

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Askk Investment Group Pty Ltd [2020] FCA 1150

File number: VID 1620 of 2018

Judgment of: **DAVIES J**

Date of judgment: 10 August 2020

Catchwords: **CORPORATIONS** – winding up of unregistered managed investment scheme under s 601EE of the *Corporations Act 2001* (Cth) (**Act**) – winding up of company operating scheme under s 461(1)(k) of the Act – whether scheme met definition of “managed investment scheme” under the Act – whether scheme required to be registered under s 601ED(1) of the Act – wind up orders not opposed

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) s 13
Corporations Act 2001 (Cth) ss 9, 461(1)(k), 601ED, 601EE
Sale of Land Act 1962 (Vic) s 29F

Cases cited: *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd & Ors* [2001] WASC 27; 36 ACSR 778

Number of paragraphs: 9

Date of hearing: 10 August 2020

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Counsel for the Plaintiff: Mr J Moore QC with Ms Z Maud

Counsel for the Defendant: Mr S Rubenstein

Solicitor for the Defendant: Mills Oakley

Counsel for the Represented Investors: Mr H Aizen

Solicitor for the Represented Investors: Toorak Law Pty Ltd

ORDERS

VID 1620 of 2018

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

AND: **ASKK INVESTMENT GROUP PTY LTD**
Defendant

ORDER MADE BY: DAVIES J

DATE OF ORDER: 10 AUGUST 2020

THE COURT ORDERS THAT:

1. The application to adjourn the hearing of the Plaintiff's application to wind up the Defendant and the unregistered managed investment scheme that has been operated by the Defendant is refused.
2. Pursuant to section 461(1)(k) of the *Corporations Act 2001* (Cth), the Defendant be wound up.
3. Salvatore Algeri and Timothy Bryce Norman (the Liquidators), of Deloitte Australia, 550 Bourke Street, Melbourne, Victoria be appointed as liquidators of the Defendant for the purposes of the winding-up.
4. Pursuant to section 601EE(2) of the *Corporations Act 2001* (Cth), the managed investment scheme operated by the Defendant (the Scheme) be wound up.
5. The Liquidators be appointed liquidators of the Scheme with all the powers of a liquidator pursuant to s 477 of the *Corporations Act 2001* (Cth) in respect of the property of the Scheme.
6. The Plaintiff's costs be taxed and be reimbursed out of the property of the Defendant in accordance with section 466(2) of the *Corporations Act 2001* (Cth).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

- 1 This is an application by the plaintiff (ASIC) for an order pursuant to s 601EE(2) of the
2 *Corporations Act 2001* (Cth) (**the Act**) for the winding up of an unregistered managed
investment scheme operated by the defendant (Askk). In addition, ASIC seeks the winding up
of Askk pursuant to s 461(1)(k) of the Act for operating a managed investment scheme that
was required to be registered pursuant to s 601ED(1)(a) of the Act but which was not:
s 601ED(5), s 601EE. Where a scheme has been operated in contravention of s 601ED(5), the
case for winding up the entity that operated the scheme is “compelling”: *Australian Securities
and Investments Commission v Chase Capital Management Pty Ltd & Ors* [2001] WASC 27;
36 ACSR 778 at 796 [93]–[94].
- 2 The application was supported by four affidavits of Ms Naomi Johnston of ASIC. Askk relied
on three affidavits of Mr Ahmad Ayad, managing director of Askk, an affidavit of Mr Khodr
El-Badaoui, a director of Askk, and a solicitor affidavit of Mr Mark Bland.
- 3 Briefly stated, the unregistered managed investment scheme operated by Askk was the
promotion of investment in blocks of land in Beveridge, Victoria. The scheme involved the
payment of money by investors to Askk to fund the purchase of the land, the subdivision of the
land into residential blocks and then the transfer of one block to each investor per \$200,000
contribution. The money paid to Askk by investors was pooled and used by Askk to pay part
of the purchase price for the land pursuant to a contract of sale.
- 4 The scheme had the features described in sub-paras (a)(ii)-(iii) of the definition of “managed
investment scheme” in s 9 of the Act for the following reasons:
- (a) the investors contributed the money as consideration for the acquisition of rights
to benefits produced by the scheme. The “right” acquired by those investors
was the right to become the registered proprietor in the future of a “lot” of
subdivided land of about 400sqm within the area comprising the land purchased
under the scheme: sub-para (a)(i) of the definition;
 - (b) at least by November 2017, the intention of Askk (objectively discerned) was
that the contributions of the investors would be pooled or used in a common
enterprise to purchase the land. That intention formed part of the “scheme” and

it was formed prior to the making of contributions: sub-para (a)(ii) of the definition;

- (c) the contributions were in fact pooled, as they were deposited into an account maintained by Askk with Westpac. Further, the contributions were used for a common enterprise, being payment of the deposit and first instalment of the purchase price for the land; and
- (d) Askk, rather than the investors, had day-to-day control over the operation of the scheme: sub-para (a)(iii) of the definition.

5 Further, the scheme was required to be registered because in the period since October 2017, Askk raised in excess of \$11 million from more than 200 investors. Thus, s 601ED(1)(a) is satisfied because the scheme has more than 20 members. The exemption in s 601ED(2) does not apply because, if the scheme had been registered, there would have been a requirement for product disclosure statements to be given to at least some investors.

6 In late 2018, ASIC commenced an investigation under s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) into the operation of the scheme. The evidence was to the effect that, upon Askk becoming aware that there may have been a contravention of s 601ED of the Act, steps were taken by Askk in an endeavour to regularise the investment scheme, including the restructure of the arrangements underpinning the scheme. Eventually those endeavours were unsuccessful and in April 2020, the company exercised its right to avoid the contract for the purchase of the land and to reclaim the monies paid by it to the vendor pursuant to s 29F of the *Sale of Land Act 1962* (Vic). As a consequence, the scheme cannot in any event now proceed.

7 Askk did not oppose the winding up of the scheme. Nor did it oppose an order that it be wound up under s 461(1)(k) of the Act on the basis that it operated a scheme in contravention of s 601ED(5). However, the submission was made that the interests of the investors in the scheme ought to be an important factor taken into account by the Court in determining the appropriate relief in the circumstances.

8 At the hearing, a number of those investors were represented by counsel. Counsel informed the Court that those investors did not oppose the winding up of the scheme but an adjournment of ASIC's application to wind up the company was sought in order to have an opportunity to consider whether and how to respond to that application. That application was not supported

by any affidavit material, let alone affidavit material to indicate that there may be some point to the adjournment other than to give the investors time to consider what position they may wish to take in relation to the wind up application. In the circumstances the application for an adjournment was refused.

- 9 Accordingly, orders should be made for the winding up of the unregistered managed investment scheme and for the winding up of Askk.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies.

Associate:

Dated: 10 August 2020