

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID426/2012
File Title:	ASIC v ActiveSuper Pty Ltd & Ors
Registry:	SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 24/04/2015 4:32:31 PM AEST

A handwritten signature in blue ink, reading 'Warwick Soden'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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IN THE MATTER OF ACTIVESUPER PTY LTD (ACN 125 423 574) and others

**Australian Securities & Investments Commission**  
Plaintiff

**ActiveSuper Pty Ltd (ACN 125 423 574) and others named in the schedule**  
Defendants

## ASIC'S OUTLINE OF SUBMISSIONS ON FINAL ORDERS

### Declarations

- 1 The declarations in the proposed order reflect the Court's decision that declarations agreed between ASIC and the first defendant (**ActiveSuper**), Mr Burrows and Mr Adamson should now be made.<sup>1</sup> The Court also decided that the declarations in the proposed order relating to the other defendants should be made.<sup>2</sup> Each declaration is footnoted with references to the relevant paragraphs in the judgment.

### Injunctions

- 2 The Court concluded at [624] that the injunctions agreed by ActiveSuper, Mr Burrows and Mr Adamson should be made. The Court also concluded at [625] to [628] that injunctions should be granted against the corporate defendants, Mr Gore, Mrs Gore and Mr George. The only outstanding question in relation to the injunctions is the period of the restraint in relation to Mr Gore, Mrs Gore and Mr George.
- 3 The relevant principles and considerations were addressed by Santow J in *ASIC v Adler* (2002) 42 ACSR 80 at [56].<sup>3</sup> That case concerned disqualification orders, but the same principles have been held to apply to restraint orders made under s 1324: *Re Idylic Solutions*; *ASIC v Hobbs* (2013) 93 ACSR 421 at [92]-[106]. Santow J in *Adler* summarised the types of cases that warrant permanent orders or orders for very long periods (25 years), medium periods (of between 7 and 12 years), and the

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<sup>1</sup> Reasons [619].

<sup>2</sup> Reasons [619].

<sup>3</sup> See also *ASIC v Vines* (2006) 58 ACSR 298 (NSW SC); *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 (WASC).

shortest periods (up to 3 years). Permanent orders have been made in a number of cases.<sup>4</sup>

- 4 Having regard to those principles and the considerations applicable in this case, ASIC seeks permanent restraint orders against Mr Gore, Mr George and Mrs Gore. ASIC relies upon the following considerations in support of the proposed orders.

*Mr Gore*

- 5 Mr Gore's conduct was the most egregious. He conceived and promoted the BVI scheme<sup>5</sup> with the intention of avoiding the legal and regulatory requirements protecting investors in Australia.<sup>6</sup> He was anxious to get access to the funds raised by the scheme<sup>7</sup> and ultimately received about \$1.99 million of investors' funds.<sup>8</sup>
- 6 As pleaded in paragraph 16(b) of the statement of claim, Mr Gore was disqualified from managing any corporation from 23 November 2010, when he entered into a personal insolvency agreement under Part 10 of the Bankruptcy Act 1966 (Cth) (s 206B(4) of the Corporations Act 2001). He was similarly disqualified from 18 April 2012, upon the presentation of his bankruptcy petition. Accordingly, Mr Gore was prohibited from acting as a director of any corporation at all times from 23 November 2010. The Court has found that Mr Gore was acting as a director of MOGS during this period.<sup>9</sup> That was a plain, deliberate contravention of s 206A of the Act. Though not pleaded, the contravention is undeniable in light of the Court's findings. That is a relevant consideration for the purpose of determining the appropriate period of restraint.
- 7 Mr Gore engaged in a course of conduct involving multiple contraventions of the Act. He has shown a blatant disregard for the legal and regulatory requirements applicable to the conduct of a business of the nature he and his associates conducted. He acted with conscious, deliberate impropriety: he was knowingly involved in the publication of materials that were intended to induce small, unsophisticated SMSF investors to invest their funds in the BVI scheme,<sup>10</sup> knowing that such funds would

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<sup>4</sup> *Idyllic* at [10], [316], [347]-[348], *ASIC v Elm Financial Services Pty Ltd* (2005) 55 ACSR 544 at [5], [8] (NSW SC) (by consent); *Re PFS* (2006) 57 ACSR 553 at [396]-[399] (VSC), *Re Scott* [2012] NSWSC 1643 at [18]-[19], [25] (by consent).

<sup>5</sup> Reasons [158], [565], [627].

<sup>6</sup> Reasons [167], [516], [534], [535]. He knew that the scheme was being marketed without a PDS and without a licence: [532]-[534], [593].

<sup>7</sup> Reasons [520].

<sup>8</sup> Reasons [202].

<sup>9</sup> Reasons [136], [556] – [567].

<sup>10</sup> Reasons [533].

not be invested in the manner that had been represented to investors<sup>11</sup> – but instead, would benefit him personally and his associates. All of the funds invested in the scheme have been lost by unsuspecting members of the public.<sup>12</sup> Mr Gore has not repaid anything to investors. Mr Gore did not seek to explain his conduct by giving evidence at trial.<sup>13</sup> It can be inferred that, if ASIC had not taken action against him, Mr Gore would have continued with this course of conduct. There is no evidence pointing to any mitigating factors or contrition. In his closing address at trial, Mr Gore attributed blame only to others and avoided any mention of his own culpability. Against the weight of evidence of serious wrongdoing, Mr Gore’s position at the end of the trial was that ASIC’s “investigation is a joke. It is a waste of taxpayers’ money.”<sup>14</sup> That reveals a complete lack of insight into the serious impropriety of his own conduct, and that of the other defendants. In these circumstances, no submission could credibly be made that there is a realistic prospect of rehabilitation for Mr Gore.

- 8 Given those matters, the “very real risk that, left unrestrained, Mr Gore will engage in like activity in the future” (at [627]), and his complete lack of remorse, or even recognition of the wrongfulness of his conduct (ibid), a permanent order preventing Mr Gore from being involved in the financial services industry is submitted to be both necessary and amply justified.

*Ms Gore*

- 9 Ms Gore, a director of MOGS, was intimately involved in assisting her husband’s gross misconduct. She facilitated, and participated extensively in, the development and implementation of the BVI scheme, which included travelling to the BVI, attending meetings and participation in the development of the PPMs and the Cayco website.<sup>15</sup> She knew that the purpose of the scheme was to avoid compliance with the Australian regulatory regime,<sup>16</sup> and knew that investors were, via the PPMs, being lied to about the purpose for which their funds would be used: at [605]. She received personally \$1.54 million from the monies raised.<sup>17</sup> No amount has been repaid, and is unlikely to ever be repaid. The Court found that, without restraint,

<sup>11</sup> Reasons [601], [602], [607].

<sup>12</sup> Reasons [16], [626].

<sup>13</sup> Reasons [49].

<sup>14</sup> T1298.46.

<sup>15</sup> Reasons [191], [193], [268], [382(e)], [468], [471], [496], [498], [508], [513]-[523], [547]-[505].

<sup>16</sup> Reasons [549], [464]. See also [487].

<sup>17</sup> Reasons [202], [382], [627]. See also [203]. Some of the funds were recorded as loan payments to Ms Gore. Mr Killer expressed concern as to their collectability (report dated 6 June 2013, at p 33).

“there is a real chance that Ms Gore may engage in similar forms of activity in the future”: at [627].

- 10 Whilst Mr Gore was the “central figure” in the scheme, the conduct of Ms Gore was so serious that the same permanent disqualification from involvement in the provision of financial products and services is warranted.<sup>18</sup>

*Mr George*

- 11 Mr George played a significant role in the development and implementation of the BVI scheme.<sup>19</sup> He was the point of contact for the other defendants in the BVI.<sup>20</sup> He was heavily involved in the development of the PPMs<sup>21</sup>, and knew that the shares were being offered to SMSF investors in Australia.<sup>22</sup> Like Mr and Mrs Gore, Mr George knew what the funds invested pursuant to those documents were really to be used for,<sup>23</sup> and thus knew that what investors were being told would be done with their money was false.<sup>24</sup> He knew that Australian regulatory requirements were being evaded.<sup>25</sup> Mr George received at least \$350,000 from funds invested by unsuspecting SMSF investors.<sup>26</sup> He had a hand in the sale of the properties once owned by the LLCs for \$610,000 but he has never accounted for the proceeds.<sup>27</sup> Almost certainly, he never will. Mr George was prepared to act at the direction of Mr Gore, which is an additional consideration indicating the appropriateness of injunctions against him.<sup>28</sup>
- 12 The proposed orders will not prevent the defendants from engaging in any other type of business but will protect unsuspecting investors seeking financial products and services from being exposed to the very real risk that Mr and Mrs Gore and Mr George will repeat the disgraceful conduct exposed in this case.

**Costs of the proceeding**

- 13 In respect of the defendants other than Mr Stonehouse, it is submitted that no departure from the ‘costs follow the event’ principle is warranted. ASIC achieved substantial success, and it could not be said that significant time or resources were

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<sup>18</sup> See for example, *Re Idyllic Solutions* (2013) 93 ACSR 421 at [348].

<sup>19</sup> Reasons [176] – [183], [188], [268], [475]-[485], [50]3-[508], [513], [521]-[523], [568], [[628].

<sup>20</sup> Reasons [189].

<sup>21</sup> Reasons [191].

<sup>22</sup> Reasons [570].

<sup>23</sup> Reasons [382](h), (i).

<sup>24</sup> Reasons [382] (l) and (m).

<sup>25</sup> Reasons [570] and [595].

<sup>26</sup> Reasons [198], [202].

<sup>27</sup> Reasons [524]-[525], [628].

<sup>28</sup> Reasons [628].

devoted to issues that ASIC did not establish (being limited to misleading conduct by omission and Ms Gore's knowing concern in breaches of s 911A of the Act).

- 14 In respect of Mr Stonehouse, ASIC submits that the appropriate order is that there be no order as to costs. ASIC obtained *ex parte* orders against Mr Stonehouse pursuant to s 1323 of the Act and joined him as a defendant to the proceeding on 3 December 2012. Mr Stonehouse contested the orders and filed an affidavit dated 7 December 2012 on his own behalf in opposition, describing his involvement in MOGS. ASIC's application for s 1323 relief against Mr Stonehouse was plainly warranted and reasonable in all of the circumstances known to ASIC at that time and in light of the findings that have now been made in respect of MOGS's conduct and that of all other persons involved in the management of MOGS.<sup>29</sup> The application for s 1323 orders having been unsuccessfully opposed by Mr Stonehouse, ASIC would otherwise have been entitled to an order for costs in relation to that part of the proceeding. Having regard to that fact, the appropriate order is that there be no order as to costs of the proceeding against Mr Stonehouse.

#### Other orders

- 15 The proposed winding up orders reflect the Court's findings at [638].
- 16 ASIC submits that, at this stage, no variations should be made to the interlocutory orders made on 10 July 2012 and 3 December 2012 (as subsequently varied). The continuance of those orders will provide members of the public and the liquidators of the various companies with the opportunity to consider whether to institute proceedings against some or all of the defendants.<sup>30</sup> In the meantime, the property which is the subject of the asset preservation orders should continue to be preserved for the benefit of creditors and investors.
- 17 ASIC seeks to adjourn the proceeding to a date to be fixed, for directions regarding the future conduct of the claims against Mr Gibson and Royale Capital.

24 April 2015



*Legal Practitioner for the  
Australian Securities & Investments Commission*

NORMAN O'BRYAN  
JONATHON MOORE  
CARYN VAN PROCTOR

<sup>29</sup> *ASIC v Johnston* [2011] FCA 920, *ASIC v Aust-Home Investments Ltd* (1993) 44 FCR 194 at [35], *ASIC v Munro* [2011] QSC 405, *ASIC v Groves* [2009] FCA 915, *Ann Street Mezzanine Pty Ltd (In Liquidation) (ACN 102 854 866) v Beck (No 1)* [2008] FCA 1021 at [9]

<sup>30</sup> *ASIC v Richstar* [2007] FCA 1395 [15]-[16]

**Schedule**

No: VID426/2012

Federal Court of Australia  
District Registry: Queensland  
Division: General

Second Defendant:	ACN 143 832 053 PTY LTD (ACN 143 832 053)
Third Defendant:	JASON GRANT BURROWS
Fourth Defendant:	JUSTIN LUKE GIBSON
Fifth Defendant:	U.S. REALTY INVESTMENTS #1, LLC (L-1666059-6)
Sixth Defendant:	U.S. REALTY INVESTMENTS #2, LLC (L-1666058-5)
Seventh Defendant:	U.S. REALTY INVESTMENTS #3, LLC (L-1668734-4)
Eighth Defendant:	U.S. REALTY INVESTMENTS #4, LLC (L-1668736-6)
Ninth Defendant:	SYNDICATED PROPERTY GROUP LTD
Tenth Defendant:	WORLDWIDE PROPERTY OPPORTUNITIES LTD
Eleventh Defendant:	CAYCO MANAGEMENT
Twelfth Defendant:	MOGS PTY LTD
Thirteenth Defendant:	JEFFREY GEORGE
Fourteenth Defendant:	GRAEME STONEHOUSE
Fifteenth Defendant:	MARINA GORE
Sixteenth Defendant:	MARK GORDON ADAMSON
Seventeenth Defendant:	CRAIG KIRRIN GORE
Eighteenth Defendant:	MASH INVESTMENTS PTY LTD (ACN 149 597 384)