

**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**

**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**

**ENOMORE 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

JUDGE: GORDON J
DATE: 24 FEBRUARY 2010
PLACE: MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

1 These proceedings concern a number of commercial projects in which Mr Mark Ronald Letten (**Mr Letten**), the first defendant, has been or is currently involved. In general terms, the Australian Securities and Investments Commission (**ASIC**) contends Mr Letten (an accountant) promoted 16 joint venture projects to investors which were required to be registered as managed investment schemes pursuant to s 601ED of the of the *Corporations Act 2001* (Cth) (the **Act**) but were not.

2 On 17 February 2010, ASIC filed an originating process against Mr Letten and 44 corporate defendants (the second to 45th defendants inclusive). Mr Letten is a director of each of the second to 45th defendants and, in respect of a number of the corporate defendants, Mr Letten is the sole director. By way of final relief, the originating process sought orders that 16 named “unregistered managed investment schemes” be wound up pursuant to s 601EE(1) of the Act on the grounds that each scheme is and was being operated in contravention of s 610ED(5) of the Act. A list of the schemes, the corporate entities said to be involved in them and the real property connected to each scheme is attached as Schedule 1. By way of final relief, the originating process also sought orders for the winding up of the second to 45th corporate defendants, declarations of contravention of ss 601ED(5) and 911A of the Act by Mr Letten and a permanent injunction against Mr Letten from operating a financial services business.

3 The initial originating process also sought relief on an interlocutory basis. At the hearing of the application for interlocutory relief on 23 February 2010, ASIC filed an amended originating process which identified the amended interlocutory relief sought by ASIC.

4 Before turning to consider that interlocutory relief, it is necessary to identify the parties who appeared and those who were represented. At the hearing on 23 and 24 February 2010, Mr Murdoch QC and Mr Trichardt appeared for ASIC and Mr Sifris SC and Mr Hibble appeared for Mr Letten and the second and tenth defendants. Each of the other corporate defendants filed a submitting appearance stating that they had been served with material showing that ASIC had made application to the Court pursuant to s 601EE of the Act to have

receivers and managers appointed to the schemes and the corporate defendants and that they would submit to the decision of the Court. Two of the submitting appearances (SY21 Retail Pty Ltd and Yarra Valley Golf Pty Ltd) did not appear to be signed by the requisite number of directors. A request was made for those submitting appearances to be resubmitted properly executed. After the hearing on 23 February 2010, a solicitor for Mr Peter Bate (**Mr Bate**), a director and 50% shareholder in SY21 Retail Pty Ltd, informed the Court that he had received no notice of the orders sought by ASIC and opposed the orders sought by it on an interlocutory basis to the extent they concerned SY21 Retail Pty Ltd, the 17th Defendant, which Mr Letten had contended was involved with the SY21 Joint Venture, the scheme listed 12th in Schedule 1 to these reasons for decision. In addition, the submitting appearance for Yarra Valley Golf Pty Ltd which was provided to the Court did not contain the signature of one of the named directors. That entity was said to be one of a number of corporate defendants involved in the Yarra Valley Golf Joint Venture, the scheme listed 15th in Schedule 1. As a result of these (and other matters), ASIC's interlocutory application was listed for further hearing on 24 February 2010. At that hearing, in addition to those who had appeared on 23 February, Mr Woodward sought and was granted leave to appeal for Mr Bate in relation to SY21 Retail Pty Ltd, the 17th Defendant. I will deal with Yarra Valley Golf Pty Ltd and SY21 Retail Pty Ltd separately later in these reasons for decision.

AGREED ORDERS APPROPRIATE?

5 The interlocutory relief sought by ASIC reflects discussions between legal advisers for Mr Letten and the second and tenth defendants and ASIC's legal advisers. When the matter came on for hearing on 23 February 2010, I was informed that those legal advisers had substantially agreed the form of orders and, in particular, had agreed:

1. each of the schemes listed in Schedule 1 was a managed investment scheme which was and is required to be registered under the Act but was not registered;
2. each scheme listed in Schedule 1 be wound up;
3. to the appointment of receivers and managers of the property of the schemes listed in Schedule 1 and the property of the corporate defendants, although the parties did not agree on the identity of the persons to be appointed;
4. the powers to be given to the receivers and managers and the reporting regime to be adopted by them; and

5. ancillary orders relating to the receivers and managers including access and remuneration.

6 Prior to the hearing of the interlocutory application, an ASIC investigator had filed an affidavit which summarised the reasons for, and history of, its investigations into the management and affairs of the corporate defendants and the activities of Mr Letten. Neither Mr Letten nor any of the corporate defendants filed any material seeking to challenge the contents of that affidavit. Instead, Mr Letten filed a position paper and an outline of submissions in which he acknowledged ASIC's concerns about the legal structure of some of the projects and agreed that it was in the best interests of all parties (particularly the investors) that a court appointed receiver and manager be appointed to manage the schemes listed in Schedule 1. The consent was for him personally. As noted earlier and subject to the qualifications already noted, the corporate defendants had filed submitting appearances.

7 The ASIC affidavit explained that:

1. from late 2008 until July 2009, it received a number of complaints regarding the management and affairs of the second defendant and Mr Letten in relation to a number of the schemes listed in Schedule 1;
2. as a result of those complaints, ASIC issued notices under ss 30 and 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) on a number of the corporate defendants and Mr Letten;
3. its investigation revealed that Mr Letten had promoted at least 15 joint venture projects in a similar manner. After he identified a suitable property for purchase, executed the purchase contract and paid the deposit, he would arrange finance to purchase the property and would identify members of the public or clients of his accounting practice to join the joint venture project. Each investor would sign a document described as "joint venture agreement". I consider the terms of one of the joint venture agreements in further detail below;
4. the corporate defendants, other than the second, tenth and eleventh defendants, were incorporated to act as project managers and / or property owners of the joint venture schemes which were promoted by them and Mr Letten. As noted earlier, Schedule 1 lists the schemes, the corporate entities said to be involved in them and the real property connected to each scheme. A careful reader of the Schedule will notice that

the second, tenth and eleventh defendants are not listed on Schedule 1. Mr Letten, however, submitted that a receiver and manager should be appointed to each of the second, tenth and eleventh defendants because of the central treasury function each played in connection with the schemes listed in Schedule 1.

8 Some of the joint venture agreements (see [7(3)] above) were in evidence. One of the agreements was purportedly executed by SY21 Retail Pty Ltd, the 17th Defendant. At the further hearing of ASIC's application for interlocutory relief, Mr Murdoch QC for ASIC properly noted that although that joint venture agreement was purportedly executed on behalf of SY21 Retail Pty Ltd by a Mr Lane, he was not a director of that company. SY21 Retail Pty Ltd has two directors – Mr Letten and Mr Bate. I will return to deal with SY21 Retail Pty Ltd later in these reasons for decision.

9 For present purposes, it is sufficient to note however that Mr Letten did not challenge ASIC's assertion that the joint venture agreements were similar for each project. The contents of the agreements before the Court were substantially common. The recitals to the agreements recorded that:

- A. The Investors and the [Named Corporate Defendant] have agreed to associate themselves as Joint Venturers for the purpose of acquiring an Interest in [named property] and to hold the same as an investment to earn income therefrom ("the Project").
- B. The [Named Corporate Defendant] has agreed to act as nominee of the Investors and as manager of the Joint Venture and has entered or will enter into the Contract of Sale for the purchase of the Project and agrees to enter into all other contracts on behalf of and nominee for the Investors.

10 The terms of the joint venture agreement provided that the assets of the joint venture would be held by the Manager (the named corporate defendant) on trust for the investors who own the beneficial interest as tenants in common: cl 2.2. Further, the joint venture would continue until termination, inter alia, by agreement by the parties, the sale of the property by the Manager and distribution of all surplus funds of the joint venture or the sale of the assets of the project (defined as interests comprising a share or interest in the investment): cl 2.3. The investors appointed the Manager as their nominee, to manage the joint venture and to hold all of the assets of the joint venture: cll 3 and 4.

LEGISLATIVE FRAMEWORK

11 Section 601ED(5) of the Act provides that “[a] person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered”.

12 Section 601ED(1) of the Act provides that a managed investment scheme must be registered under s 601EB, relevantly, if:

- (a) it has more than 20 members; or
- (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes ...

13 In *National Australia Bank Ltd v Norman* (2009) 74 ACSR 561, Gilmour J (with whom Spender J agreed at [5]) summarised the relevant features of the statutory regime:

[118] The regulation of managed investment schemes is dealt with in Ch 5C of the Act. The history of the law leading to the present statutory regime is set out at length in *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [38]–[44] (*Knightsbridge Managed Funds*).

...

[125] All that the word “scheme” requires is that there should be some “programme or plan of action”: *Australian Softwood Forests Pty Ltd v A-G (NSW)*; *Ex rel CAC* (1981) 148 CLR 121 at 129 ; 36 ALR 257 at 262 ; 6 ACLR 45 at 51 per Mason J, Gibbs CJ and Stephen J concurring.

[126] This has been applied in numerous cases including *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403; [1999] QSC 387 (*Enterprise Solutions 2000*); *Knightsbridge Managed Funds* at [45].

[127] Barrett J in *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 43 ACSR 46; [2002] NSWSC 834 at [15] (Takaran) applied the following gloss:

[15] The essence of a “scheme” is 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. In some cases, the scope of the scheme will readily be gathered from some constitutive document in the nature of a blueprint setting out all relevant matters.

[128] Finkelstein J in *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd* (2006) 236 ALR 699 ; 60 ACSR 447 ; [2006] FCA 1415 at [2], citing *Takaran* at [16] observed that a “scheme ... is the combination of these things necessarily connected by design”, while “[t]he scheme may also include those things or attributes that ‘contribute to the

coherence and completeness' of the three essential elements". Goldberg J in *Australian Securities and Investments Commission v Primelife Corp Ltd* (2006) 235 ALR 328 ; 58 ACSR 447 ; [2006] FCA 1072 at [33] described a scheme as "a network of contractual rights and contractual obligations".

[129] Further, as is explicit in the definition, a "managed investment scheme" contemplates a pooling of contributors' funds or of a "common enterprise" as between the contributors.

PARTIES' POSITIONS

14 ASIC contends each of the schemes listed in Schedule 1 was an unregistered managed investment scheme which was required to be registered (a) because of the terms of the joint venture agreements (see [9] and [10] above); (b) each scheme either has more than 20 members or was promoted by a person who was, when the scheme was promoted, in the business of promoting managed investment schemes, namely Mr Letten; (c) was operating; and (d) was required to be registered by the Act but was not registered. Affidavits filed by ASIC set out the number of investors in each scheme listed in Schedule 1 which ASIC has been able to identify to date and, in general terms, the manner in which Mr Letten promoted the schemes. Mr Letten did not and does not challenge ASIC's description of those matters. Rather, as noted above, his position paper and submissions supported the making of the orders sought by ASIC subject to a limited number of matters which I will address shortly.

APPROPRIATE ORDERS

(1) Schemes listed in Schedule 1 except those numbered 2, 3, 10, 11 and 12

15 Having regard particularly to the fact that the Letten interests agreed and the corporate defendants (other than SY21 Retail Pty Ltd, the 17th Defendant) submitted to any order the Court might make, I consider that, save for the schemes numbered 2 (Healesville Walk Shopping Centre Joint Venture), 3 (Howleys Road Joint Venture), 10 (National Boulevard Joint Venture), 11 (Simms Investment Project) and 12 (SY21 Joint Venture) listed in Schedule 1, it is appropriate in the circumstances that each of the schemes listed in Schedule 1 should be wound up pursuant to s 601EE(1) of the Act. Each of those schemes is an unregistered managed investment scheme and cannot lawfully be continued. Whether it is legally or commercially practical or desirable to take some or all of the assets of any of those schemes and use them in connection with a registered managed investment scheme is not a question I can or should decide on this application. Perhaps they are matters that will be affected by the report of the receivers' investigations and the views of the investors.

For present purposes, what matters is that the schemes are unregistered managed investment schemes. These schemes should be wound up.

16 I also consider that a receiver and manager should be appointed to the property of each of those schemes and the property of the managers of each of the schemes, the corporate defendants. The appointment of a receiver is a drastic remedy. Any appointment of a receiver must be made cautiously and only when it is absolutely necessary: *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386. In my view, this is one of those situations. Funds have been contributed by investors in “joint venture projects”. Serious questions have been raised about the management of those projects and the entities associated with them, including the extent to which the funds of one “joint venture” have been loaned or transferred between various accounts and other ventures and schemes. Some investors in some of the schemes have lodged complaints that their funds have not been returned following the sale of the properties the subject of the investments.

17 However, at present I do not consider it appropriate to empower the receivers and managers to realise any property of those schemes or to move to complete any existing sale contracts in relation to any property of those schemes. ASIC’s application was designed to achieve two objectives – preserve the status quo and to provide an independent report into the status of each of the projects. In my view, the orders I propose to make achieve those objectives. If before the time for reporting by the receivers provided for in the orders, the receivers consider additional steps are necessary, then they can make application to the Court in the usual way. By that time, my hope and expectation is that all interested parties will be in a better position to consider any proposal for the future management of the schemes.

18 As noted earlier (see [4]), there were issues concerning the submitting appearance filed by Yarra Valley Golf Pty Ltd, connected with the scheme listed 15th in Schedule 1. The submitting appearance has been signed by a majority (4 of 5) of the named directors. I am informed by Counsel for the Letten interests that the remaining director, Mr Tickell, has recently been diagnosed with a serious illness and is incapacitated. I accept that Yarra Valley Golf Pty Ltd has filed a submitting appearance stating that they had been served with material showing that ASIC had made application to the Court pursuant to s 601EE of the Act to have receivers and managers appointed to the scheme known as the Yarra Valley Golf Joint

Venture and to Yarra Valley Golf Pty Ltd and that they would submit to the decision of the Court: see ss 127(1)(a) and Arts 103 and 104 of the Articles of Association of Yarra Valley Golf Pty Ltd. For the same reasons in relation to the other schemes identified in [15]ff, I consider that the same orders should be made in relation to corporate defendants in the scheme listed 15th in Schedule 1 and the Yarra Valley Golf Joint Venture.

CONCLUDED SCHEMES – schemes 2, 3, 10 and 11

19 Despite the general agreement about the form and content of the orders, one area of dispute concerned the appropriate method for dealing with four of the schemes which the Letten interests submitted had concluded. The “Concluded Schemes” were:

1. the Healesville Walk Shopping Centre Joint Venture involving the fourth defendant, Bluemist Pty Ltd and 251-263 Maroondah Highway, Healesville – listed 2nd in Schedule 1;
2. the Howleys Road Joint Venture involving the fifth defendant, Dellwood Holdings Pty Ltd and 40-48 Howleys Road, Notting Hill – listed 3rd in Schedule 1;
3. the National Boulevard Joint Venture involving the 15th defendant, Rosebery Enterprises Pty Ltd and 144 National Boulevard, Campbellfield – listed 10th in Schedule 1; and
4. the Simms Investment Project Joint Venture involving the 16th defendant, Simms Investment Pty Ltd and Pittwater Road, Brookvale – listed 11th in Schedule 1.

20 The Letten interests submitted that the appropriate order was for the corporate defendants associated with these Concluded Schemes to be wound up. On the other hand, ASIC sought an order that the Concluded Schemes be wound up under s 601EE of the Act and for a receiver and manager to be appointed to the property of the scheme and to the property of the corporate defendants associated with those Concluded Schemes.

21 In relation to the first three Concluded Schemes listed in [19] above, the project manager for the LGH Group of companies had informed ASIC during an examination under s 19 of the ASIC Act that she considered these projects were not finalised because payments remained due and owing to investors. For present purposes, that evidence raises at least two difficulties - neither ASIC nor Mr Letten knew whether these schemes had in fact concluded

and secondly, s 601EE of the Act does not authorise the winding up of a scheme which was not operating.

22 Section 601EE of the Act gives the Court power, on the application of ASIC, a person operating the scheme or a member of the scheme, to wind up an unregistered managed investment scheme if a person “operates” a managed investment scheme in contravention of s 601ED(5). If the managed investment scheme is no longer “operating”, the Court’s power to order the winding up of a scheme cannot be invoked: see *National Australia Bank Ltd v Norman* (2009) 74 ACSR 561 at [75] and [4]. (The word “operate” refers to acts constituting the “management of or carrying out of activities which constitute the managed investment scheme”: *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 at [55] per Davies AJ. See also *Australian Securities and Investments Commission v Edwards* [2004] QSC 344 at [31] and [34] per McMurdo J; *Australian Securities and Investments Commission v McDougall* (2006) 229 ALR 158; *Australian Securities and Investments Commission v McNamara* (2002) 42 ACSR 488; *Australian Securities and Investments Commission v Risqy & Others (No 2)* [2008] QSC 139 at [5]-[6]).

23 After discussion and debate, ASIC and Mr Letten accepted that on the basis of the current state of the evidence it was inappropriate to order that these Concluded Schemes be wound up under s 601EE of the Act and that the appropriate order was the appointment of receivers and managers to the assets of each scheme and to the assets of the corporate defendants associated with those concluded schemes. Those orders would preserve the status quo and require the receivers and managers to report to the Court, the investors and other interested parties on the status of the schemes. I will make orders in those terms.

17TH DEFENDANT, SY21 RETAIL PTY LTD AND THE 12th LISTED SCHEME IN SCHEDULE 1

24 As noted earlier, the 17th Defendant, SY21 Retail Pty Ltd, appears to be connected with the 12th named scheme in Schedule 1. On 24 February 2010, Mr Woodward appeared on behalf of Mr Bate, a director and 50% shareholder of SY21 Retail Pty Ltd to oppose the appointment of a receiver and manager to SY21 Retail Pty Ltd.

25 Despite the Court being told on 23 February 2010 by Counsel for Mr Letten that no stakeholder opposed the orders sought by ASIC, Mr Woodward informed the Court that his client was not aware of the proceedings or the proposed orders until he received an email at 11.00 am on 23 February 2010. Further, Mr Woodward informed the Court that although Mr Bate was aware that ASIC was investigating Mr Letten, Mr Bate was not contacted by ASIC or Mr Damian Templeton (**Mr Templeton**), the investigating accountant (see [30ff] below) in relation to SY21 Retail Pty Ltd. Moreover, until 23 February 2010, Mr Bate apparently was unaware of the existence of any investors (other than he and Mr Letten) in SY21 Retail Pty Ltd and / or the property located at 720-760 Chapel Street, South Yarra.

26 The SY21 Joint Venture (listed 12th in Schedule 1) was the subject of an investigation by Mr Templeton. The circumstances surrounding his appointment I address in the next section of the judgment. For present purposes, it is sufficient to note that this venture has been the subject of investigation by Mr Templeton and the preparation of a report (the **Templeton Report**). A number of facts disclosed in the Templeton Report are not in dispute including that the property is tenanted by three tenants. Mr Bate is not mentioned in the report.

27 The Templeton Report, however, did disclose that he had identified 38 investors who had participated in the venture by purchasing or taking an interest in the interests held by the 10th defendant, LGH Administration Pty Ltd. As noted earlier, Mr Bate informed the Court he was unaware of the other investors or the existence of the Templeton Report. There are other difficulties. The joint venture agreement placed before the Court in relation to this purported scheme appears on its face to have been executed by a person who was not a director of SY21 Retail Pty Ltd. As Mr Woodward submitted, this may raise questions about what it was that the investors in fact invested in, if they did in fact contribute in the manner described in the Templeton Report. These are all matters of serious concern that require urgent consideration.

28 To permit Mr Bate time to review these materials concerning SY21 Retail Pty Ltd and what is called the SY21 Joint Venture and to obtain the necessary advice, he has offered undertakings to protect the essential capital value of the investment for the benefit of the alleged investors. The undertakings proffered by Mr Bates were conditional on Mr Letten undertaking to take specific steps in relation to bank accounts of SY21 Retail Pty Ltd.

Mr Letten refused to provide the undertakings sought by Mr Bates and indicated that if a receiver and manager was not appointed to SY21 Retail Pty Ltd, he would resign this afternoon as a director of SY21 Retail Pty Ltd and would forthwith deliver the necessary books and records to Mr Bate's solicitors.

29 At the hearing on 24 February 2010, Mr Sifris SC for Mr Letten had submitted that having regard to the matters in the Templeton Report and that the rents from the property at 720-760 Chapel Street, South Yarra are currently being paid to Mr Letten, a receiver and manager should be appointed to the scheme in the same manner as the other schemes. However, Mr Sifris did not submit that a receiver and manager should be appointed to SY21 Retail Pty Ltd. As is apparent, Mr Letten's position in relation to SY21 Retail Pty Ltd is fluid.

30 After the undertakings were proffered by Mr Bate, ASIC did not seek any additional relief.

31 In the circumstances, I will receive the undertakings proffered by Mr Bate on the basis that Mr Letten has undertaken to resign this afternoon as a director of SY21 Retail Pty Ltd and will take all necessary steps to deliver the books and records of SY21 Retail Pty Ltd to Mr Bate's solicitors and facilitate his removal as a signatory to the bank accounts of SY21 Retail Pty Ltd. If that does not occur, the matter can be listed for urgent mention pursuant to the liberty to apply. I will otherwise adjourn ASIC's application for interlocutory relief in relation to SY21 Retail Pty Ltd and the SY21 Project until 9.30am on 4 March 2010. If any party intends to seek to rely on any material at that further hearing, the material should be filed and served by 12 noon the day before the hearing.

IDENTITY OF THE RECEIVER AND MANAGER

32 ASIC and the Letten interests agreed that two persons should be appointed as joint and several receivers and managers. That was not surprising. Given the number and location of the schemes, assets and investors, it is appropriate that two persons be appointed. However, the parties did not agree on who should be appointed.

33 Mr Letten sought that Mr Templeton and Mr Hennessy, both of KPMG, be appointed as the receivers and managers of the property of the corporate defendants and of the property

of the schemes. ASIC opposed the appointment of Mr Templeton and instead sought the appointment of Mr Crosbie and Mr Martin of PPB.

34 ASIC did not raise any issue or concern about the probity or competence of Mr Templeton. On the contrary, as the summary of facts will demonstrate, ASIC had selected him as an investigating accountant. Moreover, ASIC accepted that there was no actual conflict of interest that would affect Mr Templeton if he was appointed to act as a receiver and manager. Instead, ASIC expressed concern that a reasonable and informed person *may* perceive a conflict of interest affecting Mr Templeton because of his previous engagement by Mr Letten.

35 The relevant principles concerning conflicts of interest and independence relating to the appointment and removal of liquidators are established and well known: see, for example, *Re the Mutual Stock Financial Agency Company Ltd* (1886) 12 VLR 777 at 782; *Re National Safety Council of Australia* [1990] VR 29 at 32-34. Of course, a liquidator must be and must be seen to be independent and impartial: *Re Allebart Pty Ltd* (1971) 2 NSWLR 24 at 28-30. That is not surprising given the nature of the duties of the liquidator as described by Marks J in *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 696:

When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the Court.

36 These same principles have been held to be equally applicable to voluntary administrators: *Bovis Lend Lease Pty Ltd v Wily* [2003] NSWSC 467 at [133]; *Commonwealth of Australia v Irving & Anor* (1996) 19 ACSR 459 at 462. Further, as Santow J said in *Re St George Builders Hardware Pty Ltd* (1995) 18 ACSR 451 at 452, a case concerning the appointment of a person as administrator:

In giving leave in applications of this kind, the court should have regard to analogous principles to the removal of a liquidator on the ground of actual or perceived conflict of interest. In *Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230, the relevant principles are set out and may be summarised as follows:

- (1) The cases show that there must be a real and not merely theoretical possibility of conflict and that the guiding principle in the appointment by the court of a liquidator is that he must be independent and must be seen to be

independent.

- (2) Those who assert that a liquidator should be removed are under a duty to establish at least a prima facie case that this is for the general advantage of the persons interested in the winding up and the onus of proof will not be easy to discharge if the liquidator has become well acquainted with the business and affairs of the company.
- (3) A liquidator may act as a liquidator of a company even if there is a prior involvement with the company in liquidation provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or give rise to a reasonable apprehension that the liquidator might be so inhibited or impeded.

37 In my view, analogous principles should apply equally to the appointment of receivers and managers by the Court. In the present case, the application of those principles to the facts do not preclude Mr Templeton's appointment but, in my view, favour it.

38 First, the facts surrounding his appointment and subsequent engagement require examination. Mr Templeton was engaged by Mr Letten in December 2009 to act as an investigative accountant. However, Mr Letten did not in fact select him. Mr Templeton was one of three investigating accountants nominated by Mr Letten to ASIC. It was ASIC that selected Mr Templeton. Secondly, the terms of his engagement were shown to and commented on by ASIC. Put another way, ASIC played a critical role not only in his appointment but also in the terms of his engagement.

39 Thirdly, Mr Templeton spent in excess of 500 hours at a cost of some \$70,000 familiarising himself with the two schemes on which he reported but also 10 other schemes he considered but in respect of which he did not prepare a report. In that context, it is accepted by both ASIC and the Letten interests that following his engagement, Mr Templeton properly obtained information from Mr Letten about the schemes for inclusion in the Templeton Report. The work he undertook included detailed discussions with Mr Letten to understand the background and current status of each of the relevant schemes, preparing summaries of historical financial statements, understanding the current financing arrangements of the schemes, reviewing valuations for the properties, and preparing lists of investors. Mr Templeton anticipates that it would take a new appointee approximately three weeks to develop the same level of knowledge about the schemes and the circumstances surrounding them. Mr Templeton has become well acquainted with the business and affairs of a number of the corporate defendants and the schemes. To not appoint Mr Templeton

would mean that that knowledge would be lost and would need to be repeated at additional cost. At the very least, that would be unfortunate.

40 Fourthly, the report prepared by Mr Templeton for two of the schemes (SY21 and 211 Wellington Road) were submitted to the Letten interests and to ASIC and raised significant issues concerning the management of those schemes and, in particular, the conduct of Mr Letten.

41 Fifthly, as noted earlier, the cost of the work undertaken by Mr Templeton was in the vicinity of \$70,000. I was informed by Counsel for the Letten interests that Mr Templeton of KPMG has been paid for this work, albeit by interests associated with Mr Letten.

42 Sixthly, the appointment as receiver and manager is a joint and several appointment by the Court. Such an appointment carries with it two important aspects. Mr Templeton is an officer of the Court, must report to the Court and is subject to the supervision of the Court: s 423 of the Act; *Artistic Builders Pty Ltd v Tuthill (Mortgages) Pty Ltd & Anors* (2002) 10 BPR 19,565 at [136] and *GE Capital Australia v Davis* (2002) 180 FLR 250 at [63]-[65]. Secondly and no less importantly, in the unlikely circumstance that events transpire which are of concern to Mr Hennessy, then I would expect Mr Hennessy to apply to the Court, a course he can adopt at any time under the general liberty to apply.

43 Finally, Mr Templeton and Mr Hennessy have informed the Court that they are willing to accept appointment as the receivers and managers of the property of the corporate defendants and of the property of the schemes on the same terms proposed by ASIC, namely without security for their fees.

44 In relation to fees, the draft order submitted by ASIC provided that:

[T]he Receivers shall be entitled to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as receivers and managers over the Property of each Scheme, to be calculated on the basis of the time reasonably spent by the receivers and managers, their partners and staff in accordance with *the Insolvency Practitioners Association scale of fees or such other scale as the Registrar may decide, such fees to be paid out of the assets of the Scheme ...*

(Emphasis added.)

45 There is no Insolvency Practitioners Association scale of fees. Such a scale has not existed for about 10 years. Mr Templeton and Mr Hennessy proposed charge out rates specified in a schedule. In my view, the rates proposed by Mr Templeton and Mr Hennessy are appropriate. The Receivers will be entitled to *reasonable* remuneration and *reasonable* costs and expenses properly incurred in the performance of their duties and the exercise of their powers as receivers and managers. That remuneration and those costs and expenses are to be calculated on the basis of time *reasonably* spent and will be subject to Court approval. Any assessment by the Court would involve consideration of the complexity of the tasks and the efficient use of appropriate staff in relation to the tasks.

46 For those reasons, I reject ASIC's submission and will appoint Mr Templeton and Mr Hennessy as joint and several receivers and managers of the property of the schemes listed in Schedule 1 (except that numbered 12) and the property of the corporate defendants (except that of SY21 Retail Pty Ltd). I do not consider that a reasonable and informed person may perceive a conflict of interest affecting Mr Templeton because of his previous engagement by Mr Letten.

47 In my view, the receivers are entitled to reasonable remuneration and reasonable costs and expenses properly incurred in the performance of their duties and the exercise of their powers as receivers of a scheme as may be fixed by the Court on the application of the Receivers, such sum to be calculated on the basis of the time reasonably spent by them and their staff at the rates specified in an Annexure to the Order and such remuneration, costs and expenses should be paid out of the assets of the relevant scheme.

LETTEN LIVING EXPENSES

48 In December 2009, Mr Letten had provided undertakings to ASIC which were due to expire on 28 February 2010. Those undertakings, in part, restrained Mr Letten from disposing or otherwise dealing with his assets but permitted Mr Letten to access \$5,000 per week for living expenses. The parties have agreed that a form of the undertakings will now be given by Mr Letten to the Court. However, ASIC submits that an allowance of \$5,000 per week for living expenses is excessive and should be reduced to \$2,500.00 per week.

49 Mr Adrian Muller, a solicitor for Mr Letten, filed an affidavit setting out in general terms Mr Letten's contention that his living expenses were \$3,757.00 per week or some

\$195,367.00 per annum. Counsel for Mr Letten contended that having regard to Mr Letten's degree of cooperation and that there was no assertion of defalcation, Mr Letten should be permitted living expenses of \$4,000.00 per week. I accept ASIC's submission that the affidavit material filed on behalf of Mr Letten is less than satisfactory. It is not an affidavit from Mr Letten, but his solicitor. It contains no supporting documentation. At best, it is assertion. The figures quoted for particular expenses are not explained and include such items as "miscellaneous contingencies". Further, although the affidavit suggests that Mr Letten's family are dependent on these living expenses, the affidavit does not disclose the financial position of Mr Letten's wife.

50 In the circumstances, Mr Letten should be permitted living expenses of \$2,500.00 per week. This amount does not include his legal expenses. If it transpires that the amount fixed is insufficient, Mr Letten can apply to the Court in the usual way on proper material.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon.

Associate: 

Dated: 25 February 2010