JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION -v- CHASE CAPITAL MANAGEMENT PTY LTD & ORS [2001] WASC 27
CORAM	:	OWEN J
HEARD	:	22 NOVEMBER, 5 & 19 DECEMBER 2000
DELIVERED	:	2 FEBRUARY 2001
FILE NO/S	:	COR 137 of 2000
MATTER	:	Sections 601EE(1), 1114, 1323 and 1324 of the *Corporations Law* of Western Australia and Chase Capital Management Pty Ltd ACN 089 976 812 and Chase Capital Management Ltd and Leadenhall Funds Management Pty Ltd ACN 089 937 315 and Leadenhall Funds Management Ltd
BETWEEN	:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Applicant AND CHASE CAPITAL MANAGEMENT PTY LTD First Respondent CHASE CAPITAL MANAGEMENT LTD Second Respondent

LEADENHALL FUNDS MANAGEMENT PTY LTD
Third Respondent

LEADENHALL FUNDS MANAGEMENT LTD
Fourth Respondent

DAVID LLEWELYN HICKS
Fifth Respondent

JAMIE JO SIMS
Sixth Respondent

IRENE ANNE PERCY
Seventh Respondent

Catchwords:

Corporations - Corporate finance - Whether investment clubs run by respondents were managed investment schemes - Whether schemes should be wound up - Whether companies participating in the operation of the schemes should be wound up on the just and equitable ground

Legislation:

Corporations Law s 9, 601ED, 601EE

Result:

Schemes wound up - Companies placed in liquidation

Representation:

Counsel:

Applicant	:	Mr T A Staples
First Respondent	:	Mr M C Hotchkin
Second Respondent	:	Mr M C Hotchkin
Third Respondent	:	Mr M C Hotchkin
Fourth Respondent	:	Mr M C Hotchkin
Fifth Respondent	:	Mr M C Hotchkin
Sixth Respondent	:	Mr M C Hotchkin
Seventh Respondent	:	Mr M C Hotchkin
Receiver And Manager	:	Mr N P Gentilli
Investors	:	Mr R A Harrison (22/11/00 and 5/12/00)

Solicitors:

Applicant	:	Michael Gething
First Respondent	:	Hotchkin Hanly
Second Respondent	:	Hotchkin Hanly
Third Respondent	:	Hotchkin Hanly
Fourth Respondent	:	Hotchkin Hanly
Fifth Respondent	:	Hotchkin Hanly
Sixth Respondent	:	Hotchkin Hanly
Seventh Respondent	:	Hotchkin Hanly
Receiver And Manager	:	Jackson McDonald
Investors	:	Deacons Lawyers

Case(s) referred to in judgment(s):

Australian Securities and Investments Commission v Austimber Pty Ltd (1999) 17 ACLC 893
Australian Securities and Investments Commission v Enterprises Solutions 2000 Pty Ltd [2000] QCA 452
Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504
Australian Softwoods Forests Pty Ltd v Attorney-General for the State of New South Wales (1981) 148 CLR 121
Walter L Jacob Ltd (1989) 5 BCC 244

Case(s) also cited:

Nil

1 **OWEN J**: This is an application for the winding up of the first respondent, Chase Capital Management Pty Ltd ("Chase") and the third respondent, Leadenhall Funds Management Pty Ltd ("Leadenhall"). The application is brought pursuant to a chamber summons dated 22 September 2000.

Background

2 The second respondent ("CCML") and the fourth respondent ("LFML") are companies registered or incorporated in the Turks and Caicos Islands. Neither of them is registered as a foreign company in Australia. The fifth respondent ("Hicks") controls CCML and LFML. CCML holds the issued shares in Chase and LFML holds the issued shares in Leadenhall. The sixth and seventh respondents ("Sims" and "Percy" respectively) are directors of Chase. Hicks is the sole director of Leadenhall. Chase is (or was) the trustee of a unit trust called the Chase Capital Unit Trust constituted by a deed dated 14 October 1999.

3 The respondents have had a connection, in one way or another, with a series of syndicated investments. Moneys have been obtained from various investors, pooled together and invested in securities. The question at issue is whether these syndicated investments are "managed investments scheme" under the *Corporations Law* ("the Law") and whether the respondents, or any or all of them, have operated or promoted or been relevantly involved in these schemes in a way that contravenes the Law.

4 A business name "The Manhattan Club" was registered on 11 January 1999. The nature of its business is described as "investment information service". Various persons or entities have, from time to time, carried on business under that name. It was founded by Hicks and a man named Horne. Since 2 December 1999 the proprietor of the business has been The Manhattan Club Pty Ltd ("MCPL"). Hicks is a director of MCPL. The company is the trustee of the Manhattan Club Unit Trust. The sole shareholder MCPL is The Manhattan Club Ltd ("MCL"), a company incorporated in the Turks and Caicos Islands but not registered in Australia as a foreign company.

5 On 17 November 2000 Hicks swore one of several affidavits that have been relied on by the respondents. In it he deposes to the background to the investment activities. It seems that out of the activities of the Manhattan Club there emerged another group called the Chase Investment Club. It is not easy to ascertain from the materials the exact

relationship between the Manhattan Club and the Chase Investment Club. I will refer to the groups globally as "the Club". The idea for the Club came about after discussions following addresses Hicks made to groups of people on subjects relating to tax minimisation and wealth creation. This led to a group comprised of members who paid subscriptions in return for educational videos, compact discs, books and presentations from individuals in the finance industry. In an advertising brochure for the Manhattan Club it is said that the Club "educates and assists its subscribers in financial literacy". It held fortnightly seminars and distributed a monthly newsletter. The advertising brochure goes on to say:

> "[The Club] is an educational service available throughout Australia on an annual subscription basis. Workshops and introductory evenings are held regularly. It makes available to its subscribers a structured educational program to enhance knowledge of the wealth creation process."

6 Again according to Hicks, the Club commenced in February 1999. In his affidavit sworn 20 November 2000 Hicks says:

> "A number of the members of [the Club] were keen to initiate their own investment club, whereby they could pool their funds for the purpose of undertaking investments which they could not undertake as individuals.
>
> As a result, [CCML]was registered in May 1999 … ."

7 A person named Kevin Smith suggested to the group that they invest in a company called Global Alert Pty Ltd, which was involved in the manufacture and distribution of a product called "Viva Tablets". Hicks says that because of his leadership role in the Club the members asked him to handle the investment. Various funds were given to him which he held in a bank account called "Leadenhall Funds Management". The funds were delivered to Global Alert Pty Ltd in return for royalties from the sale of Viva tablets.

8 Chase was established so that if there were further investments, they could be handled on a more organised basis. More members expressed interest in making investments. An investment committee was set up to look at prospective investments. Between June 1999 and March 2000 several investments were made.

9 By the end of 1999 the Club had about 300 members who attended regular fortnightly meetings. On 2 November 1999 Hicks sent a letter, on MCL letterhead to members of the Club offering them the opportunity to participate in the ownership structure of the organisation. The letter invited members to apply for the purchase of units of $1,000 in MCL. I think it is common ground that the reference to "units" is to shares in the company. Approximately 91 persons applied for shares and $232,000 was raised.

10 In November 1999 ASIC received an inquiry from a member or prospective member of the Club as to whether the various entities associated with the Club had complied with the Law. On 2 February 2000 ASIC formally commenced an investigation pursuant to the ASIC Law. In February and March 2000 Hicks, Sims, Percy and another person were compulsorily examined under s 19 of the ASIC Law. They were legally represented at the examinations and claimed privilege in relation to the answers given by them to almost all of the questions. The attitude of the respondents to the investigation, and to these proceedings generally, can be seen from this extract from the affidavit of Hicks sworn 27 June 2000 in opposition to an application for the appointment of a receiver:

> "11. Any breach of the Corporations Law that [CCML Leadenhall or LFML] or myself may have committed in respect of the operation of the Chase Investment Club or the other investments ("the Investments") the subject of these proceedings have come about as a result of ignorance of the relevant provisions of the Corporations Law.
>
> 12. At the conclusion of my examination by ASIC on 25 February 2000, my solicitor Michael Hotchkin said to Mr Scott and Mr Staples, who together with Mr Rogers were conducting the examination, words to the effect of "If you consider my clients are breaking any Corporations Law then you should inform them immediately so they don't continue to do so. If you don't advise them and they continue to do something which you consider to be against the Corporation Law they would be doing so with your knowledge". Mr Scott said words to the effect that they would get back to us soon if they considered Chase or Leadenhall were doing anything wrong. This conversation took place after Mr Hotchkin and I had

> stood up to leave. I believe the recording of the examination had already concluded. ASIC then instituted these proceedings on or about 31 May 2000 without reverting back to myself or my solicitors stating they had formed the view that the Corporations Law was or had been breached.
>
> 13. I am concerned that the appointing of a receiver and manager would compromise the ability of the First to Fourth Respondents to recover the moneys invested by them because in my experience whenever a receiver or liquidator is appointed debtors become recalcitrant. This is even more so the case if the debtor is located in another jurisdiction … .
>
> 14. It is my desire to make sure that all the people who have invested with Chase Investment Club, or the other investments, the subject of these proceedings, will receive, at the very least, their capital invested back or shares in the respective companies they invested in."

11 I think that the original investor grouping was the Manhattan Club. As new members came in they were directed to the Chase Investment Club rather than the Manhattan Club. Often, new members would join following meetings of the Manhattan Club. Offers or invitations to invest in the individual schemes or securities were posted out to all members of the Manhattan Club and the Chase Investment Club or handed out at meetings of the Manhattan Club.

12 It is common ground that the shares in MCL which were offered to members in the letter of 2 November 1999 were not the subject of a prospectus. On 17 March 2000 ASIC commenced proceedings against MCPL, MCL, Hicks, Percy and Noel Herbert seeking declarations that the activities contravened the Law. The respondents consented to a declaration that the contracts by persons purporting to purchase securities in MCL were null and void and consequential relief. All moneys paid for the purchase of shares in MCL were refunded to the persons purporting to make the investments.

13 It is also common ground that the investment activities are not registered as managed investment schemes under the Law. The respondents contend that this is because they are not managed investment schemes and therefore do not need to be registered. They also deny any

other contraventions of the Law in relation to the activities. It is also common ground that none of the entities or persons concerned holds a licence to carry on a securities business.

14 On 31 May 2000 ASIC filed the initiating process by which this application was commenced. It contains a wide ranging prayer for relief. In particular it seeks a declaration that between 1 January 1999 and 29 February 2000 Hicks, Sims and Percy operated and promoted managed investment schemes called "the Chase Scheme" and "the Leadenhall Scheme" without the schemes being registered in contravention of the Law. A myriad of other declarations and orders are sought in relation to the conduct of the various respondents in relation to the investments. ASIC also sought injunctions to prevent the respondents continuing with the impugned investment activities and orders for the appointment of receivers and managers to various assets and investments.

15 On 6 June 2000 I granted an interim injunction preventing the respondents (other than CCML and LFML) from disposing of certain nominated assets and from dealing with bank accounts. They were also restrained from operating or promoting the Chase Scheme, the Leadenhall Scheme or any other managed investment scheme without first having it registered under the Law. The injunctions have been extended and varied from time to time since then. However, I deferred consideration of the appointment of a receiver and manager to the assets which were the subject of the injunctions.

16 When it became apparent that a receiver might be appointed the investors called a meeting. The affidavit of Margaret Delbridge (an investor) sworn 23 November 2000 indicates what happened. A meeting was held on 30 July 2000. Seventy four investors attended in person or by proxy. They passed, unanimously, a resolution appointing a committee of four (including Ms Delbridge) to represent "the whole group of investors" and to do "whatever they can possibly do to protect and/or arrange the transfer of shares to investors and/or arrange refunds of investor' funds to the best of their ability".

17 The application for the appointment of a receiver came on for hearing again on 1 August 2000. ASIC proposed the appointment of Anthony Woodings as receiver. The respondents opposed the appointment entirely. The investor group was separately represented and supported the appointment of a receiver. The investor group proposed the appointment of Louis Nilant as receiver. I decided that it was appropriate to appoint an interim receiver and manager and entrusted the

task to Nilant ("the Receiver"). The Receiver was given a limited power to sell assets. He could do so only with the approval of the investors committee or the Court and then only if he had formed the view that it was necessary in order to preserve the asset.

18 Paragraph 8 of the orders stipulated that by 15 September 2000 the Receiver was to provide to the Court, the investors and the parties a report specifying a number of things, including a recommendation as to the best methods to finalise the investment schemes. The report was duly prepared and is an exhibit to an affidavit sworn by the Receiver on 10 October 2000. The Receiver's recommendation was that Chase, Leadenhall and the investment schemes in which the companies were involved should be wound up by the Court.

19 On 24 September 2000 the investors held a meeting at which they resolved to support the appointment of Nilant as liquidator to finalise the scheme and wind up the companies. According to Delbridge, about 67 investors were present at the meeting. Of these only five or six (one of whom was Hicks) voted against the resolution.

20 ASIC also accepted the recommendation made by the Receiver. On 22 September 2000 ASIC filed an application for orders under s 601EE that the schemes be wound up and for orders under s 461(1)(k) that Chase and Leadenhall be wound up. It is to be borne in mind that this is still at the interlocutory stage. The substantive proceedings for declarations that the investment schemes are managed investment schemes or otherwise contravene the Law have not yet been heard.

21 It is apparent that since the September meeting the investor group has either fallen apart or had a change of heart. When the application for appointment of a liquidator came on for hearing the solicitor representing the investor group (or more particularly the committee) made submissions in support of ASIC's position that winding up orders should be being made. The matter was not concluded on that day. When it was called on again on 5 December 2000 the solicitor said that there had been developments within the investor group and that he was no longer instructed to appear on behalf of the committee members. He took no further part in the proceedings, either on that day or when the matter was finalised on 19 December 2000.

22 There is affidavit evidence, for example an affidavit sworn by Ian Nicholson (an investor) on 15 December 2000 which suggests that some of the investors, perhaps even a majority of them, do not wish to see a

liquidator appointed. Hicks, Sims and Percy have indicated that they are concerned only to finalise the investments and are prepared (so long as a liquidator is not appointed) to give an undertaking to the Court not to initiate, manage or be involved in an investment club or anything else that may properly be described as a managed investment scheme.

The Investments

23 I think I should start by describing the various investments that have been made by or on behalf of the investor group. I repeat that this is still at the interlocutory stage and in all probability I do not have before me all of the evidence that the parties would like to adduce. However, I must do the best I can. The information comes, in the main, from the affidavits of Murray Scott sworn 30 May 2000, Louis Nilant sworn 10 October 2000, 17 November 2000 and 4 December 2000 and of Hicks sworn 27 June 2000, 4 July 2000, 17 July 2000, 17 November 2000 and 30 November 2000. I will deal with each of the investments in turn.

Australian Environmental Technology Pty Ltd ("AET")

24 AET is an Australian company described as "a research company set up to develop technology to convert household waste into fertiliser". There is evidence that the application form inviting investors to participate was posted to all members of the Manhattan Club around January 2000 by Percy at the direction of Hicks and Sims. The application form is, in part, as follows:

> "Application to Participate in Syndicated Investment
>
> I/we the undersigned, hereby apply to invest … units at AUD$5,000 each in [AET].
>
> I/we understand that:
>
> 1. The syndicated investment security will be held in the name of [CCML] on behalf of the investors;
>
> 2. Management of the investment will be carried out by [CCML];
>
> 3. Distribution of profits will be paid directly into the bank account nominated by the investor;

4. [CCML] will deduct an administration fee amounting to ten per centum of the profit distribution prior to disbursement of the payment;

5. I/we have examined the merits and risks associated with this type of investment and the decision to invest is taken solely on my judgment."

25 Chase received applications from about 100 investors. From his reconciliation of the Chase bank account the Receiver has ascertained that the total of the moneys received from investors for the purposes of the AET investment was $787,500. Hicks disputes this and says that $800,000 was received. Most of the moneys were banked to an account with Challenge Bank operated by Chase. Sims and Percy were the sole signatories to the account. Cheques were drawn on that account in instalments and paid to AET. The total of the moneys paid to AET was $800,000. A further $32,500 was refunded to investors. It is common ground, that so far as AET is concerned, its shareholder is CCML rather than the individual investors. Indeed, it is unlikely that AET would have been aware of the identity of the investors. In other words, no individual investor had a direct interest in AET. It is also common ground that no offer document, complying with the Law, was lodged with ASIC by or on behalf of CCML in respect of the investment in AET.

26 The Receiver has also ascertained (from AET rather than from the respondents) that there is no final agreement between AET and CCML as to the exact nature of the investment. AET acknowledges that CCML was to provide "seed capital" at its discretion up to a maximum of $2,000,000. AET also acknowledges that CCML is entitled to 3,200,000 shares each of 25 cents but that they have not yet been released. The respondents have arranged for the preparation of share transfers for the shares from CCML to the individual investors, although the common seal placed on the transfer forms is that of Chase, not CCML.

Bioenergy Products Pty Ltd ("Bioenergy")

27 Sims is a director and shareholder of Bioenergy, which is an Australian company. The application form offering participation in Bioenergy is very similar to that used for AET. The Receiver says that $76,000 was received from investors for the purpose of the investment in Bioenergy. The money was paid into the Chase bank account. Of this, $50,000 was paid out to Bioenergy for the purchase of a 49 per cent interest in the Bioenergy Products Trust and a unit certificate was issued

to CCML on 12 October 1999. Bioenergy has ceased trading as it did not turn out to be a profit-making venture. Draft accounts for Bioenergy as at 30 June 2000 show the CCML investment as a long term loan of $51,052.73. The company has virtually no assets and a net asset deficiency of about $51,700. This equates (almost) to the amount of the CCML loan.

28 Early in May 2000 the full amount of $76,000 was refunded by Chase to the investors. However, no part of the $50,000 advanced to Bioenergy has been repaid to CCML or Chase. It can be assumed, therefore, that the refund to investors was from other funds held by Chase.

29 Hicks says that the sum of $50,000 was paid as a loan. The committee then decided that it would take Bioenergy too long to reach a positive cash flow position and that the investment should be terminated. Chase was aware that it had not received repayment of the $50,000 from Bioenergy. However, Hicks believed that there would be profits from another investment (the Bank Bill fund) and receipts from other administration fees on other profitable investments which would give Chase sufficient funds of its own to cover the reimbursement. By error, the cheques to investors were released before funds from these other sources were received.

30 The affidavit of Scott sworn 30 May 2000 contains a list of 22 people who invested in Bioenergy. That evidence is not contradicted.

Brake Technologies Pty Ltd ("Brake")

31 The application form relating to the investment in Brake is in much the same form as I have described for AET and Bioenergy except that it states that management of the investment "will be carried out on behalf of [CCML] by Leadenhall Funds Management" described as "the agent". The administration fee of 10 per cent is to be deducted by CCML "through its agent".

32 A total of $160,000 was received from 11 investors. These moneys were paid into an account styled "Leadenhall Funds Management" with the Commonwealth Bank of Australia Ltd ("the LFM account"). "Leadenhall Funds Management" is a business name registered to Hicks.

33 The Receiver's investigations reveal that there was an arrangement for CCML to advance $160,000 to Brake to enable it to acquire a particular piece of machinery. The loan was to be repaid when Brake

refinanced the acquisition. The profit that was to be realised from the investment was the allocation of 15,000 shares in Brake at $2.85 (a total of $42,750) from one of Brake's directors. The Receiver says that only $154,000 was advanced to Brake and that Brake repaid $166,109 in December 1999 and a further $7,000 in May 2000. He says that only $132,000 has been repaid to investors. After his appointment the Receiver negotiated with Brake and received $32,750 which, together with the $7,000 received in May 2000, makes up the promised profit component.

34 Hicks says that this is an incorrect categorisation of the transaction. CCML did not "lend" money to Brake. Chase purchased the item of machinery and leased it to Brake on terms that included a put option. Chase exercised the put option and sold the machine to Brake. Hicks says that all of the initial investment has been returned to investors and that the only reason they have not received the profit component is because the Receiver is holding it.

35 The Receiver's investigations also revealed a transaction in which $350,000 was paid from the LFM account to a company called Dynawest Enterprises Pty Ltd, a shareholder of Brake. The Receiver has been unable to find any documentary evidence in the records of the group as to the reasons behind the payment. Both Dynawest and Hicks have declined to provide any information, the latter for reasons which I will discuss later.

36 In November 1999 CCML had written to the persons who had invested in Brake advising that a pay-out was pending and asking instructions as to where the proceeds should go. They were offered investments in other entities such as AET, Bioenergy and the Index Fund.

Defense Shield Pty Ltd ("Defense")

37 Defense was a company marketing a film that could be affixed to glass to make it bullet-proof. The application form inviting persons to invest in Defense is in similar terms to that used for AET and Bioenergy. However, it contained a clause that after 12 months the investor could elect to have the majority shareholders buy back the shares at twice the original amount invested.

38 The Receiver says that $335,000 was received from investors and paid in the LFM account. The sum of $100,000 was paid out of the LFM account to Defense. The investment soured and $225,000 has been

refunded to investors from the LFM account. A further $20,000 was paid to three investors from the Chase bank account. Prior to the appointment of the Receiver instructions had been given by the group to its solicitors to sue a financial adviser who had recommended the investment. Due to these proceedings, that action has not been commenced.

39 At the time of the Receiver's report there were nine investors in Defense. However, the Scott affidavit contains a list of 25 persons who had, at one time or another, been investors.

Global Alert Pty Ltd ("Global")

40 Global was a shareholder in a company called Bio Enviro Plan Pty Ltd ("Bio"). Bio had an exclusive distribution agreement to distribute the VIVA hangover cure in most of the World. Bio was to receive royalty payments, a portion of which would be distributed to Global. The application form inviting investment is similar to that used for Brake. About $476,000 was received from investors and paid into the LFM account.

41 Global has advised the Receiver that "LFM" has a $550,000 investment in Global, being 550,000 shares each of $1.00. According to Global, the shares were purchased by CCML, although share certificates have not yet been issued. The records of the group indicate that $450,000 was paid out from the LFM account to Global. On 1 March 2000 a dividend of 10 per cent was paid to investors in Global from funds held in the Chase account. The amount paid out to investors was $47,610. The sum of $47,610 had been received by Chase from the LFM account on 4 February 2000 for the payment of the dividend. On 24 March 2000 $15,920.85 was received and deposited into the LFM account, being a "royalty cheque" from Global. On 10 May 2000 an amount of $30,000 was refunded to the LFM account by Chase apparently in relation to the dividend.

42 According to Hicks and Sims only $450,000 and not $476,000 was received from investors. Hicks claims that the balance of the dividend (approximately $1,700) was made up of his own funds. Sims also says CCML's interest in the royalty agreement with Global was transferred to individual investors. This is not supported by the information which the Receiver has been given by officers of Global.

43 The Receiver's report says that there were 64 investors in Global. The Scott affidavit lists 59 persons.

3D Software Systems Pty Ltd ("3D")

44 3D was developing a product for use in computer aided drafting so that drawings could be displayed in three dimensions on a two-dimensional screen. The application form for investments in 3D was similar to that used for AET. According to the Receiver, CCML received a total of $175,000 from 20 investors. The money was deposited to the Chase account. From there, $150,000 was paid out to 3D and $25,000 was transferred to the LFM account. From the LFM account, $28,000 was paid to 3D. I think it is the case that no moneys have been received by the group from 3D and no moneys have been refunded to investors.

45 Hicks says that in about March 2000 "the shares previously held by [CCML] in [3D] have been transferred to individual investors". The Receiver has been unable to confirm that fact or obtain details of the status of the investment. Hicks says that he has continued to be in contact with 3D concerning the sale of the technology. He says that if the sale is consummated the funds would be returned to investors with a substantial profit.

The Bank Bill Fund - 001 ("BBF")

46 Again, the application form sent to prospective investors is similar to that used for AET. Hicks describes BBF in this way:

> "[BBF] was the name I gave to the investment whereby a substantial sum of money is paid to a bank to be held on deposit for 12 months. During that period of 12 months, a registered trader is authorised to use those funds as security for his trading in inter-bank debentures. In this particular case the bank (which we were told by Des Camilleri was Barclays Bank) was to pay a dividend monthly to Chase on behalf of investors. We expected a minimum return to investors of 6% per month, with the capital either rolled over at the end of the 12 months or returned to investors. … Payment does not get made directly to a bank in this type of investment. It must be placed with a registered trader who in turn arranges the bank-guaranteed trade."

47 According to the Receiver, approximately $965,000 was received from 62 investors on account of this investment. Amounts of $342,545 and $230,895 were paid out from the Chase account by telegraphic transfer on 18 February 2000 and 22 March 2000 respectively. It is not

at all clear from the materials available to me exactly how much of the $965,000 has been released. In his affidavit sworn 17 November 2000, Hicks says that he authorised Camilleri to invest part of the moneys (not specified) in a project involving the completion of a pipeline contract by a company called Displaytex International Limited. The Receiver has not been able to identify any receipts from the BBF investment, although two dividends totalling $932,700 have been paid to investors.

The Commodity Fund ("TCF")

48 It appears that TCF is a fund operated by LFM which pools investors' funds and invests them in derivatives based on the price of commodities. Approximately 21 investors paid a total of $150,000 into the LFM account. There is very little in the materials to explain how TCF operated or its current status. In his report the Receiver says:

> "The group's books and records indicate that investors in [TCF] were regularly sent statements showing their investment as well as weekly/monthly profits in relation to the investment. There are no records in my possession which support the calculations of these returns except a copy of an email dated 19 November 1999 from Hicks to Percy in relation to [TCF] which states 'the October figure is 11.2%'".

49 In a summary attached to his affidavit sworn 17 November 2000 the Receiver notes this payment from the LFM account: "Commodity Fund - Withdrawal by Investors $157,938. In his affidavit of 30 November 2000 Hicks surmises that the extra $7,938 was the profit on the investment.

The Index Fund ("TIF")

50 Hicks has described TIF as a fund operated by LFM which pools investors funds and uses them to trade in futures and derivatives based on the share price index. The Receiver says that about 72 investors were involved in this fund. A total of $748,470 was paid into the LFM account and a further $28,500 was transferred to the LOFM account from the Chase account. Hicks says that these figures cannot be right because people invested in lots or units of $1,000.

51 Again, there is very little evidence as to the workings of the fund. The Receiver says that an amount of $219,033 has been "withdrawn" by

investors. Hicks says that he is unable to confirm the figure but several pay-outs were made to investors.

Managed Investment Funds - The Legal Framework

52 The originating process contains wide ranging allegations of misleading and deceptive conduct, carrying on securities businesses without the requisite licence, offering securities without a prospectus having been lodged and the like. However, for the purposes of this application I propose to concentrate primarily on the issue of managed investment schemes.

53 So far as concerns the statutory framework the starting point is the definition of "managed investment scheme" in s 9 of the Law:

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

54 These schemes are dealt with in Chapter 5C of the Law. Section 601ED of the Law provides:

> "(1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:
>
> (a) it has more than 20 members; or

(b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or

(c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.

(2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made did not need disclosure to investors under Part 6D.2 (see sections 706 and 708) when they were made.

(3) ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.

(4) For the purpose of this section, when working out how many members a scheme has:

(a) joint holders of an interest in the scheme count as a single member; and

(b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:

(i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or

(ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.

(5) A person must not operate a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

(6) For the purpose of subsection (5), a person is not operating a scheme merely because:

(a) they are acting as an agent or employee of another person; or

(b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.

(7) A person who would otherwise contravene subsection (5) because an interest in a scheme is held in trust for 2 or more beneficiaries (see paragraph (4)(b)) does not contravene that subsection if they prove that they did not know, and had no reason to suspect, that the interest was held in that way.

55 Section 601EB provides the mechanisms for registering a scheme and I do not need to refer further to it. Part 6D.2, which is referred to in s 601ED(2), is not relevant for these purposes. It is common ground that none of the investments mentioned in these reasons are "time sharing schemes". The definition also contains a number of exclusions but I do not think that any of them are relevant.

56 Managed investment schemes are required to be registered with ASIC under Part 5C.1, they must have a "responsible entity" as set out in Part 5C.2 and they must have a constitution (Part 5C.3). The responsible entity is required to operate the scheme in accordance with its constitution (s 601FB(1)) and it must be a public company that holds a dealers licence (s 601FA). A scheme must have a compliance plan with a compliance committee and it must be audited. It is common ground that none of these requirements were met in relation to the investments described in these reasons.

57 The term "scheme" is not defined in the Law. Some guidance can be obtained from ***Australian Softwoods Forests Pty Ltd v Attorney-General for the State of New South Wales*** (1981) 148 CLR 121 at 129, where Mason J said, in the context of the term "interest" in the former Companies legislation: "… all that the word 'scheme' requires is that there be 'some programme, or plan of action' ".

58 Chapter 5C of the Law also provides for the winding up of schemes. Relevantly, s 601EE provides:

> "(1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
>
> (a) ASIC
>
> (b) the person operating the scheme
>
> (c) a member of the scheme.
>
> (2) The Court may make any orders it considers appropriate for the winding up of the scheme."

59 The application was brought forward on the basis that there were two managed investment schemes. One was the combination of the investments promoted through Chase and CCML (called "the Chase Scheme") and the other was the combination of the investments promoted through Leadenhall and LFML (called "the Leadenhall Scheme"). I think this is correct. It seems to me that each investment is itself a separate part of the scheme but, nonetheless, it is a part of the overall scheme. I acknowledge that each is comprised of different participants or groups of participants. The method of organisation, while substantially similar, had subtle differences. The "manager" was different in the sense that on some occasions the application form mentioned that CCML would be the manager while, on others, it would act through an agent. The target or object of the various investments were different. For example, in some of them the money was put in by way of subscription for shares or units in unit trusts. On another there was a purchase of a piece of machinery and the lease of the equipment to the target. Other investments, such as BBF, TCF and TIF were quite different again. But many, if not most, investment schemes will have a spread of investments.

60 In the end, though, what ties the various investments together is the concept of "the club". It is the same overall structure, using the same method of operation and designed towards the same end. It seems to me, therefore, that it is appropriate to speak of "the Chase scheme" and the "Leadenhall scheme". But that does not mean that the individuality of a particular investment is ignored. It would be unrealistic to ignore the subtle differences between the individual components that go, in combination, to make up the scheme. In the end, on the finalisation of the scheme (whether that be by a simple realisation of the assets or a formal winding up and, in the latter event, subject to the costs of the winding up generally) each individual investment will have to be accounted for separately.

61 If the schemes are looked at in this broad sense, it is clear that they are comprised of more than 20 members. If I am wrong in this conclusion, and the individual investments are separate schemes, I would hold that those who promoted the investments (and assuming for the moment that they are managed investment schemes) were involved in the business of promoting managed investment schemes. I say this because it appears from the newsletters and other publications of the Club and from the description given by Hicks in his affidavits as to the way that the Club operated that the aim was to seek out investment opportunities, offer them to members, elicit subscriptions and manage the investments on behalf of the participating members. All of this was done for profit. For the members the profit was the returns on the investment. For the manager, the profit was the administration fee. In my view, this constitutes a "business".

62 The first question is whether these are "managed investment schemes". It is clear that the investor participants "contributed money or money's worth". However, and this is the first point relied on by the respondents in support of their contention that these are not managed investment schemes, was the money provided "as consideration for the acquisition of rights to benefits produced by the scheme"?

63 Counsel for the respondents submitted that here the money was paid by investors to the various corporate entities as managers "as a conduit" to the ultimate investments. Chase and Leadenhall were never in a position "to give consideration" for anything. Rather, they were trustees or agents to invest the money as requested by the investors. I do not accept this submission. It seems to me that relevant part of the definition focuses on the acquisition of benefits from the "scheme", not from the manager. The "scheme" is the entire operation. It starts with "the club". It then involves the generation of ideas or proposals for individual investments that are communicated to members of the club either orally at meetings, or by newsletters or the posting of invitations to participate. It then involves the investors, the manager, the ultimate recipient of the investment funds and the flow of moneys to, from and between those various persons or entities. Take AET as an example. AET is referred to in the newsletter "Millionaires' Corner" for December 1999, January 2000 and February 2000. The application form indicates that moneys are to be paid "for a syndicated investment security [to] be held by [CCML] on behalf of the investor". CCML is to manage the investment. It envisages that profits will be earned and that, subject to CCML deducting an administration fee, those profits will be distributed back to the investor.

64 This, it seems to me, constitutes the acquisition by the investor of rights, namely a sharing of profits, from the scheme. The fact that the money is paid by the investor to a trustee or agent to be passed through to the entity that is (hopefully) to generate the profit is not to the point. It is a payment as part of the overall scheme and it is consideration for the acquisition of rights or benefits in the scheme. I was referred to the judgment of the Court in ***Australian Securities and Investments Commission v Enterprises Solutions 2000 Pty Ltd*** [2000] QCA 452 . At [6] of that judgment I find support for the proposition that the generation and earning of profits from the investment and the distribution of those profits to the investor is a relevant benefit produced by the scheme, which benefit has been acquired by the investor.

65 The next part of the definition is that the contributions are pooled to produce financial benefits for the people who hold interests in the scheme. Clearly, this aspect is present in these schemes and I do not understand the respondents to have contended for the contrary position.

66 Counsel for the respondents also argued that these were not schemes because of the *ad hoc* nature of the decision making processes. He contended that the investors had sufficient control over the schemes to take them outside the definition. According to the statutory definition, a managed investment scheme is one where the members "do not have day to day control over the operation of the scheme, whether or not they have the right to be consulted or to give directions". Counsel's argument was that while individual investors did not attend every meeting there was an investment committee taken from their ranks "to be involved in the day to day operation of [the] schemes". Counsel continued:

> "… unlike a classic managed investment scheme where full responsibility for looking after an investment is handed over to a party who charges for it, here you have in truth an investment club where members of the investment club appointed from among their ranks … to meet together or just keep track of how the investments were going. We say that fits with the definition of day to day control of the operation of the investments so as not to require registration."

67 In his affidavit of 17 November 2000 Hicks describes the activities of the investment committee and annexes minutes of various meetings held between 25 November 1999 and 13 March 2000. According to Hicks, the task of the committee was "to consider prospective investments and monitor them". As a matter of principle, I am not sure that activities

of the committee advances the respondents' argument very far. The question is whether the *members* have day-to-day control. It is not difficult to discern the distinction that the legislature was attempting to make. Very broadly, it is between the investment activities of an individual and that of a group. By the express terms of the applications, the investors have delegated "management" of the investment to CCML. There is no reservation of day-to-day or any other control or functions. I am not sure that the appointment of a committee of some of the investors to monitor the investments would make much difference. The question still remains: who has the day-to-day control?

68 The information in the Receiver's report reveals, so far as concerns the entities in which the investments were placed, the contact was with Hicks (and sometimes Sims and Percy) and not with the individual investors or with the committee. I refer, by way of example, to par 5.9, par 5.33. par 5.45, par 5.48 (in relation to an investment that did not proceed) and 5.59. I have also noted Hicks explanation of the investment in BBF, to which I have already referred. It was Hicks, not the committee, who authorised Camilleri to place some of the funds with the company completing the pipeline project. There is also reference in the affidavits to Hicks being in a position to effect transfers of some shares or units investments from the group entity to the individual investors.

69 In my view, and on the state of the evidence that is presently before the Court, the Chase scheme and the Leadenhall scheme, made up (as they are) by their component investments, are "managed investment schemes".

Participation in the Schemes

70 It must be borne in mind that this is an application for the winding up of the schemes and of Chase and Leadenhall. I do not think there can be any doubt that Chase has participated in the Chase scheme. Funds from investors have passed through its bank account before being used to purchase securities in various entities. There would be little point in me repeating the evidence that I have already outlined in this respect.

71 I am less sure about Leadenhall. Even having concluded, as I have for the purposes of this application, that the Leadenhall scheme is a managed investment scheme, the question still has to be asked whether Leadenhall has participated and, if so, in what way? According to Hicks, LFM is owned by him, not by Leadenhall or by LFML and the LFM account is in his name and it belongs to him. However, there is uncontradicted assertions of concessions made by Hicks that some

transactions, although very limited in number, were conducted through Leadenhall: see Receiver's report par 4.6 and Nilant's affidavit of 17 November 2000 par 6.

Should the Schemes be Wound Up?

72 In his report the Receiver has recommended that the schemes and the corporate entities be wound up. I have had regard to this recommendation but the ultimate issue remains one for me. The question is whether the jurisdiction has been enlivened and, if it is, whether, in the proper exercise of discretion, winding up orders should be made.

73 I think the Chase scheme and the Leadenhall scheme are schemes that are required to be registered by virtue of s 601ED. It is common ground that they are not so registered. For the reasons that I have just outlined, Chase and Leadenhall (although I confess to saying it in relation to Leadenhall with some diffidence) have participated in the operation of the respective schemes. So too have Hicks, Sims and Percy. There has been a contravention of s 601ED(5) of the Law in that the schemes have not been registered. The jurisdiction to wind up the schemes under s 601EE(1) has been enlivened. Because there have been contraventions of the Law, *prima facie* the schemes should be wound up. I now turn to the discretionary considerations to see if there is anything that would displace the *prima facie* position.

74 Counsel for ASIC submitted that in exercising the discretion pursuant to s 601EE(2) I should be guided by the considerations that are relevant to the exercise of the discretion to wind up companies on the just and equitable ground under s 461(1)(k). Each case has to be assessed according to its own circumstances. However, in the context of this case I accept that the just and equitable ground is a sound base against which to test the proper exercise of discretion.

75 ASIC relies primarily on public interest considerations. The public interests justifies intervention where, among other things, it is required for investor protection and where there has been regular or repeated breaches of the Law: ***Australian Securities Commission v AS Nominees Ltd*** (1995) 62 FCR 504 at 530 - 33 and ***Australian Securities and Investments Commission v Austimber Pty Ltd*** (1999) 17 ACLC 893 at [5]. I was also referred to ***Walter L Jacob Ltd*** (1989) 5 BCC 244 a decision of the Court of Appeal in the United Kingdom. I do not think it takes the matter much further than the Australian authorities do, other than to make the point that it is important for the Court to identify the

aspects of the public interest that would be promoted by the making of a winding-up order.

76 In this case, it seems to me that there is, at very least, a serious issue as to whether offers have been made for subscriptions in securities without a prospectus having been lodged and without the form of application being attached to a prospectus. Section 1018 prohibits a person offering for subscription or from issuing invitations to subscribe for, securities of a corporation without a prospectus. By virtue of s 92(2) and s 1002A(1) securities includes interests in a managed investment scheme made available by the body. Securities made available by the body are therefore securities of that body. Under s 78(2) an invitation to deposit money with a body corporate constitutes an invitation to subscribe for or purchase debentures of that body and therefore securities. Offers and invitations to invest in the Chase scheme and the Leadenhall scheme were made by virtue of the newsletters, the oral information disseminated at meetings and the various application forms to which I have referred. It is common ground that no prospectus was lodged in relation to these offerings.

77 Without reaching a final conclusion as to whether these breaches have been established, there is a serious issue on the subject sufficient to justify intervention. I do not need to go further and discuss whether the information given to members in relation to particular investments was misleading and deceptive in the relevant sense.

78 There is another consideration. There is a continuing breach of s 601ED(5) in that someone is continuing to operate an unregistered scheme. I say this because there is a need to collect repayments (of capital or earnings) from the various investments that are extant. Speaking hypothetically, there may be situations in which the public interest will not be unduly compromised by further activities that are necessary but technically illegal. However, the overall circumstances of this case have caused me to conclude that other steps need to be taken.

79 As a general statement, I think it is fair to say that the Receiver's report reveals a number of uncertainties about some of the investments. I have detailed some of them (and Hicks' contentions or answers) earlier in these reasons. There have, from time to time, been transactions between Chase and the LFM account. The Receiver's partial reconciliation of the LFM account (attached to his affidavit of 17 November 2000) show unreconciled amounts of relatively substantial proportions. The ramifications of these unreconciled amounts are dealt with in par 11 of the

Receiver's November affidavit. In par 11 of his affidavit of 30 November 2000 Hicks seeks to explain these amounts (in part) and denies that any of the investors funds have been utilised for his personal affairs. It is not possible for me to make a finding on that question and I do not do so. However, it is clear that there has been a series of intra-group (used in a non-technical sense) transactions that will need to be unravelled.

80 It would be inappropriate for me to reach a decision without having regard to the wishes of the individual investors. As I have already said, at the outset, and probably until as late as the 5 December 2000, the information available to the Court was to the effect that a majority of the investors were in favour (albeit without much enthusiasm) of the receivership and liquidation. The true position is no longer clear. The investor group and committee that had instructed Mr Harrison have withdrawn those instructions. I do not know what attitude those investors now take. I have seen affidavits sworn by Ian Nicholson and Susan Franklin (two of the investors) opposing the liquidation proceedings. Nicholson says that he has approached 92 investors and 90 per cent of them share his view. What this suggests to me is that there is not a unanimous view among the investors (and nor would I expect there to be one) but a significant number of them are opposed to ASIC's application. On the other hand, I think it is a reasonable inference (given the affidavit of Margaret Delbridge sworn as late as 23 November 2000) that the investor group has fallen apart, so to speak. I am mindful of the wishes of investors but it cannot be the overriding consideration. I must take all of the factors into account.

81 Counsel for the respondents submitted that the schemes should not be wound up. Instead, Hicks, Sims and Percy, with the assistance and support of the investor group, should be allowed to finalise the schemes by transferring securities to the individual investors (where possible and where that was desired by the investors) and otherwise by realising the investments and returning the proceeds to the investors according to their individual interests. There had not, counsel submitted been a contumelious disregard for the law and that the respondents had at no stage intended to breach, or knowingly or recklessly breached, the law in relation to these activities. They had no wish to be involved in the promotion or operation of managed investment schemes and had offered, to ASIC and to the Court, undertakings in that respect.

82 I have come to the conclusion that it would be in the public interest for the schemes to be wound up in a formal administration. I have reached these conclusions for a number of reasons.

83 1. As detailed in the Receiver's report, at least some of the investments are in a questionable state and, in my view, it would be better if an independent person were in control of the recovery processes. Then statement that there are question marks hanging over some of the investments is especially the case in relation to BBF for the reasons set out in pars 5.97 to 5.108 of the Receiver's report.

84 2. It is at least conceivable, because of the intra-group transactions, that there may be disputes as to the true ownership of some assets and as to the true purport of certain of the transactions.

85 3. It may also be the case that investors take differing views as to the appropriate method of finalisation, for example, if some were to request direct transfer of securities while others opted for the proceed of realisation. Difficult questions might arise as to the allocation of costs. Again, it would be preferable for an independent person to take control of these investigations.

86 4. I note also the evidence that in some instances dividends have been paid to investors purportedly as returns from certain investments that are in excess of receipts in relation to those investments. If this is so, there must inevitably be an accounting between the various interest.

87 5. Finally, placing the schemes under the control of an independent external controller in a winding up will remove the conceptual problems that would arise if finalisation were to be effected with further breaches (albeit technical) of the Law. In this respect, it is difficult to see how the schemes could be finalised without dealings in securities. It is common ground that neither Hicks, Sims nor Percy nor any of the corporate entities are the holders of requisite dealers' licences.

88 I acknowledge that this comes at a cost and that, ultimately, the costs will be borne by the investors. I acknowledge also that these costs would, in all likelihood, be less if I were to accede to the respondents contention that they ought be allowed to finalise the schemes. That is to be regretted. But having taken all of the factors into account I think a formal winding up is the result that best caters for the public interest. The major element of the public interest that is involved in this case are the preservation of the integrity of the system of investor protection for which the Law stands. I have also taken into account the prevention of continuing breaches of the Law and the orderly functioning of external administrations in the interests of the commercial community generally.

Winding Up of the Corporate Entities

89 I now turn to the separate issue of the winding up of Chase and Leadenhall.

90 The Receiver has stated in his report (par 6.3(2)) that "the companies comprising the group are insolvent as they are unable to repay investors' funds". If that were so, it would undoubtedly call for the companies to be liquidated. But I am not sure that it is correct. The relationship between the individual investors and Chase and Leadenhall is such that I doubt whether it could be said that the companies have an obligation to repay the investors funds. I doubt whether the obligation to manage the investments undertaken by, say, CCML under the terms of the application forms would translate into an obligation by Chase to pay moneys. It might be different if, for example, the entity receiving the investment funds had paid the moneys to Chase and Chase had failed to pay it back to the investors. But there is no evidence that this is the case with any of the investments. Individual investors might have an action against Chase for breach of a duty or perhaps being a party to a breach of fiduciary duty by some other person or entity but nothing of that nature has yet been established. I should add that what I have said there is purely hypothetical and by way of illustration and I am not suggesting that such a cause of action exists. I would, therefor, be disinclined to order the winding up of the companies on the grounds that they are insolvent.

91 I return, then, to the just and equitable ground. The same sought of public interest considerations arise and I will not repeat them. There is no evidence that Chase and Leadenhall have assets other than those arising by reason of their involvement in the schemes. Nor is there evidence that they have businesses or any reason for existence outside the operation of the schemes.

92 Hicks has said in his affidavits that shortly after the Receiver was appointed he nominated himself to replace Chase and Leadenhall as trustee of their respective trusts and effected the changes. That, itself, is something that would need to be investigated.

93 Having decided that the schemes should be wound up, the case for the companies to be placed in liquidation becomes compelling. It would inject an air of unreality if the schemes were wound up without the corporate entities that had been part of the operation not also being made the subject of a formal administration. The great risk of taking that course would be to leave the administration open to sterile arguments

about power. That would increase the overall costs of the finalisation and would not be in the interests of the creditors.

94 I have little doubt that Chase should be wound up. The evidence connecting Leadenhall to the schemes might be described as wafer thin. However, because of the uncertainty of the provenance of the LFM account and as to some of the intra-group transactions I think it is, once again and for pragmatic considerations, better if it too goes into liquidation. The investors in these schemes are already going to suffer because of the costs associated with the winding up. To open the administration up to the prospect of challenges to steps taken by the external controller because one entity is in liquidation and the other is not will almost certainly delay the orderly finalisation of the affairs of the group and increase the costs.

Conclusion

95 There are aspects of this application that have caused me concern, and I said so at the time of the hearing. It would have been preferable had the substantive application been brought forward for resolution.

96 In my view the Chase scheme and the Leadenhall scheme are managed investment schemes as that term is defined and used in the Law. They are required to be registered and they are not. There has therefore been breaches of the Law. There may also have been breaches of the Law in that, as part of the operations of the schemes, offers or invitations for subscriptions were made without relevant prospectuses.

97 Taking into account all of the circumstances I believe that the best course is for the Chase scheme and the Leadenhall scheme to be wound up under s 601EE of the Law. I will also order that Chase and Leadenhall be placed in liquidation on the grounds that it is just and equitable to do so: s 461(1)(k) of the Law.

98 I will hear counsel as to the exact form that the orders should take.