NEW SOUTH WALES SUPREME COURT

CITATION: ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310 revised - 30/04/2002

CURRENT JURISDICTION: Equity Division

FILE NUMBER(S): 1739/01

HEARING DATE{S): 8 & 9 April 2002

JUDGMENT DATE: 24/04/2002

PARTIES:
Australian Securities and Investments Commission
Pegasus Leveraged Options Group Pty Ltd
Craig John McKim

JUDGMENT OF: Davies AJ

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr D R Stack for the Plaintiff
Mr J Kintominas for the Defendants, for the limited purpose of applying for adjournment; otherwise, no appearance for the Defendant

SOLICITORS:
Ms Jan Redfern for the Plaintiff
No appearance for the Defendant

CATCHWORDS:
Corporations
whether managed investment scheme
whether breach of provisions of Corporations Act 2001
whether scheme should be wound up
whether just and equitable that corporation be wound up
whether director of corporation was personally liable for breaches
whether the director should be disqualified from managing corporations
whether permanent injunctions should issue
meaning of "carry on" discussed
meaning of "operate" discussed
meaning of "investment advice business" discussed

ACTS CITED:
Companies Act 1961 (NSW) (repealed)
Corporations Act 2001 (Cth), s9, s77, s79, s92, s93, s206A, s206B, s206E, s206F, s206G, s420, s461, s601ED, s601EE, s601FA, s670E, s700, s706, s708, s727, s780, s781, s995, s999, s1000, s1324, s1383
Corporations Law (repealed), s1317DB
Interpretation Code (WA), s38(1)
Trade Practices Act 1974 (Cth), s75B, s82

DECISION:
See paragraphs 116 and 117 of the judgment.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

Davies AJ

Wednesday, 24 April 2002

1739 / 01 **ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor**

Judgment

1 **His Honour**: These proceedings were instituted by the Australian Securities and Investments Commission ("ASIC") seeking declarations that the defendants (Pegasus Leveraged Options Group Pty Ltd ("Pegasus") and Mr Craig John McKim) had each committed breaches of specified sections of the Corporations Law. Ancillary and consequential orders said to be appropriate as a result of those breaches are also sought.

2 After the institution of the proceedings, the Corporations Act 2001 (Cth) ("the Act") was enacted and came into force on 15 July 2001. The Act now takes the place of the Corporations Law. Section 1383 of the Act provides, inter alia:

> "(1) This section applies to a proceeding, other than a federal corporations proceeding, in relation to which the following paragraphs are satisfied:
>
> (a) the proceeding was started in a court before the commencement; and
>
> (b) the proceeding was:
>
> (i) under a provision of the old corporations legislation of a State or Territory in this jurisdiction; or

(ii) … and

(c) the proceeding was not an enforcement proceeding, or an appeal or review proceeding, in relation to an order of a court; and

(d) the proceeding had not been concluded or terminated before the commencement; and

(e) …

(2) In this section:

(a) the proceeding to which this section applies is called the *old proceeding* ; and

(b) the provision of the old corporations legislation referred to in whichever of subparagraphs (1)(b)(i) and (ii) applies is called the *relevant old provision.*

(3) A proceeding (the *new proceeding*) equivalent to the old proceeding is, on the commencement, taken to have been brought in the same court, exercising federal jurisdiction:

(a) if subparagraph (1)(b)(i) applies—under the provision of the new corporations legislation that corresponds to the relevant old provision; or

(b) ...

To the extent that the old proceeding, before the commencement, related to pre-commencement rights or liabilities, the new proceeding relates to the substituted rights and liabilities in relation to those pre-commencement rights or liabilities.

…"

3 Section 1400 of the Act provides, inter alia:

"(1) Subject to subsection (4), this section applies in relation to a right or liability (the *pre-commencement right or liability*), whether civil or criminal, that:

(a) was acquired, accrued or incurred under a carried over provision of the old corporations legislation of a State or Territory in this jurisdiction; and

(b) was in existence immediately before the commencement.

However, this section does not apply to a right or liability under an order made by a court before the commencement.

(2) On the commencement, the person acquires, accrues or incurs a right or liability (the *substituted right or liability*), equivalent to the pre-commencement right or liability, under the corresponding provision of the new corporations legislation (as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right or liability).

…"

4 Thus, the proceedings became, on the commencement of the Act on 15 July 2001, proceedings under the Act. Substituted rights and liabilities were created by s1400(2) and, by virtue of s1383(3), the proceedings were taken to have been brought under the provisions of the Act that correspond to the relevant provisions of the Corporations Law. Section 1401 does not apply to incorporate those provisions of the Corporations Law into the Act, for s1401 relates only to pre-commencement rights and liabilities accrued or incurred under legislation that was not in force immediately prior to the commencement of the Act. All of the relevant provisions of the Corporations Law were in force immediately prior to the commencement of the Act.

5 The defendants are Craig John McKim and Pegasus, a company which Mr McKim established and of which he was the sole director and the directing mind. Up until the hearing commenced on Monday 8 April 2002, the defendants were represented by Galloways solicitors. Galloways had filed a defence and a lengthy affidavit had been sworn by Mr McKim. However, on Friday 5 April, Mr Galloway gave notice of his withdrawal as a solicitor and that notice became effective on 8 April. When the matter was called on 8 April, Mr Galloway informed the Court that his instructions had been withdrawn. He did not state the reasons for the withdrawal of his instructions, saying that that was a matter of privilege. Mr P Kintominas of counsel appeared for Mr McKim to apply for an adjournment. He said that, in the time that he had had to look at the matter, he had not perceived any defence to the breaches of law alleged, but that any order banning Mr McKim from carrying on a managed investment business could have a serious effect on his future. Mr Kintominas said that the making of any such order may depend upon the Court's view as to whether the conduct complained of amounted to fraud or dishonesty or negligence or whether Mr McKim had been duped. He said that a friend of Mr McKim's father was overseas attending on a company or companies in Barcelona with a view to getting to the bottom of the matter and to see if monies may be recovered. He said that all the moneys that were available to Mr McKim were frozen and that Mr McKim was not in a position to fund representation this week. Mr Kintominas said that Mr McKim was unable to and would not handle the hearing himself and that the extent of any ban to be imposed on Mr McKim should not be determined without giving Mr McKim an adequate opportunity to defend himself.

6 The application for an adjournment was opposed by Mr D R Stack, counsel for ASIC, who said that the investigations undertaken on behalf of ASIC had not been able to trace any relevant moneys going to a company or companies in Barcelona or any involvement of such a company or companies in the matters of which evidence would be given.

7 Mr McKim was not in Court, it having been intimated that he would not be in Court and would not attend the hearing if it proceeded.

8 I refused the adjournment as I considered it inappropriate to grant an adjournment without having an explanation from Mr McKim as to the reason or reasons why instructions had been withdrawn from Galloways. I considered that Mr McKim was quite capable himself of dealing with the matter to which Mr Kintominas had drawn attention, the banning order, and that Mr McKim, even if unrepresented, should be able to make clear to the Court what he alleged was his involvement in the events which occurred. I referred to the fact that a lengthy affidavit by Mr McKim had been filed. In dismissing the adjournment, I said that I had had a good deal of experience with litigants in person and considered that the issue mentioned by Mr Kintominas was one in respect of which a litigant in person should be able to speak. The

adjournment having been refused, the matter proceeded in the absence of Mr McKim and in the absence of any representation on behalf of the defendants.

9 Pegasus was formed on 14 July 2000. Mr McKim was its directing mind. In an interview held on 7 March 2001 with an officer of ASIC and an officer of the Australian Federal Police ("the Interview"), Mr McKim said that it was he who made the management decisions for Pegasus and that no-one else had any involvement. Pegasus had two relevant bank accounts with the National Australia Bank at Crows Nest, the No.1 account and the No.2 account in which the subject investments were deposited. Mr McKim was the signatory to those accounts.

10 In the Interview, Mr McKim described the business of Pegasus as follows:

> "It is basically to – acting as not only an investment brokerage company, but – and certainly not a financial advisory company. It is, it is to assist people in making financial decisions – investment financial decisions, to point them in the right direction of investments and also to have them invest as a limited partner into the company, and then the company invests their money into a medium-return vehicle which – you know, we've been able to get into a trading program which basically can provide a good return."

11 From August 2000 until March 2001, when ASIC instituted these proceedings, Mr McKim had a modus operandi whereby he attracted investments by offering high rates of return. An investigator for ASIC, Mr A M Sims, has identified investments, mainly of lump sums, $10,000, $20,000 and so on from at least 89 people. These identified investments totalled $3,723,937. He also identified a large number of other payments into the accounts which were of lump sums similar to those credits he attributed to investors, but he was unable to identify the source of the payments. These credits totalled $2,125,010. The probability is that these payments came from investors who have not been identified.

12 Seven investors have given evidence. Their evidence establishes a pattern of behaviour which is consistent with the regular payment of lump sums into the accounts. In each case, Mr McKim offered an astronomical rate of return. Generally, the rate of return was five per cent per week, sometimes two per cent per week and sometimes eight per cent per week. What was to be the subject of the investment was never made entirely clear. Sometimes reference was made to US Treasury Bonds, sometimes to options in relation to US Treasury Bonds, sometimes to trading programmes and so on. The description given to the proposed investment does not matter a great deal for there is no acceptable evidence that the investments were so used.

13 Each of the investors received at least four documents. The first was an agreement to invest. A typical agreement in relation to US Treasury Bonds was as follows:

> "THIS AGREEMENT made this __ day of ___ 2001
>
> BETWEEN
>
> Name: Pegasus Leveraged Options Group
>
> Address: Suite 401/10-12 Clarke St
> Chatswood
>
> Hereafter called the "Principal"
>
> And
> Name: _____

Company (Director) _____
Address:_____

Hereafter referred to as the "Limited Partner"

NOW IT IS HEREBY AGREED

1. The Limited Partner shall invest the sum of _____ with the Principal upon the signing of this agreement.

2. The Principal will invest the monies into US Treasury Bonds to provide the returns to the Limited Partner as follows:

(a) A return of 5% of the Principle invested _____, being _____ each week or part there of there after on investment.
(b) The investment may be redeemed on any calendar month on fourteen days notice in writing and the principle sum shall be paid to the Limited Partner together with any weekly non invested return of ____ per week or part there of there after calculated on a daily basis."

14 In such an agreement, paragraph 1 would be completed by the insertion of a sum of $10,000 or a multiple thereof. In paragraph 2, interest of $500 per week or other appropriate figure would be inserted. The agreement was signed by Mr McKim and also by the investor, who was called the "limited partner". Some agreements referred, in lieu of "US Treasury Bonds", to the use of "computer modeling skills based on options". One agreement in evidence referred to a "Trading Program".

15 Sometimes, in a case where Treasury Bonds or options in relation to Treasury Bonds were mentioned, there was attached or associated with the agreement a document in the following form, signed by Mr McKim:

"Factors for Limited Partners and the Principle

1. The exact Real Value of the Bond purchased after the 3rd week of purchase, becomes the total of the Principle, and therefore is to be paid to the Limited Partner at the Maturity date.

2. The 13% Bonus offered for holding the Bond until maturity, is to be paid to the Limited Partner at the Maturity date.

3. Any % amounts over the assigned 14%, totalled at the maturity date is to be divided equally between all Limited Partners invested in the said Bond, and distributed as a bonus."

16 Another document provided was a receipt in the following form:

"Pegasus Leveraged Options Group

RECEIPT

> This is a receipt for the amount of _____ to be invested with Pegasus Leveraged Options Group as determined in the *Agreement to Invest*.
>
> Dated, this day ____ of ____ 2000."

17 A guarantee by Pegasus was given in this form:

> "Pegasus Leveraged Options Group
>
> GUARANTEE
>
> This is the Guarantee given to the Limited Partner named in the Agreement to Invest.
> Dated the ____ day of ____ The year ____ The same date as the Agreement to Invest.
> Amount Guaranteed: _____
> Return Guaranteed: _____ The same as the Agreement to Invest."

18 On occasions, a personal guarantee by Mr McKim was also given in this form:

> "Craig J McKim
> 61 Hayberry St
> Crows Nest NSW
> Australia 2065
>
> Craig J McKim
>
> _____
>
> I Craig J McKim give the following, a personal guarantee that accompanies Pegasus Leveraged Options company guarantee for Principle amounts invested, to be managed by myself as the senior shareholder/director of Pegasus Leveraged Options Group.
>
> _____: amount guaranteed: _____ The return of ____ per week is tax free as Pegasus leveraged options Group will pay the income/ investment tax on your behalf.
>
> As a personal guarantor, this makes me liable for any payments the company, Pegasus Leveraged Options Group are unable to make to the above investors/Limited Partners."

19 I need not discuss in detail what each of the investors was told as to the activity in which the investment would be used. In each case, the information given was a nonsense for there was no describable activity which was likely to produce a return of five per cent per week. The mere mention of an interest rate of five per cent per week was enough to cloud the minds of gullible investors, including the two deponents who were financial planners. One of these was informed that the money was to be invested in US Treasury Bonds and options. The other was informed that the fund would be invested in leveraged options. They should have known better.

20 The point of fact which is important is that each of the investors was informed that his or her moneys would be used together with the moneys of other investors in a business transaction or transactions which would create profits sufficient to enable Pegasus to pay the rate of interest which was promised.

21 In the Interview, Mr McKim described his activities as follows:

> "What I can do is have them come in as a limited partner of the business – they're limited to – the responsibility to them is putting the money into – it's basically like a loan, loaning the company money.
>
> I give them a rate of return, I then invest that money pooled with my own and however many other limited partners that there are in, and put it into a program where I don't manage – it's managed by a registered licensed brokerage firm, being Windsor Limited. They then provide me with the return on a weekly basis, and I then provide that out to, to my clients at the rate they have locked in at."

22 Windsor Limited was a company based in Barcelona. There is no evidence before the Court, other than Mr McKim's statement, that moneys went to Windsor Limited. Mr Sims, the investigator, traced payments from the accounts. Payments totalling $2,883,355.75 were made to investors in payments of interests and in repayment in those cases where repayment was sought before the funds were frozen. Mr Sims did not locate evidence of any investment other than gambling. Mr Sims found that $2,107,963.00 was paid out in gambling and $185,567.80 was recovered back. $1,116,854.00 went to a betting shop in Vanuatu, $709,820.00 to a betting shop in Darwin and $95,720.00 to the Totalisator Agency Board. The discrepancy between the moneys going out to the betting shops and the sums received back is very great. It could be that some betting returns were diverted to other purposes but, if so, what happened is not known.

23 Section 92(1) of the Act provides:

> "Subject to this section, *securities* means:
>
> …
>
> (c) interests in a managed investment scheme…
>
> but does not include a futures contract or an excluded security."

Section 92(2) of the Act provides:

> "The expression *securities*, when used in relation to a body, means:
>
> …
>
> (c) interests in a managed investment scheme made available by the body…
>
> but does not include a futures contract or an excluded security."

Section 92(3) of the Act provides:

> "In Chapters 6 to 6D (inclusive):
>
> *securities* means:
>
> …
>
> (c) interests in a registered managed investment scheme…"

24 Section 9 of the Act defines "managed investment scheme" as, inter alia:

> "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);
>
> …"

25 Section 9 provides that

> "*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)."

26 The above definitions include the term "scheme". In looking at the word in the Companies Act 1961, Mason J, with whom Stephen J agreed, in ***Australian Softwood Forests Pty Ltd v Attorney-General (NSW); ex relatione Corporate Affairs Commission*** (1981) 148 CLR 121 at 129, said:

> "We begin with the circumstance that the words in question are of very wide import. For example, all that the word 'scheme' requires is that there should be 'some programme, or plan of action' (***Clowes v. Federal Commissioner of Taxation*** (1954) 91 CLR 209, at p 225). The next step is that, in contradistinction to s. 26 (a) of the Income Tax Assessment Act 1936, as amended, which, as ***Clowes*** shows, is directed to a profit-making undertaking or scheme carried on by the taxpayer, the statutory definition is not concerned with the identity of the person or persons who carry it on. It is not material that the person who offers the 'interests' to the public does not himself carry on the undertaking or scheme. Nor does it matter that by subscribing for an interest a member of the public will constitute himself as one who is engaged in carrying on the enterprise.

> Nor again does it matter that the subscriber by accepting the offer constitutes himself as one who executes some elements of the scheme and derives from so doing a financial advantage which is not earned by other participants whose activities relate to other elements in the scheme. It is not an objection to an enterprise qualifying as an undertaking or scheme that it consists of a number of parts or elements, the participation of individual parties being limited to one of these parts or elements, their profit or remuneration being derived from the particular activities in which they engage. There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in the plan or that there must be a share or pooling of profits or receipts."

27 In the present case, the investors invested in a scheme. They did not merely make individual loans to Pegasus at interest. In each case, the investors understood that the moneys would be used with other moneys in some money-making programme or plan of action. Of course, they were duped into so believing. But that fact does not destroy the finding that, in each case, the investment was an investment in a scheme.

28 The definition of "managed investment scheme" requires the scheme to have the three characteristics which are specified in s9. In the present case those characteristics existed. First, the moneys invested were paid as consideration for rights to benefits produced by the scheme. Those rights were "interests" as defined in s9. In each case, the investor was informed and understood that the ability of Pegasus to pay the specified rate of interest would result from a dealing with the moneys in the manner which was represented to the investor. It was obvious to each investor that the rate of interest offered was not a normal rate of interest. That rate of interest was understood to be achievable only by the carrying out by Pegasus of its represented programme or plan of action.

29 The second element required by the definition is that the contributions are to be pooled, or used in a common enterprise to produce financial benefits for the members. In each case, the investor understood that the funds would be pooled with others and used for the derivation of profits from which the benefits would be paid.

30 The facts of the case are in many ways similar to those considered by Windeyer J in ***ASIC v Hutchings*** (2001) 38 ACSR 387. In that case, the defendants carried on business in an enterprise which involved borrowing money from members of the public, promising high rates of interest on moneys lent. It was held by Windeyer J that there was a managed investment scheme and that, so far as the members were concerned, the virtue of the scheme was that they were to receive rights to interest produced by the scheme of pooled borrowings. At 393 ([13]), Windeyer J said

> "I have little doubt that what was being done amounted to a scheme. It was an arrangement under which funds would be borrowed from numerous investors, put together and then re-invested in, or perhaps gambled on, securities. There is no doubt that the features referred to in sub-paragraphs (ii) and (iii) of the s9(1) definition were present. The investors were told that their contributions were to be pooled and used in a common purpose, which would provide financial benefits for them not otherwise available. It is clear that they thought that these benefits would be available through the ability of the borrowers to use the pooled funds to obtain high returns. It is clear that the lenders had no control whatsoever over the operation of the scheme. All they had was the right to receive the interest and the principal. None of them suggested otherwise, except that some were told that in some way the capital was insured, which it was not. The question then is whether the "lenders" contributed money as consideration to acquire rights to benefits produced by the scheme. It seems to me that this is determined by the decisions in ***Waldron v Auer*** [1977] VR 236 and ***ASIC v Enterprise Solutions 2000 Pty Limited*** (2000) QCA 452. In the latter case it was

> held that the term "interest" included "a right to have a scheme operate in accordance with the agreements they have made and to be paid moneys due". In the former case it was held that borrowing of money at interest and lending out that money at a higher rate of interest and using those interest payments to pay interest to borrowers amounted to a scheme. So far as the lenders were concerned the feature of the scheme was that they would receive rights to interest produced by the scheme of pooled borrowings, which borrowings were able to be invested so as to produce remarkable returns owing to the skill of Hutchings. It follows from this that there should be a declaration that Hutchings and Tindall were operating a managed investment scheme, which was not registered as required by the Corporations Law."

31 Other cases pointing in the same direction are ***Attorney-General for NSW v Australian Fixed Trusts Limited*** [1974] ACLC 40-100; ***Waldron v M G Securities*** [1974] VR 508 at 529-30; ***Carragreen Currency Corporation Pty Ltd v CAC*** (1986) 7 NSWLR 705; ***ASC v United Free Farmers Pty Ltd*** (1997) 24 ACSR 94; ***ASIC v Enterprise Solutions 200 Pty Ltd*** (2000) 35 ACSR 620; ***ASIC v Chase Capital Management Pty Ltd*** [2001] WASC 27.

32 The final element of the definition is that the members do not have day-to-day control over the operation of the scheme. There is no doubt that that was the situation in the present case. I should add that none of the exemptions specified in the definition in s9 applies in the present case.

33 Accordingly, each investor invested in a managed investment scheme and the interest which the investor obtained was a security for the purposes of the legislation.

34 There is a question as to whether there was one managed investment scheme or several such schemes for the stories which investors were told varied somewhat. M A Britton was informed that the money would be invested in US Treasury Bonds. V Chandrala was informed that the scheme would invest in real estate options. J A Garlick was informed that Pegasus was buying US Treasury Bonds. C S Naylor was informed that the money would be invested in US Treasury Bonds and options. M W Powell was told that the funds would be invested in leveraged options and that Mr McKim would be trading in different options. A Rullo was informed that the moneys would be invested in options in relation to US Treasury Bonds.

35 Section 601ED(1) of the Act provides that a managed investment scheme must be registered if it has more than 20 members. Section 708(1) provides that personal offers of a body's securities by a person do not need disclosure to investors if none of the offers results in more than 20 investors or the raising of more than $2 million. Section 708(3) provides:

> "An offer by a body to issue securities:
>
> (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom securities of the body have been issued exceeding 20 in any 12 month period; and
>
> (b) results in a breach of the $2 million ceiling if it results in the amount raised by the body by issuing securities exceeding $2 million in any 12 month period."

36 In the light of these provisions, it is necessary to determine whether there was one scheme or more than one scheme and whether, in respect of each scheme, whether the scheme had more than 20 members and received more than $2 million in investments. Only one of the investors who has given evidence has

suggested that there was investment in a scheme limited by the number of investors or by the amount to be invested. Mr S J Wand deposed that he was informed by a Ms Wise, an agent of Pegasus, that

> "US Treasury bonds are bought under contract by Craig and have an expiry date. The expiry date is in December 2001. Craig has just opened up an opportunity for investment into a new contract. My job is to find investors to the value of about $300,000 to fill this contract, and that is why we are taking on new investors such as yourself. I have previously had to turn investors away because Craig hasn't had the opportunity to obtain contracts. These investment opportunities are only available from time to time to Craig to purchase these US Treasury bonds."

37 However, there is no other evidence before the Court that Pegasus purchased or dealt in US Treasury Bonds or that there was any limited scheme involving persons investing up to a total of $300,000. From the point of view of Pegasus, there was only one scheme, which was to get investors to pay money into the accounts which Pegasus held at the NAB bank, Crows Nest. All invested moneys went into these accounts and were used indiscriminately as Mr McKim saw fit. The only investments made were gambling bets. In this circumstance, I have concluded that, when the substance of the matter is looked at, there was only one scheme and that all investors who paid their money into the NAB accounts held an interest in the same scheme. During the period of less than 12 months during which it operated, the scheme had more than 20 investors and the moneys raised substantially exceeded $2 million.

Declarations of Contravention

38 Declarations of breach have been sought. The Court has jurisdiction to grant such relief and should do so if it is in the public interest. In ***ASIC v Sweeney*** [2001] NSWSC 114, Austin J said (at [30]):

> "It is beyond contest that this Court has plenary jurisdiction to make a declaratory order concerning contravention of the Corporations Law, by virtue of ss 23 and 75 of the Supreme Court Act 1970 (NSW). In ***Australian Softwood Forests Pty Ltd v Attorney-General (NSW)*** (1981) 148 CLR 121, the High Court expressly disagreed with the Court of Appeal of New South Wales, which had declined to grant a declaration with respect to contravention of the 'prescribed interests' provisions of the Companies Act 1961 (NSW). Gibbs CJ remarked that it was proper to grant a declaration in that case although it had been agreed that an injunction was not an appropriate remedy (at 125).
>
> In ***Corporate Affairs Commission v Transphere Pty Ltd*** (1989) 7 ACLC 205, 209, Young J dealt with the question more fully. He observed that, while a declaration will not ordinarily be made that a defendant has committed a crime, there is jurisdiction to do so in a proper case. In his Honour's view, older cases which discouraged a statutory authority from commencing proceedings for declaratory relief are no longer applicable, in view of the changed social climate, and the Court will now grant declaratory relief at the suit of the statutory authority which exists to regulate an industry, in an appropriate case: at 214. In his Honour's view, the fact that the subject matter of the declaration is of public interest is an important consideration in favour of the granting of declaratory relief, even though the order may be of only slight utility: at 213. In that case the Court declined to make a declaratory order, because (inter alia) the declaration would affect investors who were not parties to the proceedings. That consideration is not present here. The approach taken in the Federal Court is very similar: ***Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*** (1993) 113 ALR 257."

39 As his Honour pointed out, in ***Australian Softwood Forests Pty Ltd v Attorney-General (NSW)***, Gibbs CJ, Stephen, Mason, Murphy and Wilson JJ allowed an appeal from orders of the Court of Appeal and restored the declaration made by the trial judge. I agree with the views expressed by Young J and Austin J that, when declarations are sought by a public authority such as ASIC, the declarations should be made if it is in the public interest to do so.

40 I now turn to the specific sections in respect of which a declaration of breach is sought.

Section 206A

41 Section 206A(1) of the Act provides:

> "A person who is disqualified from managing corporations under this Part commits an offence if:
>
> (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (b) they exercise the capacity to affect significantly the corporation's financial standing; or
>
> …
>
> It is a defence to the contravention if the person had permission to manage the corporation under either section 206F or 206G and their conduct was within the terms of that permission."

42 Section 206B of the Act provides, inter alia,

> "(1) A person becomes disqualified from managing corporations if the person:
>
> (a) …
>
> (b) is convicted of an offence that:
>
> (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or
>
> (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
>
> (c) ...
>
> (2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:
>
> (a) if the person does not serve a term of imprisonment — 5 years after the day on which they are convicted; or

(b) if the person serves a term of imprisonment — 5 years after the day on which they are released from prison.

…"

43 On 20 November 1995, Mr McKim was convicted in the District Court of New South Wales of obtaining a valuable thing by deception, of attempting to obtain a valuable thing by deception and of obtaining a benefit by deception. He was sentenced to five years imprisonment and was initially released from prison on 19 July 1997. Subsequently, his parole was twice revoked and he was imprisoned again. Even five years after the day on which he was first released from prison included the period whilst he was managing the affairs of Pegasus. Mr McKim made decisions that affected the whole or a substantial part of the business of Pegasus and he exercised the capacity to affect significantly the corporation's financial standing. He was disqualified from so acting by reason of the provisions of s206B and his conduct was a breach of s206A. He did not have permission under s206F or s206G.

44 Mr McKim was likewise the sole director and the manager of another company, Pinacle Group Pty Ltd, from 20 December 2000 until orders were made by the Supreme Court on 12 March 2001 and, in relation to that company, he equally acted whilst disqualified to do so.

45 Accordingly, I shall make the a declaration of breach:

Section 601ED

46 Section 601ED of the Act 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.

...

(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;

…"

47 I have already discussed the issue as to whether Pegasus carried on a managed investment scheme. In my view it did and for most of the relevant period the scheme had more than 20 members. It follows that Pegasus was in breach of s601ED by operating a managed investment scheme that the section required to be registered. The scheme operated by Pegasus was not so registered.

48 The position with respect to Mr McKim is more difficult. Mr Stack referred to and relied upon s79 of the Act, which provides:

"A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention."

Mr Stack submitted that the effect of s79 was that a person who aided and abetted a contravention or induced it or was knowingly concerned in it, etc., was liable as a principal for the contravention which occurred.

49 However, s79 does not say that. Section 79 operates in a manner similar to s75B of the Trade Practices Act 1974 (Cth) which defines when a person is "involved in a contravention". In each case, the section defines the meaning of the term "involved in a contravention", which is elsewhere used in the statute. In the Trade Practices Act, the term appears, for example, in s82. In the Act, the term is used in very many sections. For example, s670E(1) provides:

"A person who:

(a) enters into a transaction relating to securities in reliance on:

(i) a public proposal for a takeover bid; or

(ii) an announcement of a market bid; and

(b) suffers loss or damage that results from a contravention of section 631:

may recover the amount of the loss or damage from:

(c) the person who contravened the section; or

(d) any person involved in the contravention."

50 Section 79 does not provide that the person who is comprehended by its provisions is to be treated as a person who contravened the Act. Section 79 is merely a definition section. Other sections, such as s670E, use the term "involved in a contravention" and thereby pick up its terms.

51 Therefore, s79 provides no assistance in the present case, for s601ED does not use the term which it defines. Mr Stack relied upon the judgment of Heerey J in ***ASC v Spencer*** (1997) 25 ACSR 143. At 143, his Honour said:

> "The respondent Mr Michael Geoffrey Spencer was not an officer of the company but he is liable as being involved in the contravention within the meaning of s 79. He was the accountant for the company concerned and devised the scheme which I shall shortly describe."

52 However, his Honour's words are explained by the fact that the provisions of the Corporations Law which his Honour applied contained s1317DB which provided:

> "For the purpose of this Part, a person who is involved in a contravention of a particular provision of this Law or a corresponding law is taken to have contravened that provision."

Accordingly, his Honour's judgment is no authority for the proposition which Mr Stack propounded, there being no equivalent section to s1317DB in the provisions which are applicable in these proceedings.

53 Mr Stack also relied upon the principles of accessorial liability discussed in ***Hamilton v Whitehead*** (1988) 166 CLR 121. However, again, that case took into account s38(1) of the Interpretation Code (WA) which provided that a person who abets, counsels or procures, etc., the commission of an offence "shall be deemed to have committed that offence and is punishable accordingly". No such provision is applicable in the present case.

54 The issue remains, however, whether Mr McKim contravened the statute by operating the managed investment scheme which was not registered although required to be so.

55 The word "operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme. The Oxford English Dictionary gives these relevant meanings:

> "5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work.
>
> 6. To cause or actuate the working of; to work (a machine, etc.). Chiefly *U.S.*

> 7. To direct the working of; to manage, conduct, work (a railway, business, etc.); to carry out or through, direct to an end (a principle, an undertaking, etc.). orig. *U.S.*"

56 I have concluded that Mr McKim operated the managed investment scheme. He was the living person who formulated and directed the scheme and he was actively involved in its day to day operations. He supervised others in their performance.

57 I have also concluded that Mr McKim is not exempted by s601ED(6). He did not "merely" act as agent or employee of Pegasus. He was the directing mind and will of Pegasus and of the scheme.

58 Accordingly, I shall make a declaration of breach.

Section 727

59 Section 727(1) of the Act provides:

> "A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged with ASIC."

60 I have already discussed the definition of "securities" and I have set out the definition of "interest in a managed investment scheme" which appears in s9.

61 It is clear from these provisions that the rights which were offered to each investor were an interest in a managed investment scheme. Section 700 appears in Chapter 6D. Section 92(3) defines "securities" for the purposes of that chapter. Thus the chapter applies to offers of interests in managed investment schemes. Section 706 provides that an offer of securities for issue needs disclosure to investors under Part 6D.2 in Chapter 6D unless s708 states otherwise. I have already made the point that, during the relevant period, once the scheme came to have more than 20 investors and raised more than $2 million from the investors, s708 did not operate so as to exempt Pegasus from the disclosure provisions.

62 I need not discuss the type of disclosure that Part 6D.2 of Chapter 6 required. It is clear that no such disclosure was made.

63 So far as Pegasus is concerned, the offers of securities were made by its servants and agents in its name and with its authority. It thereby contravened the section. I am of the view that Mr McKim also made at least some offers of securities during the relevant period. Most of the investors have deposed that they dealt with Mr McKim. Two investors, Mr Naylor and Mr Rullo, have deposed that they dealt with a Ms Wise. In the Interview, Mr McKim spoke of Carleen Wise and of a person by the name of Allan Edwards as "my consultants". Of Ms Wise, Mr McKim said

> "Carleen, as I mentioned before is a consultant of mine. She is on a commission basis only. She has worked for me… under the consultant banner, since September / October last year."

I conclude from this evidence that Ms Wise was an agent or consultant of Pegasus when she made the offers to Mr Naylor and Mr Rullo. However, it appears that, in the case of all the transactions, Mr McKim authorised and approved of the offer and all the documents, the agreement, the receipt

and the two guarantees were signed by him. Mr McKim was the only officer or employee of Pegasus. I have concluded that, in each case, he was a principal in the contravention.

64 I shall therefore make a declaration accordingly:

Section 780(1)

65 Section 780(1) of the Act provides:

> "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."

66 Section 92(1) of the Act defines "securities" to include "interests in a managed investment scheme". Section 93(1) of the Act defines "securities business" as "a business of dealing in securities".

67 The business which Pegasus carried on was a securities business and Pegasus was in breach of s780 as it did not hold a dealer's licence. Pegasus was not an exempt dealer. I shall so declare.

68 Mr Stack sought a similar declaration in respect of Mr McKim. However, the words "carry on" are not equivalent to "operate", a term which appears in s780(2)(b). In the context, the words refer not to the operations of a business but to the proprietorship of the business. Thus, s780 does not include the exception for agents and employees which appears in s601ED.

69 Mr McKim did not carry on a business. He was an officer of Pegasus, which carried on the business. Therefore, he was not required to hold a dealer's licence and did not contravene s780(1).

Section 781

70 Section 781 of the Act provides:

> "A person must not:
>
> (a) carry on an investment advice business; or
>
> (b) hold out that the person is an investment adviser;
>
> unless the person is a licensee or an exempt investment adviser."

71 Section 77(1) of the Act defines "investment advice business" as follows:

> "A reference to an investment advice business, in relation to a person, is a reference to:

(a) a business of advising other persons about securities; or

(b) a business in the course of which the person publishes securities reports."

72 The facts of the present case have many similarities with those in ***ASIC v Hutchings*** in which Windeyer J held that a breach of s781 occurred because the two persons concerned (at 393 ([15]))

> "were carrying on an investment advice business and holding themselves out as investment advisors in that they advised the loan clients about securities, mainly advising them that they should invest their funds in the managed investment scheme, being the pooled loan scheme."

73 I have set out above a passage above from Mr McKim's Interview in which he said that the business of Pegasus was "certainly not a financial advisory company" but that its business was "to assist people in making decisions – investment financial decisions, to point them in the right direction".

74 Obviously, the conversations between Mr McKim and the consultants on the one hand and the investors on the other did include statements that could be termed advice about securities. However, I would not describe the business which Pegasus carried on as "an investment advice business" and I am certainly not satisfied that Pegasus held itself out as "an investment advisor". I am not satisfied that Pegasus carried on a business of "advising other persons about securities". It is one thing to say in the course of the business activities some statements that constituted advice about the securities was given. It is another to say that the nature, character or quality of the business was a business of advising other persons about securities.

75 Mr Stack asked me to make the following declaration:

> "Between 21 July 2000 and 12 March 2001, the First Defendant and the Second Defendant contravened s781(1) of the Corporations Law by advising people to take interests in a managed investment scheme without holding a license."

76 So far as I can ascertain from the evidence before the Court, although the conversations of which evidence was given at least implied advice that an investment in Pegasus was a good investment, the investors did not come to Pegasus seeking advice and were not given express advice. The mere offer of a rate of interest of five per cent per week of itself clouded intelligible thought. That rate of return could not be obtained from other investments. There was no need to obtain advice as to how the Pegasus investment compared with others. The conversations of which detailed evidence has been given concentrated on the rate of the return and the manner in which the moneys would be used. The only clear evidence of advice is a statement by Mr Naylor that Ms Wise said to him, on one occasion:

> "I have put my friends and family into the investment. I wouldn't have recommended this to my family unless I was sure it was working."

77 On the facts of the present case, I have concluded that, although Pegasus carried on a business in the course of which advice was given about securities, it did not carry on "a business of advising other persons about securities". In the context, the word "of" is used to connect the noun "business" with the specified character or quality, that of "advising other persons about securities", which the business was required to possess. The business which Pegasus carried on did not have that character or quality.

78 Mr McKim, in any event, did not carry on a business.

79 Accordingly, I shall not make the declaration sought.

Sections 995, 999 and 1000

80 Section 995(2) of the Act provides:

> "A person must not, in or in connection with:
>
> (a) any dealing in securities; or
>
> (b) without limiting the generality of paragraph (a):
>
> (i) the allotment or issue of securities; or
>
> (ii) a notice published in relation to securities; or
>
> (iii) the making of, or the making of an evaluation of, or of a recommendation in relation to, offers under a takeover bid; or
>
> (iv) the carrying on of any negotiations, the making of any arrangements or the doing of any other act preparatory to or in any other way related to any matter referred to in subparagraph (i), (ii) or (iii);
>
> engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

81 Section 999 of the Act provides:

> "A person must not make a statement, or disseminate information, that is false in a material particular or materially misleading and:
>
> (aa) is likely to induce other persons to subscribe for securities; or
>
> (a) is likely to induce the sale or purchase of securities by other persons; or
>
> (b) is likely to have the effect of increasing, reducing, maintaining or stabilising the market price of securities;
>
> if, when the person makes the statement or disseminates the information:
>
> (c) the person does not care whether the statement or information is true or false; or
>
> (d) the person knows or ought reasonably to have known that the statement or information is false in a material particular or materially misleading. "

82 Section 1000(1) of the Act provides:

"A person must not:

(a) by making or publishing a statement, promise or forecast that the person knows to be misleading, false or deceptive; or

(b) by a dishonest concealment of material facts; or

(c) by the reckless making or publishing (dishonestly or otherwise) of a statement, promise or forecast that is misleading, false or deceptive; or

(d) by recording or storing in, or by means of, any mechanical, electronic or other device information that the person knows to be false in a material particular or materially misleading;

induce or attempt to induce another person to deal in securities."

83 Mr McKim, at about the end of September 2000, created the following certificate:

"**Certificate of Registered Guarantee**

This is to certify that

PEGASUS LEVERAGED OPTIONS GROUP PTL LTD

Australian Company Number 093 767 894

Has registered with us a Client Capital Guarantee to the value of **$2,500,000**.

The Guarantee commencement date being **the fourteenth day of July 2000**.

The Guarantee is registered for a period of one year, or as long as the policy is continued.

Issued by the International Investment and Securities Commission
On this fourteenth day of July, 2000.

[signed]

Peirce Vandermear
Chairman"

84 In the Interview, Mr McKim agreed that he drafted this document. In the Interview, Mr McKim said that

"basically, the document was drafted by me never to leave these offices, never to be shown to anybody".

85 The certificate was false. Mr McKim conceded in the Interview that the International Investment and Securities Commission did not exist and that the name Peirce Vandermear was a made-up name. He also conceded that no Client Guarantee to the value of $2,500,000 had been lodged by Pegasus with any organisation and that no relevant guarantee had been obtained. I conclude that the document was drawn up for the purpose of fraudulent use.

86 No explanation given by Mr McKim in the Interview seems acceptable. In the Interview, Mr McKim said, inter alia:

> "Allan Edwards said to me, 'All you've got to do is put it down on a piece of paper, "Certificate of registered guarantee", and have that as a standby.'
>
> Now, he has provided people – he's run seminars, as I, as I explained before, all over the country in all major cities. He had, basically, a copy of all of the documents for Pegasus and, in all honesty, I had no idea he had a copy of this.
>
> Basically, the documents were made available to him, and I said, 'Take what you need. Take copies of what you need to be able to show people through your seminars, if that's what you want to do.'"

87 It is difficult to make sense of Mr McKim's statement. There are contradictory statements. However, it appears that the certificate of registered guarantee was created by Mr McKim after a suggestion by Mr Edwards. The document was made available to Mr Edwards and was disseminated by him.

88 Ms Britton gave evidence that, in November 2000, she made inquiries of Mr McKim about the nature and security of her investment. On Tuesday 28 November 2000 Mr McKim faxed to her a number of documents, one of which was the certificate of guarantee. Mr Garlick deposed that, on 16 November 2000, after he had placed another $40,000 with Mr McKim, Mr McKim attended the premises where he worked at Chatswood and handed him the paperwork in respect of the investment. That paperwork included the usual documents which I have mentioned and also a copy of the certificate of registered guarantee. Accordingly, on at least two occasions, Mr McKim was personally instrumental in disseminating the document.

89 I shall make declarations accordingly.

Winding up of the scheme

90 Section 601EE of the Act 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."

91 ASIC seeks an order that the scheme be wound up pursuant to s601EE of the Act. In ***ASIC v Chase Capital Management Pty Ltd***, Owen J said (at [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.
>
> 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."

92 I agree with his Honour's approach.

93 Funds are still held and their distribution needs to be resolved. In the present case, the winding up of the scheme should not be left to Mr McKim or any other person who may be connected with Pegasus. It is in the interest of the investors and it is in the public interest that the scheme should be wound up in a formal administration.

94 I shall make orders accordingly.

Winding up of Pegasus

95 Section 461(1)(k) of the Act provides:

> "The Court may order the winding up of a company if:
>
> …
>
> (k) the Court is of the opinion that it is just and equitable that the company be wound up."

96 The application of this provision was discussed at length by Finn J in ***ASC v A S Nominees Ltd*** (1995) 13 ACLC 1822 at 1844-6. His Honour rejected a submission that an application by a public body such as the ASC was to be treated in no different manner from that of an ordinary applicant and emphasised the public interest considerations to which regard should be had.

97 More recently in ***ASIC v Austimber***, Merkel J applied the same principle. At 894-5 ([5]), his Honour said:

> Reliance on the just and equitable ground by a regulatory authority, such as ASIC, was considered by Finn J in ***Australian Securities Commission v AS Nominees Ltd*** (1995) 62 FCR 504. His Honour (at 530-533) discussed the case law in respect of a winding up order on the just and equitable ground, which has been relied upon where it is appropriate for investor protection, where there are regular or repeated threatened breaches of the Corporations Law and also where there has been mismanagement or misconduct in the conduct of the affairs of the corporation. There has been a long-standing resort to the just and equitable ground in similar circumstances, see ***Re Chemical Plastics Ltd*** [1951] VLR 136 at 142 and ***Re Producer's Real Estate and Finance Co Ltd*** [1936] VLR 235 at 246. In the latter case Mann CJ said that it was appropriate to wind up a company on the just and equitable ground where a company's business cannot be carried on consistently with candid and straightforward dealings with the public, from whom further capital must be obtained if the company's existence is to be prolonged.

98 In the present case, a winding up on the just and equitable ground is appropriate for investor protection, particularly as there have been repeated contraventions of the Act and mismanagement of and misconduct in the conduct of the affairs of the corporation. As Owen J pointed out in ***ASIC v Chase Capital Management Pty Ltd*** at [93], if the scheme is to be wound up, the case for a liquidation of the company that conducted it is compelling.

99 I shall make orders accordingly.

Disqualification

100 Section 206E of the Act provides, inter alia:

> "(1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
>
> (a) the person:
>
> (i) has at least twice been an officer of a body corporate that has contravened this Act while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
>
> (ii) has at least twice contravened this Act while they were an officer of a body corporate; or
>
> (iii) … and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate."

101 In ***Re Magna Alloys & Research Pty Ltd*** (1975) 1 ACLR 203 at 205, Bowen CJ in Eq said, when speaking of an analogous provision in the Companies Act 1961:

> "The policy to which s122 gives effect is that a person convicted of an offence of any of the types specified in that section is not to be permitted to act as a director or take part in the management of a company. The section is not punitive. It is designed to protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with the company. In its operation, it is calculated to act as a safeguard against the corporate structure being used by individuals in a manner which is contrary to proper commercial standards."

102 In the present case it has been established that Mr McKim has at least twice contravened provisions of the Act and has at least twice been an officer of Pegasus when it contravened the Act and failed to take reasonable steps to prevent the contravention. Mr McKim was the directing mind and will of Pegasus and supervised and controlled all its activities. He was instrumental in causing the contraventions to occur.

103 In ***ASIC v Hutchings***, the facts had many similarities with the present as the two defendants borrowed very large sums of money from the public, promising high rates of interest. Most of the moneys borrowed were lost. At 394-5 ([20]), Windeyer J said:

> "ASIC seeks a banning order against Hutchings and Tindall under s206E. I have hesitated about this as the offences were not corporate offences but individual offences. Nevertheless they are covered by s206E(1)(a)(ii). The difficulty in coming to a decision on this part of the relief sought by ASIC arises from the nature of the proceedings. No penalties are sought. The exact loss is unknown and strictly speaking Hutchings and Tindall were not required to explain where the moneys went. Nevertheless there is uncontested evidence that the principal lost is in the order of $13 million. The deficiency is of such magnitude that it is desirable for the protection of the community that these men not be in charge of corporations when there is a risk they may use the corporate veil to engage in activities bringing harm to members of the public. There is no logical reason to think a disqualification period of say five or ten years would be appropriate. I consider the appropriate course is to make a disqualification order for life with the right to apply on three months' notice after five years for variation of such order."

104 Mr Stack seeks an order of disqualification for 30 years, a period slightly longer than that ordered by Austin J in ***ASIC v Parkes*** (2001) 38 ACLC 355. At 386 ([181]), Austin J said:

> "After careful consideration, I have decided that I should accede to the plaintiff's submission that a prohibition for 25 years is appropriate. In reaching this conclusion, I take into account the following factors:

· the contraventions that I have found include some very serious contraventions;

· those contraventions have led to loss and damage on the part of companies and investors, contrary to the protective purpose of the relevant provisions of the Corporations Law;

· the defendant's field of activity, management and financial consultancy, is an area where the potential to do damage is especially high, compared, say, with a defendant whose expertise is in making cement;

· the defendant's contraventions have been recurrent, arising in the context of three different sets of companies;

· until the end, the defendant asserted explanations for what he had done which I have found to be implausible, and this suggests me that he has no contrition;

· all of these facts lead me to believe that there is a high propensity that the defendant will engage in similar conduct if only a short period of the prohibition is imposed;

· I am conscious of the fact that a prohibition for 25 years will effectively prevent the defendant from managing a corporation for the rest of his life, but it will not prevent him from earning income as an employee, using his undoubted financial skills under proper supervision."

105 The facts of the present case show that Mr McKim, shortly after being released from prison, embarked on an extensive operation in which members of the public were duped and defrauded. Many millions of dollars were raised and lost. For the purpose of the enterprise, he incorporated Pegasus and managed its affairs although disqualified from doing so. The public is at grave risk from Mr McKim. A substantial disqualification of Mr McKim from managing corporations is desirable to protect the public from Mr McKim's likely future activities. Mr McKim has shown that he has a propensity to defraud on a large scale. I consider that a term of 30 years, slightly more than that adopted by Austin J, would be appropriate. I shall so order.

Prohibition Orders

106 ASIC has sought orders under s1324 of the Act, which provides, inter alia:

> "(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act; or
>
> (b) attempting to contravene this Act; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
>
> (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
>
> (f) conspiring with others to contravene this Act;
>
> the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms

as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

...

(6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

…

(9) In proceedings under this section against a person the Court may make an order under section 1323 in respect of the person.

…"

107 The orders sought are as follows:

"16. An order that each of the First and Second Defendants be permanently restrained, by itself, himself, themselves or their servants or agents or their employees from operating a Managed Investment Scheme in contravention of s601ED of the Law.

17. An order that each of the First and Second Defendants be permanently restrained, by itself, himself, themselves or their servants or agents or their employees from making an offer of securities or distributing an application form for an offer of securities that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodge[d] with the Australian Securities and Investments Commission ('ASIC') in contravention of s727(1) of the Law.

18. An order that each of the First and Second Defendants be permanently restrained, by itself, himself, themselves or their servants or agents or their employees from:

(a) carrying on a securities business; and / or

(b) holding themselves out as carrying on a securities business,

in contravention of s780 of the Law.

19. An order that each of the First and Second Defendants be permanently restrained, by itself, himself, themselves or their servants or agents or their employees from:

(a) carrying on an investment advice business; and/or

(b) holding themselves out as carrying on an investment advice business,

in contravention of s 781 of the Law."

108 Injunctions were granted in ***ASIC v Sweeney*** and ***ASIC v Parkes***. In ***ASIC v Sweeney***, Austin J said (at [32]):

"Section 1324 (1) of the Corporations Law empowers the Court, on the application of the Commission or a person whose interests have been affected, to grant an injunction restraining a person from engaging in conduct that constitutes a contravention of the Law. Section 1324 (2) empowers the Court to grant a mandatory injunction requiring a person to do something required to be done by the Corporations Law. By s 1324 (6) (a), the power to grant an injunction restraining a person from engaging in conduct may be exercised whether or not it appears to the Court that the person intends to engage again, or continue to engage, in conduct of that kind. Obviously there will be discretionary considerations for and against the grant of injunctive relief, but there is no doubt about the power to grant the relief, as Cohen J confirmed in ***Permanent Trustee Australia Ltd v Perpetual Trustee Co Ltd*** (1994) 15 ACSR 722, 728.

…

The present proceedings have been brought by the public regulator to enforce the corporations and securities legislation. According to s 1 (2) of the Australian Securities and Investments Commission Act 1989 (Cth), in performing its functions and exercising its powers, the plaintiff must strive to achieve various objectives, including:

· to promote the confident and informed participation of investors and consumers in the financial system;

· to administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and

· to take whatever action it can take, and is necessary, in order to enforce and give effect to the laws that confer functions and powers on it.

These provisions imply that it is appropriate for the Commission to take civil proceedings for declaratory and injunctive relief in respect of past events, even if there is no risk of repetition, where the outcome may establish that the conduct complained of was wrongful (and thereby mark the Court's and the community's disapproval of it) and may deter other wrongdoers. It is appropriate for the Court to take these matters into account in the exercise of its discretion to grant or refuse such relief.

> Thus, the Court has jurisdiction to grant relief of the kinds sought by the plaintiff in these proceedings. The granting of that relief will depend on the exercise of the Court's discretion. It cannot be said that the plaintiff is doomed to fail because of the nature of the relief that it seeks. On the contrary, it is likely that there will be persuasive discretionary considerations in favour of granting such relief, which will be taken into account at the final hearing. Therefore the defendant's first ground discloses no reasonable basis for challenging the order for substituted service."

109 However, although the Court has a wide discretion and is relieved by ss 1324(6) and (7) from the shackles which would otherwise be imposed by the well understood principles of equity, nevertheless, the Court should not grant an injunction simply because it has been requested to do so. An injunction should not be granted unless the order is directed to and appropriate to achieve an end such as enforcing and giving effect to the statute.

110 In the present case, no purpose would be served by granting an injunction directed to Pegasus. That company will be under the control of a liquidator and it will be in the course of being wound up as from the time the judgment is delivered.

111 No order would be useful with respect to the management of a managed investment scheme. Mr McKim will be disqualified from managing a corporation for the next 30 years. Section 601FA provides that the responsible entity of a registered scheme must be a public company that holds a dealer's licence authorising it to operate a managed investment scheme. Therefore, Mr McKim will be disqualified, under the order of the Court, from carrying out the acts such as those which are the subject of these proceedings. Indeed, the disqualification has a wider ambit than that.

112 As for the orders relating to the carrying on of a securities business or an investment advice business, I have concluded that Mr McKim has not contravened the Act by carrying on a securities business or by carrying on an investment advice business or by holding himself out as doing so. As Mr McKim has not been shown to have so acted in the past, it is not appropriate to injunct him from doing so in the future.

113 The order sought, which seeks to restrain a contravention of s727(1) of the Act, falls into a different category. However, although a finding has been made that Mr McKim contravened s727(1), the substantive character of his conduct was that it was fraudulent. It is generally not useful to attempt to restrain future fraudulent activity, which has not been identified or threatened, by relying upon the powers of a civil court to grant declarations and injunctions and to punish for contempt. Fraudulent activity calls for criminal prosecution and punishment. I see no benefit in granting an injunction restraining Mr McKim from contravening s727(1). The Court has already expressed its disapproval of his activities. If, in the future, he contravenes s727(1) by making an offer of securities in respect of which, in contravention of the Act, a disclosure document has not been lodged with ASIC, he should be prosecuted. The penalty for a breach of s727(1) is specified in Schedule 3 as 200 penalty units or imprisonment for five years or both.

114 In my opinion, the Court's power to grant an injunction should be exercised only when it appears that the injunction would serve a useful end. In the present case, the grant of an injunction would not do so. An injunction is not the appropriate way to restrain the activities in which Mr McKim may engage in the future. Only awards of damages, the imposition of penalties, prosecution and punishment are likely to restrain him. The present proceedings are not a prosecution for an offence and they seek neither penalties nor damages.

115 Accordingly, I shall not make the injunctive orders which are sought.

Declarations and Orders

116 For the reasons given above, the Court declares:

1. Between 14 July 2000 and 12 March 2001, the second defendant contravened s206A(1) of the Corporations Act by:

(a) making or participating in making decisions that affected the whole or a substantial part of the business of the first defendant;

(b) exercising the capacity to affect significantly the first defendant's financial standing.

2. Between 20 December 2000 and 12 March 2001, the second defendant contravened s206A(1) of the Corporations Act by:

(a) making or participating in making decisions that affected the whole or a substantial part of the business of Pinacle Group Pty Ltd;

(b) exercising the capacity to affect significantly the financial standing of the Pinacle Group Pty Ltd.

3. Between 21 July 2000 and 12 March 2001, the first defendant and the second defendant contravened s601ED(5) of the Corporations Act by operating a managed investment scheme which required registration but which was not so registered.

4. Between 21 July 2000 and 12 March 2001, the first defendant and the second defendant each contravened s727(1) of the Corporations Act by offering interests in a managed investment scheme without lodging a disclosure document with the plaintiff.

5. Between 21 July 2000 and 12 March 2001, the first defendant contravened s780(1) of the Corporations Act by carrying on a business of offering securities, being interests in a managed investment scheme, without holding a dealer's licence.

6. The first defendant, by its servants or agents, and the second defendant contravened s995 of Corporations Act by engaging in conduct in or in connection with dealings in securities which was misleading or deceptive, or likely to mislead or deceive by providing to third parties a "Certificate of Registered Guarantee" dated 14 July 2000, purportedly provided to the first defendant by the "International Investments and Securities Commission" to the effect that the first

defendant had registered a Client Capital Guarantee to the value of $2.5 million with that organization.

7. The first defendant, by its servants or agents, and the second defendant contravened s999 of the Corporations Act by:

(i) disseminating to third parties a "Certificate of Registered Guarantee" dated 14 July 2000, purportedly provided to the first defendant by the "International Investment and Securities Commission" to the effect that the first defendant had registered a Client Capital Guarantee to the value of $2.5 million with that organization;

(ii) at a time when each defendant knew that the information was false in a material particular and materially misleading;

thereby making a statement and disseminating information which was:

(iii) false in a material particular and materially misleading; and

(iv) likely to induce other persons to subscribe for or purchase securities.

8. The second defendant contravened s1000 of the Corporations Act in that he, on and from 14 July 2000 induced or attempted to induce other persons to deal in securities by disseminating copies of a "Certificate of Registered Guarantee" dated 14 July 2000 and purportedly provided to the first defendant by the "International Investment and Securities Commission" that contained a statement to the effect that the first defendant had registered a Client Capital Guarantee to the value of $2.5 million with that organization to a person which he knew to be misleading, false and deceptive.

117 And the Court orders that:

9. (a) The managed investment scheme carried on by the first defendant shall be wound up pursuant to s601EE of the Corporations Act.

(b) Scott Darren Pascoe is appointed as receiver and manager for the purposes of winding up the scheme.

(c) The receiver's costs shall be paid out of the scheme.

(d) The receiver shall have all the powers necessary for the purpose of winding up the scheme, including, but not limited to, all the general and specific powers identified in ss 420(1) and (2) of the Corporations Act.

10. (a) The first defendant shall be wound up pursuant to s461(1)(k) of the Corporations Act.

(b) Scott Darren Pascoe is appointed as liquidator of the first defendant.

(c) The costs of the liquidator shall be paid from the assets of the first defendant (if any).

11. The second defendant shall be disqualified from managing corporations pursuant to s206E of the Corporations Act for a period of 30 years from 24 April 2002.

12. The defendants should pay the plaintiff's costs of the proceedings.

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