

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Letten (No 7)

[2010] FCA 1231

Citation: Australian Securities and Investments Commission v Letten (No 7) [2010] FCA 1231

Parties: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MARK RONALD LETTEN (and others according to the attached schedule)**

File number: VID 95 of 2010

Judge: **GORDON J**

Date of judgment: 11 November 2010

Catchwords: **CORPORATIONS** – unregistered managed investment schemes – receivers and managers appointed – whether receivers are justified in distributing property of the schemes on a pooled basis – method of distribution of the property of the schemes – power of the Court to make the directions sought by the receivers

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth)
Corporations Act 2001 (Cth)
Federal Court of Australia Act 1976 (Cth)
Federal Court Rules

Cases cited: *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 082
Australian Securities and Investments Commission v Letten (No 1) [2010] FCA 140
Australian Securities and Investments Commission v Letten (No 3) [2010] FCA 512
Australian Securities and Investments Commission v Letten (No 4) [2010] FCA 571
Australian Securities and Investments Commission v Letten (No 5) [2010] FCA 1047
Australian Securities and Investments Commission v Letten (No 6) [2010] FCA 1048
Australian Securities and Investments Commission v Nelson [2003] NSWSC 129
Australian Securities Investments Commission v Tasman Investment Management Ltd (2006) 202 FLR 343
Barlow Clowes International Ltd (in liq) v Vaughan [1992]

4 All ER 22
Birtchnell v Equity Trustees, Executors and Agency Co Ltd
(1929) 42 CLR 384
Canny Gabriel Castle Jackson Advertising Pty Ltd v
Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321
Concrete Pty Ltd v Parramatta Design and Developments
Pty Ltd (2006) 229 CLR 577
Devaynes v Noble (1816) 35 ER 781
Federal Commissioner of Taxation v Bruton Holdings Pty
Ltd (In Liquidation) (2008) 173 FCR 472
Hospital Products Ltd v United States Surgical
Corporation (1984) 156 CLR 41
James Roscoe (Bolton) Ltd v Winder [1915] 1 Ch 62
John Alexander's Clubs Pty Ltd v White City Tennis Club
Ltd; Walker Corporation Pty Ltd v White City Tennis Club
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Liquidations* (2010)

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Dr Sykes (a non-party investor): Appeared in person

Mr McCulloch (a non-party investor): Appeared in person

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 95 of 2010

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

**AND: MARK RONALD LETTEN
First Defendant
(and others according to the attached schedule)**

JUDGE: GORDON J

DATE OF ORDER: 11 NOVEMBER 2010

WHERE MADE: MELBOURNE

For the purpose of this order, **Property, Receivers, Scheme** and **Secured Lender** have the meanings ascribed to them respectively in the Orders made in this proceeding on 25 February 2010, 4 March 2010 and 30 July 2010.

Additional Scheme has the meaning given to it in the 30 July 2010 Orders.

Corporate Defendants means each of the corporate defendants to this proceeding.

Schemes means each Scheme and each Additional Scheme.

THE COURT DIRECTS THAT:

1. Pursuant to ss 601EE(2) and 1323 of the *Corporations Act 2001* (Cth) (the **Act**), alternatively ss 23 and 57 of the *Federal Court of Australia Act 1976* (Cth) and O 26 r 7 of the Federal Court Rules:
 - (a) the Receivers are justified in paying the following amounts out of the proceeds of sale of each asset of the Schemes and the Corporate Defendants, in the following order of priority:
 - (i) priority receivership costs, as fixed by the Court, to the Receivers;
 - (ii) any liabilities which are secured by that asset to the relevant Secured Lender;
 - (iii) the amount of trust creditor claims in respect of the relevant Corporate Defendant (if any) in respect of which the relevant Corporate Defendant

has a right of indemnity and lien to the relevant Corporate Defendant;
and

- (iv) the balance (if any) into a bank account held in the name of the Receivers and designated as the “Common Fund” account (**Common Fund**); where:

priority receivership costs are the Receivers’ fees, costs and expenses which:

- (i) relate to getting in, preserving or realising a relevant asset; or
(ii) if a priority deed or other agreement is entered into by the Receivers with a relevant secured creditor, have priority under that deed or other agreement;

as approved by the Court.

trust creditor claims, in respect of an asset, are claims against the Corporate Defendant which is the trustee of that asset and in respect of which the Corporate Defendant has a right of indemnity and lien against the asset.

- (b) Notwithstanding the terms and conditions of any joint venture agreement or other instrument governing the administration, management or winding up of the Schemes, the Receivers are justified in proceeding and making distributions out of the funds comprising the Common Fund:

- (i) as if and on the basis that the Common Fund includes the “scheme property” of each of the Schemes;
(ii) as if and on the basis that the Common Fund constitutes a single fund;
and
(iii) in the following order of priority:

(A) first, to the Receivers, all fees, costs and expenses incurred by the Receivers in respect of the receiverships of each of the Corporate Defendants and the Schemes, which have not been paid by the Corporate Defendants (and not covered by paragraph 1(a)(i) of these Directions), as fixed by the Court; and

(B) second, to Claimants, a rateable share of the balance of the Common Fund, calculated by reference to the amount adjudged by the Receivers to be the amount of their respective Claims, where:

Claimants means any person who has a Claim; and

Claim means:

- in respect of members of each Scheme, the members' total net contributions to a Scheme or Schemes as established by that member pursuant to the proof of claim process conducted under Direction 1(c) below; and
 - in respect of all other Claimants, any net proprietary claim on the Common Fund which can be established by the Claimant pursuant to the proof of claim process conducted under Direction 1(c) below.
- (c) For the purposes of effecting distributions in accordance with Direction 1(b) above, the Receivers shall conduct a proof of claim process, which to the extent practicable conforms with (and is governed by the rules and regulations applicable to) the proof of debt or claim process applicable in a liquidation, pursuant to which the existence and value of Claims will be finally determined by the Receivers, subject to all rights of appeal to the Court (including pursuant to s 1321 of the Act).
2. Nothing in paragraph 1 above is to affect the rights of any person to claim that they have, or any other person has, an entitlement to distribution from an asset of a Scheme or a Corporate Defendant (or the proceeds of sale of such asset) which differs from the distribution which they would receive pursuant to the process outlined in paragraph 1 above.

AND THE COURT ORDERS THAT:

3. The proceedings be adjourned to a date to be fixed.
4. Costs reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

VID 95 of 2010

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

AND: **MARK RONALD LETTEN
First Defendant
(and others according to the attached schedule)**

JUDGE: **GORDON J**

DATE: **11 NOVEMBER 2010**

PLACE: **MELBOURNE**

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REASONS FOR JUDGMENT

1 In these reasons for decision, **Property, Receivers, Scheme** and **Secured Lender** have
the meanings given to them in the 25 February Orders, the 4 March Orders and the 30 July
Orders. **Additional Scheme** has the meaning given to it in the 30 July Orders.
Corporate Defendants means each of the corporate defendants to this proceeding and **Schemes**
means each Scheme and each Additional Scheme.

A. INTRODUCTION

2 This is the seventh judgment in a series about unregistered managed investment schemes
in which Mr Mark Ronald Letten (**Mr Letten**), the First Defendant, was involved.

3 The current issue is an application for directions by the Receivers that they are justified
in pooling the assets of the Schemes and the Corporate Defendants by first paying certain
amounts out of the proceeds of sale of the assets of the Schemes and the Corporate Defendants
and then placing any surplus into a Common Fund for distribution rateably between claimants
who have a claim.

4 Notice of the pooling application was given to the parties to the proceeding, to the
Secured Lender and to investors in the Schemes (the **Investors**). The Court received
submissions from the Receivers, from the Australian Securities and Investments Commission
(**ASIC**) (written and oral), from Light Investments Pty Ltd and Light Carden Investments Pty
Ltd (collectively the **Light Interests**) (written and oral), from Mr Letten (written and oral) and
written submissions from 99 Investors. In addition to Counsel representing the Light Interests,
three investors appeared in person and made helpful oral submissions. The detailed content of
these submissions will be addressed in further detail below. Written submissions were also
received from a non-party creditor to several Schemes, Bridgehead Pty Ltd (**Bridgehead**).
At the hearing of the application for pooling, Bridgehead's submissions were supported by
another non-party creditor, Matclair Pty Ltd (**Matclair**).

5 In general terms, ASIC supports the Receivers' revised proposal. The Light Interests
oppose any wholesale order for pooling and submit that such an order would be inimical to the
overriding object of protecting and preserving, *inter alia*, the interests of Investors: *Re Brighton
Joint Venture Partner No 2 Scheme; Australian Securities and Investments Commission v*

Primelife Corp Ltd (2005) 54 ACSR 177 at [13]. The views of Investors were not consistent. However, the hardships faced and still being faced by Investors as a result of their involvement in these Schemes was consistent. The hardship is real, distressing and, in many cases, has resulted in dire consequences including loss of life, loss of marriages and relationships, the loss of the family home and loss of security for the future. These realities cannot be ignored.

6 For the reasons that follow, I would grant the Receivers directions in the form ultimately sought. As will become apparent, both the form of the relief and the extent of the relief were substantially amended during the course of the hearing.

B. PROCEDURAL HISTORY

7 The initial history of these proceedings was summarised in *Australian Securities and Investments Commission v Letten (No 3)* [2010] FCA 512 at paragraphs [1] – [2] in the following terms.

1. On 25 February 2010, the schemes numbered 1, 4 to 9 and 13 to 16 in Annexure A to these reasons for decision were wound up pursuant to s 601EE(1) of the *Corporations Act 2001* (Cth) (the **Act**). Also on 25 February 2010, Mr Damian Templeton and Mr Phillip Hennessy of KPMG (the **Receivers**) were appointed as joint and several receivers and managers of certain property of each of the second to sixteenth and eighteenth to forty-fifth defendants (the **Corporate Defendants**) and as joint and several receivers and managers of identified property of each of the schemes listed in Annexure A (**the Schemes**) except for the scheme numbered 12: *Australian Securities and Investments Commission v Letten* [2010] FCA 140 (the **25 February Orders**).
2. On 4 March 2010, Orders were made appointing the Receivers as joint and several receivers and managers of the property of the scheme defined in those orders as “the funds invested, contributed or deposited by investors for the purpose of acquiring an interest in the project known as SY21 Retail Complex Project” (the **SY21 Scheme**), being the scheme numbered 12 in Annexure A (the **4 March Orders**). The 4 March Orders also provided the SY21 Scheme be wound up pursuant to s 601EE(1) of the Act.

8 On 13 April 2010, the Receivers filed Disclosure Reports in relation to each Scheme except for Schemes numbered 6, 15 and 16. The Disclosure Reports for Schemes numbered 6, 15 and 16 were filed on 28 April 2010.

9 On 6 May 2010, Orders were made (the **6 May Orders**) requiring the Receivers to file and serve, *inter alia*:

1. draft minutes of orders relating to the proposed realisation of the property of the “Letten Property Schemes” and the “Letten Operating Business Schemes”;
2. any written submissions in relation to the realisation of the property of the Letten Property Schemes or the Letten Operating Business Schemes; and
3. any written submissions in relation to the distribution of property of the Schemes (after payment of amounts due to any Secured Lender and other priority creditors).

10 The 6 May Orders also provided that any Investor could make an application in relation to distribution of property of the Schemes. Between 17 May and 15 October 2010, submissions from 99 Investors were received. Many Investors had invested in multiple schemes. As noted earlier, the content of these submissions will be considered in further detail below.

11 On 25 May 2010, the Court granted the Receivers the power of sale in relation to the Schemes numbered 4, 5, 8, 9, 13 and 14 (*Letten (No 3)*) and, on 28 May 2010, the Court made orders about the manner in which the Receivers would initially deal with any proceeds from disposal of the assets of the Schemes numbered 4, 5, 9, 13 and 14 (*Australian Securities and Investments Commission v Letten (No 4)* [2010] FCA 571). On 4 June 2010, the Court granted the Receivers the power of sale in relation to assets of the Schemes numbered 6, 15 and 16 (*Letten (No 4)* [2010] FCA 571).

12 By order two on 30 July 2010, the Receivers were also appointed joint and several receivers and managers of identified property of five additional Schemes numbered 17 – 21 (inclusive) (the **Additional Schemes**). The Schemes numbered 19, 20 and 21 were wound up pursuant to s 601EE(1) of the Act (the **30 July Orders**). Disclosure Reports were received for the Additional Schemes on 30 August 2010.

C. HISTORY OF CURRENT APPLICATION

13 On 29 July 2010, the Receivers filed a preliminary outline of submissions about distribution of property of the Schemes. At that time, the Receivers recommended that the “scheme property” of each of the Schemes be distributed:

- (a) to creditors, via the winding up of the Letten Entities, on a company by company basis; and
- (b) to Investors, in effect, on a pooled basis.

14 On 17 September 2010, the Receivers filed proposed orders purportedly pursuant to s 601EE(2) of the Act which, in general terms, proposed:

1. the creation of a common fund into which would be contributed the surplus, after payment of certain costs, of what were described as “the proceeds of sale of each of the assets which are the subject of the Schemes”; and
2. any and all claims between the Corporate Defendants were to be satisfied upon the creation of the common fund.

15 On 5 October 2010, the Receivers filed further submissions and further proposed orders. The supplementary submissions proposed amendments to the “pooling” orders which had the effect of ensuring that any scheme property which properly belonged to third parties was not expropriated for the benefit of Investors. The power for granting the relief was amended. The amended proposed orders stated that the orders were sought pursuant to ss 424 and 601EE(2) of the Act and s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) for the creation and management of a common fund from the proceeds of sale of each of the assets which are the subject of Schemes, net of what were described as “priority receivership costs”, any liabilities which are secured by a Scheme asset and the amount of trust creditor claims in respect of the relevant Corporate Defendant (if any) in respect of which the relevant Corporate Defendant has a right of indemnity and lien. “Priority receivership costs” and “trust creditor claims” were defined terms.

16 Prior to the hearing, the Court requested that the Receivers consider the form of relief sought in light of the decision of Austin J in *Australian Securities Investments Commission v Tasman Investment Management Ltd* (2006) 202 FLR 343 at [27] – [32] (citing McLelland J in *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674) where His Honour stated:

30. By analogy, it seems to me probable that, whether or not s 601EE(2) permits the court to make binding orders about entitlements in a form that affects third parties, the court is likely to prefer to make directions having the limited effect described by McLelland J. There are several consequences of doing so. One is that the rights of claimants to the scheme funds distributed on winding up will be unaffected by the court’s directions, except in one limited respect. The limited impact on claimants’ rights is this: if the court directs that the receiver would be justified in implementing a scheme of distribution, after full and fair disclosure of the material facts has been made, and the receiver complies with the court’s directions, the receiver will be protected from liability for any alleged breach of duty as receiver, to a creditor or beneficiary of the scheme, for anything done in accordance with the direction. *It will therefore remain open to anyone who disagrees with the distribution sanctioned by the*

court to take proceedings to seek to recover the alleged overpayment. This is important in the case of the winding up of a managed investment scheme, in contrast with the winding up of a company, because the winding up does not lead to the dissolution of any of the entities that conducted the scheme and might subsequently be defendants in an action by an aggrieved investor or scheme trustee.

31. Another consequence of the court confining itself to directions in limited form is that the application may be dealt with by a relatively informal procedure analogous to the procedure on an application by a trustee for judicial advice or an application by a liquidator for directions. In *HIH Casualty & General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2004) 51 ACSR 21, Barrett J observed (at [18]) that, where a liquidator applies for directions under s 479(3), the practice is for the applicant to place before the court a statement of facts identifying the particular matter upon which directions are sought. The court makes its decision on the basis of the facts presented to it by the liquidator, and if they are not presented fully and fairly, the liquidator loses the protection that would otherwise apply to conduct undertaken in accordance with the court's direction.

(Emphasis added.)

17 The form of the relief sought, and the consequences of the form of that relief, are important. As Austin J made clear, if any person or entity has a *provable* legal or beneficial interest in a particular asset of a scheme or schemes, then it is open to that person or entity to commence proceedings to seek to recover that interest. The orders initially proposed by the Receivers did not achieve that objective.

18 When the matter was called on for hearing, the Receivers informed the Court that the relief sought would be amended to be limited to directions. Counsel for the Receivers was asked to list the entities and persons the Receivers considered might be affected by pooling. At that time, the list included the following entities and persons:

	Person or Entity	Person(s) potentially affected
1	Schemes wound up pursuant to s 601EE(2) of the Act: Schemes numbered 1, 4 to 9, 12 to 16 and 19 to 21 in Attachment A.	Joint Venture investors Equity deposit bond holders Equity mortgage investment investors
2	Schemes not wound up because they were not operating: Schemes numbered 2, 3, 10, 11, 17 and 18 in Attachment A.	Joint Venture investors
3	Corporate Defendants	Creditors

	Person or Entity	Person(s) potentially affected Secured Lenders
4	LGH Administration Pty Ltd (LGHA)	Project Reserve Bondholders “War Chest” investors
5	The LGH Family Trust	Beneficiaries

19 As is apparent, contrary to the Receivers’ amended proposed orders that had been provided to the Court on 5 October (see [15] above), the Court’s power to make the pooling direction in relation to each category listed in [18] above could not be ss 424 and 601EE(2) of the Act and s 23 of the FCA. To take just one example, s 424 of the Act is concerned with the ability of a controller of property of a corporation to apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller’s functions and powers as controller. It is doubtful whether that section applies to receivers appointed to property of managed investment schemes: see *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd* (2002) 42 ACSR 240.

20 On the second morning of the hearing, the Receivers filed two documents: “Further Revised Proposed Minutes of Orders” and a Summary of Investments, Entities and Persons which were affected by the pooling direction sought. The matter was stood down to enable the parties and the Court to review the Receivers’ revised position. A number of significant changes had been made. First, the purported power to grant the directions was expanded to include s 57 of the FCA as well as s 23 of the FCA and s 601EE(2) of the Act. Reliance on s 424 of the Act was eschewed. Secondly, the definition of priority receivership costs was amended. Thirdly, and no less significantly, the revised proposed minutes of orders included, for the first time, a proposed order that the pooling direction would not “affect the rights of any person to claim that they have, or any other person has, an entitlement to distribution from an asset of a Scheme or a [Corporate Defendant] ... which differs from the distribution which they would receive” pursuant to the pooling direction.

21 Finally, the Receivers’ application for directions that the Receivers were justified in pooling was now limited to categories (1), (2) and (3) (see [18] above), namely the assets of the Schemes and the Scheme property (if any) held by of the Corporate Defendants. The Court’s

power to make such a direction was said to be s 601EE(2) of the Act. For the reasons set out in *Australian Securities and Investments Commission v Letten (No 1)* [2010] FCA 140 at [19] to [23], I expressed the view at that time that s 601EE(2) of the Act was not applicable to those Schemes which were not operating, namely category (2) in [18] above (the **Concluded Schemes**). After the hearing, the Receivers filed further submissions seeking to explain the basis on which the Court was entitled to make a direction concerning pooling for the Concluded Schemes and the Scheme property held by the Corporate Defendants. Those submissions contended that the basis for the directions was:

1. s 1323 of the Act or alternatively, ss 23 and 57 of the FCA and O 26 r 7 of the *Federal Court Rules* in relation to the Concluded Schemes; and
2. s 601EE(2) and s 1323 of the Act or alternatively, ss 23 and 57 of the FCA and O 26 r 7 of the *Federal Court Rules* in relation to the property of the Corporate Defendants which is property of the Schemes.

The Receivers also filed “Further Revised Proposed Minutes of Order” to reflect that submission.

22 The remaining issues to be considered are addressed under the following headings:

- D. Relevant factual findings;
- E. Court’s power to make pooling directions and the relevant legal principles;
- F. Legal Framework for the Method of Distribution;
- G. Submissions for and against pooling;
- H. Analysis and Conclusion.

D. RELEVANT FACTUAL FINDINGS

23 At the outset, it must be noted that the following factual findings are primarily based on the current state of the Receivers’ investigations into the Schemes. Whilst the Receivers informed the Court that they had placed before the Court all the facts within their knowledge, there are apparent gaps in the facts. Undoubtedly, there are other errors and omissions which are not so apparent. The following factual analysis is primarily extracted from the Disclosure Reports prepared by the Receivers (see [8] and [12] above).

24 Because the issues to be decided and the facts that bear on those issues are complicated it is important to set out a summary of the principal points that are to be made in the balance of these reasons.

25 The Schemes to which the Receivers have been appointed have not all been wound up: see [21] above. Those Concluded Schemes which are no longer operating cannot be wound up.

26 Investors and creditors have claims which they would seek to make against the “Schemes”. But the “Schemes” have no separate legal personality: *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339 at [20]. Because of the way in which Mr Letten and companies associated with him (including the Corporate Defendants) conducted the Schemes, it is not possible to say now what are the net assets of any Scheme. There appear to have been so many inter-scheme transactions that it is not possible to say what assets were acquired by what scheme using whose money.

27 The Receivers initially sought to have the Court decide how the assets they hold should be applied. Ultimately, the Receivers sought directions that a particular course of action could be followed. That course of action would allow claimants to prove their claims to particular assets or against particular entities or assets, but then permit the Receivers to proceed to apply what remained after those claims were determined rateably among all remaining claimants.

(1) DESCRIPTION OF THE SCHEMES

28 There are 21 Schemes: see Attachment A to these reasons for decision. Each Scheme was or is a separate unregistered managed investment scheme in which it appears that investors contributed money as consideration to acquire rights to benefits intended to be produced by the acquisition of a particular asset or assets. At the time of preparing the Disclosure Reports, the Receivers estimated that 916 Investors invested in the Schemes in the period from 1998 to 2009.

29 The form and timing of the investment in each Scheme was not consistent within Schemes or between Schemes. Some investors executed joint venture agreements. Other investors bought or invested in what were described as “equity deposit bonds” or “equity mortgage investments”. Others appear to have contributed money to the Scheme without executing any documentation. Other investments occurred by way of “rollovers” from other

Schemes. Some investors invested after the asset was bought. Others invested before the asset was acquired. Some investors fall into more than one of these categories. The varying forms of investment are complicated further by the fact that many Schemes received contributions through a combination of these methods.

30 I will deal with each Scheme in the order in which they appeared to have occurred.

1998 – Scheme 15 – Yarra Valley Golf Joint Venture

31 The Yarra Valley Golf (YVG) Joint Venture was the first of the Schemes established by Mr Letten and the group of companies collectively defined as the “Letten Entities”, being LGH Administration Pty Ltd, the tenth defendant (**LGHA**), LGH Finance Pty Ltd, the 11th defendant (**LGHF**) and LGH Holdings Ltd, the second defendant (**LGHH**). It is undoubtedly the most complicated of the Schemes. As will become apparent, investments in the YVG Joint Venture occurred in a variety of ways to a variety of entities and sub-entities, the details of which, taken at their highest, are a vague, and often inaccurate, reflection of the actual investment.

32 In *Letten (No 4)*, the YVG Joint Venture was summarised as follows:

[20] The Disclosure Report identifies the property of the scheme numbered 15 as the Heritage Golf Club and Country Club, Corner of Hughes and Yarraview Roads, Chirnside Park, Victoria (the **YVG Property**). The YVG Property is described by the Receivers as follows:

The ... property is situated within the Heritage Golf Club and Country Club Complex. This includes residential, hotel, day spa, conference and golf facilities (albeit these have different owners).

The ... property comprises the two golf courses (St John & Henley), clubhouse, residential development land and 92% of the shares in HGCC Pty Ltd. HGCC Pty Ltd in turn operates the Heritage Golf Club and Country Club (an unincorporated association). The St John course is subject to a lease to HGCC Pty Ltd. It was originally intended that a similar lease be provided to HGCC Pty Ltd once the subdivision of the relevant land occurs.

[Yarra Valley Golf Pty Ltd] is responsible for the day to day management of the golf operations and the development, marketing and sale of the residential land. The hotel operations including conference and day spa facilities are not owned by [Yarra Valley Golf Pty Ltd].

[21] The Disclosure Report set out the “key” steps and processes by which the project was established. For present purposes, it is sufficient to note that the Receivers stated that:

The investor funding for the development of [Yarra Valley Golf Pty Ltd] has been sourced from many different investors and in different forms over a long period of time and as such may constitute separate schemes.

There are a number of issues which make it difficult to identify the scheme property for each of the schemes. These include:

- The fact that a number of [Joint Venture Agreements] appear to relate to the same physical assets (even though different corporate managers were appointed pursuant to the [Joint Venture Agreements]).
- Any separate schemes are effectively ‘cross collateralised’ as the secured finance in relation to [Yarra Valley Golf Pty Ltd] has not been quarantined to particular assets of the schemes.
- The substantial number of investors who invested in various aspects of the [Yarra Valley Golf Pty Ltd] development.

On any view, the arrangements are complicated. So, for example, the initial source appears to have been provided in the mid 1990’s with the creation of a partnership and the acquisition of the St John and Henley land. The current status of that partnership is an issue which remains unresolved.

33

As noted in *Letten (No 4)*, the initial source of funds for YVG was raised by way of a partnership between what the Receivers identified as “a small group of largely sophisticated investors” (the **original partners**). The original partners entered into a partnership agreement in July 1996 with FBN Property Pty Ltd (a Letten related entity), Keywear Pty Ltd and Yarra Valley Golf Pty Ltd, the 21st defendant (described in the partnership agreement as the “manager”). According to the partnership agreement, the purpose of the partnership was “the acquisition of the Land, the development of the Land and the Heritage Golf & Country Club thereon and the sale or lease of the Land and the development thereon”. The “Land” was described as “the land in Yarra Valley known as the St John of God land and the Henley Farm land and such other land acquired by the Partnership for the purposes of the Partnership”. In the 1995 to 1997 financial years, the original partners collectively invested approximately \$6.9 million.

34 On 25 July 1997, Mr Letten wrote to the original partners advising that the project was facing significant challenges and that an administrator would need to be appointed to the project in the absence of both significant additional equity and an equity restructure. According to the Receivers, Mr Letten subsequently converted the original partners' investment into an interest bearing loan in the name of LGHA. Certain original partners have been repaid a portion of their investments but the Receivers are unaware of the specific terms surrounding the repayments other than that they occurred at the direction of Mr Letten. The Receivers do not treat the investments by the original partners as part of the current application or part of the Scheme.

35 Investments in the YVG Joint Venture the subject of the 25 February Orders fell into a number of categories:

1. those who invested in the joint venture, of which there were two subcategories being (a) direct joint venture investors and (b) indirect joint venture investors; or
2. investments which fell outside of the joint venture but which the Receivers categorised as investments in "sub-schemes" of the YVG Joint Venture. Within this category there were two subcategories being (a) equity deposit bonds and (b) an equitable mortgage in what is defined as "The Sebel Heritage Lodge Investment Stage 2".

Direct Joint Venture Investors in Yarra Valley Golf

36 In the financial years ended 30 June 1998, 1999 and 2000, approximately \$18 million was raised for the YVG Joint Venture from those the Receivers defined as "direct joint venture investors". The Receivers identified the nature of the direct joint venture investments as follows:

- Investors entered into [Joint Venture Agreements] pursuant to which each of the investors invested in a project which was described in the [Joint Venture Agreements] only as 'The Heritage Golf & Country Club';
- pursuant to the joint venture agreements, a number of corporate managers were appointed ..., the assets of the joint venture were to be held on trust for investors by the relevant corporate manager and investors were to beneficially own any profits and be liable to contribute any losses or liabilities of the joint venture in proportion to their investments;
- [the Receivers] have not been able to identify the existence of any documented arrangements between the corporate managers and YVG in relation to the direct joint venture investments;

- it does not appear that any joint venture assets were actually directly held by the relevant corporate managers (i.e. no land was registered in their names) and it appears that all direct investors funds were deposited with YVG ... We have not verified whether the funds raised from Investors were deposited directly with YVG or deposited initially with LGHA then deposited with YVG.

37 The “screed” (as the Receivers described it), or promotional material distributed to potential investors, for the direct joint venture investments in the financial years ended 30 June 1998 and 1999 (defined by the Receivers as **direct JV #1** and **direct JV # 2** respectively) was identical in both years: the project was identified as “The Heritage Golf & Country Club Project”. In the joint venture agreements themselves, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Heritage Golf and Country Club* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

38 For direct JV #1, there were five identified managers. Only one joint venture agreement between an investor and a manager was produced by the Receivers. The phrase “Heritage Golf and Country Club” was not defined. “Interest” was defined as a “share or interest in the investment known as S10 HGCC Investment”.

39 For direct JV #2, there were six identified managers. Example joint venture agreements were produced for all six managers. The recitals were identical to that in the JVA for direct JV#1. Also like the joint venture agreement for direct JV#1, “Heritage Golf and Country Club” was not defined. Unlike direct JV #1, “Interest” was defined as a “share or interest in the investment known as ‘The Heritage Golf and Country Club’”.

40 The screed for the direct joint venture investments in the financial year ended 30 June 2000 (**direct JV#3**) specifically identified the investment opportunity as the “S10” site of the Heritage Golf and Country Club. There were six identified managers of direct JV#3. Example joint venture agreements were produced for all six managers. The recitals were identical to that in the JVA for direct JV#1 and direct JV#2. Like the other two direct joint venture investments, “Heritage Golf and Country Club” was not defined. “Interest” was defined in all agreements as “a share or interest in the investment known as ‘S10 HGCC Investment’”.

41 The Receivers identified 581 direct joint venture investors, of which 546 are still active. Under the relevant joint venture agreements, direct joint venture investors were not entitled to annual distributions during the life of the project. Distributions were not paid to direct JV investors.

42 The following chart summarises the number of direct joint venture investors who initially contributed funds to one of the entities and also identifies the total investor contribution (as reflected in the YVG Disclosure Report and subsequent submissions of the Receivers):

Form of Investment	Entity (JV Manager)	\$ Raised by investors (net)	No. of Investors (Active)	LGH takeover/ buyout of investor	Distributions	Total investor contribution \$
Direct JV #1	Adina Rise Pty Ltd (22 nd Def)	\$3,919,000	48	(\$702,000)	-	\$3,217,000
	Hallmark Corporation Pty Ltd (32 nd Def)	\$220,000	6	(\$8,000)	-	\$212,000
	Norton Ridge Pty Ltd (34 th Def)	\$813,000	5	(\$200,000)	-	\$613,000
	Tulloch Downes Pty Ltd (41 st Def)	\$1,595,800	7	-	-	\$1,595,800
	Virtual Mlmer Pty Ltd (39 th Def)	\$526,000	4	(\$45,000)	-	\$481,000
Direct JV #2	Albright Investments Pty Ltd (23 rd Def)	\$1,713,965	40	(\$157,500)	-	\$1,556,465
	Bradfield Corporation Pty Ltd (25 th Def)	\$1,079,000	36	(\$108,000)	-	\$971,000
	Devlin Way Pty Ltd (27 th Def)	\$1,069,500	36	(\$135,000)	-	\$934,500
	Glenvale Way Pty Ltd (30 th Def)	\$1,153,000	48	(\$32,000)	-	\$1,121,000
	Moorleigh Holdings Pty Ltd (33 rd Def)	\$2,495,500	31	(\$350,000)	-	\$2,145,500
	Raleigh Glen Pty Ltd (35 th Def)	\$97,500	5	-	-	\$97,500
	Sutton Rise Pty Ltd (38 th Def)	\$690,000	43	-	-	\$690,000
Direct JV #3	Ashfield Rise Pty Ltd (24 th Def)	\$576,000	42	(\$15,000)	-	\$561,000
	Copeland Enterprises Pty Ltd (24 th Def)	\$813,000	41	(\$12,000)	-	\$801,000
	First Hazelwood Pty Ltd (28 th Def)	\$740,000	39	(\$55,000)	-	\$685,000
	Greenview Lane Pty Ltd (31 st Def)	\$600,000	39	(\$70,000)	-	\$530,000
	Suri Corporation Pty Ltd (37 th Def)	\$1,419,805	37	(\$195,000)	-	\$1,224,805
	Tivendale Pty Ltd (40 th Def)	\$500,000	39	(\$5,000)	-	\$495,000

Indirect Joint Venture Investors in Yarra Valley Golf

43 As a result of a tax audit conducted by the Australian Taxation Office (the circumstances of which are not relevant to the present application), Mr Letten determined not to introduce any further direct joint venture investments to the YVG Joint Venture. As an alternative, funds were raised by LGHA through the use of what the Receivers describe as “sub joint venture entities” and the funds were “injected to YVG”. The Receivers define this group of investors as “indirect joint venture investments”.

44 The Receivers summarised the nature of the indirect joint venture investments as follows:

- Investors entered into joint venture agreements pursuant to which each of the investors appears to have intended to invest in a particular aspect of the YVG development ...
- pursuant to the joint venture agreements, a number of corporate managers were appointed, the assets of the joint venture were to be held on trust for investors by the relevant corporate manager and investors were to beneficially own any profits and be liable to contribute any losses or liabilities of the joint venture in proportion to their investments;
- [the Receivers] have not been able to identify the existence of any documented arrangements between the corporate managers, LGHA and YVG in relation to the indirect joint venture investments;
- it does not appear that any joint venture assets were actually held by the relevant corporate managers and it appears that all investor funds were paid directly to LGHA.

45 There were six indirect joint venture investments identified by the Receivers.

46 The manager of the first indirect joint venture was Allblue Pty Ltd, the 44th defendant (**Allblue**). However, exactly which project Allblue was said to be managing was not clear. For instance, the Receivers state in their report that Allblue was the designated manager for “Yarraview 1 and 2”. However, the joint venture agreements produced to the Court for Allblue referred to the project as “St Johns East House & Land Subdivision”, which the Receivers acknowledge is a different (closed) joint venture. St Johns East House & Land Subdivision was not defined in the joint venture agreements for Allblue. The screed that the Receivers produced as being the relevant screed for Allblue does not in fact mention Allblue, and relates to the St John’s East Land Subdivision, not Yarraview.

47 The manager for the second indirect joint venture investment identified by the Receivers for YVG was Aranbay Pty Ltd, the 45th defendant (**Aranbay**). Aranbay is stated by the Receivers to be the designated manager for “Henley Golf Course Funding”. No screed or promotional material for Aranbay was produced by the Receivers. The joint venture agreement for Aranbay notes that the “Project” for investors in Aranbay was the acquisition of an interest in the “Henley Golf Course Project”. “Henley Golf Course Project” was not defined.

48 The manager for the third indirect joint venture investment identified by the Receivers for YVG was Topglen Pty Ltd, the 43rd defendant (**Topglen**). Like Allblue, it is difficult to identify which project Topglen was in fact managing. The Receivers submitted that Topglen was the manager of a project described as “Henley House”. However, the screed produced by the Receivers to the Court, and the joint venture agreement, refer to the Topglen project as “Yarraview”. The screed appears to have been prepared by LGHH and does not mention Topglen. Further, in the relevant joint venture agreement, “Yarraview” is not defined.

49 The manager for the fourth indirect joint venture investment identified by the Receivers was Maining Pty Ltd, the 42nd defendant (**Maining**). The Receivers submitted that Maining was the designated manager for a project known as “Botanica Stage 3 funding”. Again, details of this project are scant. The Receivers produced a screed entitled “Stage 3 Real Estate Joint Venture at the Heritage Golf & Country Club” which they submitted “seems to relate to stage 3”. The document was prepared by Mr Letten “for the manager of the Joint Venture”, but does not identify Maining as the manager. The joint venture agreement between the investors and Maining identified the project as “Stage 2A Real Estate at Heritage Golf & Country Club” but, like the other joint venture agreements, does not otherwise provide a definition.

50 The manager for the fifth indirect joint venture investment was LGHH and related to a project known as “Sebel Heritage Lodge Investment Stage 2”. No joint venture agreement was produced to the Court for the fifth indirect joint venture investment. The relevant screed produced by the Receivers provides:

[YVG] will develop the new 32 Suites in Stage 2 of the Sebel Heritage Lodge. Glenbelle Pty Ltd (the Owner of the present conference facilities) will develop and retain the new Conference space.

The Joint Venture Participant will develop and own the new Hotel Suites with [YVG] (until the Joint Venture decides to sell them to third party buyers see risks). The Joint Venture Participant will fund their involvement in the Joint

Venture via funds held from the sale of Stage 1 of the Sebel Heritage Lodge Rooms.

...

[YVG] has decided to use a Joint Venture structure for this project. The Joint Venture will be represented by a specific purpose Management Company. This company will not act as Manager for any other current Joint Venture. Please note that the Manager will be a company associated with both [YVG] and [LGHH].

As is apparent, the screed was not accurate. The manager was not “a company associated” with LGHH, but LGHH itself. Further, notwithstanding the statement in the screed that the management company would not act as a manager for any other current joint venture, LGHH was in fact a manager for many other joint ventures.

51 Finally, the manager for the sixth indirect joint venture investment was also LGHH and concerned a project known as “Augusta”. There was no screed or joint venture agreement produced for the Augusta project.

52 Under the relevant joint venture agreements produced to the Court, investors in the indirect joint ventures were not entitled to receive annual distributions during the life of the project. However, investors were paid annual distributions by LGHA. At the direction of Mr Letten, these distributions ceased in September / October 2008. The total distributions paid to indirect joint venture investors was \$9.4 million.

53 The following chart summarises the number of indirect joint venture investors who contributed funds to one of the entities, the project identified for that investment and the distributions (as reflected in the YVG Disclosure Report and subsequent submissions of the Receivers):

Form of Investment	Entity (JV Manager)	Project identified by the Receivers	\$ Initially Raised by investors	\$ return on investment/ transfer	No. of Investors (Active)	Distributions
Indirect JV #1 (Phases 1 and 2)	Allblue (44 th Def)	Yarraview 1&2	\$1,415,065 initially raised \$124,266 subsequently invested	-	21	\$224,114
Indirect JV #2	Aranbay (45 th Def)	Henley Golf Course Funding	\$5,195,083 initially raised \$495,090 subsequently invested	(\$233,500) returned	104	\$2,967,078

Form of Investment	Entity (JV Manager)	Project identified by the Receivers	\$ Initially Raised by investors	\$ return on investment/ transfer	No. of Investors (Active)	Distributions
Indirect JV #3 (Phases 1 and 2)	Topglen (43 rd Def)	Henley House	\$1,060,363 initially raised \$59,725 subsequently invested	(\$18,000) returned (\$65,330) transferred	17	\$247,788
Indirect JV #4 (Stage 1 and 2)	Maining (42 nd Def)	Botanica Stage 3	\$7,906,059 initially invested \$1,466,588 subsequently invested	(\$1,704,063) returned (\$1,322,628) transferred	85	\$2,847,688
Indirect JV #5	LGHH (2 nd Def)	Sebel Heritage Lodge Investment Stage 2	\$5,440,125 initially invested \$99,416 subsequently invested	(\$2,524,950) returned (\$333,100) transferred	48	\$1,050,830
Indirect JV #6	LGHH (2 nd Def)	Augusta	\$5,490,328 initially raised \$625,987 subsequently invested	(\$270,570) returned	70	\$872,359

54 As noted above, funds were raised by indirect joint venture investors for the purpose of undertaking specific projects at YVG. The “Yarraview 1 & 2” and “Augusta” projects have still not commenced and the Receivers were informed by Mr Letten that those funds were paid to LGHA. The Receivers were also informed by Mr Letten that the indirect investor funds were contributed to the YVG Joint Venture via an LGHA working capital loan. The Receivers have been unable to ascertain the monthly movements in the working capital loan and therefore, as at the date of preparing their Disclosure Report, were unable to confirm whether the funds raised by indirect joint venture investors were used for their intended purpose or whether they were even invested by LGHA in the YVG Scheme.

Equity Deposit Bonds in Yarra Valley Golf

55 The Receivers identified a number of investors’ contributions to the YVG Joint Venture were made pursuant to “Equity Deposit Bonds”. At the time of preparing the Disclosure Report for the YVG Joint Venture, the Receivers were unable to locate any formal documentation for the Equity Deposit Bonds. Prior to the hearing, the Receivers were only able to locate a limited number of screeds in relation to YVG Equity Deposit Bonds. In addition to the material produced by the Receivers, ASIC produced further information it received from Mr Letten concerning the Equity Deposit Bonds. Equity deposit bonds were apparently issued in relation to YVG in 2003 (**Equity Deposit Bond 2003**), May 2005 (**Equity Deposit Bond 2005**) and May 2007 (**Equity Deposit Bond 2007**).

56 The screed for Equity Deposit Bond 2003 (as produced by the Receivers) stated:

This investment replaces the Heritage Equity Mortgage & HGCC Deposit Bond Investments.

We are rolling over the Investors from these two investments to allow them a continuity of investment plus a staged repayment program which will provide an excellent ongoing income plus capital gain.

The basis of the new arrangement is as follows:

- Investment period is 24 months from rollover date.
- Interest rate on the investment is 7.5% per annum payable monthly and to be adjusted as per the capital repayments (see below).
- The capital gain for the 24 month period is 15% fixed on the original rollover amount invested, irrespective of the receipt of the partial capital repayments over the life of the investment.

...

Neither the property nor the joint venture manager is identified in the screed, although the material was published by LGHH.

57 According to ASIC, in course of their examination of Mr Letten pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth), Mr Letten stated to ASIC that the “Heritage Equity Mortgage”, the “HGCC Deposit Bond Investments” and the “Equity Deposit Bond” investments were the same project, with funds being rolled over from time to time and related to the YVG Joint Venture.

58 The Equity Deposit Bond 2005 replaced the Equity Deposit Bond 2003. The documents produced by ASIC and the Receivers concerning the Equity Deposit Bond 2005 were inconsistent. The screed produced by ASIC, which they state was provided by Mr Letten, identified the properties that Equity Deposit Bond 2005 related to as (1) 49 Mitchell Road, Brookvale, New South Wales (2) Patterson Street, Launceston, Tasmania and (3) Nicholson Street, Brunswick, Victoria. Only one of those properties (Nicholson Street) is in these proceedings, and according to Mr Letten the former two relate to concluded joint venture projects. The screed produced by the Receivers bore the same date as the screed produced by ASIC, but did not identify any property. Both of the screeds produced for the Equity Deposit Bond 2005 do not identify the joint venture manager.

59 According to ASIC, although the material they had been provided stated that the investment related to the three properties identified at [58] above, Mr Letten informed ASIC that all of the investments related to the YVG Joint Venture and that LGHH was the manager of these investments.

60 ASIC also produced a joint venture agreement for the Equity Deposit Bond 2005. That agreement identified LGHH as the manager. “Equity Deposit Bond 2005” is not defined in the joint venture agreement.

61 The screeed for the Equity Deposit Bond 2007 provided that the project replaced the Equity Deposit Bond 2005. Neither the property nor the joint venture manager related to the Equity Deposit Bond 2007 investment was stated in the screeed.

62 The following chart summarises the number of investors who contributed funds via the Equity Deposit Bonds, the amount invested, and any distribution (as reflected in the YVG Disclosure Report and subsequent submissions of the Receivers). As the amounts were rolled over from one phase to the next, only the total amount is listed:

Form of Investment	Entity (JV Manager)	No. of Investors (Active)	\$ Initially Raised by investors	\$return on investment / transfer	Distributions
Equity Deposit Bonds (2003, 2005 and 2007)	Unknown (presumably LGHH)	33	\$3,357,840 initially raised \$262,675 by subsequent investment	(\$1,153,010) returned (\$181,723) transferred	\$985,709

Sebel Heritage Lodge Investment Stage 2 – Equity Mortgage

63 In addition to the fifth indirect joint venture managed by LGHH concerning the project known as “The Sebel Heritage Lodge Investment Stage 2”, the Receivers also identified an equity mortgage investment in which a Mr Geoff Mitchell invested. According to the equity mortgage investment screeed, the equity mortgage investment concerned a \$15,000 investment with 10% interest per annum payable monthly secured by a “1st Registered Mortgage over the property known as ‘S13 and S14,’ which is located next to the Sebel Heritage Lodge Site”. The documents produced by the Receivers concerning the equity mortgage investment indicated that on 22 May 2003 Mr Mitchell was offered the opportunity to roll his funds into a new investment, an Equity Deposit Bond. Those documents also contain an (undated) Equity Deposit Bond in the name of Mr Mitchell and his wife. According to the YVG Disclosure

Report, Mr and Mrs Mitchell rolled over their investment (which by this time was \$25,000) into an Equity Deposit Bond on 16 June 2003. It is unknown whether there are any other investments in YVG by way of these kind of “equity mortgage” arrangements.

64 A consolidated cash flow statement prepared by the Receivers reveals that there was approximately \$155,158,000 of capital expenditure expended on the Scheme. The Disclosure Report for the YVG Joint Venture records that a substantial proportion of this capital expenditure was land and development costs and plant and equipment. The Receivers were unable to identify the source of the funds for the capital expenditure. The capital expenditure significantly exceeded the surplus generated through the residential and land sales (\$106,478,000) and, as already identified, cannot be traced to the funds contributed by the investors. It is likely that funds were sourced from other Schemes.

1999 – Scheme 18 – Aurora Park Project

65 The Aurora Park Project Scheme was a Concluded Scheme. It was not wound up on 30 July 2010. At the time of the appointment of the Receivers, there were no secured creditors and the previous property of the Scheme – the subdivision and development of the site located at 443-447 Warringah Road, Frenchs Forest in New South Wales – had been sold.

66 The property had been owned by Tilley Lane Pty Ltd, the 47th defendant (**Tilley Lane**). However, the subdivision and development of certain lots appears to have been undertaken through different entities, namely:

Lot Number	Entity (joint venture manager)
Lots 9 and 13	Tobago Holdings Pty Ltd, the 54 th defendant (Tobago)
Lot 9 (said to be a different lot)	Maywood Investments Pty Ltd, the 51 st defendant (Maywood)
Lot 8	Sagebay Pty Ltd, the 53 rd defendant (Sagebay)
Lots 2-7 and 10-12	Acetrain Pty Ltd, the 52 nd defendant (Acetrain)

The Receivers are not aware of any documentation which records the arrangements between these entities and Tilley Lane. The Receivers have concluded that there were probably separate schemes relating to the four separate entities.

67 Investors in the Aurora Park Project invested by a number of mechanisms:

1. execution of a joint venture agreement;
2. roll over from another Scheme;
3. payment of funds without the execution of a joint venture agreement or any other document;
4. investing in the ABC Equity Mortgage Investment.

68 Regardless of the mechanism through which they invested, the investors paid the funds directly to LGHA and not to the Scheme or sub-scheme. LGHA may be understood to have performed a central treasury function on behalf of Tilley Lane and each of the joint venture managers.

69 The following chart summarises the number of investors who initially contributed funds to one of the entities and the method or methods of investment and also identifies the number and value of the remaining investors:

Lot Nos	Entity	\$ Initially Raised	Initial No. of Investors	Form of Investment	Return of investment	Distributions	Outstanding Number of investors and \$
Lots 9 and 13	Tobago (54 th Def)	\$3,940,080 \$1,833,802 (subsequent investment)	115	Joint Venture Agreement No documentation signed ABC Equity Mortgage Investment	(\$5,146,882)	\$2,521,856	9 investors (\$627,000)
Lot 9 (said to be a different lot)	Maywood (51 st Def)	\$2,005,000 \$80,000 (subsequent investment)	29	Joint Venture Agreement No documentation signed	(\$160,000)	\$735,267	26 investors (\$1.93m)
Lot 8	Sagebay (53 rd Def)	\$2,103,000	41	Joint Venture Agreement No documentation signed	(\$2,103,000)	\$376,097	Nil
Lots 2-7 and 10-12	Acetrain (52 nd Def)	\$2,681,400 \$325,000 (subsequent investment)	45	ABC Equity Mortgage Investment	(\$2,855,400)	\$924,394	4 investors (\$151,000)

70 The screed and the joint venture agreements were defective and inconsistent. For instance, the screed for each of the investment opportunities (Tobago, Maywood, Sagebay

and Acetrain) offered two types of return for investors; a yearly income from the respective property payable monthly and a capital return payable on the sale of the property. However, although the joint venture agreements produced by the Receivers only provided for the latter (a capital return), as can be seen from the table in [69] above, the investors are recorded as having received periodic payments. Further, as in many other of the joint venture agreements, the recitals identified the particular project, for example “Lot 9 Aurora Business Park Project” as “hereinafter defined”, but it was not defined.

71 In the case of the ABC Equity Mortgage Investment, copies of the relevant screeds and investment certificates which the Receivers had been able to locate were produced to the Court. The investment certificate was entitled “ABC Equity Mortgage Investment Version 2002” and provided:

- Interest Rate:** 7.5% per annum – payable monthly.
- Investment Term:** Estimated to be 2 years from 15 August 2002, due for maturity on 15 August 2004. The investment term is related to Stage 2 of the ABC Site.
- Investment Return:** It is estimated that the profit return on 15 August 2004 will be 18% of the initial investment.

The document attached to the certificate did not define “Stage 2 of the ABC” but otherwise provided:

... The balance of the subdivision is owned by LGH and comprises Lots 1 to 8 and Lots 10 to 12 ...
LGH is in the process of developing these sites. We are offering investors the opportunity to participate with us in the holding and development of these sites.

The Investment is as follows:

- Investors contribute \$1,200,000 to the ABC Equity Mortgage Version 2002 secured by an unregistered mortgage over the site.
- The investment is for 2 years and will complete on the 15/08/2004.
- LGH recognises the importance to Investors of monthly income on their investments. Therefore in this regard the investment will pay income of 7.5% per annum for the 2 years payable on a monthly basis.
- At the end of the 2-year period the Investor will receive a profit share payment of 18%.

- Therefore for the 2-year period their income and capital gain will equate to 16.5% per annum.

72 As the table at paragraph [69] above reveals, payments were made to investors over the life of the Scheme in the form of distributions (\$4.56 million in total) and a return to investors upon leaving the Scheme or transferring to another Scheme (\$10.26 million). According to the Receivers, there has been a net overall “overpayment” to investors in the Scheme of \$2.3 million, notwithstanding that there is still approximately \$2.7 million said to be owing to certain investors. The Receivers submitted that the overpayments appear to have been funded by LGHA and / or other Schemes.

73 At day one, the deficit for the Aurora Park Scheme of approximately \$2,198,000 (as a result of the initial acquisition of property) was funded by LGHA. The Receivers submitted that it was not clear whether LGHA had the resources to undertake the transaction and that it was likely that investor funds from other Schemes were used.

74 Further, the consolidated cash flow statement prepared by the Receivers reveals that the Scheme had incurred an overall deficit of \$2,265,000. Contributing to that deficit was approximately \$2,923,000 of capital expenditure in relation to the Scheme, in addition to \$6,325,000 expended on the purchase of property. Notwithstanding these expenses and the overall deficit, distributions were made to investors. The Receivers were unable to identify the precise source of funds for the capital expenditure and other expenses and, as already identified, the expenses cannot be traced to funds contributed by investors. It is likely that funds were sourced for the various projects from other Schemes.

2000

(1) Scheme 1 – 211 Wellington Road Joint Venture

75 The Scheme was wound up on 25 February 2010. At the time of the appointment of the Receivers, there were no secured creditors and the Scheme asset – 211 Wellington Road, Mulgrave, Victoria – had been sold.

76 Investors in the 211 Wellington Road Scheme invested by a number of mechanisms. The form of investment fell into two broad groups – those who invested in the joint venture

(approximately 117 investors) and those who invested through what were described as Equity Deposit Bonds (approximately 58 investors).

77 LGHA may be understood to have performed a central treasury function on behalf of this Scheme. LGHA collected all receipts from any debt and / or investment raising undertaken by the Scheme. LGHA also funded distributions paid to the investors (see [82] below) and settled some amounts owing to third party suppliers / financiers on behalf of the Scheme.

78 For the joint venture investors, 60 of the 117 investors executed joint venture agreements, 5 had investments rolled over from another scheme, and up to 52 invested without executing a joint venture agreement. The joint venture agreements for 211 Wellington Road Scheme, where they exist, are vague. The manager of the joint venture agreement was 211 Wellington Road Pty Ltd, the third defendant. Unlike many other joint venture agreements, “Interest” is defined as a “share or interest in the *property* (rather than the Project) located at 211 Wellington Road”. The screed for the Scheme offered two types of return for investors; an “income” return at an estimated annual rate of 8% payable monthly and a capital return to be paid upon sale of the joint venture asset and termination of the joint venture. However, although the joint venture agreements produced by the Receivers only provided for the latter (a capital return), the investors received periodic payments.

79 The Receivers produced to the Court the terms of the instruments and the relevant screeds for the Equity Deposit Bonds. One of the screeds was entitled “The 211 Wellington Road Equity Investment” and provided that the investment would operate as follows:

- The investors would contribute \$1,200,000 to the 211 Wellington Road Equity Investment.
- The investment is for 18 months commencing from the 15th November 2002 and completing on the 15th March 2004.
- The investors will be paid a monthly income of 7.5% per annum for the 18-month period. The first payment of interest will be the 15th December 2002.
- At the end of the 18th month period the Investor will receive a profit payment of 13.5%.
- Therefore for the 18-month period the Investors income and capital will equate to 16.5%.

80 Another screed produced by the Receivers dated 1 May 2005 entitled “The 211 Wellington Road Joint Venture Equity Project” provided, *inter alia*:

This new 211 Wellington Road Joint Venture (211WJV) replaces the previous 211 Wellington Road Equity Project.

...

To that end we are offering our fellow Project Participants the following arrangement:

- Firstly, to pay out their profit share of 10% in the next 90 days from 1 May 2005.
- Secondly, to with continue their capital in the Project for another 2 years from 1 May 2005 until 30 April 2007 ...
- Project Participants will continue to receive a monthly income return based on 8% per annum payable monthly ...
- On or around 30 April 2007 ... the Joint Venture anticipates a budgeted gain of 16% calculated on the Joint Venture capital should be available for distribution ...

81 According to the Receivers, of the 58 Equity Deposit Bond investors, only 26 investors produced to the Receivers executed equity deposit bond certificates. As at the date of the Disclosure Report, the Receivers were unable to determine the validity of the claims and accordingly did not reflect that amount in the balance sheet.

82 The following chart summarises the method or methods of the investment, the number of investors who initially contributed funds to one of the entities and also identifies the number and value of the remaining investors:

Nature of Investment	\$ Initially Raised	Initial No. of Investors	Return of investment	Distributions	Outstanding Number of investors and \$
Joint Venture Investment	\$5,786,815 \$2,250 subsequently invested	117 (101 active)	(\$450,812) returned (\$186,650 transferred)	\$3,042,387	101 investors (\$5,151,610)
Equity Deposit Bonds	\$3.8 million	58	Unknown	Unknown	Unknown

83 Despite the sale of the property, only minimal funds have been returned to investors. Mr Letten informed the Receivers that the investors’ funds were retained by LGHA at the

request of the investor until a subsequent project was found. The Receivers do not have any information or documentation to support that assertion.

84 In addition to the distributions and returns to investors, a consolidated cash flow statement prepared by the Receivers reveals that there was approximately \$587,000 of capital expenditure in relation to the Scheme. The cumulative surplus of assets over liabilities over the life of the Scheme was approximately \$10,763,000 (including \$3.8 million contributed by Equity Deposit Bonds). The capital expenditure and other expenses identified in the Receivers' Disclosure Report cannot be traced to the funds contributed by the investors. Given the central treasury role that LGHA played in relation to this Scheme and the other Schemes, it is likely that the funds were sourced from other Schemes.

(2) Scheme 13 – The Glen Centre Joint Venture

85 The Glen Centre Joint Venture was wound up on 25 February 2010. The property was described by the Receivers as a retail complex comprising 16 shops, a restaurant and dance studio at 673-681 Glenferrie Road, Hawthorn (the **Glen Centre Property**). At the time of the appointment of the Receivers, Westpac had a secured claim over the property of \$7.95 million. The Receivers were granted the power of sale and orders were made governing the Receivers' dealing with the proceeds from the disposal of the assets of the Scheme: see [11] above.

86 According to the Receivers, the Glen Centre Property was purchased by The Glen Centre Hawthorn Pty Ltd, the 18th defendant (**Glen Centre**), in October 1999. The deposit was paid by LGHA. Prior to inviting investors to participate in the Scheme, Mr Letten sold a 15% interest in the Glen Centre Property to one investor and a further 15% to a group of three investors. Of the remaining 70% of the project, 65% was initially sold to approximately 92 investors, with the remaining 5% held by LGHA. Mr Letten informed the Receivers that LGHA purchased the 15% interest from the investor which increased LGHA's share in the Scheme to 20%. No agreement was signed recording that subsequent arrangement.

87 Investments in the Scheme occurred through by following means:

1. execution of a joint venture agreement;
2. roll over from another Scheme;
3. payment of funds without execution of a joint venture agreement or any other document.

88 The joint venture agreements were largely entered into between the investor and Glen Centre, the manager of the Scheme. However, the Receivers identified a small number of joint venture agreements for the Scheme that were entered into between individual investors and Castello Holdings Pty Ltd, the 19th defendant, whose relationship to the Scheme is not clear. The recitals to the joint venture agreement provided:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Glen Centre Hawthorn* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

“Interest” was defined as a “share or interest in the investment known as ‘The Glen Centre Hawthorn’”. “The Glen Centre Hawthorn” was not defined. The joint venture agreement only provided for capital growth and not an income return. Notwithstanding that term of the joint venture agreement, over the life of the Scheme, investors received distributions.

89 The promotional material for the Scheme produced by the Receivers described the investment proposal in vague terms. It provided:

The proposal is to hold the property for a medium to long term period and in the process, steadily improve the asset by:

- Replacing shop fronts and mall.
- Renewing façade and awnings to Glenferrie Road frontage.
- Changing tenant mix.
- Improve trading conditions to car park and mall tenancies.

with the ultimate aim to subdivide the property and ‘sell off’ the individual tenancies on very firm yields which are currently being evidenced and improving dramatically in this retail precinct.

90 There were initially 92 investors in the Scheme who contributed \$4,779,000. 22 initial investors have left the Scheme. The Receivers were informed by Mr Letten that, upon leaving, these investors may have agreed a “handshake” agreement with Mr Letten whereby the investors were entitled to share in any capital gain on wind-up of the Scheme. However, no documentation has been produced to the Receivers to support such an agreement. A total of \$530,000 was returned to investors exiting the scheme and \$45,000 was transferred to other Schemes. Further, a total of \$2,844,921 in distributions was made to investors from the inception of the Scheme until October 2008. Those distributions were funded by LGHA.

91 As at 25 February 2010, the Scheme has 70 investors who have contributed \$3,775,000 to the Scheme. In addition to that sum, there is an additional \$0.3 million that was acquired by LGHA from another investor, increasing the total funds from active investors to \$4,075,000. There is also a secured loan from Westpac for \$7.95 million. The estimated surplus for the Scheme is only \$1,227,000 which represents the total amount owed to the Scheme by LGHA given the central treasury funding model adopted by this Scheme. According to the Receivers, the main uses of cash during the life of the Scheme included the purchase of property and associated improvements (\$8.3 million) as well as distributions paid to investors (\$2.8 million). Although the distributions paid were higher than the retained profits during the life of the Scheme (and therefore had to be funded from another source), the Receivers noted that once property revaluations were taken into account, the Scheme appeared to have sufficient retained profits to pay those distributions.

2001 – Scheme 11 – Simms Investment Project

92 Receivers were appointed to the Simms Investment Project on 25 February 2010. The Scheme was not wound up as it was a Concluded Scheme. The property was described as 626 Pittwater Road, Brookvale, New South Wales and was acquired by Simms Investments Pty Ltd, the 16th defendant, in March 2001 and sold to Australand in October 2007.

93 According to the Receivers, investment in the Scheme occurred in two “stages”. Further, investments in the Scheme came about by the following means:

1. execution of a joint venture agreement (nine investors);
2. roll over from another scheme (15 investors);
3. payment of funds without execution of a joint venture agreement or any other document (14 investors).

94 LGHA may be understood to have performed a central treasury function on behalf of this Scheme. LGHA collected all receipts from any debt and / or equity raising undertaken by the Scheme. LGHA also funded distributions paid to investors in the Scheme and settled some accounts owing to third party suppliers / financiers on behalf of the Scheme.

95 The undated screed offered investors the opportunity to “undertake the Joint Venture Project known as 626 Pittwater Road Brookvale Stage 2”. The proposal was to construct a

commercial / retail complex on the site to generate medium to long-term income plus a capital gain return. The proposal offered investors a 12 month investment with a predetermined income and capital gain return. The “income” return was net income of 10% per annum of the amount invested, payable monthly. The capital return was 7% payable at the conclusion of the Joint Venture. The phrase “Joint Venture” was not defined.

96 The joint venture agreements produced by the Receivers only provided for a capital gain return and not for an income return. The recitals to the agreement provided:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *626 Pittwater Road, Brookvale Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

97 As with other Schemes, the phrase “626 Pittwater Road, Brookvale Project” was not defined. “Interest” was defined as a “share or interest in the investment known as ‘626 Pittwater Road, Brookvale Project’”. The manager of the joint venture was Simms Investments Pty Ltd, the 16th defendant.

98 The Receivers determined that approximately \$2.1 million was invested by investors over the life of the Scheme. A total of \$1.2 million was returned to investors who left the Scheme. Notwithstanding the terms of the joint venture agreement, over the life of the Scheme investors received distributions of \$780,354.

99 Since its inception, the Scheme did not generate any meaningful returns. The Receivers have determined that even after realising a profit on sale of \$0.3 million, distributions exceeded retained profits by \$0.5 million, indicating that distributions were being paid from other sources.

100 Further, as at 25 February 2010, 19 of a total of 38 investors were yet to receive their initial capital investment despite the real property of the Scheme being realised. The Receivers were informed by Mr Letten that those investors requested that their funds be retained by LGHA until a suitable replacement project was identified, although there were no documents to support this assertion. The Receivers estimate that \$911,890 is owed to investors in the Scheme. At the time the Receivers were appointed, the Scheme was owed \$373,000 by LGHA. This is the Scheme’s only asset.

2002

(1) Scheme 16 – Glenbelle Project

101

Receivers were appointed to the Glenbelle Project on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The Receivers were granted the power of sale in relation to the assets of the Scheme and Orders were made governing the Receivers dealing with the proceeds from the disposal of those assets: see [11] above. In *Letten (No 4)*, the Glenbelle Project was described as follows:

- [28] The Disclosure Report identifies the property of the scheme numbered 16 as the Management Lot of The Sebel Lodge Yarra Valley, Corner of Hughes and Yarraview Roads, Chirnside Park, Victoria and the Heritage Retreat, in Wonga Park, Victoria. Careful readers will note that The Sebel Lodge Yarra Valley has the same address as the Heritage Golf Club and Country Club (that is, the YVG Property). The Sebel Lodge Yarra Valley is a hotel. The rooms in the hotel are strata titled and owned by individuals pursuant to a registered managed investment scheme which is not the subject of these proceedings. The “Management Lot” covers those areas of the hotel which are needed to operate the hotel as a business including kitchens, the reception and conference facilities. Mirvac Hotels is the manager of the hotel business.
- [29] A flow chart included by the Receivers in the Disclosure Report summarising the arrangements is attached as Annexure D to these reasons for decision. As that chart illustrates, there were two phases. Despite Redcrest Holdings Pty Ltd, the 36th defendant, being the joint venture manager for phase II, it does not appear to hold any assets. Instead, Glenbelle Pty Ltd, the 29th defendant (**Glenbelle**), the joint venture manager of phase I, holds all the assets. Whether there is one scheme or, in fact, two schemes has not yet been resolved. Moreover, it is unnecessary to resolve it at present. If that position changes, I expect the Receivers to make immediate application to the Court.
- [30] I turn to consider the financial position of scheme 16 as it is currently defined. Westpac is a secured creditor. The debt owed to Westpac is secured by real property mortgages over two titles as well as a fixed and floating charge over the assets and undertaking of Glenbelle. An amount is also owing to LGHA. The trading summary indicates that prior to the appointment of the Receivers a substantial sum was paid for services that were to be provided after the appointment of the Receivers. As a result, the available cash flow was negative. That position is expected to continue for the next few months. As a result, during that period at least insufficient revenue is being generated to service the debt.
- [31] Counsel for the Receivers submitted that after the initial period just described, it remained the position that future forecasted cash flows *might* be insufficient to service the debt especially when the costs of the receivership were taken into account.

102 Investments in the Scheme through LGHA occurred through by following means:

1. execution of a joint venture agreement (68 investors);
2. roll over from another Scheme (14 investors);
3. payment of funds without execution of a joint venture agreement or any other document (83 investors).

103 There were a total of 165 investors. 49 investors have since left the Scheme. Mr Letten informed the Receivers that upon leaving the Scheme some of the investors may have had a “handshake” agreement whereby they were entitled to a share in any capital gain on wind up of the Scheme. Again, there is no documentary evidence to support this assertion.

104 As noted in *Letten (No 4)*, the Scheme is complicated by the fact the manager of the original joint venture (Phase I) was Glenbelle Pty Ltd, the 29th defendant (**Glenbelle**) whereas Redcrest Holdings Pty Ltd, the 36th defendant (**Redcrest**), is the joint venture manager of “Phase 2” of the Scheme (the Retreat and Spa) but is not the registered owner of the Retreat and Spa assets. The Receivers do not have documentation setting out the relationship between Glenbelle and Redcrest and have to date been unable to determine whether there is one scheme or multiple schemes. For the present purposes they will be treated as one scheme.

105 The undated screed produced by the Receivers provided that the investment would be “associated with the acquisition of the Hotel Lot (excluding the rooms) for the Sebel Lodge Hotel”. The Hotel Lot was defined as the general area of the Hotel, incorporating the Real Estate of the Central Management Lot together with the business that operates through this. The life of the project was said to be five years starting on 15 February 2002. The screed provided for a ‘yearly income return’ for investors as a percentage of their investments. The screed also provided for a capital return to be paid upon the sale of the property.

106 The joint venture agreement provided in its recitals that investors would acquire an interest in the “Project”. “Interest” was defined as a “share or interest in the investment known as ‘the Project’”. “Project” was not defined. The joint venture agreement only provided for capital growth and not an income return. Notwithstanding that term of the joint venture agreement, over the life of the Scheme, investors received distributions of \$3.4 million.

107 The amount raised from investors was approximately \$7.3 million. Cash investments were made by investors via LGHA. LGHA has returned \$1.1 million of funds to Investors who left the Scheme.

108 The two main sources of cash inflows have been funds raised from investors and debt funding from Westpac of \$2.5 million. The main uses of cash included the purchase of the Hotel Management Lot and the Heritage Retreat properties for \$6.0 million (including associated plant and equipment) and distributions paid to investors (\$3.4 million). The arrangement is complicated by the fact that until 28 February 2010, Glenbelle had been utilising the YVG bank account for its operational activities. The cumulative cash deficit over the life of Scheme is \$66,000. Unlike other Schemes, at the time of the appointment of the Receivers, they estimate that the Scheme owed money to LGHA rather than being owed money by LGHA.

(2) Scheme 2 – Healesville Walk Shopping Centre Joint Venture

109 Receivers were appointed to the Healesville Walk Shopping Centre Joint Venture on 25 February 2010 but the Scheme was not wound up as it was a Concluded Scheme. The property was described as 251-263 Maroondah Highway, Healesville, Victoria and was initially purchased by LGHA. Bluemist Holdings Pty Ltd, the fourth defendant, (**Bluemist**) completed the purchase in September 2001 for \$11.9 million. The property was sold to Australand for \$19.5 million in October 2007. All secured creditors were repaid when the property was sold.

110 Investments in the Scheme through LGHA occurred in “stages” and came about by the following means:

1. execution of a joint venture agreement (16 investors);
2. roll over from another scheme (three investors);
3. payment of funds without execution of a joint venture agreement or any other document (98 investors);
4. investment in Healesville Equity Mortgage (30 investors).

111 The Receivers determined that the first three categories of investment raised approximately \$5.9 million and that an additional \$3 million may have been contributed by investors by way of the equity mortgage. Cash investments were made by investors to LGHA. Approximately \$4.046 million was returned to investors who left the Scheme.

112 One of the undated screeds for investors in the Scheme offered two types of return for investors; an “income” return of an unspecified amount which was to be paid monthly during the life of the project and a capital return of an unspecified amount to be paid upon sale of the property. However, one of the “2005” joint venture agreements produced by ASIC only provided for the latter (a capital return). Notwithstanding the terms of that joint venture agreement, over the life of the Scheme, investors received distributions of \$3.284 million.

113 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Healesville Walk Shopping Centre Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

114 As with other Schemes, the phrase “Healesville Walk Shopping Centre Project” was not defined. “Interest” was defined as a “share or interest in the investment known as ‘the Project’”. The manager of the joint venture was Bluemist.

115 A screed dated 1 March 2005, being an offer to investors to replace an existing member in “The Healesville Walk Shopping Centre Joint Venture”, again offered two types of return for investors. This time a monthly “income” return of 8.75% per annum and an estimated capital return of 14% at the end of the investment – on or around 31 March 2007. The offer was for an “interest” in the “Joint Venture”. Neither was defined.

116 A further screed entitled “Healesville Walk Equity Joint Venture” dated 1 May 2007 offered investors the opportunity to “continue in the Joint Venture for a further period of approximately 12 months” and receive in return a monthly “income” return of 9% per annum and an estimated capital return of 7% at the end of the investment – on or around 15 May 2008. The Receivers have concluded that the additional funds in the 2005, 2006 and 2007 years was used to fund distributions in this and other Schemes.

117 No screed for the Healesville Equity Mortgage was produced. A copy of one of the certificates which was produced described the “investment” as follows:

- Interest Rate:** 10% per annum – payable monthly.
- Investment Term:** Estimated to be 2 years from 15 October 2002, due for maturity on 15 October 2004. *(Please note that the maturity date could change if completion of the project is delayed) ...*
- Investment Return:** It is estimated that the profit return in October 2004 will be 20%.

118 LGHA may be understood to have performed a central treasury function on behalf of Bluemist. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of Bluemist. LGHA is said to owe the Scheme \$3.6 million.

119 Prior to the sale of the property, the Receivers estimate that although the Scheme had retained profits of \$2.3 million, \$3.3 million of “income” had been paid to investors. The Receivers were unable to identify the precise source of the funds for the “income” returns and normal creditor payments and suggest that these amounts were funded by LGHA. A further \$4.2 million of capital returns were made to investors. 46 investors are yet to receive repayment of their initial investment.

120 As at 25 February 2010, approximately \$3.6 million is claimed by investors and a further \$3 million is claimed by those who participated in the Healesville Equity Mortgage. The estimated net surplus is only \$3.696 million. In the 2008 financial year, LGHA is recorded as having received a 43% share of the gain on the sale of the property on the basis of the intellectual property contributed by LGHA. There is no documentation to support LGHA’s interest in the property.

(3) Scheme 3 – Howleys Road Joint Venture

121 Receivers were appointed to the Howleys Road Joint Venture on 25 February 2010 but the Scheme was not wound up as it was a Concluded Scheme. The property described as 40-48 Howleys Road, Melbourne, Victoria was acquired by Dellwood Holdings Pty Ltd, the fifth defendant (**Dellwood**), in February 2002 for approximately \$8.1 million (including costs)

and sold for \$11.2 million in April 2007. All secured creditors were repaid when the property was sold.

122 Investments in the Scheme through LGHA occurred in “stages” and came about by the following means:

1. execution of a joint venture agreement (61 investors);
2. roll over from another scheme (two investors);
3. payment of funds without execution of a joint venture agreement or any other document (50 investors).

123 LGHA may be understood to have performed a central treasury function on behalf of Dellwood. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of Dellwood.

124 The Receivers determined that approximately \$5.5 million was raised from investors. Over the life of the Scheme, distributions to investors totalled \$3.4 million and \$4.3 million was returned to investors who had left the Scheme.

125 One of the undated screeds for investors in the Scheme offered two types of return: an “income” return to be paid monthly during the life of the project (11.10% in 2002, 11.76% in 2003, 12.48% in 2004, 13.23% in 2005 and 13.94% in 2006) and a capital return of in excess of 15% per annum to be paid upon sale of the property. However, one of the “2005” joint venture agreements produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received distributions of \$3.4 million.

126 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Notting Hill Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

127 As with other Schemes, the phrase “Notting Hill Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture agreement was Dellwood.

128 Prior to the sale of the property, the Receivers estimate that although the Scheme had retained profits of \$1.7 million, \$2.4 million of “income” returns had been paid to investors. The Receivers were unable to identify the precise source of the funds for the return of “income” and normal creditor payments and suggest that a large majority of these amounts were funded by LGHA.

129 As at 25 February 2010, 24 investors were yet to receive their initial investment. The amount outstanding is estimated at \$1.823 million. The estimated surplus is \$2.725 million (after adding back LGHA’s alleged 18.18% share (\$902,000) of the gain on the sale of the property on the basis of the intellectual property contributed by LGHA).

(4) Scheme 14 – Twinview Joint Venture

130 Receivers were appointed to the Twinview Joint Venture on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The property at 167-173 Flinders Lane, Melbourne, Victoria was a retail / commercial complex which was acquired by Twinview Nominees Pty Ltd, the 20th defendant (**Twinview**), in September 2001 for \$3.9 million.

131 Investments in the Scheme through LGHA came about by the following means:

1. execution of a joint venture agreement (35 investors);
2. roll over from another scheme (four investors);
3. payment of funds without execution of a joint venture agreement or any other document (43 investors).

Of the 82 investors, 74 were initial investors. There was one subsequent third party investor, six were transfers between investors and one investor left the Scheme.

132 A screeed for investors in the Scheme dated 25 September 2001 was issued by LGHH. Investors were offered the opportunity to “join with [LGHH]” in the purchase of the property. The investment offered two types of return: an “income” return to be paid monthly during the

life of the project (7.46% in 2001, 7.46% in 2002, 7.41% in 2003, 9.37% in 2004, 11.26% in 2005 and 12.25% in 2006) and a capital return upon sale of the property. However, one of the “2002” joint venture agreements produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received distributions of \$1.95 million.

133 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *167 Flinders Lane Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “167 Flinders Lane Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Twinview.

134 LGHA may be understood to have performed a central treasury function on behalf of Twinview. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of Twinview.

135 The Receivers determined that approximately \$3.540 million was raised from investors. Cash investments were made through LGHA by cheque payable to LGHA. At the start of the Scheme, there was a surplus of \$1.7 million because the funds raised from investors and debt exceeded the purchase price of the property. This was contrary to what investors had been told, namely fund raising of \$1.9 million along with debt raising of \$2 million. It is not known whether investors were told about the over-funding.

136 Over the life of the Scheme, distributions to investors totalled \$1.95 million and capital expenditure totalled \$2.570 million. Although these amounts were capable of being funded through subsequent debt raisings of \$4.2 million and profits of \$0.1 million, the source of funding was LGHA.

137 As at 25 February 2010, LGHA owed the Scheme \$1.6 million (the Scheme's estimated surplus cash as at that date) and Twinview had a loan payable to Westpac of \$6.2 million.

2003 – Scheme 4 – George Street Joint Venture

138 Receivers were appointed to the George Street Joint Venture on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The property at 34 George Street, Launceston, Tasmania was commercial property which was initially acquired by LGHA in September 2002 for \$542,000. Settlement of the purchase took place in November 2002. To fund the purchase, LGHA secured debt funding of \$260,000. LGHA contributed \$290,000 to the purchase. Two years later, in August 2004, LGHA sought investors. LGHA sought to exit its investment by raising \$0.85 million. Investors contributed \$1.1 million (of which \$0.85 million was used to purchase LGHA's interest in the property). Enmore Enterprises Pty Ltd, the sixth defendant (**Enmore**), became the registered proprietor of the property.

139 A screed for investors in the Scheme dated 1 August 2004 was issued by LGHH. Investors were told that LGHH was in the process of undertaking a major upgrade of the building and were being offered the opportunity to become part of the joint venture. The investment offered two types of return: an "income" return to be paid monthly during the life of the project of 8% and a share of the capital return upon sale of the property. A copy of a joint venture agreement produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received monthly distributions totalling \$348,000.

140 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *34 George Street, Launceston Project, Melbourne Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom ("the Project").

(Emphasis added.)

As with other Schemes, the phrase "34 George Street, Launceston Project" was not defined. "Interest" was defined as a "share or interest in the investment known 'the Project'". The manager of the joint venture was Enmore.

141 LGHA may be understood to have performed central treasury functions.
LGHA collected all receipts from any debt or investment raising. It also funded distributions to
investors, received rental income receipts from tenants and settled amounts owing to third party
suppliers / financiers.

142 The Receivers determined that approximately \$1.16 million was raised from investors.
Over the life of the Scheme, distributions to investors totalled \$0.348 million and capital
expenditure totalled \$0.477 million. The source for these amounts was not identified.

143 As at 25 February 2010, Westpac was owed \$0.7 million.

2004

(1) Scheme 8 – Low Head Joint Venture

144 Receivers were appointed to the Low Head Joint Venture on 25 February 2010 and the
Scheme was wound up pursuant to s 601EE of the Act. The property at 40 Gunn Parade, Low
Head, Tasmania, 128-136 Low Head Road, George Town, Tasmania and 142 Low Head Road,
George Town, Tasmania was a tourist park and beach front property. The properties were
respectively acquired in April 2004, August 2004 and August 2005 by Low Head Village Pty
Ltd, the 12th defendant (**Low Head**). In fact, in January 2004, an LGH affiliated entity acquired
the Gunn Parade property for \$850,000 and paid a deposit of \$85,000.

145 Investments in the Scheme were by the following means:

1. execution of a joint venture agreement (16 investors);
2. roll over from another scheme (11 investors);
3. payment of funds without execution of a joint venture agreement or any other document
(53 investors).

There were 69 investors. 14 investors have left. Investors contributed funds (\$4.8 million)
directly to LGHA in its role as treasurer to the Scheme.

146 Investors invested in stages. First, in March 2004, prior to settlement of the purchase of
Gunn Parade, LGHA sought investors (Phase I). A screeed for investors in an investment
proposal entitled “Low Head Beach Front Village, 136 Low Head Road, Low Head” was issued

by LGHH. Investors were told that an “LGH affiliated company” had acquired the site, this was a joint venture investment with LGHH and “LGH intend[ed] to redevelop the site... and build residential accommodation on it”. The screed stated that the amount to be subscribed was \$0.6 million. The investment offered two types of return: an “income” return to be paid monthly during the life of the project of 9% and a share of the capital return upon sale of the property of 15% payable on or around 30 November 2005. A copy of a joint venture agreement produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received monthly distributions of totalling \$1.1 million.

147 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Low Head Beach Front Village Project, Tasmanian Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “Low Head Beach Front Village Project, Tasmanian Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Low Head.

148 In fact, LGHA raised \$2.5 million from the Phase I investors as well as \$0.3 million of bank debt. The investor funds were oversubscribed by \$1.9 million. Settlement of Gunn Parade occurred in April 2004 and the debt raised from Tasmanian Perpetual Trustees Limited (**Perpetual**) was used to partially satisfy the purchase price.

149 In August 2004, 136 Low Head Road was acquired for \$0.6 million. In August 2005, 142 Low Head Road was acquired for \$4 million. Extensive development of the sites commenced in October 2005.

150 In November 2005, a screed for investors in an investment proposal entitled “Low Head Beach Sanctuary & The Low Head Caravan Park” was issued by LGHH (**Phase II**). Investors were told that Phase I of the development was to mature on 30 November 2005 and LGHH were progressing to Phase II of the project which was estimated to complete on or around June 2007. The screed did not state the amount to be subscribed. The investment

offered two types of return: a net “income” return to be paid monthly during the life of the project of 9% per annum and a share of the capital return upon sale of the property of 15% payable at the conclusion of the joint venture. No joint venture agreement for Phase II was produced by the Receivers. In February 2006, \$0.4 million was raised as part of Phase II to fund the development as well as additional debt funding from Perpetual of \$0.4 million. In January 2007, further additional debt funding of \$1.0 million was raised from Perpetual.

151 In July 2007, a further screed was sent to investors seeking investors to continue in the Project during Phase III which focussed on the Low Head Beach Sanctuary. The screed did not state the amount to be subscribed but did state that if an investor decided not to continue with the project, a replacement investor would need to be found. The investment again offered two types of return: a net “income” return to be paid monthly during the life of the project of 9.25% per annum and a share of the capital return upon sale of the property of 15% payable at the conclusion of the Joint Venture. No joint venture agreement for Phase III was produced by the Receivers. In July 2007, \$2 million cash was raised as part of Phase III. In April 2009, Lot 1 of 142 Low Head Road was sold for \$115,000.

152 Investors received distributions of \$1.1 million from LGHA. In October 2008, LGHA ceased to pay distributions to investors.

153 LGHA may be understood to have performed a central treasury function on behalf of Low Head. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received all receipts from trading and settled amounts owing to third party suppliers / financiers. 69 investors contributed \$4.1 million (net of investor returns of \$0.9 million) via cheques payable to LGHA. 11 investors were rollovers from other LGHA schemes. 14 initial investors left the Scheme. None were replaced. Mr Letten informed the Receivers that upon leaving, those investors may have had a “handshake agreement” with him that there were entitled to share in any capital gain on the wind up of the Scheme. No documentation was produced to support that assertion.

154 Capital expenditure of \$3.412 million was spent on the project. Outflows from capital expenditure and distributions were greater than the inflows from debt funding and investor contributions. All payments were made by LGHA. As at 25 February 2010, Low Head had a

loan payable to Perpetual of \$1.6 million and a loan payable to LGHA of \$0.468 million. At the same date, land and buildings were valued at \$5.3 million.

(2) **Scheme 6 – Reef House Resort**

155 Receivers were appointed to the Reef House Resort on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act.

156 In *Letten (No 4)*, the Property of the Scheme was described as follows:

[14] The Disclosure Report identifies the property as the Sebel Reef House Resort, the Esplanade, Palm Cove, Queensland (the **Resort**) with the Resort's operations being managed by Mirvac Hotels. The whole of the real property is mortgaged to Westpac together with a fixed and floating charge over the assets of Firbank Arch Pty Ltd (receiver and manager appointed) (**Firbank**). Firbank is the seventh defendant and the trustee of the Reef House Resort Unit Trust (the **Trust**).

[15] The Disclosure Report also records that:

1. LGH Finance Pty Ltd (the 11th defendant) [**LGHF**] holds 66% of the units in the Trust on behalf of Glenline Pty Ltd (the eighth defendant) [**Glenline**] which in turn holds the units as joint venture manager for the scheme;
2. the balance of the units in the Trust (34%) are held by Tercar Pty Ltd (**Tercar**) and that Mr Thomas Avelsgaard is a director and shareholder in Tercar;
3. in addition to the Westpac mortgage, the scheme owes an amount to LGH Administration Pty Ltd (**LGHA**), the 10th defendant, of approximately \$5.0 million, and to Tercar of \$1.37 million.

157 Investments in the Scheme occurred in “stages” (2004, 2006 and 2008) and came about by the following means:

1. execution of a joint venture agreement (77 investors);
2. rollover from another scheme (53 investors);
3. payment of funds without execution of a joint venture agreement or any other document (one investor).

The Receivers concluded that it appears investors contributed (through joint venture agreements with Glenline) to acquire LGHF's 66% of units in the Reef House Resort Unit Trust (see [156])

above). No unit holder certificate was executed between investors and LGHF. Glenline in turn notionally “owns” those units, although there is no written documentation of the sale of units from LGHF to Glenline. No documentation has been produced governing the relationship between LGHA, LGHF, Glenline and / or Firbank Arch in relation to the Scheme.

158 The undated screed for the first stage was entitled “Reef House Equity Joint Venture (RHEJV)” and offered investors in short term projects known as Lytham Mews, 323/324 and Muirfield Mews (which were said to be coming to a conclusion), to be paid out of those joint ventures or to roll their funds into the RHEJV. The offer was for an 18 month arrangement which provided two types of return for investors; an annual net “income” return of 7.5% which was to be paid monthly and an estimated capital return of 15% to be paid on or around 31 May 2006. The amount sought by way of subscriptions was to be \$4 million.

159 A “2004” joint venture agreement produced by the Receivers only provided for a capital return. Notwithstanding that term of that joint venture agreement, investors received monthly distributions totalling \$2 million. In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Reef House Equity Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

Again, the phrase “Reef House Equity Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was identified as Glenline.

160 The undated screed for the second stage was entitled “Reef House Extension Joint Venture” and offered investors in the RHEJV to continue for another 18 months or to be paid out of the RHEJV (the **Stage 2 Reef House Offer**). At the same time, LGHH offered the investors an opportunity to participate in the Stage 2 Joint Venture of the Sebel Heritage Lodge. The Stage 2 Reef House offer was for an 18 month arrangement which again provided two types of return for investors; an annual net “income” return of 8% which was to be paid monthly and an estimated capital return of 15% to be paid on or around 30 November 2007. The amount sought by way of subscriptions was not identified. No joint venture agreement for the Stage 2

Reef House offer was produced by the Receivers. Further, no screed or joint venture agreement was provided for the third stage of the Reef House project.

161 There were 127 investors in the Scheme. 93 investors are still active. The amount contributed by the investors was approximately \$8.56 million. LGHF received a profit of \$6.6 million when it sold its interest to investors. \$1.4 million has been returned to investors by LGHA as well as distributions of approximately \$2 million. Mr Letten informed the Receivers that, upon leaving, those investors may have had a “handshake agreement” with him that there were entitled to share in any capital gain on the wind up of the Scheme. No documentation has been produced to support that assertion.

162 LGHA may be understood to have performed a central treasury function on behalf of Firbank Arch and Glenline. LGHA collected all receipts from any debt or investment raising undertaken by Glenline. It also funded distributions paid to investors and “Reef House Resort Unit Trust unitholders”: see [156] above.

163 The cumulative deficit over the life of the Project of approximately \$5 million represents the total amount said to be owed by the project to LGHA. At the commencement of the Scheme, the amount owing to LGHA was \$5.3 million. In short, the deficit from day one arose because the cash received from investors (\$8.6 million) and financiers (\$4.2 million) was significantly less than the cash outflows for the property in the form of distributions (\$3.4 million) and capital expenditure on improvements (\$10.232 million).

(3) Scheme 7 – Queen Street Joint Venture

164 Receivers were appointed to the Queen Street Joint Venture on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The Property was described as 118-126 Queen Street, Melbourne. It was purchased in May 2003 for \$6.8 million. The registered proprietor was Gerling Holdings Pty Ltd, the ninth defendant (**Gerling**). It was sold in March 2008 for \$10.6 million and the secured lender was repaid.

165 Investments in the Scheme through LGHA occurred in “stages” (2003 and 2007) and came about by the following means:

1. execution of a joint venture agreement (52 investors);

2. payment of funds without execution of a joint venture agreement or any other document (51 investors).

166 The Receivers determined that the amount raised from investors was approximately \$5.6 million (\$5.1 million in 2003 and \$0.4 million in 2007). The initial amount raised in 2003 was \$2.1 million higher than the amount required. Cash investments were made by investors to LGHA. Approximately \$4.046 million was returned to investors who had left the Scheme.

167 One of the undated screeds for the Scheme offered two types of return for investors; an annual “income” return of 8.75% which was to be paid monthly during the life of the project and a capital return of an unspecified amount to be paid upon sale of the property. However, a joint venture agreement produced by the Receivers dated 14 August 2003 only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received distributions of \$2.8 million.

168 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the [*Project Description*] (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

Again, the phrase “[Project Description]” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Gerling.

169 LGHA may be understood to have performed a central treasury function on behalf of Gerling. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of Gerling. LGHA collected the surplus proceeds from the sale of the property and LGHA owed \$6.1 million to the Scheme.

170 Prior to the sale of the property, the Receivers estimate that although the Scheme had retained profits of \$0.3 million, \$1.6 million of “income” had been paid to investors. The Receivers were unable to identify the precise source of the funds for the return of “income” and normal creditor payments and suggest that the amounts were funded by LGHA. Total distributions to investors totalled \$2.8 million. \$0.6 million was paid in the 2008 and

2009 year (after the Property had been sold). A further \$0.2 million of capital returns were made to investors. At least 46 investors are yet to receive repayment of their initial investment, totalling approximately \$5.4 million.

(4) Scheme 21 – Mt Hutt Project

171 Receivers were appointed to the Mount Hutt Project on 30 July 2010. The Scheme was wound up pursuant to s 601EE of the Act. Investors contributed a total of \$3.42 million to the Scheme to be used for an investment in the “Tosswill Ltd / Mt Hutt Joint Venture”. It appears that the investors intended to invest in properties located at McLennan’s Bush Road, Methven, South Island in New Zealand.

172 Three properties, with identified certificates of title, were in fact acquired by Tosswill Limited (**Tosswill**) (an entity registered in New Zealand) for approximately NZ\$2.2 million. One of the properties was later sold by Tosswill for NZ\$0.85 million. Tosswill remains the registered proprietor of the other properties. The Receivers were not appointed as receivers and managers of Tosswill.

173 Investments in the Scheme were by the following means:

1. execution of a joint venture agreement;
2. roll over from another scheme;
3. payment of funds without execution of a joint venture agreement or any other document.

There were 59 investors. 16 investors have left. Investors contributed funds (\$3.42 million) directly to LGHA in its role as treasurer to the Scheme.

174 The Receivers determined that LGHA appears to have paid at least NZ\$1.42 million to Tosswill.

175 One of the screeds offered investors the opportunity to participate in a joint venture with LGHH. The proposal was to “acquire and develop” McLennans Bush Road, Methven, South Island, New Zealand. The proposal sought subscriptions of \$800,000 by 20 June 2004. It offered investors an investment with a predetermined income and capital gain return. The “income” return was net income of 7% per annum paid monthly. The capital return was

20% payable on or around 30 June 2006. However, one of the “2005” joint venture agreements produced by the Receivers only provided for the latter (a capital return).

176 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *MT HUTT NEW ZEALAND Project, Melbourne Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “Mt Hutt New Zealand Project, Melbourne Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Oakdale Rise Pty Ltd, the 50th Defendant.

177 Notwithstanding the terms of the screed and the joint venture agreement, over the life of the Scheme:

1. investors contributed \$3.42 million. The over-funding was retained by LGHA;
2. in the 2005 to 2009 years, investors received distributions of \$0.65 million;
3. in the 2005 to 2009 years, some investors received return of capital of \$0.7 million.

As at 30 July 2010, 43 investors were yet to receive repayment of their initial investment.

178 LGHA may be understood to have performed a central treasury function. Investors contributions were likely to have been paid to LGHA. LGHA paid only a proportion of the investors’ funds to Tosswill. LGHA paid the distributions and return of capital. The Scheme did not generate any profits.

(5) Scheme 17 – Tomasetti House Joint Venture

179 Receivers were appointed to the Tomasetti House Joint Venture on 30 July 2010 but the Scheme was not wound up as it was a Concluded Scheme. The property was described as Tomasetti House, 277-279 Flinders Lane, Melbourne, Victoria. It was a commercial / retail office building. The property was sold for \$12.2 million on 22 November 2007.

180 Investments in the Scheme through LGHA came about in three stages (currently still 40 investors from Stage 1, 16 from Stage 2 and 24 from Stage 3) and by the following means:

1. execution of a joint venture agreement;
2. roll over from another scheme;
3. payment of funds without execution of a joint venture agreement or any other document.

There were initially 122 investors. 44 investors have left.

181 The Receivers determined that the investors contributed \$8.68 million by making payments to LGHA. It is not clear how the funds were applied by LGHA. The Receivers have concluded that at least \$7.42 million of the investor contributions were retained or applied by LGHA for purposes other than the Scheme. Approximately \$5.43 million was returned to investors in two ways – \$2.4 million in distributions and \$3.03 million in return of capital and rollovers to other schemes.

182 One of the undated screeds offered investors the opportunity to participate in a joint venture with LGHH. The proposal was to lease the building for 18 months and redevelop the site. The proposal offered investors a 12 month investment with a predetermined income and capital gain return. The “income” return was net income of 9% paid monthly. The capital return was 10% payable on or around 31 January 2005. The amount to be subscribed was \$1.5 million. However, one of the “2005” joint venture agreements produced by the Receivers only provided for the latter (a capital return).

183 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Tomasetti House 277-279 Flinders Lane, Melbourne Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “Tomasetti House 277-279 Flinders lane, Melbourne Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager for the joint venture was Melville Corporation Pty Ltd, the 46th defendant (**Melville**).

184 No documentation in relation to the subsequent investments by investors was produced.

185 Notwithstanding the terms of the deed and the joint venture agreement, over the life of the Scheme:

1. investors contributed \$8.68 million;
2. the over-funding at the time of acquisition of the property was \$2.3 million and was retained by LGHA;
3. the extent of the refurbishment was reduced (approximately \$1.084 million was spent on capital expenditure). LGHA continued to retain the surplus;
4. investors received distributions of \$2.4 million; and
5. investors received returns of capital of \$3.03 million.

186 LGHA may be understood to have performed a central treasury function. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of Melville. The Receivers suggest that it was possible that moneys advanced to LGHA by investors in other Schemes were used to acquire and develop the property or to make payments to investors in this Scheme or both and that the funds of this Scheme which were held by LGHA were used to meet demands in other schemes.

2005 – Scheme 12 – SY21 Joint Venture

187 In *Australian Securities and Investments Commission v Letten (No 5)* [2010] FCA 1047, SY21 was examined at length. It is unnecessary to repeat the factual and legal findings. For present purposes, it is sufficient to note that the role of LGHA, LGHH and the difficulties that existed with the other Schemes also applied to this Scheme.

2006

(1) Scheme 9 – Nicholson Street Joint Venture

188 Receivers were appointed to the Nicholson Street Joint Venture on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The property at 127-137 Nicholson Street, Brunswick, Victoria was an industrial complex purchased by Nicholson Street Pty Ltd,

the 13th defendant, in April 1995 for about \$3.1 million. The Receivers have not seen any contract because records before 2000 were not available.

189 For the ten years between 1995 and 2005, the Nicholson Street Property was operated without any third party investors. In November 2005, LGHA decided to “sell-out” of Nicholson Street and sought funds from third party investors.

190 Investments in the Scheme through LGHA were in “stages” (January 2006 (Phase I), October 2007 (Phase II) and late 2007 (Phase II(b))), and came about by the following means:

1. execution of a joint venture agreement (17 investors);
2. roll over from another scheme (116 investors);
3. payment of funds without execution of a joint venture agreement or any other document (12 investors).

Cash investments were made by investors to LGHA with cheques made payable to LGHA. The investors contributed \$9.7 million over three stages - \$3.2 million in Phase I, \$5.1 million in Phase II and \$1.3 million in Phase II(b). Of this amount, \$5.7 million was rollovers from other Schemes.

191 In January 2006, a screed for investors to contribute to the Scheme was issued by LGHH. Investors were offered the opportunity to “become part of this Joint Venture” in what was described as the “redevelopment, construction and tenanting of the property”. It did not involve the purchase of the property as Nicholson Street had acquired the property in April 1995. Funds of \$3 million were sought with funds to be subscribed by 31 March 2006.

192 The investment offered two types of return: a net “income” return of 8.5% to be paid monthly and an estimated capital return of 15% at the conclusion of the Joint Venture. Again, one of the “2006” joint venture agreements produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, LGHA paid monthly distributions to Phase I and Phase II investors from 2006 to 2009 of \$1.2 million. LGHA did not pay monthly distributions to Phase II(b) investors.

193 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint

Venturers for the purpose of acquiring an *Interest* in the *Nicholson Street Redevelopment Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “Nicholson Street Redevelopment Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager identified in the majority of joint venture agreements was Holloway Crest Pty Ltd (**Holloway Crest**), the 14th defendant. However the Receivers also identified joint venture agreements that appointed Nicholson Street Pty Ltd and Rosebery Enterprises Pty Ltd, the 15th defendant (**Rosebery**), as manager of the joint venture. The Receivers could not locate any documentation governing the relationship between Nicholson Street Pty Ltd, Holloway Crest and Rosebery.

194 In April 2006, it appears that the property was notionally “sold” for \$10.25 million including debt of \$6 million to the Phase I investors. The registered proprietor remained Nicholson Street. Investors initially contributed \$3.2 million into the Scheme in Phase I. The oversubscriptions (as against the screed) were retained by LGHA. In fact, there was an alleged deficit in April 2006 because the subscriptions and debt funding were insufficient to satisfy the directors’ notional purchase price of \$10.25 million.

195 LGHA may be understood to have performed a central treasury function on behalf of this Scheme. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of the Scheme.

196 In August 2007, another screed for investors to contribute to “Stage 2” of the Scheme was issued by LGHH. Investors were offered the opportunity to invest funds in a joint venture to redevelop the Nicholson Street property. The screed stated that there would be various stages to the project and that “Stage 2” would operate for 18 months from 1 October 2007 until 31 March 2009. Funds of \$2 million were sought with funds to be subscribed by 31 October 2007.

197 The investment again offered two types of return: a net “income” return of 9% per annum to be paid monthly and an estimated capital return of 10.5% at the conclusion of the Joint

Venture. The Receivers did not produce a joint venture agreement executed by a “Stage 2” investor. Contrary to the screeed, LGHA raised a further \$5.1 million in Phase II and another \$1.3 million in Phase II(b). Mr Letten informed the Receivers that the Phase II(b) investor funds were raised for the purposes of commencing development works once rezoning permits were obtained and were to have been held by LGHA and released when the permit was obtained.

198 Over the life of the Scheme, 145 investors have contributed about \$9.7 million to the Scheme. Five initial investors left the Scheme. One was replaced. About \$0.2 million has been returned to those investors who left the Scheme. Mr Letten informed the Receivers that upon leaving, those investors may have had a “handshake agreement” with him that they were entitled to share in any capital gain on the wind up of the Scheme. No documentation has been produced to support this assertion.

(2) Scheme 5 – Cimitiere House Joint Venture

199 Receivers were appointed to the Cimitiere House Joint Venture on 25 February 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The property at 113-115 Cimitiere Street, Launceston, Tasmania was a retail / commercial complex acquired by Enmore (see [138] above) in April 2006 for \$1.1 million. It adjoins the George Street Property (see [138] above).

200 Investments in the Scheme through LGHA came about by the following means:

1. execution of a joint venture agreement (23 investors);
2. roll over from another scheme (52 investors);
3. payment of funds without execution of a joint venture agreement or any other document (25 investors).

Cash investments were made by investors to LGHA with cheques made payable to LGHH. The investors contributed \$8.7 million over three stages - \$2.4 million in Phase I, \$5.3 million in Phase II and \$0.9 million in Phase III. Of this amount, 52 investors totalling \$4.9 million were rollovers from other Schemes.

201 A screeed for investors to contribute to the Scheme by 19 May 2006 was issued by LGHH. Investors were offered the opportunity to “become part of the Joint Venture” in the purchase of the property. The investment offered two types of return: an “income” return of

10% to be paid monthly during the life of the project and an estimated capital return of 15% at the conclusion of the Joint Venture. Again, one of the “2006” joint venture agreements produced by the Receivers only provided for the latter (a capital return). Notwithstanding that term of that joint venture agreement, over the life of the Scheme, investors received distributions of \$0.9 million between the 2007 and 2009 financial years.

202 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *113 Cimitiere Street Launceston Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

As with other Schemes, the phrase “113 Cimitiere Street Launceston” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Enmore.

203 Notwithstanding that cheques from investors were made payable to LGHH, LGHA may be understood to have performed a central treasury function on behalf of this Scheme. LGHA collected all receipts from any debt or investment raising. It also funded distributions to investors, received rental income receipts from tenants and settled amounts owing to third party suppliers / financiers of the Scheme.

204 At the start of the Scheme, there was a surplus of \$1.7 million because the funds raised from investors exceeded the purchase price of the property (inclusive of associated buying costs) and debt of \$0.8 million was raised shortly after settlement of the property to fund capital expenditure. This was contrary to what investors had been told, namely fund raising of \$1.3 million. It is not known whether investors were told about the over-funding. From the 2007 financial year, additional funds totalling \$6.593 million were raised from investors (\$0.638 million in 2007, \$5.048 million in 2008 and \$0.907 million in 2009). Initial investors were allegedly offered a first right of refusal to invest in the subsequent phases.

205 Over the life of the Scheme, the Scheme had retained losses of \$69,000. During this time, distributions to investors totalled \$0.921 million and capital expenditure totalled

\$13 million. These amounts were funded through LGHA and included subsequent debt raisings of \$7.57 million and additional investor funds of \$6.6 million.

206 As at 25 February 2010, the Scheme had 100 investors who had contributed a net amount of \$8.1 million to the Scheme. A number of initial investors had left the Scheme. LGHA funded the returns to those investors. Also at 25 February 2010, Westpac was owed \$9.1 million in respect of Cimitiere House and the George Street Joint Venture. Other amounts were claimed to be owed to a builder who worked on the redevelopment.

(3) Scheme 10 – National Boulevard Joint Venture

207 Receivers were appointed to the National Boulevard Joint Venture on 25 February 2010, but the Scheme was not wound up as it was a Concluded Scheme. The property was described as 144 National Boulevard, Campbellfield. This is one of two Schemes where fund raising from investors was undertaken before any contract to acquire the property was executed.

208 In general terms, before November 2005, Pacific Brands Clothing Pty Ltd (**Pacific Brands**) approached LGHA to find a suitable site for its warehouse and offices. LGHA identified various sites. Pacific Brands selected the Campbellfield property as its preferred site location. LGHA engaged Bridgehead Properties as the development manager. Mr Letten informed the Receivers that Bridgehead was offered 50% of the profits of the Scheme. No documentation supporting such an arrangement has been produced.

209 The Receivers identified that between November and December 2005 approximately \$3.9 million was raised from investors. According to the Receivers, investments in the Scheme came about by the following means:

1. execution of a joint venture agreement (61 investors);
2. roll over from another scheme (six investors);
3. payment of funds without execution of a joint venture agreement or any other document (19 investors).

210 The undated screed produced by the Receivers provided that the investment would be “to undertake the Project known as ‘Pacific Brands Office and Warehouse facility at National Business Park’” in a joint venture with LGHH. Subscriptions of \$1.75 million were sought with

subscriptions required by 30 November 2005. The screed provided for a 'yearly income return' for investors of 8.5% per annum paid monthly and for a capital return to be paid upon the conclusion of the project estimated at 15%.

211 The joint venture agreements produced by the Receivers provided for a capital gain return and not for an income return. In fact, payments have been made to investors during the life of the project totalling \$3.9 million (distributions of \$0.8 million and returns to investors of \$3.1 million).

212 The recitals to the agreement provided:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Pacific Brands Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom ("the Project").

(Emphasis added.)

As with other Schemes, the phrase "Pacific Brands Project" was not defined. "Interest" was defined as a "share or interest in the investment known as 'the Project'". The manager of the joint venture was Rosebery.

213 In April 2006, the purchase contract was signed. The purchase price was payable upon completion of the construction of the building. In July 2007, Pacific Brands signed a long term lease and construction was completed. In August 2007, settlement of the purchase of the Property for \$16.2 million was completed. LGHA obtained \$15.3 million funding from Suncorp to fund that purchase.

214 In November 2007, the property was sold to Perpetual Trustee Company Limited for \$20 million. The Suncorp debt was repaid.

215 LGHA may be understood to have performed a central treasury function on behalf of this Scheme. LGHA collected all receipts from any debt and / or equity raising undertaken by the Scheme. LGHA also funded distributions paid to investors in the Scheme and settled some accounts owing to third party suppliers / financiers on behalf of the Scheme.

216 The Receivers determined that approximately \$3.9 million was invested by investors over the life of the Scheme. A total of \$3.1 million was returned to investors who left the Scheme. Notwithstanding the terms of the joint venture agreement, over the life of the Scheme investors received distributions of approximately \$0.8 million.

217 Since the inception of the Scheme, it did not generate any meaningful returns. The operating asset was only held for three months in the 2008 financial year and generated rental income of \$163,000. That income was offset by interest charges of \$329,000. During the same period, distributions substantially exceeded earnings and \$277,000 was spent on improvements. The facts suggest that these amounts were paid from other sources. The Receivers suggest that a cumulative surplus of \$1.5 million over the life of the project represents the amount LGHA owes to the Scheme as at 25 February 2010. This is the Scheme's only asset.

218 Further, as at 25 February 2010, 25 of a total of 86 investors are yet to receive their initial capital investment despite the real property of the Scheme being realised. The Receivers were informed by Mr Letten that those Investors requested that their funds be retained by LGHA until a suitable replacement project was identified, although there were no documents produced to support this assertion.

(4) **Scheme 20 – Cass Bay Spur Project**

219 Receivers were appointed to the Cass Bay Spur Project on 30 July 2010. The Scheme was wound up pursuant to s 601EE of the Act. Investors contributed a total of \$2.96 million to the Scheme to be used for an investment in the “Cass Bay Spur / Cass Bay Joint Venture”. It appears that the investors intended to invest in the property located at Governors Bay Road, Lyttelton Harbour, New Zealand. That property was acquired by Cass Bay Spur Limited (a New Zealand incorporated entity) (**Cass Bay**) for approximately NZ\$1.05 million. Cass Bay remains the registered proprietor of the property and is in liquidation. The Receivers were not appointed as receivers and managers of Cass Bay.

220 Investments in the Scheme were by the following means:

1. execution of a joint venture agreement;
2. roll over from another scheme;

3. payment of funds without execution of a joint venture agreement or any other document.

There were 46 investors. 22 investors have left. Investors contributed funds (\$2.96 million) directly to LGHA in its role as treasurer to the Scheme.

221 The Receivers determined that LGHA appears to have paid at least NZ\$0.976 million towards the purchase of the property. It is not known what funds LGHA used or what happened to the funds contributed by the investors to the Scheme.

222 One of the screeds offered investors the opportunity to participate in a joint venture with LGHH. The proposal was to “develop (via subdivision) the Land and resell to Residential House Buyers”. The proposal sought subscriptions of \$1.8 million by 22 July 2005. It offered investors an investment with a monthly income and a capital gain return. The “income” return was anticipated to be 8.5% per annum paid monthly. The capital return was estimated at 12.5% payable at the conclusion of the joint venture. However, one of the “2005” joint venture agreements produced by the Receivers only provided for the latter (a capital return).

223 In the joint venture agreements, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Cass Bay Spur, New Zealand Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom (“the Project”).

(Emphasis added.)

224 As with other Schemes, the phrase “Cass Bay Spur, New Zealand Project” was not defined. “Interest” was defined as a “share or interest in the investment known ‘the Project’”. The manager of the joint venture was Jensdale Pty Ltd, the 49th Defendant.

225 Notwithstanding that term of the screed and the joint venture agreement, over the life of the Scheme:

1. investors contributed \$2.96 million. The over-funding was retained by LGHA; and
2. investors received distributions of \$0.49 million and returns of capital of \$1.21 million.

226 LGHA may be understood to have performed a central treasury function. Investors contributions were likely to have been paid to LGHA. LGHA paid only a proportion

of the investors' funds to Cass Bay (NZ\$0.976 million compared to contributions totalling \$2.96 million). LGHA paid the distributions and return of capital. The Scheme did not generate any profits.

(5) Scheme 19 – Moorhouse Shopping Centre Project

227 Receivers were appointed to the Moorhouse Central Shopping Centre Project on 30 July 2010 and the Scheme was wound up pursuant to s 601EE of the Act. The property at 343-359 Moorhouse Avenue, Christchurch, New Zealand was described as the “Moorhouse Central Shopping Centre”. It was acquired and developed by Moorhouse Avenue 343 Limited (a New Zealand incorporated entity) (**Moorhouse Avenue**) for NZ\$14.4 million in March 2006. The Receivers concluded that Stage 1 of the Scheme was a shopping centre that was redeveloped and sold to a Proportional Ownership Scheme for NZ\$21.5 million in the 2009 financial year. Stage 2 is still owned by Moorhouse Avenue and is an incomplete retail / office building development next to the shopping centre.

228 The Receivers were not appointed to Moorhouse Avenue. A liquidator has been appointed to Moorhouse Avenue. This has limited the scope of the Receivers' review of the Scheme.

229 Investments in the Scheme came about by the following means:

1. execution of a joint venture agreement between the investors and HPSC Pty Ltd (**HPSC**), the 48th defendant;
2. rollover from another Scheme;
3. payment of funds without execution of a joint venture agreement or any other document.

230 There were 227 initial investors, of which 193 are active. Funds from investors appear to have been paid to LGHA, with the exception of some contributions by New Zealand investors which may have been paid to Ascent Business Directions (an entity associated with Mr Letten and a Mr Mark Salmon). Mr Letten informed the Receivers that this process was said to have been adopted to avoid the currency risk associated with New Zealand investors transferring money to LGHA, only for the funds to be returned to New Zealand for property development purposes. If this was the case, such funds may not have been deposited into the LGHA account and therefore may not be commingled with funds from other Schemes. However, Mr Salmon

indicated to the Receivers that all funds were paid to LGHA after receipt by Ascent Business Directions. The Receivers have been unable to verify the receipt and application of investors' funds through Ascent Business Directions.

231 The screed for the Scheme describes the Scheme as a joint venture with an intended duration of 18 months offering a capital gain at completion of the project on or around 31 March 2007. Notwithstanding that information in the screed, it is apparent that money continues to be owed to the majority of investors in the Scheme. The screed provided for a net income for investors of 8.5% per annum paid monthly and for a capital gain to be paid upon the conclusion of the project estimated at 15%. Once again, the joint venture agreement produced by the Receivers did not provide for any payments to be made to investors during the life of the Scheme. Nevertheless, investors have received periodic payments throughout the life of the Scheme.

232 In the joint venture agreement, the recitals provided that:

The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purpose of acquiring an *Interest* in the *Moorhouse Central Shopping Centre Project* (hereinafter defined) and to hold the same as an investment and to earn income therefrom ("the Project").

(Emphasis added.)

233 As with the other Schemes, the phrase "Moorhouse Central Shopping Centre Project" was not defined. "Interest" was defined as a "share or interest in the investment known 'the Project'". The manager of the joint venture was HPSC.

234 The Receivers determined that a total of \$16.35 million was contributed by investors to LGHA. The Receivers were unable to quantify the extent to which investor funds were transferred to Moorhouse Avenue. According to Mr Letten, these funds were paid by LGHA to Moorhouse Avenue for the purchase and development of the Scheme properties. However, the balance sheet for Moorhouse indicates that only NZ\$11.9 million of investor contributions were advanced to Moorhouse Avenue.

235 Distributions or returns of capital to investors of approximately \$4.6 million were made from LGHA from the 2007 financial year to the 2009 financial year notwithstanding that the Scheme did not generate any profit during that period. Of that \$4.6 million, \$1.94 million was

paid to investors upon leaving the Scheme or transferring to another Scheme and \$2.69 million was paid to investors in respect of other distributions.

236 The Receivers have concluded that the balance of funds contributed by investors to the Scheme appears to have been used by LGHA for other purposes (including potentially paying moneys to other Schemes). The Receivers also concluded that it is likely that moneys advanced to LGHA by investors in other Schemes were used to acquire the Scheme Property and / or make payments to investors in the Scheme. The Receivers have been unable to trace how the funds have been applied by LGHA.

237 The only remaining assets of the Scheme appear to be some interest in “Stage 2” of the Scheme property or some claim against Moorhouse Avenue in respect of the Scheme’s remaining interest in that property of at least NZ\$5.8 million (which does not appear to be documented), and a trust or other claim against LGHA in respect of the balance of moneys contributed by investors to the Scheme, together with possible claims against other assets acquired with those moneys. If the funds advanced to Moorhouse Avenue are in accordance with the accounting records the Receivers have obtained, the Scheme may have a potential trust or other claim against LGHA.

(2) ESTABLISHMENT OF A TRUST

238 Each of the Schemes is a separate managed investment scheme in that it appears that investors contributed money as consideration to acquire rights to benefits produced by the acquisition of a particular identified asset or assets. However, the property of the Schemes was irretrievably commingled owing to the central treasury role played by LGHA and the manner in which the Schemes were operated.

239 It was common ground that each of the Schemes was established as a trust or a number of trusts. That requires more explanation and in particular, requires a distinction to be drawn between the various ways Investors invested in the Schemes.

(a) Investments pursuant to joint venture agreements

240 Many investors executed joint venture agreements (including for the equity deposit bonds) pursuant to which:

1. one or more of the Letten Entities were appointed as manager of one or more of the joint ventures;
2. the investors and the manager agreed to associate themselves as joint venturers for the purposes of carrying out the relevant “project”;
3. the assets of the joint venture were held by the manager on trust for the investors and the investors owned the beneficial interest in those assets in accordance with their respective participating interests; and
4. the profits of the joint venture were owned by the investors in proportion to their respective interests with investors each liable to contribute to any losses of the joint venture in the same proportion.

241 On that basis, each of the Schemes involving a joint venture agreement appears to be a trust created under the relevant joint venture agreement (or possibly a number of trusts in the case of YVG) with the relevant Corporate Defendant appointed pursuant to the joint venture agreement acting as the operator of the relevant Scheme and trustee of the relevant trust. The same conclusion applies equally to the joint venture agreement produced for the “Equity Deposit Bond 2005” for YVG (see [60] above).

(b) Alternative forms of investment

242 The Receivers conceded that the terms of the other “forms of investment” (investment by way of equity deposit bonds, equity mortgage investments and contribution in the absence of a joint venture agreement) do not expressly create a trust in the same manner as the joint venture agreements. However, the Receivers submit that a trust may nevertheless have been created in respect of the contributions of the investors who contributed money pursuant to these investments.

243 In the absence of the joint venture agreements, the screeds for the various alternative investments are the “blueprint”. For instance, the screeds, pursuant to which investors contributed by way of equity deposit bond investments reveal, that the intended nature of the equity deposit bonds were property based investments. So, for 211 Wellington Road, the screed for the equity deposit bond provides that “the investment is based around the property at 211 Wellington Road, Mulgrave, Victoria”. In relation to the equity deposit bonds for YVG, while it is not clear from the terms of the relevant screeds what property was intended to be the

subject of these investments, it appears the investments came about largely as a result of investor roll-overs from other investments in relation to various aspects of the YVG development. The screeds for the equity mortgage investments in YVG and Aurora Park similarly identify the property to which the equity mortgage relates.

244 For those investors that contributed without a joint venture agreement or any other formal documentation, the screeds are similarly relevant. Although each screed differs for the 17 Schemes that had investments without any apparent documentation, the following general conclusions can be drawn. First, the various screeds identify some property or project to which the investment relates. Secondly, the screeds promise investors the same benefits that one would obtain pursuant to a joint venture agreement (that is an “income” and a capital gain). Finally, pursuant to these screeds, investors contributed money and that money appears to have been applied in exactly the same way as that which was contributed pursuant to joint venture agreements. Put another way, although the various forms of the investment differed, the money was applied by the Corporate Defendants and in particular LGHA in exactly the same way.

245 As noted earlier (see [117] above), there was no screed produced in relation to the Healesville Walk Equity Mortgage. However, given that the form of the screeds produced for the equity mortgage investment were consistent, I have concluded for the purposes of the present application that it is more likely than not that the screed would have been in the same form as those identified for YVG and Aurora Park.

246 The Receivers also relied on the following propositions:

1. the responsible entity of a registered managed investment scheme is required, pursuant to s 601FC(2) of the Act, to hold scheme property on trust for scheme members;
2. The Full Court of this Court commented in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd* (2009) 180 FCR 11 at [64] that, if an arrangement is required to be registered as a managed investment scheme, then “by force of the legislation, scheme property is to be held on trust by the responsible entity”.

247 On those bases, the Receivers submitted that investors’ contributions in respect of the other forms of investment should be deemed to have been received by LGHA (or the relevant Letten entity) subject to a trust in favour of the investors. The Receivers submitted that conclusion was further reinforced because the funds contributed by the alternative forms of

investment were most likely paid to LGHA and will have been applied in the same manner as investors' contributions pursuant to joint venture agreements.

248 I accept that submission. In all circumstances, notwithstanding the deficiencies in the screeds and the joint venture agreements, a trust was created when the moneys were received by LGHA or the relevant Letten Entity (as the case may be) to hold that money and apply it for the purposes of a joint venture in which the property or project was sufficiently identified to form the subject matter of a trust: *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Limited & Others* [2010] EWCA Civ 917 at [171].

(3) MANNER IN WHICH SCHEMES WERE OPERATED

249 A summary of the Receivers' present understanding of the manner in which each of the Schemes generally operated has been set out above. However, there are other facts and matters of general application which are of some significance to the present application. This section has been divided into the following headings:

1. Receivers' attempts to trace investor contributions;
2. Lack of reliability in the accounting records; and
3. Costs associated with an attempted reconstruction of the financial and accounting data and the possible outcomes.

(a) Receivers' attempts to trace investor contributions

250 The Receivers attempted to trace individual investor contributions to a particular Scheme through the LGHA bank accounts and into particular assets. The payments could not be traced for a number of reasons:

1. receipts and payments in relation to each Scheme were made through common bank accounts and the payments were commingled;
2. there were four primary LGHA bank accounts and funds frequently were moved between these accounts;
3. the LGHA bank accounts were often in overdraft;
4. a number of the Schemes were oversubscribed in that the amount of investor contributions in relation to a particular Scheme exceeded the funding requirements for

that Scheme. These oversubscriptions were not refunded or returned to Investors: see, by way of example, Schemes numbered 14 (Twinview, see [135] above), 8 (Low Head- see [148] above) and 5 (Cimitiere House, see [205] above);

5. a significant proportion (up to \$38 million) of investor contributions to Schemes appears to have been used to pay distributions to investors in other Schemes in circumstances where there were not sufficient profits or funds in those other Schemes to fund payment of distributions: see, by way of example, Scheme numbered 18 (Aurora Park, see [72] above); and
6. the tracing of funds is further complicated and, in some cases, rendered impossible by the lack of reliable financial and accounting data.

251 The last issue requires further explanation.

(b) Lack of reliability in the Accounting Records

252 There are numerous problems with the accounting records. The primary accounting information is MYOB accounting records maintained by LGHA.

253 First, the accounting records are incomplete. No accounting records are available for the period prior to the 2002 financial year due to there having been a changeover in accounting systems. No MYOB accounting records were kept for LGHH or LGHF. There is a lack of any detailed supporting documentation in relation to key transactions.

254 Secondly, the accounting records do not reconcile and are unreliable. There are no known documented accounting policies for LGHA. The accuracy of the opening balances in the MYOB accounts cannot be ascertained. There are inconsistencies in the way in which transactions are recorded in various MYOB files. After undertaking some limited verification work, the Receivers concluded that the way in which some transactions were recorded was inconsistent with supporting documentation that was available to them. Further, accounting entries do not appear to have been recorded on a consistent basis from year to year.

255 Indeed, there were three types of accounting records maintained for the Schemes: LGHA, Investor Current Accounts and "Letten Scheme / Project Accounts". As LGHA acted as the treasurer for the Schemes, it would be expected that a number of transactions would have been recorded in all three sets of MYOB accounting records. So, for example, investor

contributions should have been recorded in the Investor Current Accounts (to record their investment), the Letten Scheme / Project Accounts (to record their equity in the project) and the LGHA accounts (to record the flow of funds through LGHA). In a number of cases, this did not occur. Moreover, no reconciliation of the three sets of accounts appears to have been undertaken.

256 Thirdly, there has been a mixing of funds between entities and those transfers are not recorded accurately or at all. For example, funds were transferred between various LGHA entities as part of normal operations. The source or sources of those transfers is not identified with any certainty. Another complicating factor is that LGHA also acted as the trustee of the LGH Family Trust. However, LGHA's accounts did not reflect the fact that it was the trustee and LGHA's accounts were not maintained in accordance with trust accounting requirements.

257 Fourthly, although the Receivers were provided with a set of MYOB files for LGHA for each year from 2002 that reconcile to the year end management accounts, no statutory accounts were prepared and none of the accounts were audited. Given the issues identified above in relation to LGHA's accounting records, the Receivers do not accept the accuracy of the management accounts.

(c) Cost associated with an attempted reconstruction of the financial and accounting data and the possible outcomes

258 Given the complexities associated with the financial and accounting data (or lack of it), the Receivers concluded that to attempt to reconstruct the LGHA accounts, the Investor Current Accounts and to attempt to trace the approximately 110,000 transactions which took place in relation to the LGHA bank accounts plus the distributions to investors would cost approximately \$18 million. That cost is prohibitive. As the Receivers stated in the LGH Companies' Disclosure Report it would not "be justifiable to incur any further costs in the tracing exercise in circumstances where it is clear that the tracing exercise cannot be completed".

259 Even if the tracing exercise could be completed (and it cannot), in the circumstances of this case it is not justifiable to reduce the available funds for distribution to investors by \$18 million (the approximate cost of the tracing exercise) out of a possible fund of \$13 to 14 million (after payment of secured creditors) because:

1. The funds contributed by investors in each of the Schemes were paid directly by investors to LGHA or another Letten Entity rather than to the manager of the relevant Schemes;
2. None of the Corporate Defendants beneficially own any assets which are not property of one or more of the Schemes;
3. Funds contributed by investors in each of the Schemes were mixed and commingled in common bank accounts of LGHA;
4. The proceeds of sale of a number of the Scheme properties which were sold prior to the appointment of the Receivers were also paid to the Letten Entities and were mixed and commingled in the bank accounts of LGHA;
5. The Letten Entities applied the mixed investor funds and the proceeds of sale of various Scheme properties to the assets of other Schemes by way of:
 - 5.1 the purchase and development of individual properties;
 - 5.2 the operation and maintenance of individual properties;
 - 5.3 the payment of distributions to investors; and
 - 5.4 some limited returns of capital to certain investors;
6. The books and records of each of the Schemes (as interpreted and adjusted by the Receivers) describe the assets of each Scheme as an identified property development (unless that asset has been sold) with or without a loan receivable from LGHA;
7. The books and records of each of the Schemes (as interpreted and adjusted by the Receivers) describe the liabilities of each Scheme as the secured and unsecured debts of the relevant Corporate Defendant with or without a loan payable to LGHA;
8. The books and records of LGHA refer to LGHA as having net assets of \$21.1 million which primarily relates to LGHA's "net contributions in the projects" (**NCIP**) and some ancillary matters;
9. The books and records of each of the Schemes and the Corporate Defendants (including the Letten Entities) cannot be reconciled, the balances of the intercompany loans and the NCIP (as described in the relevant books and records) cannot be verified and individual investors' contributions cannot be traced into particular properties because even with the expense of a full reconstruction, the accounts may not reconcile;

10. any tracing exercise would confirm that various investors have an interest in common assets (such as the assets of the YVG Joint Venture) and various investors have an interest in funds or property in the hands of investors in other Schemes.

260 It is for those reasons that I accept that any further tracing of investor contributions should not be attempted on the basis that it would not “be justifiable to incur any further costs in the tracing exercise in circumstances where it is clear that the tracing exercise cannot be completed.”

E. COURT’S POWER TO MAKE POOLING DIRECTIONS AND THE RELEVANT LEGAL PRINCIPLES

261 At the outset, it is important to identify the source of the Court’s power to consider a direction of the kind ultimately sought by the Receivers. The following categories of investors were in issue:

	Person or Entity	Person(s) potentially affected
1	Schemes wound up pursuant to s 601EE(2) of the Act: Schemes 1, 4 to 9, 12 to 16 and 19 to 21 in Attachment A.	Joint Venture investors Equity deposit bond holders Equity mortgage investment investors
2	Concluded Schemes: Schemes 2, 3, 10, 11, 17 and 18 in Attachment A.	Joint Venture investors Equity mortgage investment investors
3	Corporate Defendants.	Creditors

262 The source of the Court’s power for each category is different. I will deal with each in turn.

(1) Schemes wound up pursuant to s 601EE(2) of the Act

263 A number of principles were not in dispute. As was stated in paragraph [12] of *Letten (No 5)*:

... [Section] 601EE(2) of the Act confers on the Court power “to make any orders it considers appropriate *for* the winding up of the scheme” (emphasis added). It is a very broad power: *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532 and *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd* (2002) 42 ACSR 240 at 243-244 and

Mier at [16]. Courts have construed s 601EE(2) of the Act as conferring jurisdiction throughout the course of the winding up:

1. to make orders to resolve issues that arise in the course of that winding up: see *Re GDK Financial Solutions Pty Ltd; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd* (2006) 236 ALR 699 at [42] and the authorities cited; see also *Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd* [2004] 1 Qd R 591 at [28] and the authorities cited and *Mier* at [16];
2. to make orders and declarations identifying the scheme property (*Mier* at [16]). However, Courts have also held that the Court's statutory and inherent powers do *not generally* permit it to make orders that depart from the proprietary rights of the scheme participants: *Australian Securities and Investments Commission v Tasman Investment Management Ltd* (2006) 59 ACSR 113.

264

It is the last sentence in sub-point (2) that lies at the heart of the current application – that the Court's statutory and inherent powers do *not* generally permit it to make orders that depart from the proprietary rights of the Scheme participants. That principle has been reiterated in a number of cases and has a sound juridical foundation:

1. Chapter 5C of the Act regulates managed investment schemes: *National Australia Bank Ltd v Norman* (2009) 180 FCR 243 at [118];
2. "Managed investment scheme", but not "scheme", is defined in s 9 of the Act. "Scheme property" of a registered scheme is defined broadly in s 9 of the Act. Attempts to define or describe a "scheme" have resulted in a number of formulations (for example, *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388 at [15]; *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd* (2006) 236 ALR 699 at [2], citing *Takaran* at [16]; *Australian Securities and Investments Commission v Primelife Corp Ltd* (2006) 235 ALR 328 at [33]; *Norman* at [125] – [126] citing *Australian Softwood Forests Pty Ltd v A-G (NSW); Ex rel CAC* (1981) 148 CLR 121 at 129; *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403; *Knightsbridge Managed Funds* [2001] WASC 339 at [45]). In the end, the statutory definitions that do exist show that a "scheme", in the context of a managed investment scheme, contains some essential elements – a coherent and defined purpose, in the form of a "programme" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan and a pooling of contributors' funds or of a

“common enterprise” as between the contributors. As Keane JA explained in *Mier* at [26]:

[T]here can be no doubt that the scheme property of an unregistered scheme is to be identified by reference to the terms of the scheme in relation to the contribution of assets to the *enterprise* involved in the scheme.

(Emphasis added.)

3. The word *enterprise* is important because a scheme, unlike a company, need not involve the existence of a legal identity separate from that of its members: *Mier* at [20].
4. Although s 601EE provides that “a Court may make any orders it considers appropriate for the winding up of the scheme”, the phrase “winding up” is not defined. In *Mier*, Keane JA held that s 601EE had to be read as empowering a Court to make such orders as it considers appropriate in order to get in the property and satisfy the liabilities of the scheme and to make such orders as are required for the “due conduct and completion of the winding up”: [16]. In other words, as Keane JA said, if the orders could not reasonably be seen as advancing this procedure, they would not be authorised by s 601EE(2). Of particular significance to the present case, Keane JA went on to state at [16] that:

Whatever the precise details of the procedure that may be fixed by a Court to wind up an unregistered scheme, the understanding of “winding up” adopted ... means that a necessary first step must be to determine what should be properly considered to be the property of the scheme.

265 The essential elements of a managed investment scheme – a coherent and defined purpose, in the form of a “programme” or “plan of action”, coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan and a pooling of contributors’ funds or of a “common enterprise” as between the contributors – necessitate the need to first identify the property of the scheme. Why? Because investors pool funds to commit to a plan which usually involves the purchase and / or development of identified property and that identified property would ordinarily be held on trust for the investors and would be received by the scheme manager or the equivalent entity (if it exists) in a fiduciary capacity: *Re French Caledonia Travel Services Pty Ltd (in Liq)* (2003) 59 NSWLR 361 at [19] and Austin J in *Tasman* at [53].

The question of the existence of a trust in the context of a managed investment scheme was considered by Austin J in *Tasman* at [53]. In that case, the Court had appointed a receiver and manager to wind up an unregistered managed investment scheme. The receiver approached the Court seeking a direction concerning the final distribution to investors in the scheme. The issue was whether the Court had power to grant the relief and, if so, whether there were any limitations on the exercise of the power. After analysing the investors' rights, Austin J concluded:

[53] The wording of the initial property report suggests a trust by which LMS would hold its ownership of the property investment in trust for the beneficiaries of the development project, including the investors. Since, however, any intended trust was not formally constituted, there is a reasonable basis for concluding the investors retained the beneficial ownership of the funds they subscribed in response to the initial property report, on resulting trust. This is on the basis that the investors have transferred their investment funds to a recipient who has received them in trust, to hold on terms which have not wholly divested the investors of their interest in the funds: *Re Vandervell's Trusts (No 2)* [1974] EWCA Civ 7; [1974] Ch 269 at 290 (reversed on other grounds). This is a case where there was more than one "settlor", with the following result, according to *Ford and Lee's Principles of the Law of Trusts* (Lawbook Co, looseleaf, at [21020]):

Where the trust fund in respect of which the full beneficial interest has not been disposed of was contributed by several persons, the resulting trust will be in favour of those persons or their respective personal representatives in proportion to their contributions: *Re British Red Cross Balkan Fund* [1914] 2 Ch 419; *Beggs v Kirkpatrick* [1961] VR 764; *Burgess v Rawnsley* [1975] Ch 429 at 441 per Browne LJ.

...

[55] Where beneficiaries' funds are mixed in a common pool such as a bank account of the trustee, and after the mixing, the funds are partly dissipated and partly retained or invested in an asset held by the trustee, modern Australian cases do not allocate the loss amongst the beneficiaries by applying the "first in, first out" rule of *Devaynes v Noble* (1816) 1 Mer 572; 35 ER 781 (*Clayton's Case*). Instead they allow each beneficiary to assert a charge over the amount remaining in the account and any assets that can be identified as having been acquired, after the mixing, by the use of funds taken from the account (*Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; (2003) 48 ACSR 97; *Commonwealth of Australia v Official Trustee in Bankruptcy (as trustee of the property of Vasil)* [2004] NSWSC 1155; *Westpac Banking corporation v Earthwise International Ltd* [2005] NSWSC 1037; *Re Rowena Nominees Pty Ltd; ex parte Conlan* [2006] WASC 69). Where the sum of the balance of the bank account and the realisable amount of any charged asset or assets is less than the total amount of the beneficiaries' charges, the charges usually abate proportionately, with the consequence that the beneficiaries share

pro rata in the balance of the account and the proceeds of realisation of the assets. Pro rata distribution is departed from only in circumstances not relevant to the present case (see *French Caledonia Travel* at [177]-[185]).

...

[57] A potential difficulty with this analysis is that the Wentworth Falls properties were acquired by a third party to the trust relationship, namely LMS. Where the trustee has disposed of funds to a third party which uses those funds to acquire an asset, the beneficiaries' right to trace against the asset in the hands of the third party depends upon whether the third party acquired the asset as a volunteer or with knowledge of the beneficiaries' rights *Re Diplock; Diplock v Wintle* [1948] 1 Ch 465; *French Caledonia Travel* at [129]-[134]).

267 At the time of winding up of an unregistered managed investment scheme, what is contemplated is the reverse to that outlined in [265] above – the realisation of the assets of the scheme, discharge of liabilities and the distribution of any surplus among the members of the scheme: *Mier* at [17] citing Barrett J in *Commercial Nominees*. In *Mier*, Keane JA went on to make a number of other points which are presently relevant:

[20] The first point is that a scheme, unlike a company, need not involve the existence of a legal identity separate from that of its members. As I have mentioned, a "scheme" might also take the form of, among other things, a trust. Those categories are not necessarily closed. Nevertheless, the Act postulates the application of the winding up process to "the scheme" regardless of what form the scheme might take. This postulate directs attention to the necessity to recognise that it is the scheme which is to be wound up, and, to that end, to identify the "property of the scheme" which is to be realised and applied in the winding up. It may be, though it is unnecessary to decide for the purposes of this appeal, that the scheme in the present instance, having no capital fund and with the manager holding rental payments on behalf of each of the lot holders, bears a stronger resemblance to a trust than to a company. There are important differences between winding up a trust and winding up a company [*Horwarth Corporate Pty Ltd v Huie* [1999] 32 ACSR 413 at 415 and *Stacks* at 466-467] but, even if one were to be guided by the law of trusts rather than the Act, the first step is still to determine what is the scheme property to be collected and realised.

[21] The second point to be made here is that the function of a liquidator in a winding up in relation to the assets of the scheme is the collection and realisation of the assets of the scheme as at the commencement of the winding up. [For example, the liquidator of a company is only empowered to sell or otherwise dispose of the "property of the company": s 477(2)(c) of the Act]. A liquidator of an entity has no power, unless it is otherwise expressly conferred by statute, to collect and realise, on behalf of that entity, assets which are not the property of the entity for the simple reason that there would be no legal right in existence entitling the liquidator to do so. [footnote omitted] It follows

that, under the Act, the liquidator of a scheme cannot be given the power to collect and realise, on behalf of the scheme members, assets to which the members of the scheme, as such, have no title right or interest.

[22] The third point is that in the case of the winding up of a scheme, as of a company, partnership or trust, the premise on which winding up proceeds must be that the business or enterprise involved in the scheme is to be terminated, so that when, for example, a company is ordered to be wound up it may continue to carry on business only for the limited purpose of collecting and realising its assets. [footnote omitted]

268 As those passages make clear, *generally* s 601EE(2) does not authorise a distribution of surplus assets of an unregistered managed investment scheme other than to those entitled to the assets in proportion to their entitlements, namely, the members. The next question is when is it possible for there to be a distribution of surplus assets of an unregistered managed investment scheme other than to those entitled to the assets in proportion to their entitlements, namely, the members and if so, by what method? I address both these issues in further detail below. However, before considering them, it is necessary to examine the Court's powers in relation to the Concluded Schemes and the Corporate Defendants.

(2) Concluded Schemes

269 Ultimately, it was common ground that the Court has the necessary power to make the directions ultimately sought by the Receivers in relation to the Concluded Schemes under ss 23 and 57 of the FCA, s 1323 of the Act and O 26 r 7 of the *Federal Court Rules*.

270 The relevant principles may be summarised as follows:

1. The power of the Court to appoint a receiver is statutory (see ss 23 and 57 of the FCA and s 1323 of the Act) but has its origins as an equitable remedy: *University of Western Australia v Gray (No 6)* [2006] FCA 1825 at [71];
2. In addition to the powers given to receivers by s 420 of the Act, the Court has the power to authorise a receiver to do any act or thing which the parties might do: see O 26 r 7 of the *Federal Court Rules*. Examples include investing the receiver with power to conduct legal proceedings and to appoint lawyers to act (*Gray (No 6)*), to settle such proceedings (*Australian Securities and Investments Commission v Letten (No 6)* [2010] FCA 1048) or to enter into formal agreements by deed (*Parker Re Purcom No 34 Pty Ltd (in Liq)* (2009) 262 ALR 85);

3. The circumstances in which the Court may exercise its power to appoint receivers, and the conditions which may be attached to that appointment, are not closed: *Gray (No 6)* at [71]. As explained by French J in *Gray (No 6)*:

There may be many circumstances of considerable diversity which would warrant such an order and it is important that the discretion not be unnecessarily confined by any particular line of cases to which it has been applied.

4. The power to appoint a receiver must carry with it an implied power to give directions with respect to the discharge of the functions for which the appointment is made: *Mariconte v Batiste* (2000) 48 NSWLR 724 at [75] per Austin J.

5. The function of the Court on an application for directions from Court appointed receivers is analogous to its function with respect to a provisional liquidator: *Mariconte* at [76] citing *Sanderson v Classic Car Insurances Pty Ltd* (1985) 10 ACLR 115 and *Law Society of New South Wales v Milios* (1999) 48 NSWLR 409.

6. It is appropriate for the Court to give directions that provide guidance to the receivers on matters of law and on the reasonableness of the contemplated exercise of discretion: *Mariconte* at [76]. However, such directions should not be given where the answer to the question would require the Court to make or to condone a particular commercial judgment: *Re One.Tel Networks Holdings Pty Ltd* (2001) 40 ACSR 83 at [32].

271 As those principles make clear, the Court's powers in relation to court appointed Receivers are broad. In my view, the Court's power extends to making directions the Receivers ultimately sought in this Court in relation to the Concluded Schemes.

(3) Corporate Defendants

272 It was also not in dispute that the Court has the necessary power to make the directions ultimately sought by the Receivers under s 601EE(2) and s 1323 of the Act, or ss 23 and 57 of the FCA and O 26 of the *Federal Court Rules* in relation to property of the Corporate Defendants which is property of the Schemes.

273 The Court's powers to grant the Receivers the directions they ultimately sought in relation to the Corporate Defendants is two-fold. First, the principles outlined in [270] above make it clear that the Court's power is sufficiently wide to make such directions.

274 Secondly, it flows from the Court's power to make the directions in relation to the Schemes that were wound up pursuant to s 601EE(2). The property of the Corporate Defendants includes Scheme property. The orderly winding up of the Schemes pursuant to s 601EE(2) cannot occur if the Scheme property of the Corporate Defendants is excluded.

F. LEGAL FRAMEWORK FOR THE METHOD OF DISTRIBUTION

275 In general terms, the Receivers submit that the Scheme property of the Schemes ought to be distributed rateably to investors on a pooled basis. Although some Investors object to the Scheme property being pooled (see [326] and [327] below) it was largely accepted that a scheme by scheme distribution was inappropriate because it was not possible and it was too costly: see [258] – [260] above. Therefore, the discussion at the hearing focussed substantially on the appropriate method of distribution from a mixed or pooled fund. As will become apparent, the authorities identify a variety of options.

(1) The Rule in *Clayton's Case*

276 The first, or "traditional" method of distribution applied when attempting to trace funds in and out of a bank account is the "first in first out" approach in *Devaynes v Noble* (1816) 35 ER 781 (*Clayton's Case*). This approach allocates the first payment out of a fund to the first payment made into it. As identified by the Light Interests, the rule in *Clayton's Case* "throws the loss on earlier depositors on the ... chance that [a] presumed intention operates".

277 Recent Australian authorities have declined to apply *Clayton's Case* in circumstances where (as here), beneficiaries' moneys have been deposited into a mixed fund. In *Re French Caledonia Travel Services Pty Ltd*, Campbell J observed at [169]:

The principles upon which tracing operates, and the proper scope of the application of the rule in *Clayton's Case*, both favour the rule in *Clayton's Case* not being used to allocate losses suffered by beneficiaries whose funds are mixed. This conclusion is arrived at as a matter of principle, regardless of whether or not there is sufficient information to enable an allocation of withdrawals to deposits, in accordance with *Clayton's Case*, to be made in any particular case.

(2) The Lowest Intermediate Balance Rule

278 Another approach is the "lowest intermediate balance rule" which provides that tracing through a mixed fund cannot occur for any sum that exceeds the lowest intermediate balance in

the fund during the interval between the original contribution and the time when a claim with respect to that contribution is being made against the fund: *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62. In *Law Society of Upper Canada v Toronto Dominion Bank* (1998) 169 DLR (4th) 353, Blair J explained the rule as follows (at [19]):

This ... concept is grounded, ultimately, on the premise that tracing rights are predicated upon the model of property rights. [The lowest intermediate balance rule] seeks to recognize that at some point in time, because of earlier misappropriations, an earlier beneficiary's money has unquestionably left the fund and therefore cannot physically still be in the fund. Accordingly, it cannot be "traced" to any subsequent versions of the fund that have been swollen by the contributions of others, beyond the lowest intermediate balance in the fund.

279 In *Toronto Dominion Bank*, Blair J rejected the application of the lowest intermediate balance rule on the basis that the performance of the necessary calculations following each deposit or withdrawal would be extremely complex and may not be achievable. His Honour stated that there were very limited circumstances in which the lowest intermediate balance rule would apply. The rule has been applied in some circumstances in Australia: *Re Laughton* [1962] Tas SR 300 and *Re Joscelyne; Allen's Plaster Products Pty Ltd v Prudential Assurance Co Ltd* [1963] Tas SR 4. However, as identified by Debelle J in *Re Magarey Farlam Lawyers Trust Accounts (No 3)* (2007) 96 SASR 337, the rule is inapplicable in cases involving multiple and competing beneficiaries whose moneys have been deposited in a mixed fund.

(3) The North American Model

280 Another approach is the so called "North American Model", sometimes known as the "rolling charge rule". Pursuant to the North American Model, a withdrawal from the mixed fund is allocated in the same proportions as the different beneficiaries bear to each other at the moment before the withdrawal is made. In other words, each debit to the fund is attributed to all existing claimants at the relevant time on a pro rata basis: *Re Global Finance Group Pty Ltd (in liq)(supervisor appointed); Ex parte Read* (2002) 26 WAR 385. The North American Model was rejected by the English Court of Appeal in *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 owing to the complexity and cost associated with its application. Similarly in *Re Global Finance*, McClure J identified that where there is a large number of claimants, the task of identifying relevant withdrawals creating the loss to be allocated renders the approach impractical and "very costly".

(4) Distribution According to Intention

281 According to the “intention based” approach, the balance remaining in the mixed fund is distributed among the beneficiaries *pro rata* in proportion to the contribution of each beneficiary. It operates according to the presumed intention in *Clayton’s Case*. But the presumption is rebutted where the trustee of a mixed fund has removed his own money from the fund and applied it to his own purposes. If the latter occurs, the trustee is presumed to have acted honestly, withdrawing money that was his own, not that of the beneficiary (*Re French Caledonia Travel*). That presumption may also be rebutted by proof of a contrary intention. It is a modified version of this approach that the Light Interests submit is the appropriate method of distribution (which they define as “proportionate equality”).

(5) Rateable Distribution

282 The final approach to distribution is that which the Receivers rely on in the present application – “rateable distribution” – whereby the beneficiaries of the trust or trusts are each entitled to an equitable charge or lien on the whole of the remaining unused common fund. Rather than being based on the purported intention of the beneficiaries, the distribution is made proportionately to the claims as assessed by the Receiver.

283 In *Australian Securities and Investments Commission v Nelson* [2003] NSWSC 129, Austin J concluded that a rateable distribution is the preferred method of distribution. In that case, a liquidator of six companies sought orders for the distribution of funds that the companies held as trustees where the funds of the various trusts had been commingled and largely depleted. The issue for the Court was whether it should order the rateable distribution to investors of the funds remaining after deduction of the liquidators’ remuneration and costs. Austin J of the Supreme Court of New South Wales ordered that the assets of each of the companies be pooled and distributed rateably to beneficiaries of the various trusts. His Honour concluded at [27] that “as a practical matter [the rateable solution] [was] far and away the best solution in the circumstances.”

284 In *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 082, Chesterman J ordered a rateable distribution of the assets of a managed investment scheme which had been placed into receivership. In that case, moneys deposited by investors were mixed in bank accounts and the mixed pooled funds had been largely dissipated.

Chesterman J concluded that the poor state of the records made it impossible to trace individual investors' moneys and any attempt to do so would involve considerable time and expense and would be unlikely to produce a reliable result. His Honour concluded at [13]:

The purposes for which the investors paid money to the respondents cannot be achieved. The solicitation of their money was unlawful and the operation of the schemes has been brought to an end. Less than 10% of the moneys paid have been recovered. Whatever were the terms on which the respondents held moneys paid by investors in the present circumstances the receivers hold the recovered moneys on resulting trusts for the investors. The trust fund being inadequate for reimbursement in full and there being no means of identifying any particular fund as being the moneys of any particular investor the appropriate order is for a rateable distribution. This proposition is supported by *Re British Red Cross Balkan Fund* [1914] 2 Ch 419; *Keefe v Law Society of New South Wales* (1998) 44 NSWLR 451 at 460 - 461 and the discussion in Jacob's *Law of Trust in Australia* 6th ed para 2711, para 2712.

285 In *Re French Caledonia Travel Services*, the Supreme Court of New South Wales held that, in circumstances where trust moneys had become mixed, a liquidator was justified in distributing among all the claimants proportionately to their claims as assessed by him, and as the funds available were small and likely to be substantially depleted by the liquidator's own costs if the liquidator tried to carry out an extensive analysis of the accounts. The Supreme Court of New South Wales went on to address the possibility that where there was evidence that various claimants ought be divided into separate classes with differential dividends, such an order should be made. Campbell J stated that:

[R]ateable abatement does not automatically apply wherever there is a mixed fund because there is a preliminary question, the answer to which cannot be assumed, of whether all claimants on the fund ... have claims which are equal.

286 In *Tasman*, a scheme established in 2002 was wound up on the application of ASIC in 2004. Funds for the project, totalling \$4.6 million, were raised from some 74 investors. Of the funds raised, some \$2 million was spent on the acquisition of a property. The equity of redemption in that property was the only asset of the scheme (the balance of the funds having been expended). If the property was sold, about \$1.6 million was left for investors. Austin J held that there was sufficient foundation for the receiver to take the view that the surplus funds of a managed investment scheme which was in the course of being wound up belonged in equity to the investors in rateable proportions and should be distributed to them pro rata.

G. SUBMISSIONS FOR AND AGAINST POOLING

(1) Introduction

287 As stated earlier, notice of the pooling application was given to the parties to the proceeding, to the Secured Lender and to the Investors. The Court received submissions from the Receivers, Mr Letten, investors in a number of Schemes (99 written submissions and four oral submissions) and from Bridgehead and Matclair (creditors). Submissions were both in writing and oral. The views expressed were not consistent. The views of each of those who participated will be considered in turn and, where necessary or appropriate, matters of substance will be addressed.

(2) Receivers

288 As noted earlier, the Receivers submitted that the circumstances of this case support the distribution of a mixed fund on a rateable distribution pursuant to the Receivers' proposed directions. The circumstances on which the Receivers' rely to justify the difficulties associated with tracing and why a Scheme by Scheme distribution is impractical are described in Section D above.

289 In addition, the Receivers submitted that the "overwhelming weight of modern authority" supports their proposed method of distribution, and sought to explain why other methods of distribution were not appropriate.

290 As to the rule in *Clayton's Case*, the Receivers submitted that it would be expensive and likely to be impossible to fully trace all funds contributed by Investors to the LGHA bank accounts. On that basis, it would not be possible to apply the "first in first out" rule in order to separately identify the scheme property of each of the Schemes.

291 In relation to the lowest intermediate balance rule, the Receivers submitted that the application of that rule would not be appropriate in relation to the LGHA bank accounts on the basis that the bank accounts were often in overdraft (particularly through much of the later period of the Schemes). If the lowest intermediate balance rule applied, it would likely result in the overwhelming majority of investors having no right to trace into LGHA bank accounts and into any assets purchased with funds deposited in those accounts.

292 The North American Model was considered inappropriate on two bases. First, owing to the central treasury function performed by LGHA for all of the Schemes, the vast majority of withdrawals from the relevant bank accounts (that is, all withdrawals of funds for the benefit of a Scheme other than the Scheme in respect of which the funds were deposited) may constitute “unauthorised withdrawals” in respect of other Schemes. Further, on that basis, there would be similar issues in terms of the complexity and the cost of reconstructing the LGHA and Scheme accounts associated with the application of the North American Model as for the application of the rule in *Clayton’s Case*.

293 As to an intention based approach, the Receivers submitted it was inappropriate on a number of bases:

1. It is not clear how an intention based approach could address the issue of the claims investors in some Schemes would clearly have against assets purchased for the purposes of other Schemes. As the analysis of the Schemes demonstrates, the proceeds of sale of the property purchased for one of the Schemes were, in a number of cases, retained by LGHA and likely redeployed for the benefit of other Schemes with the consequence that investors in the relevant Schemes may have a trust or other claim against LGHA or the other Schemes. This is not a rare occurrence: it potentially affects investors in at least Tomasetti House (Scheme 17), Mount Hutt (Scheme 21), Moorhouse (Scheme 19), National Boulevard (Scheme 10), Queen Street (Scheme 7), Healesville Walk (scheme 2), 211 Wellington Road (Scheme 1) and Howleys Road (Scheme 3);
2. Similarly, an intention based approach fails to consider that many of the Schemes were oversubscribed with the consequence that some of the contributions of investors were used, in breach of trust, to fund the operations of other Schemes and the distributions paid to investors in the Schemes generally. In some instances, the intended Scheme asset did not receive any benefit from investors’ contributions which were instead redeployed by LGHA. As members of the Schemes and beneficiaries of the trust, the investors are entitled to have the trust assets restored and would have proprietary claims against those assets purchased with funds applied in breach of trust;
3. Further, it is not possible to accurately determine the quantum of the intercompany or inter-Scheme claims and positions and under an intention based approach those loans and claims would be ignored. According to the Receivers the outcome of such an approach would be that:

- 3.1 The Schemes in respect of which the primary asset (being an item of real property) has been sold would have no assets available for distribution to investors in those Schemes, with the result that investors in those Schemes would not receive any return in the winding up of the relevant Scheme;
- 3.2 The proceeds of sale of each of the remaining assets would only be available for distribution to the investors in the Scheme for which the relevant asset was acquired with the result that the return which would be received by investors in those Schemes would depend on the net amount realised upon the sale of the relevant asset;
- 3.3 No fair recognition is given to the enhancement in value of the property of some Schemes by the application of cash (direct investor contributions to or sale proceeds of, other Schemes) which was so applied *contrary to the intentions* of the investors in those other Schemes; and
- 3.4 The consequence may be that investors in those Schemes which have been “bereft of assets” would be encouraged to make claims and commence litigation. The costs associated with resolving those disputes could materially reduce the overall pool of funds available to the detriment of investors.

294 In those circumstances, the Receivers submitted that an intention based approach is “arbitrary” and unfair and would provide a windfall to those investors whose intended assets had not yet been sold, at the expense of those investors whose intended asset had been misappropriated. It would also provide a windfall to those investors whose Scheme assets received a financial benefit from contributions (including oversubscriptions) by investors in other Schemes.

295 The Receivers submitted that a rateable distribution was not only supported by authority but was also the most pragmatic approach. This is particularly so in circumstances where the fund has been mixed for at least 12 years during which there were in excess of 110,000 transactions through relevant bank accounts, any tracing exercise would be complicated by lack of reliable financial and accounting data and the estimated costs of reconstruction would be \$18 million. The Receivers further submitted that their proposal gave “due recognition” to the proprietary and other claims which investors in each of the Schemes would have against assets acquired for the purposes of other Schemes and providing value to those claims. According to

the Receivers, the proposed method of distribution is the most fair and is in accordance with the maxim that “equality is equity”.

296 What of those investors that received distributions? The Receivers acknowledged the observations of Campbell J in *Re French Caledonia Travel Services* at [179] to [185] where his Honour referred to the personal equity which arises as a consequence of the principle that a person seeking to participate in the distribution of a fund must “bring to hotchpot” the benefits already received by that claimant from the fund. As the screeds reveal, investors were told that they would receive periodic payments in addition to a capital return. On that basis, the Receivers submitted that the investors may have an entitlement to receive distributions that is collateral to their claim for the return of the amounts invested. In those circumstances, the Receivers submitted that the investors would not be required to bring any distributions received into “hotchpot” in order to make a claim on the common fund in respect of their contributions.

297 Indeed, the Receivers submitted that the resolution of the investors’ entitlements with respect to distributions may depend, to some extent, on the representations that were made to each individual investor. Therefore, the Receivers submitted that the issue of distributions, and any residual uncertainties in respect of other entitlements, would best be resolved as part of the proof of debt process the Receivers propose to conduct in relation to the investors’ claims. I agree.

(3) **The Light Interests**

298 The Light Interests submitted that they invested some \$2.7 million in Schemes numbered 1, 5, 6, 9, 14-21 (inclusive). They opposed any wholesale *order* for pooling of all and any surplus from the winding up of the Schemes on the basis that such orders would be inimical to the overriding object of protecting and preserving the interests of investors: *Brighton*. They objected to the Court making any binding orders, a position which the Receivers ultimately accepted. Instead, the Light Interests sought directions that:

1. the Receivers would not be justified in tracing; and
2. the Receivers would be justified in pooling on the basis of “proportionate equality”, that is dividing the pool by reference to the notional value of the Scheme.

That is, ultimately, the Light Interests' supported the view that pooling was appropriate but adopted a different approach to the Receivers as to how the pool should be "carved up". Mr Kelly SC appeared on behalf of the Light Interests on a pro bono basis. His written and oral submissions were of considerable assistance in the determination of the Receivers' application for directions.

299 The position adopted by the Light Interests was based on the following overview of the facts:

5. [Mr] Letten initiated and promoted the investment and participation by some 900 Investors in a range of joint ventures throughout Australia and New Zealand (**Joint Ventures**). In doing so, he introduced and gave "favoured treatment" to clients of his accounting practice.
6. Investments in the schemes were made pursuant to the terms and conditions of certain joint venture agreements and not otherwise. Terms included that Investors' Capital Contributions would be held on trust. These circumstances impel conclusions that such Investors:
 - (a) intended to invest only in specific Joint Ventures;
 - (b) did not intend to invest in other Joint Ventures.
7. Pursuant to the intended Joint Ventures, the parties' manager was appointed, and proceeded, to purchase certain property with a view to the development of the property and did so for the purposes of holding the property on trust and deriving income from it.
8. A point of distinction between the schemes is that while some of the ventures were established solely for the purposes of acquiring, developing and holding or selling certain property (**Property Schemes**), other Joint Ventures were established for the purposes of acquiring, developing or establishing and conducting certain businesses (**Business Schemes**). The various schemes are readily distinguishable.
9. The evidence indicates that the monies invested by Investors are hopelessly co-mingled and cannot be traced with any certainty. [Even if some \$18M was expended in seeking to achieve that uncertain result]
10. Those, and other, circumstances have resulted in regulatory intervention by ASIC, applications to this Court for urgent relief, orders declaring the Joint Ventures to be unregistered managed investment schemes, orders for the winding up of those Schemes and the appointment of receivers and managers. This has resulted in loss and damage being suffered upon the immediate dilution of the Investors' equity in such Schemes. Inevitably, Investors would seek to recoup all and any loss sustained as a result of these events. So too, ASIC may well take action against those responsible. The position of secured and trade creditors fall for consideration. Additionally, the receivers and managers seek directions as to whether they would be justified in taking particular steps

in the winding up of the Schemes. They do so in the context that their initial investigations of the Schemes indicate that some of the Schemes are insolvent. As concerns liability for taxation the position of the Schemes or their Investors appears uncertain and is unresolved.

(Footnotes omitted.)

300 There are a number of matters to be noted. First, as the summary of the Schemes records, the statement that “[i]nvestments in the schemes were made pursuant to the terms and conditions of certain joint venture agreements and not otherwise” is not accurate. Many investors in many Schemes do not appear to have executed a joint venture agreement. Secondly, despite the common form and terms of the joint venture agreements produced by the Receivers and ASIC, the Receivers acknowledged that there were slight variations between the various joint venture agreements. For example, in the case of Scheme numbered 11 (Simms Investment Project), “interest” is defined by reference to a “project”, whereas in the case of Scheme numbered 1 (211 Wellington Road), “interest” is described by reference to “property”. Further, in many of the later Schemes, both descriptions and definitions of the relevant “project” or “property” are missing. In Scheme numbered 11 (Simms Investment Project), for instance, the project is described in the recitals (but not defined) as the “626 Pittwater Road, Brookvale Project”. In contrast, the Scheme numbered 7 (Queen Street Joint Venture) omits both a description and a definition.

301 Notwithstanding those differences, the Light Interests submitted that the following conclusions should be drawn from the form and contents of the joint venture agreements produced to the Court:

1. Schemes initiated and promoted by Mr Letten involved: (1) the incorporation of a discrete company to act as manager of a joint venture; (2) an agreement between investors and their manager to associate themselves as joint venturers, and; (3) an express agreement that the common purposes of the joint venture were to: (i) acquire property; (ii) hold and/or develop the property, and; (iii) derive income from the property.
2. The specific nature of the investment was underlined by the parties’ express agreement that the terms and conditions of their joint venture governed their relations with the result that investors intended to be associated with identified persons for a particular venture, to invest in specific property and intended that their investment be applied for

specific, and no other, purposes. As the Light Interests submitted, many of the submissions filed with the Court by investors were to the effect that they considered specific projects recommended by Mr Letten and decided whether or not to participate in that project.

3. The manager had distinct roles of acting as the investors' nominee, manager and trustee.
 - 3.1 The manager was agreed to be one of the joint venturers and parties. (Mr Light submitted that this had a potentially significant consequence that unless orders were carefully drawn, an unintended result could be that each manager could enforce a right to participate in any distributions. The Light Interests expressed similar concerns in relation to each of the Corporate Defendants which asserts an interest in any Scheme. I reject these concerns. The directions sought by the Receivers do not address the adjudication of any claim on the common fund by any claimant.)
 - 3.2 The manager agreed that in entering into a contract to purchase a property it did so as nominee of the investors. The terms of the agreement contemplated that a contract of sale had been, or would be, entered into by the manager on behalf of the joint venture.
 - 3.3 The manager agreed to hold all assets of the joint venture, including the investors' interest, on their behalf in accordance with the terms and conditions of the joint venture agreement and to do so "particularly" in accordance with "clause 2.2" (i.e. to hold assets on trust for the investors).
 - 3.4 Investors appointed the manager, and the manager agreed to act, as their nominee and as manager in relation to the joint venture and to do so on the terms of the agreement. In assuming responsibility to manage the joint venture, the manager expressly agreed to faithfully, dutifully and punctually carry out its duties and exercise its responsibilities in the best interests of investors and to do so with due skill, care and diligence. In addition, the manager agreed to devote adequate time, effort and resources in order to carry out its duties and responsibilities, provide detailed reports and accounts and to comply with all applicable laws. The manager further agreed to "keep full accurate and proper books of account and records of all expenditure incurred in the course of the project and of all income received by the manager in the course of the project and keep all

documents supporting and evidencing all entries in those books of account and records.”

- 3.5 The manager further agreed to establish a bank account, if required, for the joint venture which account would be in its name and the name of the joint venture and agreed that “... all Capital Contributions and other money of the joint venture shall be paid or deposited into that account or into a solicitor’s trust account or accountant’s trust account as notified to the Investors by the manager ...”.
- 3.6 The manager agreed to furnish to each investor within three months after the end of each financial year a signed statement of account, reflecting for that financial year all transactions in connection with the project, all project expenses and all joint venture assets.
4. As noted above, investors had the express purpose of acquiring an interest in a specific joint venture. The term “Interest” was defined to mean “a share or interest in the investment known as the Project”. The “Project” was defined in Recital A as being the parties’ association for the specified purpose of acquiring an “Interest” in identified property, holding that trust property as an investment and deriving income therefrom. For the reasons stated at [300] above, this statement is not accurate. The investor’s “Participating Interest” in the joint venture was defined to mean “the interest which an Investor holds ... in the Joint Venture, which Interest shall be *equal to the proportion that the Capital Contribution of that Investor bears* to the aggregate of the Capital Contributions of all Investors”
5. The joint venture agreement comprehended that investors might decide to make an investment by way of debt contribution or equity contribution. A failure to contribute funds to the extent of an investor’s commitment would “reduce the investor’s equity in the Joint Venture.” Each joint venturer, (which included the manager), committed their interest to the joint venture and agreed to do all things necessary to enable the project to be carried out. Each investor agreed to contribute to the joint venture its capital contribution which was to be held and used by the manager in accordance with the terms of the joint venture agreement.

302 As the Light Interests submitted, the terms of the joint venture agreement reflected the fact that all investors’ capital contributions were to be applied solely for the purposes of the

project, for no other project, were to be held on trust by the manager in a trust account and were to be recorded in the accounts of the joint venture as trust moneys. Investors were not merely financing the undertaking. Rather, capital was advanced “to the joint venture”, not to the manager, and it was intended that it should be paid into a bank account to be opened and maintained in accordance with the terms of the agreement: *Cf Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327 per McTiernan, Menzies and Mason JJ. Of course, in relation to a number of Schemes (see, for example Schemes numbered 14, 8 and 5 above), they were oversubscribed.

303 Profits derived from a joint venture belong severally to those venturers in proportion to their interests. A joint business venture or undertaking would normally give rise to equity favouring a tenancy in common proportionate to each parties beneficial interest: *Xenou v Katsaras* (2002) 7 VR 335 at [68]. Where partners acquire property, they are presumed to hold it as beneficial tenants in common, the right of survivorship having no place among merchants. Recently, in *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd; Walker Corporation Pty Ltd v White City Tennis Club Ltd* (2010) 266 ALR 462 at [44] the High Court said:

The expression “joint venture” is no doubt a vague one, capable of a range of applications, but it is often used to bolster a conclusion that a fiduciary relationship exists. The Court of Appeal, however, correctly said ...:

... Describing the arrangements as a “joint venture” does not however have any particular legal consequences. The rights and obligations of the parties remain to be determined by examination of the detail of what they have agreed and done.

See also *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10-11 per Mason, Brennan and Deane JJ citing *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407-409 and *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

304 In the present case, the parties’ relations were that of a joint undertaking carried out other than as a partnership. The parties expressly agreed that their association would not be that of a partnership but agreed that their capital contributions would be held by their manager on trust. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship: *United Dominions* at 11. Properly construed, having

regard to the relevant surrounding circumstances and the terms of the joint venture agreements, an obligation was assumed for the benefit of all parties to it, with a view to maximizing the financial return to all of the parties: *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 at [157] – [162].

305 Here, the Corporate Defendants and the relevant manager were in breach of their fiduciary duty to investors when they promoted investments in Schemes but did not keep the investments separate and instead commingled and combined the investors' capital contributions to their own collateral purposes and did so without the knowledge or informed consent of joint venturers: *United Dominions* at 8, 13 and 14.

306 It is against that background that the Light Interests submitted that:

1. the presumed intention of each investor is that they decided to risk their capital on a specific investment: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [46];
2. there is nothing unfair or unjust in holding investors to a regime where the fate of each investment – whether profit or loss – should flow from that presumed intention;
3. consolidation of all investments would necessarily effect a reallocation of the contractual risk which investors intended to assume when making any specific investment; and
4. the inequity of such risk reallocation needs to be recognised.

307 The Light Interests submitted that the most appropriate method of distribution was what Mr Kelly SC described as “proportionate equality”, a modified intention based approach. In oral submissions, Mr Kelly SC described the submission as follows:

If you say that only the people who executed [joint venture agreements] were the persons who intended to invest in a specific project, you can work from the negative perspective, [that] all the others did not. And so if you have this universe of assets, and you have, as it were, two integers: certainty of property and certainty of investors, you use the third integer, the ones who did not, to conclude that the trust property in each case was held for all those who did intend to so invest. ... [I]t is by that means that we urge the submission that the net tangible value of each scheme, based on this notional balance sheet, can be determined on those objective facts.

When asked what integers would go into this “notional balance sheet”, Mr Kelly SC explained:

[O]n my balance sheet, your Honour, one has the total, the aggregate of all

investors' funds, which includes the surplus so that for that scheme, the entire sum invested in that scheme is what is in the trust account. It doesn't matter that they were oversubscribed; all of those persons paid moneys to be held on trust in that scheme. All of them are the beneficiaries of that scheme. Those funds are held collectively for them proportionately to their contribution. So that's that, and it is by that result that one then nets off either a surplus or a negative equity depending upon the sale price of the property. One takes out the amounts acquired to purchase and settle with secured creditors and so on, and at the end of the sale process, one is left with a certain sum, which reflects the results of that investment. It's no more complicated than that.

...

... I'm suggesting to your Honour is for that scheme you ascribe a value, what I call the net tangible asset value of that scheme project, so that in a linear analysis, one begins with a purchase. One has the injection of funds, whether by secured creditors or investment. One has an outflow of funds to creditors concerned with providing services for that property and so forth. And at the end of the sale, one has a sale price which demonstrates whether those investors, as a venture, succeeded or failed in achieving a capital increase or decrease. Now, once one has done that for all schemes, some of them will have a positive value; some will have a negative value. But if you consolidate them and give them a total value of 100 per cent, then the specific value of each scheme, if success or failure individually, should be the criterion on which that collective group of investors through their scheme shares in the pool.

308 According to the Light Interests, if the Scheme was a failure and suffered a loss, it is a loss which is specific to the risk a particular Investor took, and any distribution should reflect that risk.

309 Contrary to the submissions of the Light Interests, the inequity identified by the Light Interests is not clear cut. The approach adopted by the Light Interests ignores several key aspects of this case:

1. as a result of the way in which Mr Letten and companies associated with him (including the Corporate Defendants) conducted the Schemes, it is not possible to say now what are the net assets of any Scheme and there appear to have been so many inter-Scheme transactions that it is not possible to say what assets were acquired by what Scheme using whose money;
2. the Receivers have been unable to trace investor contributions because receipts and payments in relation to each Scheme were made through four primary LGHA bank accounts and funds frequently were moved between these accounts, the LGHA bank accounts were often in overdraft and payments were commingled;

3. a number of the Schemes were oversubscribed in that the amount of investor contributions in relation to a particular Scheme exceeded the funding requirements for that Scheme. These oversubscriptions were not refunded or returned to investors: see, by way of example, Schemes numbered 14 (Twinview, see [135] above), 8 (Low Head- see [148] above) and 5 (Cimitiere House, see [205] above);
4. a significant proportion (up to \$38 million) of investor contributions to Schemes appears to have been used to pay distributions to investors in other Schemes in circumstances where there were not sufficient profits or funds in the other Schemes to fund payment of distributions: see, by way of example, Scheme numbered 18 (Aurora Park, see [72] above).

310 Further, as the submissions of Dr Sykes (see [319] below) and other investors make clear, it would be manifestly unjust to hold investors to a regime based on their “original intention” in circumstances where investors had a limited understanding, awareness or appreciation of the investments they were making. At least some of the investors were not given a choice or option as to which Scheme they invested in and even when they had invested, one investment got rolled into another. For the most part, this does not appear to be a case of sophisticated investors making a calculated risk. And even where the investments were more sophisticated or calculated, the investors were misled by Mr Letten and the Letten Entities as to the nature and form of the investments in such basic matters as the amount being sought from investors, the nature of the property or the asset the subscriptions were being used for and the terms of their investment.

311 During oral submissions, the Light Interests referred extensively to the recent decision of the Court of Appeal (Civil Division) of England and Wales in *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Limited & Others* [2010] EWCA Civ 917. That case concerned the resolution of ownership attaching to client funds held by Lehman Bros International Europe (**Lehman Brothers**) in circumstances where that money should have been segregated by Lehman Brothers from its own accounts. There were discrepancies in the movement of client moneys such that some accounts had been oversubscribed and others undersubscribed. The Court of Appeal was required to consider from what point in time the client moneys were held on a statutory trust and the manner in which such funds were to be distributed following Lehman Brothers’ entry into administration. As part of that analysis,

the Court of Appeal concluded that the distribution from the pool should be assessed by reference to their *contractual claims*, and not their contributions to the pool.

312 Mr Kelly SC emphasised the conclusion of Arden LJ at [154] that the “underlying concept of ‘client money entitlement’” was that of a contractual entitlement, and that the effect of this was “that some clients [would] benefit from a distribution even if they have no proprietary claim to that money”. Lord Neuberger MR agreed at [234] where his Honour concluded:

I have come to the conclusion, in agreement with Arden LJ, that the claims basis, rather than the distribution basis, is correct, and that the basis for sharing in the pool is *the amount which ought to have been segregated for each client, rather than the amount which was in fact segregated for each client.*

313 However, that case differs from the present case in many respects. Importantly, the decision that moneys should be distributed on a contractual basis, rather than a contribution basis, was based on the interpretation of “client money entitlement” in Ch 7 of the Client Asset Sourcebook (**CASS7**) issued by the Financial Services Authority pursuant to s 139 of the *Financial Services and Markets Act 2000* (UK). Further, the conclusion that the distribution should occur on a contractual basis was qualified by Arden LJ:

.... [I]t was open to the [Financial Services Authority] to determine that the failure of the firm should be treated as a common misfortune in which those who had claims to the recovery of client money should share without distinction.

314 Here, there is not one single contractual or statutory definition to which the Court can turn for guidance as to the appropriate method of distribution. The joint venture agreements lack definition and do not provide the same guidance as the CASS7 before the Court of Appeal in *Lehman Brothers*. Unlike *Lehman Brothers*, this case also involves a number of agreements with a trustee or trustees that were not the subject of any written agreement. On those bases, as well as the circumstances of this case identified in the Receivers’ submissions at [293] and [309] to [310] above, this case can be distinguished from *Lehman Brothers*.

(4) Mr Letten

315 Counsel for Mr Letten appeared. He also filed short written submissions.

316 Mr Letten provided the Court with a copy of a letter sent to the Receivers' solicitors which stated, in part:

... Mr Mark Letten ... will consent to the Pooling Application.

... [F]or the avoidance of doubt, Mr Letten will also accept that:

- (a) any share or interest that he may personally have in any of the Schemes;
and
- (b) *subject to the issues raised [below]*, any monies supplied by LGHA or a related or associated company;

are scheme property for the purposes of:

- (c) the orders made by the Federal Court on 25 February 2010, 4 March 2010 and 30 July 2010; and
- (d) section 9 of the [Act].

(Emphasis added.)

317 The phrase "issues ... below" was a reference to the fact that LGHA, in addition to having a central treasury function, was also the trustee of the LGH Family Trust. Neither the LGH Family Trust nor the beneficiaries of that trust were before the Court. It was for that (but not only that) reason that I determined that the Court should not make final or binding orders. In the end, it is unnecessary to address these issues at this stage in the winding up of the Schemes because the course of action proposed by the Receivers would allow claimants to prove their claims to particular assets or against particular entities or assets but then permit the Receivers to proceed to apply what remained after those claims were determined rateably among all remaining claimants. That process would allow for any claim on behalf of the LGH Family Trust or a beneficiary of that trust.

(5) Dr Sykes

318 Dr Sykes, a medical specialist, filed written submissions and travelled from interstate with his wife to attend the hearing of the Receivers' application for directions. Dr Sykes' submissions were of assistance to the Court.

319 Dr Sykes invested in a number of Schemes and stands to lose a considerable amount of money. He filed written submissions which summarised some of the history of his involvement in the Schemes. During Dr Sykes' oral submissions, he explained to the Court the manner in which he became involved in the Schemes. He and his wife were introduced to the Schemes through a Mr Mark Debeljak, not Mr Letten. Dr Sykes understood that Mr Debeljak was a business partner of Mr Letten. Mr Debeljak was Dr Sykes' accountant until the middle of 2010. According to Dr Sykes, he was also encouraged to join the Schemes after discussions with a Mr Tom Avelsgaard, his Amway business mentor whose accountant and "financial and business coach" was Mr Letten. Dr Sykes said that he was not given a choice or option as to which Scheme to invest in and one investment got rolled into another. In January 2009, he received an email from Mr Debeljak which stated that Dr Sykes and his wife had a number of investments which were "quite sound". Dr Sykes submitted that he and his wife would "do quite well with segmented pooling" but added an important caveat – "that's not where [they] necessarily started life, ... that's where [they] ended life."

320 Dr Sykes explained that after sitting through the hearing of the Receivers' application and speaking to Mr Templeton, one of the Receivers, he had decided that because there is a lack of a paper trail and it is difficult, if not impossible, to work out where the money actually went, that common pooling was a much fairer option. Dr Sykes wants the greatest return possible to the Investors – Investors who stand to lose a considerable amount of money. Ultimately, Dr Sykes accepted that there should be pooling and that the pooling should be "common" and not segmented.

(6) Mr Nulley

321 Mr Nulley, an investor, invested in two Schemes and stands to lose a considerable amount of money. His investment in the Schemes has had a catastrophic impact on him and his family. He filed written submissions which supported pooling as the only practical way forward without further eroding the limited funds available for distribution to investors. Mr Nulley also submitted that he considered pooling "the most cost effective and equitable way to distribute funds back to investors given the complex tracing of individual transactions, the absence of detailed accounting records and the incorrect accounting practices evident in the preparation of the management accounts".

322 His oral submissions reinforced the apparent inter-connectedness between the Schemes. Mr Nulley submitted to the Court that on the sale of properties in some of the Concluded Schemes in which he had invested, he received written advice that he had earned a capital gain (on which he paid tax). However, the capital gain was not paid to him but reallocated for other purposes – investment in another Scheme.

323 Mr Nulley also submitted that the capital gain, together with the capital originally invested, should be considered as the Investor's rateable claim on the common fund. It is also unnecessary to address this submission at this stage in the winding up of the Schemes. As I said earlier, the course of action proposed by the Receivers has two components. It would allow claimants to prove their claims to particular assets or against particular entities or assets but then permit the Receivers to proceed to apply what remained after those claims were determined rateably among all remaining claimants. The components or elements of a claim are to be identified by an investor lodging a proof with the Receivers. The existence and value of claims will be finally determined by the Receivers, subject to all rights of appeal to the Court (including pursuant to s 1321 of the Act).

(7) Mr McCulloch

324 Mr McCulloch did not file written submissions on the question of pooling. Mr McCulloch's oral submissions were forceful. He reinforced the pain being suffered by a whole range of people affected by their involvement in the Schemes. As Mr McCulloch submitted, as happens in any situation, some people handle it well, some people handle it poorly. He identified that for a number of investors marriages have disappeared, family relationships have been broken, business interests have dissolved, houses have been lost and retirement funds have dissipated.

325 Secondly, unsurprisingly, Mr McCulloch was concerned to ensure that the Receivers identified any third parties which may have in some way contributed to the position in which the investors now find themselves. As I said during the course of the hearing, potential claims against third parties have been raised by the Receivers. What those claims are and whether they are to be pursued will be determined by the Receivers as a result of further work and after taking any necessary advice.

(8) Other Investors

326 As noted above, 99 Investors took the opportunity to file written submissions in relation to the pooling application. As Attachment A demonstrates, the views expressed in the submissions were not consistent. A number of investors opposed pooling. I have read the written submissions filed by each investor. The submissions are heart wrenching. It is neither necessary nor appropriate to address each submission separately. I say that for a number of reasons. First, the issues raised by them in favour of, and against, pooling I have addressed when dealing with the other submissions.

327 Secondly, many of the investors who were against pooling were concerned to ensure that all the elements or components of their claim were included. As I have said above, the course of action proposed by the Receivers has two components. It will allow claimants to prove their claims to particular assets or against particular entities or assets (if they have such a claim) and then permit the Receivers to proceed to apply what remained after those claims were determined rateably among all remaining claimants. The components or elements of a claim are to be identified by an investor lodging a proof with the Receivers. The existence and value of the claims will be determined by the Receivers, subject to all rights of appeal to the Court (including pursuant to s 1321 of the Act).

(9) Bridgehead Pty Ltd and Matclair Properties Pty Ltd

328 These entities assert they are creditors of identified Corporate Defendants. Each expressed concern that should the Court give the Receivers directions that the Receivers were justified in pooling the scheme property of the Schemes (which by definition includes scheme property held by the Corporate Defendants), then on liquidation of the Corporate Defendants, the creditors would be disadvantaged because they would lose any opportunity to claw back payments made to related companies.

329 In my view, these concerns were addressed by the final form of the directions sought by the Receivers (see [16] to [21] above) for a number of reasons. First, the Receivers have concluded that none of the Corporate Defendants beneficially own any assets which are not property of the schemes. Secondly, para 1(a)(iii) of the directions provides that “trust creditor claims” are to receive priority in payment from the proceeds of sale of each asset of the Schemes and the Corporate Defendants *before* the creation of the common fund: see, by way of

explanation: *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (In Liquidation)* (2008) 173 FCR 472 at [35] to [37], Law Book Company, *McPherson's Law of Company Liquidations* (2010) at 11.120 and *Jacobs' Law of Trusts in Australia* (7th ed, 2006) at para 2114. "Trust creditor claims" in respect of each asset, are defined as "claims against the Corporate Defendant which is the trustee of that asset and in respect of which the Corporate Defendant has a right of indemnity and lien against that asset". In those circumstances, I consider that the creditors' concerns have been addressed.

(10) ASIC

330 ASIC endorsed the approach of the Receivers. ASIC further submitted that although the submissions on behalf of the Light Interests had a superficial attraction, the Court should not adopt them for the reasons stated by Counsel for the Receivers.

331 Counsel for ASIC submitted that at the heart of the Light Interests' submissions was the contention that because some people invested in Schemes where the projects might be described as good projects and others invested in projects that were not good projects where the Investors were always going to lose their money, the second group ought not participate in the common fund. ASIC challenged the factual foundation for such a submission. ASIC submitted that there was simply no evidence to support it. Further, ASIC submitted that it was not known where the funds provided by investors were in fact deployed and, in particular, whether the moneys that were advanced by various investors (including investors in so called bad projects) were actually used to enhance the value of some of the projects which appear to be viable.

H. ANALYSIS AND CONCLUSION

332 The facts of the present case disclose circumstances which may be classified as exceptional. Circumstances in which the general principle (that there should be no distribution of surplus assets other than to those entitled to the assets in proportion to their relevant entitlements) must yield to pragmatism. Why? Because in the present case, in addition to the matters raised in paragraph [250] and [259] above, it is to no-one's advantage that a very long time and very large costs be spent in working out the entitlements and liabilities on a Scheme by Scheme basis (see [249] to [260] above and *Re TVSN Limited* [2005] NSWSC 692 at [17]ff) where:

1. as a result of the way in which Mr Letten and companies associated with him (including the Corporate Defendants) conducted the Schemes, it is not possible to say now what are the net assets of any Scheme and there appear to have been so many inter-Scheme transactions that it is not possible to say what assets were acquired by what Scheme using whose money;
2. the Receivers have been unable to trace investor contributions because receipts and payments in relation to each Scheme were made through four primary LGHA bank accounts and funds frequently were moved between these accounts, the LGHA bank accounts were often in overdraft and payments were commingled;
3. a number of the Schemes were oversubscribed in that the amount of investor contributions in relation to a particular Scheme exceeded the funding requirements for that Scheme. These oversubscriptions were not refunded or returned to investors: see, by way of example, Schemes numbered 14 (Twinview, see [135] above), 8 (Low Head - see [148] above) and 5 (Cimitiere House, see [205] above);
4. a significant proportion (up to \$38 million) of investor contributions to Schemes appears to have been used to pay distributions to investors in other Schemes in circumstances where there were not sufficient profits or funds in the other Schemes to fund payment of distributions: see, by way of example, Scheme numbered 18 (Aurora Park, see [72] above);
5. the tracing of funds is further complicated and, I consider, rendered impossible by the lack of reliable financial and accounting data and the estimated cost (\$18 million). Such a cost and burden would reduce what is already a limited expected return with no guarantee of any certainty of outcome.

333 Such a conclusion is consistent with authority: see [275] to [286] above. In each of *Nelson*, *Enterprise Solutions 2000* and *Tasman*, the fund available for distribution to beneficiaries of the trust or members of the scheme (as applicable) was not substantial and the liquidators in each were concerned about the impact that the costs of making further investigations would have on the prospects of making a distribution. On that basis, the liquidators sought, and were granted, orders or directions for rateable distribution of the fund rather than to incur further costs in carrying out further investigations. Here, there is a mixed fund that has been conducted for a period of at least 12 years during which time there was in

excess of 110,000 transactions through the relevant bank accounts. The relationship between the Schemes and Corporate Defendants is far from clear and the accounts cannot be traced.

334 As noted earlier, in *Re French Caledonia Travel Services*, the Supreme Court of New South Wales addressed the possibility that where there was evidence that various claimants ought be divided into separate classes with differential dividends, such an order should be made. In my view, given the complicated facts which the Receivers and the Court now face in the present case, proposed paragraph 2 of the directions preserves the possibility that a claimant may seek to prove that it should be entitled to a different dividend.

335 Subject to the proof of claim process, there is no basis for distinguishing the claims of investors whose contributions to the relevant Scheme are governed by a joint venture agreement as the terms of each of the joint venture agreements are similar (but not identical). In relation to investors whose contributions to Schemes are not governed by joint venture agreements, the claims are substantially equal to the claims of those who contributed by joint venture agreements. Their funds were treated on the same basis by LGHA (and the other Letten Entities) and by the other Corporate Defendants. To adopt the same language as the Court of Appeal in *Lehman Brothers*, the investors suffered a “common misfortune”, and any method of distribution should reflect that fact. Put simply, the alternative – distribution of Scheme property in a particular Scheme to those entitled to the property in proportion to their entitlements – is practically impossible at a number of levels. Given the manner in which these Schemes were operated and the difficulties identified in unscrambling the affairs of the Schemes, no rational person would undertake or engage in that task.

336 That leaves the question of method or basis of distribution. In my view, not only should the surplus be pooled but the surplus should be distributed rateably – the distributions made proportionally to the claims assessed by the Receivers: see [282] – [286] above. For the sake of completeness, the effect of the directions sought, and granted, does *not* affect the rights of any person to claim that they have, or any other person has, an entitlement to distribution from an asset of a Scheme or a Corporate Defendant (or the proceeds of sale of such an asset) which differs from the distribution which they would receive if the pooling process identified by the Receivers is adopted.

337 For those reasons, I would grant the Receivers the directions they ultimately sought.

I certify that the preceding three hundred and thirty-seven (337) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon.

Associate:

Dated: 11 November 2010

ATTACHMENT A

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
1	211 Wellington Road	Property sold prior to appointment of Receivers	Joint Venture	117 (101 active)	\$5.8m	\$3m	30	21	5
			Equity Deposit Bonds	58	\$3.8m	unknown			
2	Healesville Walk Shopping Centre JV (Concluded Scheme)	Property sold prior to appointment of Receivers	Joint Venture	117	\$5.9m	\$3.284m	12	9	2
			Healesville Equity Mortgage	30	\$3m	unknown			
3	Howleys Road JV (Concluded Scheme)	Property sold prior to appointment of Receivers	Joint Venture	113 (24 active)	\$5.5m	\$3.4m	3	0	3
4	George Street JV	Asset acquired before any specific fund raising Property still held	Joint Venture	25	\$1.16m	\$0.35 m	5	1	3

¹ A number of submissions received did not state whether they opposed or supported pooling.

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
		at time of Receivers' appointment. Receivers granted power of sale over property in May 2010							
5	Cimitiere House JV	Property still held at time of Receivers' appointment. Receivers granted power of sale over property in May 2010o	Joint Venture	106 (100 active)	\$8.7m	\$0.9m	15	6	5
6	Reef House Resort	Manager of the Scheme has no asset. Property still held at time of Receivers' appointment. Receivers granted power of sale over property in June 2010.	Joint Venture	127 (93 active)	\$8.6m	\$2m	17	9	5
7	Queen Street JV	Property sold prior to appointment of Receivers	Joint Venture	103	\$5.6 m	\$2.8 m	7	4	2

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
8	Low Head JV	Property still held at time of Receivers' appointment. Receivers granted power of sale over property in May 2010	Joint Venture	69 (55 active)	\$4.8m	\$1.1m	7	3	3
9	Nicholson Street JV	Asset acquired before any specific fund raising. Property still held at time of Receivers' appointment. Receivers granted power of sale over property in May 2010	Joint Venture	145 (141 active)	\$9.7m	\$1.2m	20	12	4
10	National Boulevard JV (Concluded Scheme)	Property sold prior to appointment of Receivers Fund Raising Undertaken before contract to acquire property.	Joint Venture	86	\$3.9m	\$0.8m	1	-	-

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
11	Simms Investment Project (Concluded Scheme)	Property sold prior to appointment of Receivers	Joint Venture	38 (19 of which have not received their initial investment)	\$2.1 m	\$0.8 million	2	1	1
12	SY 21 JV	Property still held at time of Receivers' appointment.	Joint Venture	42	\$1.85m	\$0.4m	7	4	1
13	The Glen Centre JV	Property still held at time of Receivers' appointment. Receivers granted power of sale over property in May 2010	Joint Venture	92 (70 active) Joint Venture Agreement	\$4.8 m	\$2.8 m	14	11	2
14	Twinview JV	Property still held at time of Receivers' appointment. Receivers granted power of sale over property in May 2010	Joint Venture	82 (75 active)	\$3.5m	\$1.9m	11	5	4

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
15	Yarra Valley Golf JV	<p>Manager of the Scheme has no asset.</p> <p>Property still held at time of Receivers' appointment.</p> <p>Receivers granted power of sale over property in June 2010.</p>	Joint Venture	<p>581 direct investors (546 active)</p> <p>345 indirect investors</p>	\$42.7 m	<p>(to indirect investors)</p> <p>\$9.4 m</p>	51	24	9
			Equity deposit Bonds June 2003, 2005 and 2007	33 (active)	\$3.62 m	\$0.985 m			
			The Sebel Heritage Lodge Investment Stage 2 (Equity Mortgage)	1	\$15,000				

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
16	Glenbelle Project	<p>Fund Raising Undertaken before contract to acquire property.</p> <p>Property still held at time of Receivers' appointment.</p> <p>Receivers granted power of sale over property in June 2010.</p>	Joint Venture	165	\$7.3m	\$3.4m	18	8	4
17	Tomasetti House (Concluded Scheme)	Property sold prior to appointment of Receivers	Joint Venture	122 (78 active)	\$8.68m	\$2.4m	6	3	2
18	Aurora Park (Concluded Scheme)	<p>Property sold prior to appointment of receivers</p> <p>Manager of the Scheme has no asset.</p>	Joint Venture	<p>115 for Tobago Holdings (9 active)</p> <p>29 Investors for Maywood (26 active)</p> <p>41 Investors for Sagebay (0 active)</p> <p>45 Investors for Acetrain (4 active)</p>	\$13 m	\$4.56 m	5	5	0

No.	Scheme Name	Status of the Scheme Property	Investment Description	Estimated No of Investors	Total Amount Invested (approx)	Distributions (Approx)	No. of Investor Subs about pooling ¹	Investors in favour of pooling	Investors opposed to pooling
			ABC Equity Mortgage Investment						
19	Moorhouse Shopping Centre	Manager of the Scheme has no asset.	Joint Venture	227 (193 active)	\$16.35m	\$2.69m	12	10	1
20	Cass Bay Spur	Manager of the Scheme has no asset.	Joint Venture	46 (24 active)	\$2.96m	\$0.49m	N/A	-	-
21	Mount Hutt	Manager of the Scheme has no asset.	Joint Venture	59 (43 active)	\$3.42m	\$0.65m	3	1	0

SCHEDULE OF PARTIES

LGH HOLDINGS LIMITED (ACN 007 191 943)
Second Defendant

211 WELLINGTON ROAD PTY LTD (ACN 092 663 860)
Third Defendant

BLUEMIST HOLDINGS PTY LTD (ACN 097 306 922)
Fourth Defendant

DELLWOOD HOLDINGS PTY LTD (ACN 098 505 803)
Fifth Defendant

ENMORE ENTERPRISES PTY LTD (ACN 082 158 487)
Sixth Defendant

FIRBANK ARCH PTY LTD (ACN 059 464 381)
Seventh Defendant

GLENLINE PTY LTD (ACN 098 532 364)
Eighth Defendant

GERLING HOLDINGS PTY LTD (ACN 091 726 457)
Ninth Defendant

LGH ADMINISTRATION PTY LTD (ACN 007 165 069)
Tenth Defendant

LGH FINANCE PTY LTD (ACN 078 859 248)
Eleventh Defendant

LOW HEAD VILLAGE PTY LTD (ACN 091 731 958)
Twelfth Defendant

NICHOLSON STREET PTY LTD (ACN 069 104 089)
Thirteenth Defendant

HOLLOWAY CREST PTY LTD (ACN 091 731 967)
Fourteenth Defendant

ROSEBERY ENTERPRISES PTY LTD (ACN 091 826 229)
Fifteenth Defendant

SIMMS INVESTMENTS PTY LTD (ACN 093 504 511)
Sixteenth Defendant

SY21 RETAIL PTY LTD (ACN 107 874 564)
Seventeenth Defendant

THE GLEN CENTRE HAWTHORN PTY LTD (ACN 089 906 543)
Eighteenth Defendant

CASTELLO HOLDINGS PTY LTD (ACN 088 204 175)
Nineteenth Defendant

TWINVIEW NOMINEES PTY LTD (ACN 097 307 278)
Twentieth Defendant

YARRA VALLEY GOLF PTY LTD (ACN 066 632 479)
Twenty-First Defendant

ADINA RISE PTY LTD (ACN 083 181 122)
Twenty-Second Defendant

ALBRIGHT INVESTMENTS PTY LTD (ACN 088 204 166)
Twenty-Third Defendant

ASHFIELD RISE PTY LTD (ACN 093 504 806)
Twenty-Fourth Defendant

BRADFIELD CORPORATION PTY LTD (ACN 088 204 371)
Twenty-Fifth Defendant

COPELAND ENTERPRISES PTY LTD (ACN 093 504 824)
Twenty-Sixth Defendant

DEVLIN WAY PTY LTD (ACN 088 264 813)
Twenty-Seventh Defendant

FIRST HAZELWOOD PTY LTD (ACN 093 505 303)
Twenty-Eighth Defendant

GLENBELLE PTY LTD (ACN 097 306 646)
Twenty-Ninth Defendant

GLENVALE WAY PTY LTD (ACN 088 287 021)
Thirtieth Defendant

GREENVIEW LANE PTY LTD (ACN 093 505 312)
Thirty-First Defendant

HALLMARK CORPORATION PTY LTD (ACN 093 505 312)
Thirty-Second Defendant

MOORLEIGH HOLDINGS PTY LTD (ACN 088 287 058)
Thirty-Third Defendant

NORTON RIDGE PTY LTD (ACN 078 821 066)
Thirty-Fourth Defendant

RALEIGH GLEN PTY LTD (ACN 088 204 380)
Thirty-Fifth Defendant

REDCREST HOLDINGS PTY LTD (ACN 100 836 486)
Thirty-Sixth Defendant

SURI CORPORATION PTY LTD (ACN 093 505 321)
Thirty-Seventh Defendant

SUTTON RISE PTY LTD (ACN 088 204 399)
Thirty-Eighth Defendant

THE VIRTUAL MLMER PTY LTD (ACN 065 374 665)
Thirty-Ninth Defendant

TIVENDALE PTY LTD (ACN 093 505 349)
Fortieth Defendant

TULLOCH DOWNES PTY LTD (ACN 078 895 048)
Forty-First Defendant

MAINKING PTY LTD (ACN 100 790 485)
Forty-Second Defendant

TOPGLEN PTY LTD (ACN 096 857 564)
Forty-Third Defendant

ALLBLUE PTY LTD (ACN 100 836 388)
Forty-Fourth Defendant

ARANBAY PTY LTD (ACN 098 532 319)
Forty-Fifth Defendant

MELVILLE CORPORATION PTY LTD (ACN 091 911 045)
Forty-Sixth Defendant

TILLEY LANE PTY LTD (ACN 086 136 361)
Forty-Seventh Defendant

HPSC PTY LTD (ACN 059 930 139)
Forty-Eighth Defendant

JENSDALE PTY LTD (ACN 098 367 974)
Forty-Ninth Defendant

OAKDALE RISE PTY LTD (ACN 091 598 908)
Fiftieth Defendant

MAYWOOD INVESTMENTS PTY LTD (ACN 091 599 218)
Fifty-First Defendant

ACETRAN PTY LTD (ACN 100 820 282)
Fifty-Second Defendant

SAGE BAY PTY LTD (ACN 097 306 628)
Fifty-Third Defendant

TOBAGO HOLDINGS PTY LTD (ACN 093 504 520)
Fifty-Fourth Defendant