FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v McNamara

[2002] FCA 1005

CORPORATIONS LAW – whether defendants contravened the Corporations Law Act – whether the defendants carried on a business of dealing in securities - application of the Corporations Act to the defendants' partnership – whether the defendants offered or issued a financial product without giving a product disclosure statement - whether the managed investment scheme operated by the defendants should be wound up – whether the *Corporations Act 2001* (Cth) is inconsistent with the *Partnership Act 1892* (NSW)

Australian Constitution; s 109
Corporations Act 2001 (Cth); ss 9, 93, 68, 601EB(5), 601EE, 761A, 761D(1) and (7), 761F, 764A(1), 766A(1), 766C, 780(1), 911A(1), 1011B, 1012B(3), 1013B, 1013C, 1013E, 1013G
Federal Court Rules; O 32 r 2(1)(d), O 35 r 7, O 36
Financial Services Reform Act 2001 (Cth)
Judiciary Act 1903 (Cth); s 78B
Partnership Act 1892 (NSW)
Corporations (Common Law Powers) Act 2001 (NSW); s 3

Australian Softwood Forests Pty Ltd v Attorney-General (NSW); *Ex Relatione Corporate Affairs Commission* (1981) 148 CLR 121 – referred to
Taylor v White (1964) 110 CLR 129 – referred to
Hyde v Sullivan (1955) 56 SR (NSW) 113 – referred to
Yorke v Lucas (1985) 158 CLR 661 – referred to
Australian Securities and Investment Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561 – referred to
Australian Securities and Investment Commission v Chase Capital Management Pty Ltd (2001) 36 ACSR 778 – referred to
Australian Securities and Investments Commission v Koala Produce Ltd (2002) 41 ACSR 628 – referred to
Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504 – referred to
Australian Securities and Investments Commission v Austimber Pty Ltd (1999) 17 ACLC 893 – referred to
McDonald v McDonald (1965) 113 CLR 529 – referred to
Bailey v Marinoff (1971) 125 CLR 529 – referred to
Jovanovic v The Queen (1999) 92 FCR 580 – referred to
Donkin v AGC (Advances) Ltd [1995] FCA 696 – referred to
Commonwealth Bank of Australia v Quade (1991) 178 CLR 134 – referred to

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v JOHN JOSEPH MCNAMARA and ADELAIDE AUSTRALIAN INVESTMENT SERVICE PTY LTD (ACN 061 333 284) and BERNOLD GLASER and MAUREEN CAPP and GARY JOHN JOHNSTONE

S.3008 of 2002

MANSFIELD J
19 AUGUST 20002
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S.3008 OF 2002**

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
PLAINTIFF

AND: **JOHN JOSEPH MCNAMARA**
FIRST DEFENDANT

ADELAIDE AUSTRALIAN INVESTMENT SERVICE PTY LTD (ACN 061 333 284)
SECOND DEFENDANT

BERNOLD GLASER
THIRD DEFENDANT

MAUREEN CAPP
FOURTH DEFENDANT

GARY JOHN JOHNSTONE
FIFTH DEFENDANT

JUDGE: **MANSFIELD J**
DATE OF ORDER: **19 AUGUST 2002**
WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The managed investment scheme operated under the name Archipelago Finance Limited Partnership by the first and second defendants be wound up.
2. Robert Ferguson be appointed liquidator of the managed investment scheme.
3. The liquidator may exercise such functions and powers as set out in Chapter 5 of the *Corporations Act 2001* (Cth) as he would be entitled to exercise if the managed investment scheme were a company, with such modifications as are reasonably necessary in the circumstances.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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FIFTH DEFENDANT

JUDGE: **MANSFIELD J**
DATE: **19 AUGUST 2002**
PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

INTRODUCTION

1 Australian Securities and Investments Commission (ASIC) alleges contravention of various provisions of the *Corporations Act 2001* (Cth) (the Act) by the defendants.

2 At the hearing on 18 July 2002 John Joseph McNamara (JJM) and Adelaide Australian Investment Service Pty Ltd (AAIS) appeared. They did not dispute in any significant respect the facts alleged by ASIC. They also did not oppose the orders sought by ASIC, save for the application that the managed investment scheme to which the application relates be wound up. In one respect, they also contended that the orders sought by ASIC were too widely expressed, but that difficulty was addressed by consent. The outstanding

issue as between ASIC and JJM and AAIS was, therefore, whether the managed investment scheme to which the application relates should be wound up.

3 Bernold Glaser (BG) and Maureen Cap (MC) did not appear. They had signed orders consenting to the making of the particular orders sought by ASIC against them.

4 Gary John Johnstone (GJ) also did not appear. He had been served with the proceedings on 11 June 2002. I determined, having regard to the nature of the orders sought against him, that it was appropriate to proceed with the hearing in his absence so far as it concerned the claims against him: O 32 r 2(1)(d) of the Federal Court Rules. I found the contraventions of the Act alleged against him to have been proved, and that it was appropriate to make the orders against him which ASIC sought.

5 To reflect the orders made without opposition or by consent, and in the light of any decision concerning GJ, on 18 July 2002, I declared and ordered that:

> *"1. Between 26 February 2002 and 6 June 2002, the first and second defendants operated a managed investment scheme under the name Archipelago Finance Limited Partnership (the managed investment scheme) that was required to be registered under section 601EB of the Corporations Act 2001 (CA) and was not so registered, in contravention of subsection 601ED(5)CA.*
>
> *2. Between 13 December 2001 and 10 March 2002 the first, second and fifth defendants each carried on a securities business relating to the offer of interests in the managed investment scheme without holding a dealer's licence, in contravention of subsection 780(1) CA.*
>
> *3. Between 11 March 2002 and 6 June 2002, the first, second and fifth defendants each carried on a financial services business relating to the offer of interests in the managed investment scheme without holding an Australian financial services licence, in contravention of subsection 911A(1) CA.*
>
> *4. Between 11 March 2002 and 6 June 2002 the first, second and fifth defendants were each required pursuant to subsection 1012B(3) CA to give a Product Disclosure Statement to every person to whom they offered to arrange for the issue of interests in the managed investment scheme.*
>
> *5. The Offer Memorandum, being exhibit DAS 3 to the affidavit of Damaris Amanda Sheldon sworn herein on 6 June 2002 (Offer Memorandum), is not a Product Disclosure Statement within the meaning of section 761A CA.*

6. *Between 11 March 2002 and 6 June 2002, the first, second and fifth defendants contravened subsection 1012B(3) CA by offering to arrange for the issue of interests in a managed investment scheme to a person without giving the person a Product Disclosure Statement.*

7. *The first, second and fifth defendants each be restrained whether by their servants, agents, officers, employees or otherwise from offering interests and distributing application forms for the offer of units in Archipelago Finance Limited Partnership.*

8. *The first, second and fifth defendants be restrained whether by their servants, agents, officers, employees or otherwise from publishing, distributing, disseminating or otherwise circulating the Offer Memorandum or any other document substantially similar to the Offer Memorandum in the name of or on behalf of Archipelago Finance Limited Partnership.*

9. *The first, third and fourth defendants be restrained from withdrawing, paying out or otherwise dealing with all or any of the money held in the Commonwealth Bank account number 06 5115 10142118 in the name of Archipelago Finance Limited held at Norwood, South Australia.*

10. *Each of the defendants be restrained whether by their servants, agents, officers, employees or otherwise from depositing, paying, transferring or otherwise dealing with any payment received from any person as consideration for acquiring an interest in the managed investment scheme or unit in or becoming a partner in Archipelago Finance Limited Partnership otherwise than for the purpose of returning those funds to that person or delivering them to the liquidator.*

11. *The first, second and fifth defendants pay the plaintiff's costs.*

I reserved my decision as to whether the managed investment scheme should be wound up.

6 This judgment deals firstly with why I considered that the allegations against GJ have been made out, and for the making of the orders which I made against him on 18 July 2002. It also contains my reasons for deciding, as I do, that the managed investment scheme to which the application relates should be wound up. In reaching that conclusion, it has been necessary to make findings specifically about certain contraventions of the Act by JJM and by AAIS, based upon uncontested facts, as contraventions of the Act by them are in my view relevant to the question whether the managed investment scheme should be wound up.

THE GENERAL FINDINGS

7 AAIS was incorporated on 13 August 1993. JJM is one of its directors. On 28 November 2001 JJM entered into an agreement with Archipelago Site Survey Foundation Inc. (ASSF) for the conduct of a joint venture to carry out survey and recovery of shipwrecks, and for the provision of funds to ASSF for those purposes.

8 On 13 December 2001, Archipelago Finance Ltd Partnership (AFLP) was registered as a limited partnership under the *Partnership Act 1892* (NSW). Its general partner was AAIS, and its limited partners were JJM and BG, each of whom had applied for its registration. Pursuant to cl 3 of the AFLP partnership agreement dated 7 December 2001, the interests of the limited partners in AFLP were divided into units. Each limited partner was entitled to one unit upon payment of a capital contribution of $5000 to the partnership. Units were procured by application in writing accompanied by a limited power of attorney granted to JJM.

9 AFLP was established to provide finance to ASSF, in effect in the stead of JJM under the joint venture agreement dated 28 November 2001. Pursuant to cl 3.6 of the partnership agreement of 7 December 2001, AAIS was allocated 70 units in the partnership in consideration of the transfer from JJM to AAIS of the rights which he held under the joint venture agreement of 28 November 2001. AAIS became responsible for the management of AFLP under the partnership agreement. Under the joint venture agreement of 28 November 2001, the return to AFLP depended upon the shipwrecks and salvageable property located, the amount of finance provided by AFLP to the joint venture, and the extent of other funds required to finance the salvage operations proposed to be carried out by ASSF.

10 On 10 December 2001 a document entitled "Offer Memorandum and Partnership Proposal" (the Proposal) became available to be used by AFLP to invite applications for units in AFLP at $5000 per unit. It was proposed to secure 300 issued units in AFLP in that way. In fact, from November 2001 JJM had been approaching people by mail and by telephone to invite investment in AFLP. From December 2001, GJ undertook a role in securing investments in AFLP. He received a commission of 16.5% on any amounts invested for units in AFLP by any person he introduced, and he was also paid by AFLP a retainer of $700 a month to cover expenses for accommodation and telephone. By May 2002 GJ had received by way of commission from AFLP between $30,000 and $40,000.

11 Thus, by the efforts of JJM and GJ, AAIS received applications for units in AFLP accompanied by the limited power of attorney. By 26 February 2002, AFLP had more than 20 limited partners, and by 16 May 2002 that number had grown to about 55. AFLP had received around $300,000 for the subscription of units, and in addition JJM had contributed about $115,000 to AFLP. AFLP in turn had paid most of that amount to ASSF in relation to the purchase and maintenance of a boat for salvage purposes and to pay the crew and expenses.

12 On 27 May 2002, following investigations conducted by ASIC, JJM as agent for AFLP, purported to cancel the limited partners' units in AFLP. He did so under the limited power of attorney granted to him at the time of each application for a unit in AFLP. Each limited partner of AFLP was, at the same time, issued with 100 shares in Estate Management Services Ltd (EMS) for each unit held in AFLP. Thereafter, JJM claims that AFLP remains as a non-functioning entity with a general partner AAIS and two limited partners JJM and GJ, as it was at the date of its registration. The evidence indicates that it only has a small sum in its bank account.

CONTRAVENTIONS BY GJ

13 ASIC alleges that GJ in the circumstances has contravened three provisions of the Act.

14 The first alleged contravention is of s 780(1) of the Act as it stood prior to 11 March 2002. The Act was amended extensively by the *Financial Services Reform Act 2001* (Cth), the relevant parts of which for present purposes came into force on 11 March 2002. Section 780(1) relevantly provided:

> *"A person must not:*
>
> *(a) carry on a securities business; or*
> *(b) hold out that the person carries on a securities business;*
>
> *unless the person holds a dealers licence or is an exempt dealer."*

A securities business is a business of dealing in securities: ss 9 and 93 of the Act. Section 9 relevantly provides that:

> "deal *in relation to securities - ... means (whether as principal or agent) acquire, dispose of, ... or make or offer to make, or induce or attempt to*

induce a person to make or to offer to make, an agreement:

(i) for or with respect to acquiring, disposing of, ... the securities; or
(ii) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, ... the securities or to any of the parties to the agreement in relation to the securities."

The term securities is relevantly defined in s 92(1) of the Act as meaning, inter alia, interests in a managed investment scheme, and s 92(2) of the Act relevantly provides:

"The expression securities, *when used in relation to a body, means:*

(c) interests in a managed investment scheme made available by the body."

There are some further definitions in s 9 of the Act to which it is desirable to refer. Relevantly, they are:

"interest *in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).*

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) ...

member *in relation to a managed investment scheme – means a person who holds an interest in the scheme ..."*

15 The concept of a "scheme" is simply a program or plan of action: see *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)*; *Ex Relatione Corporate Affairs Commission* (1981) 148 CLR 121 at 129.

16 In addition to the general findings to which I have referred, and in the light of those

statutory provisions, I am satisfied that there was at relevant times a managed investment scheme within the meaning of the Act. There was a scheme whereby moneys paid by limited partners for a unit in AFLP would be used to fund marine salvage operations to be carried out by ASSF, with a view to AFLP and then through it the limited partners ultimately receiving a financial return. Each of the placita of the definition of managed investment scheme set out above are satisfied. The limited partners had contributed money to acquire rights to profits which AFLP might make from the marine salvage operations proposed to be carried out by ASSF. The money paid by limited partners for units in AFLP was pooled, and was used in a common enterprise, namely the marine salvage operations to be carried out by ASSF. Finally, the limited partners did not have day to day control over the operation of the scheme. Clause 5.6 of the partnership agreement provides that the general partner, namely AAIS, would be responsible for the day to day running of the partnership. There are some exemptions specified in the definition of managed investment scheme, but they do not apply in the present circumstances.

17 It follows, in my view, that the offer by AAIS and JJM of units in AFLP, and the acquisition of units by limited partners, was an offer and acquisition of interests in a managed investment scheme. In accordance with the definition, it was therefore a dealing in securities. It also involved both AAIS and JJM carrying on business, as their conduct was systematic, repetitious and continuous: see *Taylor v White* (1964) 110 CLR 129; *Hyde v Sullivan* (1955) 56 SR (NSW) 113. Neither AAIS nor JJM holds a dealer's licence or is an exempt dealer within the meaning of s 68 of the Act. Consequently, I find that each was carrying on the business of dealing in securities contrary to s 780(1) of the Act.

18 On the evidence, GJ was the agent of AAIS and JJM, in attempting to induce people to acquire units as limited partners of AFLP. He too was therefore dealing in securities. He was doing so by carrying on business, as he pursued that endeavour in a systematic, repetitious and continuous way and he received a commission from moneys paid by the limited partners, as well as a retainer. He also is not the holder of a dealer's licence nor is he an exempt dealer under s 68 of the Act.

19 I accordingly concluded that GJ also was carrying on a business of dealing in securities contrary to s 780(1) of the Act.

20 The second contravention of the Act alleged by ASIC against GJ was of s 911A(1) of the Act. Since 11 March 2002, it has relevantly provided:

> *"Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services."*

Again, it is necessary to trace the statutory definitions. "Financial services business" is defined in s 761A as meaning:

> *"A business of providing financial services."*

Section 766A(1) relevantly provides:

> *"... a person provides a* financial service *if they:*
> ...
> *(b) deal in a financial product ..."*

The term financial product is addressed in s 764A(1) of the Act which relevantly provides:

> *"... the following are* financial products *for the purposes of this Chapter:*
> ...
> *(ba) any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied:*
>
> *(i) an interest in the scheme ..."*

Section 601ED(1)(a) is satisfied in this case as there are more than 20 members in the scheme, so that it was required to be registered. Accordingly, the interests in the units issued to limited partners in AFLP are a financial product.

21 Section 766C relevantly provides:

> *"(1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes* dealing *in a financial product:*
>
> *(a) applying for or acquiring a financial product;*
> *(b) issuing a financial product ...*
>
> *(2) Arranging for a person to engage in conduct referred to in subsection (1) is also* dealing *in a financial product, unless the actions concerned amount to providing financial product advice."*

That provision applies to AFLP as if that partnership were a person: s 761F.

22 In the light of those provisions and the general findings which I have made, I further

find that AFLP was the issuer of a financial product by providing units in the partnership to the limited partners. In doing so it was acting in a systematic, repetitious and continuous manner. Consequently, I am satisfied that AFLP required an Australian Financial Services licence (AFS licence) to enable it to carry on the business of dealing in those products.

23 S 761F(1) provides that obligations that would be imposed on AFLP are imposed instead on each partner, but may be discharged by any of the partners. It further provides that any contravention of a provision of Chapter 7 of the Act, dealing with financial services and markets including relevantly s 911A(1), that would otherwise be a contravention by the partnership is taken to have been a contravention by each partner who aided, abetted, counselled or procured the relevant act or omission, or was in any way knowingly concerned in, or party to, the relevant act or omission. As JJM and AAIS and GJ have been limited partners of AFLP and AAIS has been the general partner of AFLP, they are each vulnerable to the operation of 761F(1). I find that each knew that AFLP was not the holder of an AFS licence. I also find that neither JJM nor GJ held an AFS licence. They each engaged in the conduct of promoting the dealing in a financial product by AFLP when they were each limited partners and each (I find) knew the essential facts which gave rise to the contravention by AFLP of s 766C of the Act. It is not necessary that they be shown to know that that conduct was in fact in contravention of that provision. For the purposes of s 761F(1), in my view, if they knew the facts which constituted the essential elements of the contraventions by AFLP of s 766C of the Act, that is sufficient: see *Yorke v Lucas* (1985) 158 CLR 661.

24 I conclude in the light of those findings that each of AAIS, JJM and GJ aided and abetted AFLP and was knowingly concerned in AFLP carrying on a financial services business whilst it was not the holder of an AFS licence. Accordingly, pursuant to s 76F(1) of the Act, each of them has contravened s 911A(1) of the Act. In addition, JJM and GJ each themselves dealt in securities as they each arranged for investors to apply for and acquire units in AFLP, and each did so by carrying on a business. As neither holds an AFS licence, I find that each of them was carrying on a financial services business contrary to s 911A(1) of the Act.

25 Finally, ASIC alleges that GJ, together with AAIS and JJM, contravened s 1012B(3) of the Act. Since 11 March 2002, it relevantly provided:

> *"A regulated person must give a person a Product Disclosure Statement for a financial product if:*
>
> *(a) the regulated person:*
> *(i) offers to issue the financial product to the person; or*
> *(ii) offers to arrange for the issue of the financial product to the person; or ...; and*
> *(b) the financial product is, or is to be, issued to the person as a retail client.*
>
> *The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division."*

A regulated person, in relation to a financial product, is defined in s 1011B, to include:

> *"(a) an issuer of the financial product; or*
> ...
> *(g) any person who is required to hold an Australian financial services licence but who does not hold such a licence."*

"Product disclosure statement" is defined in s 761A relevantly to include a product disclosure statement required by s 1012B to be given in accordance with Div 2 of Pt 7.9 of the Act. That division deals with the preparation and use of product disclosure statements.

26 Each of AFLP, AAIS, JJM and GJ was a regulated person, as each was required to hold an AFS licence but did not hold such a licence. Each person to whom a unit in AFLP was issued after 14 March 2002, was a retail client by virtue of ss 761D(1) and (7) of the Act. Accordingly, as each such person who was issued units in AFLP on and after 11 March 2002 had the status or character of a retail client, AFLP was required to give a product disclosure statement to such a person to whom an offer was made to issue units in AFLP. Pursuant to s 761F, each of AAIS, JJM and GJ were similarly required to give a product disclosure statement to such persons. They were also required to give a product disclosure statement to each person to whom they offered to arrange for the issue of the financial product to that person. I am satisfied that the Proposal dated 10 December 2001 is not a product disclosure statement, as it does not comply with s 1013B, 1013C, 1013E or 1013G. It does not properly display the words "Product Disclosure Statement": s 1013B. It does not include the information required by s 1013C(1)(a)(ii), namely information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire units in AFLP: ss 1013C and 1013E. Such information, in my view, included the commission paid to GJ for procuring investment by limited partners. It also

included more precisely the arrangements between ASSF and JJM under the joint venture agreement of 28 November 2001, and the arrangements between AFLP (whether directly or indirectly) and ASSF. It is not dated, although it says it was compiled in 2001 and "is untraded" at 10 December 2001: s 1013G. The failure of the Proposal to comply with those provisions should not be taken as indicating any attempt by JJM or GJ positively to mislead potential investors for units in AFLP about its prospects or arrangements with ASSF or to conceal relevant information. That is not a matter which I have had to address.

27 Accordingly, I am satisfied that GJ (together with AAIS and JJM) contravened s 1012B(3) of the Act.

28 Having regard to the conduct of GJ in contravention of the Act, it was and is in my view appropriate to have made the declaratory and injunctive orders against him to which reference is made above. I could see no reason why it was not appropriate to do so having regard to the nature of the contraventions. No material was put forward to suggest that I should not do so in the light of those findings.

29 Since these reasons were prepared in draft, JJM has filed two further affidavits. One is sworn on 31 July 2002. It says JJM is authorised to file it on behalf of GJ. He deposes to GJ having believed at all times that he was acting lawfully under the *Partnership Act 1892* (NSW) and did not believe the Proposal fell under the aegis of Chapter 7 of the Act; based upon the advice of JJM. An annexure to that affidavit is a letter from GJ to JJM of 30 July 2002 broadly asserting those matters. That material, even if proved by affidavit of GJ, would not alter the conclusions I reached on 18 July 2002, as I did not need to address whether GJ had an intention to contravene the relevant provisions of the Act, and I did not do so. It otherwise does not controvert any evidence adduced by ASIC upon which it relied. I do not therefore, have to consider whether I should admit that affidavit into evidence after the hearing and the making of orders which have been entered under O 36 of the Federal Court Rules. The other affidavit of JJM sworn on 30 July 2002 does not relate directly to the circumstances of GJ.

SHOULD THE SCHEME BE WOUND UP

30 I note that the application of ASIC is to have the scheme wound up, and not to have AFLP itself would up.

31 Section 601EE of the Act relevantly 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 ...*
>
> *(2) The Court may make any orders it considers appropriate for the winding up of the scheme."*

32 I have found earlier in these reasons that the scheme was a managed investment scheme. It was being operated by AAIS as the general partner in AFLP, under the partnership agreement providing that AAIS was responsible for managing the scheme. Its management of the scheme and its carrying out the activities that constitute the managed investment scheme, lead me to the conclusion, in the light of my findings, that it was operating the scheme in contravention of s 601ED(5) of the Act: see *Australian Securities and Investment Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 at [55] (*Pegasus*). As JJM was the person who formulated and directed the scheme and was actively involved in its day to day operations, and as he was the directing mind and will of AAIS and of the scheme rather than simply as its agent or employee of AAIS, I find also that he was operating the scheme in contravention of s 601EB(5): see *Pegasus* at [55] and [57].

33 Accordingly, the foundation for the exercise of the discretion under s 601EE(2) has been established. The sort of factors which should guide the Court in determining whether to exercise its power to wind up the scheme are those that are relevant to the exercise of the discretion to wind up companies on the just and equitable ground under s 461(1)(k) of the Act: see *Australian Securities and Investment Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at [74].

34 In this matter, in my view it is in the public interest that the scheme be wound up. I have found that it is operating in contravention of the Act. That is a material consideration: *Australian Securities and Investments Commission v Koala Produce Ltd* (2002) 41 ACSR 628 at [5]. There are in addition some transactions involving the interests of unit holders in AFLP in the scheme which indicate that it is desirable in the public interest that the scheme be wound up in a formal administration rather than by a person connected with the scheme: see *Pegasus* at [93]. The public interest is, of course, a matter of relevance: *Australian*

Securities Commission v AS Nominees Ltd (1995) 62 FCR 504 at 530 – 533; *Australian Securities and Investments Commission v Austimber Pty Ltd* (1999) 17 ACLC 893 at [5]. JJM has contended that, by reason of the issue of shares in EMS on 27 May 2002 to those who previously were unit holders in AFLP, and by the transfer of the rights of those persons as unit holders in AFLP to EMS, apparently by him exercising the limited power of attorney granted to him at the time the application was made for units in AFLP, there is no need for the Court now to make any order with respect to the scheme. He contends that AFLP itself has little money, now has only three members, (namely AAIS, JJM and BG), and is not now in breach of the Act. He contends further that the partnership itself of AFLP need not be wound up. He asserts that it does not intend to accept any money from any persons in the future. He further contends that the issue of shares in EMS to the (former) unit holders of AFLP as limited partners was done without consideration.

35 I do not think the position is as clear as he says. Given the timing of the purported assignment of rights of the limited partners in AFLP through their units, the purported cancellation of those units, and the issue of shares in EMS, I am not persuaded that each of those transactions was independent and without consideration. The scheme still has some funds, albeit minor. It is unclear whether the unit holders have any ongoing rights in funds already paid to ASSF, or what accounting from ASSF the scheme might be entitled to.

36 Moreover, there are matters indicating that the extent of rights that AFLP has in any successful marine salvage are uncertain. AAIS purported to transfer the rights of AFLP under the joint venture agreement dated 28 November 2001, but it is not a party to that agreement and it is unclear how it was able to do so. There may be some issue to explore, by virtue of JJM's information provided to ASIC that he has assigned 80% of what he gets under the joint venture agreement with ASSF to AFLP, as to the extent of AFLP's rights. He has indicated to ASIC a further agreement with ASSF dated 27 February 2002, which he said varied the joint venture agreement dated 28 November 2001, but in a way which does not accord with the purported transfer of rights under that agreement to AFLP. Legal advice provided to JJM and AFLP, moreover, has described the documentation as "poorly drafted", "incomplete" and "difficult to follow". That advice stated that the solicitors were "not confident at all that the documentation accurately reflects (and more importantly protects) the respective parties and their interests".

37 In the circumstances, I consider that it is in the public interest, and in the interests of those limited partners of AFLP granted units in AFLP in response to an application made following the Proposal are better protected if the scheme is wound up by the appointment of a liquidator independent of the parties, rather than to leave it in its present position where it may or may not be wound up, or if it is to be wound up would be wound up under the control of one of the persons presently directly involved in its control.

38 For those reasons, I order that:

1. The managed investment scheme be wound up;
2. Robert Ferguson be appointed liquidator of the managed investment scheme.
3. The liquidator may exercise such functions and powers as set out in Chapter 5 of the Act as he would be entitled to exercise if the managed investment scheme were a company, with such modifications as are reasonably necessary in the circumstances.

39 I note that JJM gave notice under s 78B of the *Judiciary Act 1903* (Cth) that he contended that the proceedings involved a matter arising under the Constitution or involving its interpretation. It is, as I understand his concern, that the Act should not operate to diminish the scope and operation of the *Partnership Act 1892* (NSW) or its comparative provisions in other States. No argument was addressed on the matter, and no Attorney-General sought to intervene.

40 As the point has been taken, I shall deal briefly with it.

41 I do not think there is any inconsistency between the Act and the *Partnership Act 1892* (NSW). The Act does not purport to regulate partnerships of themselves, but to regulate managed investment schemes. A managed investment scheme can take a number of forms, determined upon by the promoters of the scheme. It happens that in this particular case the scheme is in the form of a limited partnership, and to that extent in my view the Act is able to operate in relation to the scheme itself. It does not involve the Act purporting to do something inconsistently with rights granted under the *Partnership Act 1892* (NSW). Indeed, ASIC has not sought the winding up of the partnership but the winding up of the scheme.

42 It is also clear that the *Corporations (Common Law Powers) Act 2001* (NSW) referred to the Commonwealth the power to regulate such schemes. That referral Act referred to the

Parliament of the Commonwealth the matters to which the referred provisions relate, and matters of the regulation of financial products and services. Section 3 of that Act provided relevantly:

> "referred provisions *means the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State.*
>
> tabled text *means the text of the following proposed Bills for Commonwealth Act, comprised in two or more documents (each bearing identification as "part of the tabled text") as tabled by or on behalf of the Attorney General in the Legislative Assembly at any time during the period between the giving of notice of motion for leave to introduce the Bill for this Act in the Legislative Assembly and the second reading of that Bill in the Legislative Assembly:*
>
> *(a)* Corporations Bill 2001.
> *(b)* Australian Securities and Investments Commission Bill 2001."

43 There is an explicit referral of power of the referred provisions set out in the tabled text, that being in effect relevantly for present purposes the Act or including the Act. As I have said, however, I do not think it is necessary to refer to that legislation because I do not discern in the Act dealing with managed investment schemes so far as they apply to the present proceedings anything inconsistent with a right or provision in the *Partnership Act 1892* (NSW).

44 Moreover, JJM's contention that the Act should not operate to diminish the scope and operation of the *Partnership Act 1982* (NSW) is misconceived. That is because s 109 of the Constitution provides that where there is an inconsistency between a law of the Commonwealth and a law of a State, the State law is invalid (or, in a practical sense, inoperable) to the extent of the inconsistency. Therefore, even if an inconsistency between the laws were apparent, the Act must operate to diminish the scope of the *Partnership Act 1982* (NSW).

45 I accordingly make the orders referred to above.

46 I note that JJM filed, and sought to rely upon, an affidavit sworn on 30 July 2002, to dispute that he contravened ss 601ED(5), 780(1), 911A(1) and 1012B(3) of the Act. Those contraventions were declared by the Court on 18 July 2002 to have taken place, and consequential injunctive orders were made. The declarations and orders made on 18 July

2002 have been formally entered under O 36 of the Federal Court Rules.

47 The orders and declarations made on 18 July 2002 related to conduct for the period from 26 February 2002, save for the declaration concerning contravention of s 780(1) of the Act. The affidavit of 30 July 2002 of JJM asserts that up to 14 February 2002 less than 20 persons had acquired units in AFLP, and that after 14 February 2002, JJM had not introduced any persons into AFLP nor made any offers to any persons to become limited partners in AFLP. One fact asserted by ASIC at the hearing, and which JJM did not dispute, was that from about November 2001, JJM approached people by mail and by telephone to invest in AFLP. JJM did not then dispute the clear meaning of that asserted fact, namely that such conduct continued at relevant times, until about May 2002. He did not then claim that he had no role in securing the increase in limited partners from over 20 at 26 February 2002 to about 55 by 16 May 2002, that increment also being a fact asserted by ASIC and not contested. The facts asserted by ASIC were supported by its affidavit evidence. ASIC has not had the opportunity to respond to JJM's claims. Were the Court to receive the affidavit, it would have to be given that opportunity. It might wish to cross-examine JJM. It would no doubt make submissions about whether any conduct as the Court ultimately found to have been undertaken by JJM after 11 December 2001 involved him contravening s 780(1) of the Act and whether his conduct after 28 February 2002 involved him contravening the other identified provisions of the Act. Those matters were not addressed because at the hearing he acknowledged the facts asserted by ASIC, and subject to the matters referred to he acquiesced in the making of the orders, about some of which his affidavit now suggests he had second thoughts.

48 There is no formal application by JJM to set aside those declarations and orders: O 35 r 7 of the Rules, and see *McDonald v McDonald* (1965) 113 CLR 529. He does not claim that the declarations and orders were obtained by fraud: see O 35 r 7(2)(b). There is serious doubt in the circumstances whether the Court constituted by a single Judge now has jurisdiction to set aside its orders made on 18 July 2002: see e.g. *Bailey v Marinoff* (1971) 125 CLR 529; *Jovanovic v The Queen* (1999) 92 FCR 58. But even if such jurisdiction exists, it will only be exercised in exceptional circumstances: see per Black CJ and Davies J in *Donkin v AGC (Advances) Ltd* [1995] FCA 696. Moreover, the setting aside of a judgment and orders of the Court requires the applicant to confront a number of evidentiary and discretionary obstacles: see per Mason CJ, Deane, Dawson, Toohey & Gaudron JJ in

Commonwealth Bank of Australia v Quade (1991) 178 CLR 134 at 141.

49 JJM has not had the opportunity of advancing material or argument in support of any application to set aside the declarations and orders made on 18 July 2002 having regard to such matters, and has not made a formal application to do so. I think it is therefore appropriate simply not to receive his affidavit of 30 July 2002 nor to rule upon its significance at this point. In my view, the fairer course, at present, is simply to decline to receive that affidavit. If he subsequently applies formally to set aside the orders made on 18 July 2002, he may apply to rely upon his affidavit of 30 July 2002 at that time.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 9 August 2002

Counsel for the Plaintiff:	Ms C Francas
Counsel for the First Defendant:	The first defendant appeared in person.
Counsel for the Second Defendant:	The first defendant appeared by leave.
Counsel for the Third Defendant:	No appearance
Counsel for the Fourth Defendant:	No appearance
Counsel for the Fifth Defendant:	No appearance
Date of Hearing:	18 July 2002
Date of Judgment:	19 August 2002