

## Receivers' Preliminary Submissions

VID 95 of 2010

Federal Court of Australia  
District Registry: Victoria  
Division: General

### IN THE MATTER OF THE *CORPORATIONS ACT 2001*

### IN THE MATTER OF MARK RONALD LETTEN & ORS

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**  
Plaintiff

**MARK RONALD LETTEN & ORS**  
Respondents

#### **A Introduction**

- 1 By their interlocutory process dated 29 August 2011, the Receivers seek directions as to the following questions in the receivership of the Twinview Joint Venture and the Glen Centre Joint Venture:
  - (a) For the purposes of paragraph 2(d) of the orders of Gordon J dated 11 November 2010 ("**Pooling Orders**"), are the Receivers justified in paying to the Liquidators of Twinview Nominees Pty Ltd the amount of any and if so which of the creditor claims contained in the proofs of debt lodged with the Liquidators of Twinview Nominees Pty Ltd and exhibited to the Thirtieth Affidavit of Damian John Templeton sworn on 29 August 2011?
  - (b) For the purposes of paragraph 2(d) of the Pooling Orders, are the Receivers justified in paying to the Liquidators of The Glen Centre Hawthorn Pty Ltd the amount of any and if so which of the creditor claims contained in the proofs of debt lodged with the Liquidators of The Glen Centre Hawthorn Pty Ltd and exhibited to the Thirtieth Affidavit of Damian John Templeton sworn on 29 August 2011?
- 2 In this outline of submissions:
  - (a) "**Appointment Orders**" means the orders of Gordon J made in this proceeding on 25 February 2010;
  - (b) "**Receivers**", "**Scheme**", "**Twinview Joint Venture**", "**Glen Centre Joint Venture**" "Property" and "Secured Lender" have the meanings ascribed to those terms in the

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Appointment Orders;

- (c) **“Sale Orders”** means the orders of Justice Gordon made in this proceeding on 25 May 2010;
- (d) **“Twinview Property”** and **“The Glen Centre Property”** have the meanings ascribed to those terms in the Sale Orders;
- (e) **“Pooling Orders”** means the orders of Gordon J made on 11 November 2011;
- (f) **“trust creditor claims”** has the meaning ascribed in the Pooling Orders
- (g) **“Liquidators”** means the Receivers in their capacities as Liquidators of the Corporate Defendants;
- (h) **“Twinview”** means the twentieth defendant, Twinview Nominees Pty Ltd;
- (i) **“TGCH”** means the eighteenth defendant, The Glen Centre Hawthorn Pty Ltd.

**B Procedural Background and Parties before the Court**

3 In the Appointment Orders, the Court ordered that:

- (a) pursuant to section 1323(1)(h)(ii) of the Corporations Act 2001 (**“Act”**) the Receivers be appointed to the property of, inter alia, TGCH and Twinview (other than property that constitutes property of a Scheme as defined in Annexure A to the Order);
- (b) the Glen Centre Joint Venture Scheme and the Twinview Joint Venture Scheme (being Schemes identified in the said Annexure A) be wound up pursuant to section 601EE(1) of the Act; and
- (c) the Receivers be appointed as receivers and managers of the Property of, inter alia, the Glen Centre Joint Venture Scheme and the Twinview Joint Venture Scheme.

4 In the Sale Orders, the Court made orders that:

- (a) the Appointment Orders be varied with respect to the Glen Centre Joint Venture and TGCH so that the Receivers have the power to sell the Glen Centre Property;
- (b) the Receivers were justified in paying all agent’s reasonable fees and other reasonable expenses associated with the sale of the Glen Centre Property;
- (c) the remaining proceeds of sale of the Glen Centre Property be paid into the bank account established by the Receivers in relation to the Glen Centre Joint Venture;
- (d) the Appointment Orders be varied with respect to the Twinview Joint Venture and Twinview so that the Receivers have the power to sell the Twinview Property;
- (e) the Receivers were justified in paying all agent’s reasonable fees and other reasonable expenses associated with the sale of the Twinview Property;
- (f) the remaining proceeds of sale of the Twinview Property be paid into the bank account established by the Receivers in relation to the Glen Centre Joint Venture.

- 5 By the Pooling Orders, on 11 November 2010 the Court ordered, inter alia, that the Receivers were 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:
- (a) priority receivership costs, as fixed by the Court, to the Receivers;
  - (b) any liabilities which are secured by that asset, to the relevant Secured Lender;
  - (c) 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
  - (d) the balance (if any) into a bank account held in the name of the Receivers and designated as the "Common Fund" account.
- 6 The Receivers have sold the Glen Centre Property and the Twinview Property. TGCH and Twinview and the Thirteenth Defendant, Nicholson Street Pty Ltd, are the only Scheme companies which, to date, have surplus cash after realization of assets and discharge of secured debt. Accordingly, they are the only Scheme Companies in respect of which the order referred to in paragraph 5(c) above might be relevant at the present time, although the Receivers believe that the Twenty Ninth Defendant ("**Glenbelle**") may ultimately also have a cash surplus.
- 7 On 13 May 2011, Mr Templeton and Mr Hennessy were appointed as liquidators of a number of the Corporate Defendants, including TGCH and Twinview ("**Liquidators**"). On 10 June 2011, the Liquidators called for proofs of debt from creditors of TGCH and Twinview, as a result of which:
- (a) the Liquidators received nine proofs of debt from persons claiming to be creditors of TGCH. A schedule summarising these proofs of debt received in respect of TGCH is attached at Schedule A and copies of the proofs themselves are contained in Exhibit DJT-139 to Mr Templeton's 30<sup>th</sup> Affidavit;
  - (b) the Liquidators received six proofs of debt from persons claiming to be creditors of Twinview. A schedule summarising these proofs of debt received is attached at Schedule B and copies of the proofs themselves are contained in Exhibit DJT-140.
- 8 To date, the following parties have informed the receivers that they desire to appear and be heard on the Receivers' application for directions:
- (a) Bridgehead Properties Pty Ltd; and
  - (b) ABK Group Pty Ltd.
- 9 The Receivers have notified:
- (a) Westpac Banking Corporation;
  - (b) Mr Mark Letten;
  - (c) ASIC;

- (d) Australian Taxation Office;
- (e) Baker & McKenzie;
- (f) Breese Pitt Dixon Pty Ltd;
- (g) Bridgehead Properties Pty Ltd;
- (h) Gross Waddell Pty Ltd;
- (i) Ilario G Gortese Architects Pty Ltd;
- (j) Metropolitan Fire and Emergency Board;
- (k) ABK Group Pty Ltd;
- (l) Louton Pty Ltd;
- (m) Robuck Metals Pty Ltd;
- (n) Resolve Air Conditioning and Mechanical Services Pty Ltd; and
- (o) Scheme investors;

of the Receivers' application for directions.

**C. Materials and Issues for Determination**

10 The Receivers submit that the following materials are relevant for the purposes of this application:

- (a) the 30th affidavit of Damian John Templeton, sworn 29 August 2011 ("**30<sup>th</sup> Templeton Affidavit**"); which exhibits:

<b>DJT-137</b>	Circular to investors dated 11 February 2011
<b>DJT-138</b>	Circulars to creditors dated 10 June 2011
<b>DJT-139</b>	Proofs of debt received in respect of TGCH
<b>DJT-140</b>	Proofs of debt received in respect of Twinview
<b>DJT-141</b>	Circulars to creditors dated 1 August 2011

- (b) the fifth affidavit of Damian John Templeton sworn on 12 April 2010 ("**Fifth Templeton Affidavit**") and the following exhibits:

<b>DJT-15</b>	Disclosure Report Overview (Report No 1)
<b>DJT-16</b>	Disclosure Report for the Twinview Joint Venture (Report No 2)
<b>DJT-17</b>	Disclosure Report for the Glen Centre Joint Venture (Report No 3)

- (c) the tenth affidavit of Damian John Templeton sworn on 9 June 2010 ("**Tenth Templeton Affidavit**") and exhibit DJT-37, namely Disclosure Report for LGH Administration Pty Ltd, LGH Holdings Ltd and LGH Finance Pty Ltd ("**LGH Companies' Report**"); and

- (d) the thirteenth affidavit of Damian John Templeton sworn on 29 July 2010 ("**Thirteenth Templeton Affidavit**") and the following exhibit:

<b>DJT-38</b>	Receivership progress report on realisation and preservation of assets dated 29 July 2010
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- (e) the eighteenth affidavit of Damian John Templeton sworn on 4 October 2010 ("**Eighteenth Templeton Affidavit**") and the following exhibit:

<b>DJT-55</b>	Copy of Consolidated Cashflow
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- (f) the Appointment Orders;
- (g) the Sale Orders;
- (h) the Pooling Orders; and
- (i) the 2nd Affidavit of Nicholas James Kelton (to be provided before the hearing) which will depose to the notification of interested parties and exhibit additional materials received in respect of the proof of debt submitted by ABK Group Pty Ltd (which was inadvertently omitted from the 30th Templeton Affidavit).

11 The 30<sup>th</sup> Templeton Affidavit establishes that the creditor claims fall into two categories:

- (a) third parties who have contracted with the TGCH and/or Twinview to provide services, etc (A1, A2, A3, A4, A5, A6, B1, B2, B3 and B4) ("**trade creditors**");
- (b) investors asserting damages claims against the TGCH and/or Twinview (A7, A8, A9, B5 and B6) ("**investor claimants**"). The damages claims appear, in broad summary, to be based on alleged misrepresentations by TGCH and Twinview resulting in the loss of the alleged creditor's investment.

12 Mr Templeton has deposed that the Liquidators are satisfied that, apart from the investor claimants, the debts attributable to the trade creditors appear to have been incurred by TGCH and Twinview in the management of the trust assets.

13 The questions raised for determination by the Court relates to whether the Receivers are justified in accepting any of the trade creditors or investor claimants as "proper trust creditors" for the purposes of the Pooling orders which raises the question whether TGCH and Twinview are entitled to be exonerated out of the proceeds of sale for any of those claims. The Receivers submit that the substantive issues before the Court on this application for directions are as follows:

- (a) Issue 1: Are Twinview and/or TGCH liable as trustees for losses to their respective trust estates such that any right of exoneration which might otherwise have subsisted in respect of either trade creditors or investor claimants is extinguished by the operation of

the so-called “clear accounts rule”?<sup>1</sup>

(b) Issue 2: Are Twinview and/or TGCH otherwise entitled to exoneration in respect of:

(i) trade creditors;

(ii) investor claims,

having regard to the circumstances in which those debts and liabilities were incurred?

(c) Issue 3: Are Twinview and/or TGCH entitled to exoneration in respect of the Investor claims at all?

## D Relevant Legal Principles

14 It appears to be settled that the trustee of a trust is personally liable for liabilities incurred in the discharge of the trust, but is entitled to be indemnified against those liabilities from trust assets.<sup>2</sup> The trustee’s right of indemnity is secured by way of an equitable lien over the trust property in favour of the trustee.<sup>3</sup>

15 The trustee’s right of indemnity is qualified. The indemnity is not available in respect of a given liability if the activity which generated the liability involved a breach of trust or a breach of a duty which the trustee owed to the trust, was beyond the powers given the trustee or was criminal or fraudulent in nature.<sup>4</sup> There is also authority indicating the indemnity is not available where the liability is “unreasonable or unnecessary” and, as such, is not “properly incurred”.<sup>5</sup>

16 In addition, a trustee’s right of indemnification is subject to the condition precedent that the trustee makes good any loss that it has caused to the estate (“**clear accounts rule**”). The rule is described and analysed by Brooking J in *RWG Management Ltd v Commissioner for Corporate Affairs*<sup>6</sup>, where his Honour said (at 397): “a balance is to be struck between what is due by way of compensation and what is due by way of indemnity and...if the balance is in favour of trustee he may recover from the estate to that extent.”

## E Relevant Facts

17 Relevant facts relating to the establishment of each joint venture are set out in the Disclosure Reports for the Glen Centre Joint Venture and the Twinview Joint Venture.

18 For the Glen Centre Joint Venture, the Disclosure Report showed that:

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<sup>1</sup> In broad summary, the clear accounts rule provides that a trustee’s right of indemnification is subject to the condition precedent that the trustee makes good any loss that it has caused to the estate.

<sup>2</sup> *Octavo Investments Pty Ltd v Knight* (1979) 27 ALR 129 at 134

<sup>3</sup> *Jennings v Mather* [1902] 1 KB 108

<sup>4</sup> *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] ATPR 41-864

<sup>5</sup> *O’Keefe v Hayes Knight GTO Pty Ltd* (2005) 218 ALR 604 at [14]; see also *Nolan v Collie* (2003) 7 VR 287 at [50] where the test is stated to be whether it can be shown that the trustee acted improperly, with the onus resting on those who seek to deny the right

<sup>6</sup> [1985] VR 385; see also *Warne v GDK Financial Solutions Pty Ltd* [2006] NSWSC 259 per Young CJ: “it is good practice to assume that the trustee (whether bare or active) has a prima facie right of indemnity, but to order accounts if there is doubt about the entitlement of the trustee because of a default, and suspend the right of the claimant while those accounts are taken.”

- (a) Initial investors contributed \$4.51 million;
- (b) Initial debt raised was \$3.185 million;
- (c) The property acquisition cost was \$5.176 million;
- (d) There was therefore an initial cash surplus of \$2.52 million;
- (e) Up to the date of the report, allowing for profits and losses, capital expenditure, working capital movements and distributions paid to investors, there was a deficit before funding of \$3.103 million. However, there were additional funds raised from investors totalling \$0.14 million and additional debt of \$4.765 million taken on. After capital repayments to some investors, the cumulative net cash position should have been \$1.227 million but was in fact \$74,000 as at the date of the appointment of the Receivers.

19 For the Twinview Joint Venture, the Disclosure Report showed that:

- (a) Initial investors contributed \$3.605 million;
- (b) Initial debt raised was \$2 million;
- (c) The property acquisition cost was \$3.915 million;
- (d) There was therefore an initial cash surplus of \$1.69 million;
- (e) Up to the date of the report, allowing for profits and losses, capital expenditure, working capital movements, distributions paid to investors, additional funds raised from investors, capital repayments to some investors and additional debt the cumulative net cash position should have been \$1.55 million but was in fact \$26,000 as at the date of the appointment of the Receivers.

20 For the purposes of this application, the key evidence from the LGH Companies' Report includes, amongst other things:

- (a) funds contributed by investors in each of the Schemes were mixed and co-mingled in common bank accounts of LGHA;
- (b) 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 LGH Companies and were mixed and co-mingled in the bank accounts of LGHA;
- (c) the LGH Companies applied the mixed investor funds and the proceeds of sale of various Scheme properties to the assets of the Schemes by way of:
  - (i) the purchase and development of individual properties;
  - (ii) the operation and maintenance of individual properties;
  - (iii) the payment of distributions to investors; and
  - (iv) some limited returns of capital to certain investors;
- (d) the property of the Schemes is irretrievably intermingled owing to the central treasury

role played by LGHA.

- 21 The Pooling Orders were made, among other reasons, because of the complexity and probable impossibility in now reconciling the flow of funds between Schemes. As per the evidence referred to above, the funds contributed by investors, and the property of the various Schemes, are irretrievably intermingled. As a result of this co-mingling of funds, there is no certainty that the trust fund or estate of any particular Scheme truly represents the funds that were contributed by investors with an intention that they be applied to that particular Scheme. For example, the trust fund for the Twinview Joint Venture Scheme may include funds from other Schemes that have been inappropriately directed to it.
- 22 In *ASIC v Letten (No 7)* (2010) 80 ACSR 401 (“**Pooling Reasons**”), the Court found the following in relation to the Glen Centre Scheme:

[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 eighteenth 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 nineteenth 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. Twenty-two 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.

23 In relation to Twinview, the Court found that:

[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 twentieth 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 screed 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.

## **F Issue 1**

24 In the view of the Receivers, although it is clear that TGCH and Twinview held the respective Properties as trustee, in order to determine the way in which the clear accounts rule is to apply, it is necessary to identify the "trust fund" or "estate" for which they are accountable as trustees.

25 In the Pooling Reasons, the Court said that:

[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.

....

[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 ; 260 ALR 643 ; 74 ACSR 447 ; [2009] FCAFC 147 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 admin) v CRC Credit Fund Ltd* [2010] EWCA Civ 917 at [171] (*Lehman Brothers*).

- 26 The question arising from these facts is whether the trust estate for which TGCH and Twinview are accountable :
- (a) is (or was) confined to the Glen Centre Property and the Twinview Property respectively;
  - (b) extended to all monies received by LGHA for application (as described in paragraph [248] of the Pooling Reasons) to the Glen Centre Property and the Twinview Property respectively.
- 27 On the first of these views, there has not been, as far as the receivers are aware, any relevant loss to the trust estate. However, on the view described in paragraph 26(b) above, TGCH and Twinview respectively may have failed in their duty to get in and preserve the trust fund (specifically, that portion of it retained by LGHA representing the initial cash surplus).
- 28 There is a further possibility, which the Receivers submit may be the better view, being that the funds of all Schemes ought to be viewed as a single "master trust" of which the various corporate defendants constitute joint trustees. The Receivers submit that this would be consistent with the rationale which led to the making of the Pooling Orders. On the facts relating to the way in which the funds of the various schemes were dealt with, each of the approaches described in paragraph 26 may be artificial, given there is no way of determining whether the estate truly represents the funds that are referable to that particular Scheme.
- 29 As stated in the Receivers' Circular to Investors, dated 11 February 2011 (DJT-137), the expected dividend return to investors upon finalization of the winding up of the Schemes, is in the order of 8-10 cents in the dollar. Therefore, the losses to Investors are anticipated to be not less than 90 cents in the dollar. Assuming the clear accounts rule is to be assessed by reference to the single, master trust, there will be no indemnity available for trust creditor claims as the loss caused by the large scale breaches of trust committed by the various corporate trustee defendants would be far in excess of the value of those creditor claims. In the case of Glen Centre, the total of investor claims is \$3,245,000, so investor losses (at 90 cents in the dollar) are not less than \$2,920,500. In the case of Twinview, the total of investor claims is \$3,540,000, so investor losses (at 90 cents in the dollar) are not less than \$3,186,000. These amounts represent total investor contributions, less returns of capital, as set out in DJT-55.

## **G Issue 2**

- 30 The case law appears to suggest that a trustee is entitled to be indemnified in respect of a liability

incurred to the extent to which, acting in good faith, he or she has benefited the trust estate.<sup>7</sup> Assuming that this is otherwise so<sup>8</sup> the following questions remain, in the context of an illegal, unregistered management investment scheme:

- (a) can any unsecured liability incurred by the trustee be considered to be incurred within power and in good faith when the source of that power itself is misconceived and possibly based on a fraud?
- (b) can any of the unsecured creditors be said to have provided the trust with a benefit in circumstances whereby all of the investors stand to effectively lose their entire investment?

## **H Issue 3**

- 31 Whilst the proofs of debt received from investors are poorly articulated, the alleged damages claims appear, in broad summary, to constitute misrepresentation claims against the trustees resulting in the loss of the alleged creditor's investment. Presumably the investors will assert that, had they known that their funds would be deployed for purposes beyond that of the Glen Centre Joint Venture and Twinview Joint Venture, they would not have invested the monies.
- 32 While the authorities do provide that a trustee can have a right for indemnity for damages claims, those damages must be incurred during the course of carrying on the trust business.<sup>9</sup> Further, the claim for indemnity is also subject to the overarching consideration of whether the liability was properly incurred.
- 33 In the circumstances, the Receivers consider the investor damages claims may not be claims for which TGCH or Twinview could claim a right of indemnity as the liabilities were either:
- (a) incurred in breach of trust; and/or
  - (b) improperly incurred; and/or
  - (c) arguably unlawful in nature, at least to the extent that they relate to the raising of capital for an unregistered management investment scheme.
- 34 The Receivers intend to file further submissions dealing in more detail with the issues raised before the hearing of their application.

**Robert Strong**  
**Counsel for the Receivers**

**Mallesons Stephen Jaques**  
**Date: 13 September 2011**

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<sup>7</sup> *RWG Management* at 396; *Nolan v Collie* (2003) 7 VR 287 at [58]

<sup>8</sup> It is the Receivers' view that, subject to the clear accounts rule and the question raised in Issue 2, the trade creditors' claims would otherwise be valid trust creditor claims. For the reasons referred to in the discussion of Issue 3 below, they do not take this view with respect to the investors' claims.

<sup>9</sup> *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] ATPR 41-864 at [46]

## SCHEDULE A - TGCH PROOFS OF DEBT

No.	Creditor	Proof of debt	Nature of claim
1	Baker & McKenzie	\$10,166.36	Legal fees
2	Breese Pitt Dixon	\$3,850.00	Surveying services
3	Gross Waddell	\$10,499.50	Advertising/leasing costs
4	Illario G. Cortese	\$3,745.50	Architectural services
5	Bridgehead Properties Pty Ltd	\$477,420.81	Management fees
6	Metropolitan Fire and Emergency Services Board	\$1,826.00	Attendance on false alarm
7	Louton Pty Ltd	\$100,000.00	Investor damages
8	Robuck Metals Pty Ltd	\$235,000.00	Investor damages
9	ABK Group Pty Ltd	\$108,850.00	Investor damages / "JV Loan" <sup>10</sup>

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<sup>10</sup> Amended as per 2nd Affidavit of Nicholas James Kelton

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**SCHEDULE B - TWINVIEW PROOFS OF DEBT**

<b>No</b>	<b>Creditor</b>	<b>Proof of debt</b>	<b>Nature of Claim</b>
1	Baker & McKenzie	\$3,065.25	Legal services
2	Resolve air-conditioning & Mechanical Services	\$3,575.00	Supply/install air conditioner
3	Bridgehead Properties Pty Ltd	\$452,913.37	Management Fees
4	Australian Taxation Office	\$21,067.72	Tax
5	Louton Pty Ltd	\$100,000.00	Investor damages
6	Robuck Metals Pty Ltd	\$235,000.00	Investor damages

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