

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 5) [2023] FCA 163

File number(s): VID 524 of 2020

Judgment of: **O'CALLAGHAN J**

Date of judgment: 23 February 2023

Date of publication of reasons: 6 March 2023

Catchwords: **PRACTICE AND PROCEDURE** – where single judge made order restricting second defendant from leaving or attempting to leave Australia (travel ban order) – where travel ban order subsequently vacated – where Full Court made order reviving travel ban order – where plaintiff and second defendant sought orders by consent to vacate travel ban order

Legislation: *Corporations Act 2001* (Cth) ss 1323(1)(k) and 1323(3)

Cases cited: *Australian Securities and Investments Commission v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd* [2020] FCA 1166
Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 4) [2022] FCA 487
Mawhinney v Australian Securities and Investments Commission (2022) 405 ALR 292; [2022] FCAFC 159

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 19

Date of hearing: 23 February 2023

Counsel for the Plaintiff: Mr CJ Tran

Solicitor for the Plaintiff: MinterEllison

Counsel for the Second
Defendant:

Mr P Bick KC and Mr A Aleksov

Solicitor for the Second
Defendant:

Roberts Gray Lawyers

ORDERS

VID 524 of 2020

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

AND: **M101 NOMINEES PTY LTD**
First Defendant

JAMES MAWHINNEY
Second Defendant

SUNSEEKER HOLDINGS PTY LTD
Third Defendant

ORDER MADE BY: O'CALLAGHAN J

DATE OF ORDER: 23 FEBRUARY 2023

THE COURT ORDERS BY CONSENT THAT:

1. Paragraph 7 of the orders made by Justice Anderson on 13 August 2020 be vacated.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

1 On 23 February 2023, having heard from the parties, I made an order by consent that paragraph
7 of the orders made by Anderson J on 13 August 2020 be vacated.

2 I told the parties that I would give brief reasons for having done so.

3 On 13 August 2020, after an ex parte hearing, Anderson J, among other orders and by the terms
of paragraph 7, ordered that pursuant to ss 1323(1)(k) and 1323(3) of the *Corporations Act
2001* (Cth), until further order, Mr Mawhinney be restrained from leaving or attempting to
leave Australia. See *Australian Securities and Investments Commission v M101 Nominees Pty
Ltd, in the matter of M101 Nominees Pty Ltd* [2020] FCA 1166 (the **travel ban order**).

4 His Honour gave the following reasons for making the travel ban order.

Travel restraints

66 ASIC seeks an order that, pursuant to sections 1323(1)(k) and 1323(3) of the
Corporations Act, until further order, Mr Mawhinney be restrained from
leaving or attempting to leave Australia.

67 I have set out sections 1323(1)(k) and 1323(3) of the *Corporations Act* above.
Section 1323(1)(k) in short empowers the Court in certain circumstances to
make an order prohibiting a relevant person from leaving Australia without the
consent of the Court.

68 As stated above, I am satisfied that the application of those provisions to the
evidence presented to the Court by ASIC provided a proper basis for the asset
preservation orders sought by ASIC and referred to above. The question
becomes whether the application of those provisions afford a proper basis for
making the travel restriction orders ASIC has sought.

69 In this respect, imposing “restrictions upon a person’s freedom of movement
is a serious step not lightly to be undertaken”: *Australian Securities and
Investments Commission; in the matter of Richstar Enterprises Pty Ltd v Carey
(No. 19)* [2008] FCA 38; 65 ACSR 421 at [32] (per French J).

70 That said, Courts have, on a number of occasions, restrained overseas travel
by defendants being investigated by ASIC (see eg *ASIC v Troy* (1999) 33
ACSR 121; *ASIC v Australian Investors Forum Pty Ltd* [2001] NSWSC 1180;
ASIC v Mauer-Swisse Securities Ltd [2002] NSWSC 684; *ASIC, in the matter
of Money for Living (Aust) Pty Ltd v Money for Living (Aust) Pty Ltd* [2005]
FCA 1621; *ASIC v Hawley* [2008] FCA 1423; 250 ALR 57; *ASIC v Koops
[2010] FCA 20*).

71 The relevant question, which mirrors the statutory language, has been stated in
this way: is it “necessary or desirable to make ... the [relevant] travel
restriction orders for the purpose of protecting the interests of a person
(referred to as an ‘aggrieved person’ in the provision) to whom” the

Defendants “may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property” (*ASIC v CME Capital Australia Pty Ltd, in the matter of CME Capital Australia Pty Ltd (No 3)* [2016] FCA 545 at [9] (per Moshinsky J)).

72 In light of that guidance, the material provided to this Court relevantly evidences the following:

(1) ASIC has made enquiries of the Australian Border Force (ABF) concerning the travel movements of Mr Mawhinney. The ABF has advised ASIC that, between 1 January 2019 and 5 June 2020, Mr Mawhinney travelled internationally 8 times. Mr Mawhinney last departed from Australia on 7 December 2019 and arrived back in Australia on 15 December 2019 from the United Kingdom (Buckley, [159]).

(2) On 2 July 2020, ASIC received a letter from Thomson Geer, the lawyers for the provisional liquidators of the IPO Wealth Entities (that is, the entities which are the subject of the Supreme Court of Victoria proceeding referred to earlier in these reasons) (Buckley, [162]). That letter attaches an extract of a report prepared on 14 August 2019 by Pinnacle Advisory Group, the former legal and accounting advisers to Mr Mawhinney and the Mayfair 101 Group (Buckley, [163]). Under the heading “Our detailed understanding of your current structure and objectives”, the report states the following:

... you and your de facto partner currently live in Australia, and you are a tax resident of Australia for Australian tax purposes; however, you and your de facto partner are planning on leaving Australia in the next year or so [ie in the “year or so” from August 2019], at which time you will cease to be Australian tax residents ...

(3) While there are travel restrictions currently imposed by the Australian Government due to the COVID-19 pandemic, ASIC’s enquiries indicate there are international flights available, private charter flights are able to depart from Australia during the COVID-19 outbreak and last minute private charter flights can be arranged on four hours’ notice (Buckley, [176]-[177]).

(4) ASIC has stated that Mr Mawhinney’s presence in Australia is critical to ASIC’s investigations, particularly in light of the centrality of Mr Mawhinney’s role in the relevant group of companies and the comparative complexity of the relevant group’s arrangements (Buckley, [178]-[179]).

(5) Mr Mawhinney holds a bank account in Monaco (Mawhinney Affidavit, [6]). Mr Mawhinney established this account when he was considering relocating to Monaco, but, to the best of Mr Mawhinney’s knowledge and belief, this Monaco account was never used (Mawhinney Affidavit records at [9]-[10]).

(6) Ms Buckley has formed the view that Mr Mawhinney is a flight risk for the following reasons (see Buckley, [182]):

(a) Mr Mawhinney is the head of a group of companies that are

headquartered in London;

- (b) Mr Mawhinney has travelled overseas on 8 occasions in the approximately 18 months to 5 June 2020;
- (c) Mr Mawhinney is associated with a British Virgin Island Company, 101 Investments Ltd, and has transferred assets to that company;
- (d) Mr Mawhinney has substantial cash funds available to him and, as a result, has the means to travel;
- (e) as stated above, ASIC has correspondence which indicates Mr Mawhinney has previously expressed an intention to cease residing in Australia from approximately August 2020;
- (f) Mr Mawhinney is potentially facing legal action by the provisional liquidators in the IPO Wealth Proceedings;
- (g) Ms Buckley deposed that a potential flight risk also arose by reason of the scope and seriousness of ASIC's investigations and the possibility that criminal proceedings may be commenced against Mr Mawhinney at some time in the future as a result of ASIC's investigation.

73 On the hearing of this application, Counsel for ASIC, Mr Jonathon Moore QC, appropriately made submissions which accorded with ASIC's disclosure obligations on an ex parte application. Mr Moore QC submitted that, if the Defendants were present at the hearing of this application, the Defendants might submit that Mr Mawhinney is currently involved in a number of curial proceedings and is defending those proceedings. Mr Moore QC noted that Mr Mawhinney may in those circumstances submit that any travel restriction orders were unnecessary given Mr Mawhinney's continuing defence of those proceedings indicates an intention to remain in the jurisdiction.

74 On balance, given the material ASIC has provided to this Court, particularly the matters I have set out above, I am satisfied that the relevant statutory jurisdiction is enlivened and that it is appropriate to make the travel restraint orders ASIC has sought. I am satisfied that is necessary or desirable to make the relevant travel restriction orders, particularly for the purpose of protecting the relevant noteholders, whom the Defendants may be or become liable to pay money on a relevant basis.

5 The proceeding came back before Anderson J on an inter partes basis in February and March 2021. ASIC sought permanent restraining orders. On 19 April 2021, his Honour made permanent orders restraining Mr Mawhinney, among other things, from receiving or soliciting funds in connection with any Financial Product (as defined) and advertising, promoting or marketing any Financial Product for period of 20 years.

6 By the terms of order 2 of his 19 April 2021 orders, his Honour vacated the travel ban order. See *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3)* [2021] FCA 354.

7 An appeal brought against his Honour’s orders restraining Mr Mawhinney from receiving or soliciting funds in connection with any Financial Product and advertising, promoting or marketing any Financial Product for period of 20 years was allowed. See *Mawhinney v Australian Securities and Investments Commission* (2022) 405 ALR 292; [2022] FCAFC 159 (Jagot, O’Bryan and Cheeseman JJ).

8 The Full Court’s orders included the following orders:

4. The appeal be allowed.
5. Orders 1, 2 and 4 made by the primary judge on 19 April 2021 be set aside.
6. In lieu thereof it be ordered that:
 - (1) The matter be remitted for hearing and determination by a judge other than the primary judge on the basis of:
 - a. such further evidence and submissions the parties wish to adduce and put respectively; and
 - b. such further case management orders as the judge to whom the matter is remitted thinks fit.
 - (2) The plaintiff pay the second defendant’s costs of and in connection with the hearing before the primary judge on 16 February 2021 and 9 March 2021 on an indemnity basis.

9 Relevantly for present purposes, the consequence of that part of paragraph 5 of the Full Court’s orders, which set aside order 2 of Anderson J’s 19 April 2021 order, was that the travel ban order was revived.

10 The remitted proceeding was shortly thereafter allocated to my docket.

11 On 4 May 2022, I made orders staying both proceedings VID 524 of 2020 and VID 666 of 2021, pending the outcome of an application by Mr Mawhinney for special leave to appeal to the High Court of Australia from relevant orders of the Full Court. See *Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 4)* [2022] FCA 487. The special leave application has not yet been determined.

12 The proposed grounds of appeal contained in the application for special leave to appeal include that the Full Court erred in purporting to revive the travel ban order, including in circumstances where ASIC on appeal made no case for its revival, and where there was no evidence before the Full Court of any requirement for such an order.

13 On 17 February 2023, Mr Mawhinney’s solicitors sent an email to my chambers, copied to the other parties. It read, relevantly, that “[t]he parties are in agreement that the travel ban against

our client can be lifted” and asked that I make an order vacating paragraph 7 of the orders made by Anderson J on 13 August 2020.

14 I then caused my executive assistant to write to the parties to convene a brief hearing about the application.

15 The hearing took place in the afternoon of 23 February 2023. Mr CJ Tran of counsel appeared for ASIC. Mr P Bick KC and Mr A Aleksov of counsel appeared for Mr Mawhinney.

16 After having heard submissions and adjourned to consider the matter, later that afternoon my executive assistant notified the parties that I had made the order sought.

17 Shortly before the hearing, I was provided with a bundle of correspondence between ASIC’s solicitors and Mr Mawhinney’s solicitors. It disclosed that Mr Mawhinney wishes to travel to the United States on a number of occasions this year for a series of business meetings (not involving dealing with financial products). Correspondence from Mr Mawhinney’s solicitors set out a series of reasons why the travel ban should be vacated, including, among other things, that ASIC never sought a travel ban on a final basis; and that because Mr Mawhinney’s partner and young child live in Australia and will not accompany him on his trips (likely to be for no more than 2-3 weeks at a time), he was not a flight risk.

18 The respective solicitors exchanged a number of written communications, mainly because they took some time to agree on the appropriate form of order. At no time did ASIC gainsay the proposition that Mr Mawhinney is not a flight risk.

19 Having also satisfied myself that the making of the order vacating the travel ban order was within the scope of the remittal orders made by the Full Court, I thus determined that the making of the consent order sought was appropriate.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan.



Associate:

Dated: 6 March 2023