SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Young & Ors* [2003] QSC 029
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMISSION** (applicant) **v** **KEVIN YOUNG** (first respondent) **KATHLEEN CLAIR YOUNG** (second respondent) **THE INVESTORS CLUB LIMITED** ACN 077 935 865 (third respondent) **LISSON PTY LTD** ACN 069 072 742 (fourth respondent) **SELF HELP INVESTORS GROUP PTY LTD** ACN 074 114 319 (fifth respondent) **CLUB LOANS PTY LTD** ACN 096 339 150 (sixth respondent)
FILE NO:	S745 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2003
JUDGE:	Muir J
CATCHWORDS:	CORPORATIONS LAW – MANAGED INVESTMENT SCHEME – where the primary business of the first and second respondents was that of selling houses, home units and town houses to participants in "The Investors Club" – where the Club has no constitution or office holders – whether activities of the respondents in relation to the Club constituted managed investment schemes – whether the schemes were promoted by a person in the business of promoting managed investment schemes – whether the respondents are taking steps to wind up a scheme within the meaning of s 601ED(6) of the Act - whether the respondents are in breach of s 911A (1) of the Act – whether winding up orders should be made and receivers appointed – whether declaratory relief should be given.

Corporations Act 2001, s 9(a)(i), s 9(a)(ii), s 9(a)(iii), s 601ED(1)(a), s 601ED(1)(b), s 601ED(5), s 601ED(6), s 601FA, s 764A(1), s 766A(1), s 911A(a)

ASIC v Enterprise Solutions 2000 Pty Ltd [2000] QCA 452
ASIC v Takaran (2002) 20 ACLC 1,732
Australian Softwood Forests Pty Ltd v Attorney-General for the State of New South Wales (1981) 148 CLR 121
Australian Securities and Investments Commission v Chase Capital Management Pty Ltd [2001] WASC 27
Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403
Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd [2001] WASC 339
Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561
Brown v Members of the Classification Review Board of the Office of Film and Literature Classification (1998) 154 ALR 67
Lawloan Mortgages Pty Ltd v Lawloan Mortgages Pty Ltd [2002] QSC 302
Tracy v Mandalay Pty Ltd (1953) 88 CLR 215
Whaley Bridge Calico Printing Co v Green (1880) 5 QBD 109

COUNSEL: M Plunkett for the applicant
L Bowden for the respondents

SOLICITORS: M Burnett for the applicant
Woudwyks for the respondents

BACKGROUND

[1] The first and second respondents are directors of the third respondent, a public company incorporated pursuant to the *Corporations Law* and limited by guarantee.

[2] They are also directors of Lisson Pty Ltd, the fourth respondent, the fifth respondent, Self Help Investors Group Pty Ltd and of the sixth respondent, Club Loans Pty Ltd.

[3] The first and second respondents each hold approximately 50% of the issued capital in the fourth, fifth and sixth respondents. The first respondent is the Chief Executive Officer of the three companies and he and his wife are in effective control of all corporate respondents.

[4] The principal business of the first and second respondents is the selling of houses, home units and town houses to persons whom the first and second respondents designate as members of "The Investors Club" ("the Club"). These respondents conduct their activities through companies, some of which are respondents in these proceedings. For convenience, I will differentiate between the respondents only where it is necessary to do so.

[5] The respondents admit that the Club has no constitution or office holders. The "membership" consists of some 60,000 persons whose names and addresses are recorded on lists kept by the respondents and to whom the respondents sell or attempt to sell real property. No joining or membership fees are payable by Club members and nor is there any form of application for membership.

[6] Nevertheless, promotional material describing the Club and its activities distributed by the respondents to persons on the lists, whom I will describe as "members" or "Club members", treats the Club as a functioning entity. The following is an extract from the promotional material –

> "Lisson Pty Ltd (Lisson) is the family company of Kevin and Kathy Young. Kevin and Kathy were subscribing members in the formation of The Investors Club Limited and remain as Directors of the company. Kevin is also the club president.
> Kevin has had 31 years in financial management and real estate. Using new and legal tax minimisation strategies for one purpose – wealth creation through property – he was able to retire after six years.
> This experience and know how is now being provided **free** of charge to **The Investors Club.**
> …
> **What does Lisson & the Club do for you?**
> …
> Members who have used the Club to invest are pleased to discuss their case history – at meetings or over the phone… THIS REFERRAL SERVICE IS – **FREE!**
> Monthly newsletter updates and social get-togethers are – **FREE!**
> To ensure values increase quickly, in depth market research is required. We have full time researcher's information available – **FREE!**
> …
> To ensure values increase quickly, monitoring future population growth is critical…. WE DO THIS – **FREE!**
> The location, location, location report is critical….THE CLUB PROVIDES THIS – **FREE!**
> An Investment Analysis for you to check in detail is critical…. THE CLUB PROVIDES THIS – **FREE!**
> …
> Remember, we can also supply you with **a list of names of club members** who are well on their way to creating wealth for their retirement. **They are happy to talk to you about the Club** and their experiences and what the benefits are of using the club."

[7] In the material reference is made to "the Investors Club's finance manager" and to "support members". Support members are not employees of any of the respondents but are agents paid on commission for any sales which they effect through a respondent.

The Applicant's claims

[8] It is common ground that the respondents were not licensed as responsible entities to operate a managed investment scheme in accordance with s 601FA of the

Corporations Act ("the Act"). The applicant contends that the respondents operated and continue to operate managed investment schemes as defined in s 9 of the Act. Two types of scheme are identified by the applicant: a joint venture projects scheme ("the JVP Scheme") and a scheme known as No Tenant? No Problem! Program ("the NTNP Scheme"). If these schemes were managed investment schemes they were not registered contrary to the provisions of s 601EF(5) of the Act.

The facts relevant to a determination of whether the JVP Schemes are managed investment schemes

[9] Members of the Club are invited, by the promotional material issued by the respondents, to express an interest in purchasing real property in a development undertaken by the respondents by completing an expression of interest form in respect of a stipulated property development and by contributing an initial sum which is normally $6,000, although some documentation states the sum to be $5,000. The form designed to accompany such payment has provision for the payer to nominate the "next available" development or the "next development" in a specified city in lieu of a development in progress.

[10] The expression of interest form is addressed to the third respondent but the payments contemplated by it are required to be made to the fifth respondent. There is a separate form headed "Holding Deposit Confirmation" which directs that the form and cheque be posted to "Joint Ventures/Club Loans Pty Ltd".

[11] At a subsequent stage, members of the Club entered into individual agreements of loan ("the loan agreements") with the fifth respondent.

[12] The loan agreements, although generally similar in terms, are by no means identical. They all contain recitals A and B and the following clauses (which may be numbered differently)–

> "A. The parties are members of the Investors Club Limited or associated entities.
>
> B. The Lender has agreed to lend monies to the Borrower who will utilise the monies on activities that benefit members of The Investors Club Limited.
>
> 4. The Borrower anticipates that the loan period shall be [*the stated term*], but where the operations of the Borrower dictate that a further period of time is required the Lender shall agree to the extension as required by the Borrower."
>
> 6. The Loan Monies will be utilised in activities benefiting the Investors Club Limited Group and its members. It is hereby agreed by the Borrower that all activities undertaken will provide a return on costs of no less than 15%.
>
> 7. The Lenders provision of the Loan Monies to the Borrower will provide a priority to the Lender to execute a purchase contract for one strata unit within your chosen development."

[13] The loan agreements in respect of a proposed development at Wishart contain a recital C as follows –

> "C. The Lenders agree that all Loan Monies provided under this agreement are for the sole purpose of acquiring and developing a property situated at [a specified location]."

[14] In most cases the amount of the loan was $38,400 but there were some loans for as little as $5,000 and some for more than $38,400. In most cases a stated sum was expressed to be payable on "repayment of the Loan Monies or on completion of the activities of the Borrower" but some of the agreements make no provision for the payment of interest.

[15] The loan moneys were received by the third, fifth and sixth respondents, deposited into bank accounts by the third and sixth respondents and lent or provided to the first and second respondents.

[16] Such moneys were used to acquire land with a view to building apartment blocks thereon. Where a development proceeded to the construction stage, further moneys were borrowed from financial institutions to fund the balance of the project.[1] The developments which the respondents undertook or commenced in this way and which had not been finalised at the time of hearing were located at –

(i) 8-10 Lloyd Street, Southport, Queensland "(QLD");
(ii) 15-17 Lloyd Street, Southport QLD;
(iii) Coora Street, Wishart, QLD;
(iv) Regent Street, Redfern, New South Wales ("NSW");
(v) Heidelberg Road, Fairfield, Victoria.

[17] At least two of those properties were purchased in the names of the first and second respondent, but only the Southport project has proceeded to a stage of completion or near completion. The others were discontinued and the moneys borrowed refunded unless a lender requested that its loan moneys be held with a view to being used in a substituted transaction.

[18] It is common ground that a Club member participating in the JVP Scheme was entitled to a discount of 10% of the listed purchase price upon execution of a contract to purchase a unit or townhouse within the subject property development.

[19] Self Help Investors Group Pty Ltd, the fifth respondent, was incorporated or acquired by the first and second respondents as a vehicle for use by them in property development activities which they intended to finance in part through loans and other payments by Club members.

[20] The JVP Club members do not have day-to-day control over the operations of the JVP Scheme. That rests with the respondents and, in particular, the first and second respondents.

[21] The development and sale of strata title units through the JVP Scheme represents no more than about 1% of the overall real estate business of the respondents and only a relatively small percentage of Club members have participated in such developments.

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[1] Paragraph 11 of the defence.

Observations on the content of the JVP Scheme documentation

[22] It will be seen from the above that the documentation produced by the respondents in relation to the Club and, in particular, the JVP Scheme, is characterised by obscurity and imprecision. It is also misleading in a number of respects. Not the least of its defects is that it makes reference to the Club and supposed office bearers as if the Club actually existed and persons held offices in it. Yet Mr Young swears, "There are no rules of the Investors Club. There are no members as such".

[23] Recital B of each loan agreement requires the loan moneys to be utilised on activities that "benefit members of The Investors Club Limited". There are about 20 such members and the material does not disclose whether they are regarded as members of the Club or whether any of them participated in the subject developments. Probably, what is meant by "The Investors Club Limited" in the recital is "Investors Club members".

[24] A clause in the operative part of the agreement requires the loan moneys to be "utilised in activities benefiting the Investors Club Limited Group and its members". That description would seem to encompass companies controlled by the first and second respondents as well as "members" of the non-existent "Club". There is no further explanation of the manner in which the "activities" are to benefit that diffuse group of persons and corporations, possibly because a sensible explanation is likely to be difficult to advance.

[25] Each loan agreement solemnly records the agreement of the nominal borrower, Self Help Investors Group Pty Ltd, that all the unspecified "activities undertaken will provide a return on costs of no less than 15%". The benefit or even relevance of this covenant to the lender is difficult to ascertain. Mr Young swears in that regard –

> "The 15% return referred to therein is a standard industry figure which represents the sort of return on investment that one would expect in such a case and is the minimum standard generally adopted for banks when lending on such projects."

But the activities undertaken and costs incurred are those of the first and second respondents and any return will be theirs and not the lenders.

The facts relevant to a determination of whether the NTNP Scheme is a managed investment scheme NTNP Scheme

[26] The expression of interest form to which reference was made earlier provides in part –

> "I/We acknowledge that under this cover, the amount I/we will receive is 40% of actual rent per week if I/we have a vacancy on the above property. This cover is for 12 months and will commence from the date of settlement until a tenant is found and to vacancies between leases only."

[27] An information sheet provided for JVP Club members contains the following –

> "The Investors Club Ltd provides a benefits package to Club members. The benefits package will be supplemented with an additional No Tenant? No Problem! (NTNP) program benefit. If the Club member chooses to subscribe to NTNP there is currently a

> joining fee of 1.5 week's rent (plus GST). All future renewals are currently at a cost of 1 week's rent (plus GST) per annum. If there is a tenant in place at settlement, the NTNP joining fee is currently reduced to 1 weeks rent (plus GST).
> The NTNP program benefit has been introduced by the club to financially assist Club members when their residential investment property is without a tenant. …
> Subscription to the NTNP program is normally made at settlement and nominated on the Club's Expression of Interest (EOI) form, so that at settlement, the NTNP program can provide a benefit if there is no tenant in place at settlement.
> …
> Application for any benefit due under the NTNP programme must be made on the Club's **NTNP Program Benefit Payment Request** form (available from Support Members and Team Managers).
> When making a claim for a NTNP benefit payment from the Investors Club Ltd, the following conditions apply:-
> 1. The Club member has subscribed to the NTNP program and is not in arrears.
> …".

[28] A member of the Club becomes a member of the NTNP Scheme ("NTNP member") by completing an application form and paying a joining fee into a bank account held in the name of the first and fourth respondents;

[29] The fee, in general terms, is equivalent to one and a half times a stipulated weekly rental amount plus GST. Where the subject premises are tenanted at the time of entry into the scheme the fee is fixed by reference to the rental paid by the tenant.

[30] NTNP members seeking continuation of the NTNP Scheme after the first year of their membership must pay an annual renewal fee into a bank account held in the name of the first and fourth respondents. Such fee is equivalent to one (1) week's rent plus GST.

[31] In the event of a premises subject to the scheme falling vacant, the fourth respondent is obliged to pay to the NTNP member 40% of a prescribed weekly rent (where the property has never been let) and, in other cases, 40% of the rent being received prior to the tenant's vacating the premises.

[32] The first and fourth respondents deposited the joining fees and annual renewal fees into a bank account for the purposes of funding the NTNP Scheme and paid from such moneys claims made by members of the NTNP Scheme.

[33] The first and the fourth respondents, and not the NTNP members who have contributed moneys into the NTNP Scheme, have the day-to-day control over the NTNP Scheme.

Did the JVP Schemes in respect of particular developments constitute managed investment schemes?

[34] The respondents submit that the JVP Schemes do not constitute managed investment schemes as –

(a) there is no pooling of funds for the purpose of producing financial benefits. The loans were made separately by individual club members and the loan moneys could be used "in conjunction with the respondents' own moneys for any Club purposes thought desirable. The loan moneys cannot be said to have been "contributed" as the borrower in each case dealt "with a series of parallel lenders. There was never any contribution to some sort of common fund as contemplated by the definition";

(b) there was no "common enterprise" as the enterprise was that of the respondents funded in part by means of borrowing from members of the public;

(c) the overall business of the respondents is that of the sale of real estate, either as a vendor's agent or as a purchaser's agent. That business cannot be broken down into a component which concerns the sale of units in a development owned or managed by the respondents.

[35] For present purposes, in order to be a managed investment scheme, the "scheme" must satisfy the cumulative requirements of s 9(a)(i), (ii) and (iii) of the Act. Section 9 relevantly provides –

"***managed investment scheme*** means:

(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or

(b) a time-sharing scheme;

but does not include the following: …".

[There then follows a list of exceptions which are not relevant for present purposes].

[36] For there to be a managed investment scheme there must first be a "scheme". In considering the meaning of "scheme" in s 76 of the *Companies Act* 1961 (NSW) Mason J, with whose reasons Stephen J agreed and with which Gibbs CJ expressed general agreement, observed in *Australian Softwood Forests Pty Ltd v Attorney-General for the State of New South Wales*[2]–

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2 (1981) 148 CLR 121 at 129.

> "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 program, or plan of action'."

Those observations have been considered apposite to the construction of s 9 of the Act in recent decisions.[3]

[37] There is plainly a "program or plan of action" involved in a pattern of conduct in which a developer solicits loans from potential purchasers of lots in a strata title development proposed to be undertaken by the developer with a view to deducting such moneys from the purchase prices ultimately payable by the lenders and in return for which the developer agrees to provide to potential purchasers a priority right to purchase a lot at a discounted purchase price.

[38] The obscure wording of the respondents' documentation enables them to argue that there is no "contribution" of money and any payments by Club members are not made as "consideration to acquire rights … to benefits produced by the scheme". I do not accept the arguments however. The benefit afforded by "a priority to the lender to execute a purchase contract" for a unit in the purchaser's chosen development may not be one which is easily quantifiable. For example, nothing is said about how priorities are to be determined. Nevertheless it seems to me that the loan agreement confers an obligation on the borrower to cause the lender to be offered a right to purchase a unit in the relevant development ahead of any person who has not entered into a loan agreement. It may be implicit also that lenders' priorities are to be determined by the borrower acting in good faith. In any event, the reduction in the purchase price which is offered to participating Club members is a benefit produced by the Scheme. For the reasons discussed below, I have concluded that the moneys paid over by scheme participants are properly described as "contributions". The requirements of s 9(a)(i) are thus satisfied.

[39] The requirements of paragraph (iii) are satisfied as the day-to-day control over the operation of the scheme rests with the respondents.

[40] I now turn to s 9(a)(ii). In the case of those loan agreements containing recital C, despite the language of cl 6, the agreement, properly construed, contemplates the use of the loan moneys for the purpose only of "acquiring and developing" a particular property in respect of which the lender is to be given a preferential right to enter into a contract of purchase. As the loan moneys are all payable into a fund to be used to purchase the land to be developed by the respondent and sold to the JVP Scheme participants (and perhaps others) it seems to me that the moneys can be said to have been "pooled to produce financial benefits". The benefits include securing particular units and a price reduction. The respondents do not contend that any such benefits are illusory or non-existent.

[41] It cannot be deduced from consideration of the loan documentation and related written Club materials without more, in the case of those loans agreements not containing recital C, that the loan moneys are to be "pooled" or "used in a common

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[3] *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561; *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339; *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* [2001] WASC 27 at 57 and *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403.

enterprise". The loan moneys produce "financial benefits" in that each lender has a preferential right to purchase at a discounted purchase price. The loan moneys though are not required to be used in or in connection with any particular development or even by the borrower. The sole stipulated restriction on the use of the moneys is that their use benefit "The Investors Club Limited Group and its members".

[42] Whether it is possible for the borrower to meet that obligation is open to doubt. The clause does not require that the nominated beneficiaries of the obligation be benefited equally but it does appear to require the provision of some benefit to all. It is thus difficult to see how the borrower could comply with its obligations having regard to the disparate interests of all those within the description "The Investors Club Limited Group and its members". Some Club members have an interest in participating in JVP Schemes and in the NTNP Scheme, others have not. Presumably some Club members are active, some are inactive and others are somewhere in between. Some, having made a recent acquisition, or for some other reason, will be disinclined to purchase another property or other properties in the short term. Many other illustrations of the differing interests of Club members could be provided but these will suffice.

[43] In my view, the concept of "pooling", for the purposes of s 9(a)(ii), imports contributions to a discernible fund the moneys in which are to be used in an identifiable way to provide are prescribed benefits to the contributors. That analysis may be a little narrow,[4] but it will suffice for present purposes.

[44] Under the terms of the loan agreements, as has been discussed, the moneys were agreed to be used for the benefit of a disparate group of persons and corporations with differing interests. There was no expressed right on the part of the lenders to have the loan moneys used for the development in respect of which they made the loan. The moneys could not therefore be regarded as pooled. For similar reasons, if regard is had only to the documentation, it is impossible to conclude that the loan moneys are to be "used in a common enterprise". The moneys may be used in a variety of ways, assuming that it is possible to fulfil the obligation created by the clause under consideration, but there may be no commonality about the enterprise or enterprises in which the moneys are employed. Some Club members and respondents may benefit more than others and at different times and in any different ways. Any benefit received by the lenders may bear no relationship to the loan moneys advanced and so on.

[45] Notwithstanding the wording of the loan agreements, however, the respondents appropriated the money received from Club members in respect of a particular development to that development and, where real property was acquired for the purpose of the development, used such moneys for its acquisition. It may be inferred that this was done pursuant to a predetermined plan or course of action by the first and second respondents.

[46] In those circumstances the loan moneys were in fact pooled to produce financial benefits. The pooling was part of the funding of the development by participating JVP Club members with a view to securing units at discounted prices. In these

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4 *ASIC v Enterprise Solutions 2000 Pty Ltd* [2000] QCA 452 and *ASIC v Takaran* (2002) 20 ACLC 1,732.

circumstance, it is accurate to regard the moneys as contributed by the JVP Scheme participants.

[47] All of the relevant requirements of s 9(a) of the Act were thus satisfied in relation to each of the subject developments and a managed investment scheme came into existence in relation to it.

Was each JVP Scheme promoted by a person who was, when the scheme was promoted, in the business of promoting managed investment schemes?

[48] All such schemes, however, have less than 20 members and were not required to be registered by s 601ED(1)(a). The applicant argues, however, that each scheme required registration under s 601ED by virtue of s 601ED(1)(b) because "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 …".

[49] Apart from the subject developments the respondents commenced two others in 1997, one in 1998 and one in 1999. These and the subject schemes were undertaken as part of the property development activities referred to earlier and were part of the respondents' larger real estate activities conducted in connection with the Club.

[50] The term "promote" is not defined for relevant purposes but it is one which is in common usage in relation to corporations. In *Tracy v Mandalay Pty Ltd* [5] it was said in the joint judgment of Dixon CJ, Williams and Taylor JJ –

> "19. The word "promoter" has been said on many occasions to be a word which has no very definite meaning. It is sufficient to refer to the discussion of its meaning in Emma Silver Mining Co. Ltd. v. Lewis & Son (1879) 4 CPD 396. There Lindley J., as he then was, said: 'With respect to the word "promoters", we are of opinion that it has no very definite meaning: see Twycross v. Grant (1877) 2 CPD 469. As used in connection with companies the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it) and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it. …
> Moreover, it is in our opinion an entire mistake to suppose that after a company is registered its directors are the only persons who are in such a position towards it as to be under fiduciary relations to it. A person not a director may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators …'"

[51] In *Whaley Bridge Calico Printing Co v Green,* [6] Bowen J said –

> "The term 'promoter' is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation, and floating of the company, as render it contrary to

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5 (1953) 88 CLR 215 at 241-242

6 (1880) 5 QBD 109 at 111.

> good faith that the promoter should derive a secret profit form the promotion. A man who carries about an advertising board in one sense promotes a company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties."

[52] According to the *Shorter Oxford English Dictionary*, to promote is "to further the growth, development, progress or establishment of (anything) …. ".[7]

[53] Whatever the full scope of the meaning of "promoted" in the subject context, it plainly extends to activities in which a person formulates a scheme such as the JVP Scheme, advertises it, solicits others to participate in it and embarks upon its implementation. The first and second respondents are thus promoters of each of the schemes.

[54] Each of the subject schemes was promoted, as part of the respondents' real estate activities, along with other such schemes designed to benefit from the existence of the Club and the promotional activities conducted in relation to it. Each JVP Scheme was undertaken in the course of business activities with a view to profit and with the respondents having in mind the undertaking of other such schemes.

[55] In these circumstances, the respondents were "in the business of promoting managed investment schemes". The fact that the JVP Schemes constituted only a small part of the respondents' business activities does not, in my view, prevent their being "in the business of promoting" such schemes. Obviously, a person may carry on or be involved in more than one business at any given time.

Is the NTNP Scheme a Managed Investment Scheme?

[56] The respondents argue that the NTNP Scheme involves the payment of a sum of money in return for a service or a benefit which Lisson has a legal obligation to pay. In these circumstances, it is said that there is no pooling of funds or the conducting of a common enterprise. It is not argued that the requirements of s 9(a)(i) and (iii) are not satisfied. The implicit concession is properly made. The members of the scheme "contribute money as consideration to acquire rights … to benefits produced by the scheme", namely reimbursement of part of lost rental. It is plain also that the members do not have day-to-day control over the operation of the scheme.

[57] Because of the manner in which the scheme is set up and operated "contributions are to be pooled". Mr Woudwyk, the respondent's solicitor, swears that –

> "As part of its marketing strategy TIC offers a 'no tenant no problem' (NTNP) arrangement which is in the nature of insurance to cover loss of rent. Purchasers pay a sum in advance into a pool and those funds are utilised to cover any loss of rent."

[58] The fact that the pool may be insufficient for its purpose and may need supplementing from time to time does mean that no pooling has taken place. Plainly, the moneys are "pooled to produce financial benefits" and there is no difficulty in regarding the payments by scheme participants as contributions. The

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[7] See also *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67 at 81.

requirements of s 9 re satisfied in relation to the NTNP Scheme and it is thus a managed investment scheme. As it has in excess of 20 members it is required to be registered.

Are the respondents taking steps to wind up the scheme within the meaning of s 601ED(6) of the Act?

[59] Section 601ED(5) and (6) provides –

> (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
>
> (6) For the purpose of subsection (5), a person is not operating a scheme merely because:
>
> (a) they are acting as an agent or employee of another person; or
>
> (b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered."

[60] The respondents contend that they are not prevented from operating any of the subject schemes as the respondents, in each case, are "taking steps to wind up the scheme". The facts do not support the submission. The Southport development has proceeded to a stage where the settlement of unit sales is virtually completed. But the carrying out of a scheme cannot be equated with its winding up. To "wind up" a scheme in normal parlance is to terminate it with a view to discharging liabilities and making appropriate distribution of scheme assets (if any). The evidence does not establish that this is what is taking place in respect of the subject developments.

[61] Moreover, it has been held that "wind up" in s 601ED(6)(b) is a reference to a procedure contemplated by the Act and initiated by court order.[8] It was not argued that the decisions to which I refer were erroneous and I propose to follow them. Indeed, I am in respectful agreement with the relevant parts of the reasons.

Are the respondents in breach of s 911A(1) of the Act?

[62] With certain exceptions which are not relevant for present purposes, s 911A(1) of the Act prohibits a person from carrying on a financial services business without holding an Australian Financial Services licence. It is common ground that the respondents hold no such licence.

[63] By virtue of s 766A(1), a person provides a "financial service" if the person deals in a financial product. Under s 764A(1) an interest in an unregistered managed investment scheme is a financial product for relevant purposes. "Interest" in a managed investment scheme is defined in s 9 as meaning "a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)". The respondents' conduct, as described above, comprehends "dealing" in managed investment schemes.

[64] As the JVP and NTNP Schemes are managed investment schemes, the respondents are in breach of s 911A as a result of carrying on a financial services business whilst unlicensed.

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8 *ASIC v Takaran* (2002) 20 ACLC 1,732 and *Lawloan Mortgages Pty Ltd v Lawloan Mortgages Pty Ltd* [2002] QSC 302.

Conclusion and appropriate orders

[65] The applicant seeks the appointment of a receiver to wind up the subject schemes, injunctions to restrain the respondents from breaching the requirements of the Act and declaratory relief. It is appropriate that declarations be made to reflect the above findings. It is not so clear, however, that the appointment of a receiver or receivers to wind up the schemes is necessary or desirable.

[66] I have been referred to a number of authorities in which strong pronouncements are made to the effect that it would be most unusual for an order for the winding up of a scheme not to follow a finding that a scheme was being operated unlawfully.

[67] For example, in *Australian Securities and Investments Commission v Koala Quality Produce*,[9] Barrett J remarked –

> "**[5]** Section 601EE, in terms, empowers the court to order that a scheme be wound up where it is operated in contravention of the prohibition in s 601ED(5), being the prohibition upon operation of a scheme requiring registration where the necessary registration is not in place. Although s 601EE is not mandatory, it is difficult to imagine circumstances in which the court would not proceed to wind up a scheme which was operating otherwise than in accordance with the legislation, given that registration and the protections it involves are deemed by the law to be necessary in the interests of investors. Without registration and the regime it entails, necessary controls are lacking, with the result that investors are exposed to a situation in which their funds are not protected in the way the legislation intends them to be protected. This gives rise to serious public interest considerations which justify measures to put an end to the scheme: see generally the observations of Owen J in *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 subsequently approved and applied in *Australian Securities and Investments Commission v ABC Fund Managers Ltd (No 2)* [2001] VSC 383 and *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310. Speaking for myself, I cannot at the moment think of circumstances in which the court might think it appropriate to decline to order winding up of an unregistered scheme under s 601EE, except perhaps where satisfactory remedial measures of some kind were virtually complete.

[68] I accept that the JVP Schemes should be brought to an end but I am not convinced that the appointment of receivers is necessary to achieve that objective. The development involved in the JVP Schemes are largely defunct or concluded. The applicant does not suggest and the evidence does not reveal that investors' funds are at risk. It seems that in the past whenever a Club member has requested repayment of moneys advanced under the scheme, the request has been complied with. The appointment of a receiver in respect of these schemes, as well as causing unnecessary expense, may damaged the respondents' business and this, in turn, could impact on the respondents' ability to repay. The subject statutory provisions exist to protect members of the public. Care should be taken to ensure that orders

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9 [2002] NSWSC 451.

made under them do not defeat their object by causing investors avoidable injury. Although some 40 loans totalling in excess of $1,500,000 are outstanding, it should be a fairly straightforward matter to ensure that the loans (and other scheme moneys) are promptly repaid. I invite the parties to agree on an appropriate regime to terminate the JVP Schemes with a minimum of expense.

[69] The NTNP Scheme presents greater difficulty. It has about 1,600 participants and the terms of many of the existing contracts will continue to run some months. Where the term of a contract is about to expire, it may be unjust if the respondents were required to refund to the relevant participant the contract fee, such participant having had the benefit of the contract. That would be particularly where the respondents have been called upon to reimburse the participant in the event of a vacancy. There is the further consideration that the termination of the contracts and the withdrawal of the rent protection afforded thereby will leave the scheme participants exposed to a risk against which it may be difficult to obtain alternative protection. There is no evidence before me of the availability of alternative rent protection arrangements or the comparative cost of such arrangements. Furthermore, there is evidence which suggests that the NTNP Scheme is used as a promotional tool or "loss leader" and is not profit making overall.

[70] I propose to hear further argument as to the appropriate orders to give effect to my findings.