property of the EPCIF is in the best interests of members and is necessary to facilitate the winding up of each fund.
- [82] A copy of the orders made by me on 21 November 2011 and a copy of the orders made by me today are set out as annexures to these reasons.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 10478/11

In the matter of **EQUITITRUST LIMITED ACN 061 383 944**

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

ORDER

Before: Justice Applegarth

Date: 21 November 2011

Initiating document: Application filed 15 November 2011, and oral application made by the Australian Securities and Investments Commission on 21 November 2011

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND (1)(a) of the *Corporations Act 2001* (Cth) (the “**Act**”):-
 - (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999 (“**EIF**”);
 - (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999 (“**EPCIF**”).
2. David Whyte (“**Mr Whyte**”) be appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that:-
 - (a) the EIF is wound up in accordance with its constitution; and
 - (b) the EPCIF is wound up in accordance with its constitution.
3. Pursuant to section 601NF(2), that Mr Whyte:-
 - (a) have access to the books and records of Equititrust Limited which concern the EIF and the EPCIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in effecting the winding up of the EIF;

- (c) be indemnified out of the assets of the EPCIF in respect of any proper expenses or costs incurred in effecting the winding up of the EPCIF;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration; and
 - (e) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
4. Pursuant to sections 1101B(1) and 1101B(5) of the Act, Mr Whyte be appointed as:-
- (a) a receiver of the property of the EIF; and
 - (b) a receiver of the property of the EPCIF,
- until 4:00pm on Wednesday 23 November 2011, or further earlier order.
5. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Limited or the EIF.
6. That by 4pm on Tuesday 22 November 2011, Equititrust Limited publish on its website (www.equititrust.com.au), in pdf form, by way of notice to members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
7. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with section 601NF(2) of the Act.
8. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
9. The oral application of ASIC be adjourned to 10:00am on Wednesday 23 November 2011.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 10478/11

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND
ARSN 089 079 854 AND THE MEMBERS OF THE
EQUITITRUST PRIORITY CLASS INCOME FUND ARSN
089 079 729**

ORDER

Before: Justice Applegarth

Date: 23 November 2011

Initiating document: Application filed 15 November 2011 and Oral Application made 21 November 2011

THE ORDER OF THE COURT IS THAT:

1. Pursuant to s.1101B(1) of the *Corporations Act 2001* (Cth) (***the Act***) David Whyte (***Mr Whyte***) be appointed as:
 - (a) a receiver of the property of the Equititrust Income Fund (***EIF***); and
 - (b) a receiver of the property of the Equititrust Priority Class Income Fund (***EPCIF***).
2. Pursuant to s.601NF(2) of the Act David Whyte (***Mr Whyte***) be appointed as:
 - (a) a receiver of the property of the Equititrust Income Fund (***EIF***); and

- (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).
3. Pursuant to s.1101B(1) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 1 above, the powers set out in s.420 of the Act in addition to the powers set out in s.1101B(8)(a) to (c) of the Act.
4. Pursuant to s.601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 2 above, the powers set out in s.420 of the Act and the powers set out in s.1101B(8)(a) to (c) of the Act.
5. Pursuant to s.1101B(1) of the Act, Mr Whyte in respect of the appointment made in Order 1 above:
- (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
 - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
6. Pursuant to s.601NF(2) of the Act, Mr Whyte in respect of the appointment made in Order 2 above:
- (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
 - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.

7. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Ltd or the property of the EIF.
8. That by 4pm on Thursday 24 November 2011, Equititrust Ltd publish on its website (www.equititrust.com.au), in pdf form, by way of notice to its members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
9. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this application, to be assessed on the standard basis, out of the EIF.
10. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with s.601NF(2) of the Act.