FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v M101 Nominees Pty Ltd (No 3) [2021] FCA 354

File number(s):	VID 524 of 2020
Judgment of:	**ANDERSON J**
Date of judgment:	19 April 2021
Catchwords:	**CORPORATIONS** – financial products offered by first defendant and entities associated with second defendant – whether certain entities provided financial services or financial products without a financial services licence – whether financial products offered by entities associated with second defendant had similar features and are "inherently problematic" or "fatally flawed" – whether new investors' funds were used to repay redemptions promised to old investors – whether offering of certain financial products entailed misleading and deceptive conduct – whether certain entities provided financial services to a "retail client" without complying with requirements in Chapter 7 of the *Corporations Act 2001* (Cth) – whether certain financial products launched by second defendant to circumvent orders of this Court in proceeding VID 228 of 2020 **CORPORATIONS** – whether second defendant was "directing mind and will" of the relevant corporate entities – whether second defendant involved in contraventions under s 79 of the *Corporations Act 2001* (Cth) and s 12GBCL of the *Australian Securities and Investments Commission Act 2001* (Cth) **CORPORATIONS** – final relief – injunctions – whether jurisdiction enlivened under ss 1101B and 1324 of the *Corporations Act 2001* (Cth) – jurisdiction enlivened **CORPORATIONS** – final relief – whether orders should be made permanently restraining second defendant from engaging in certain activities in relation to financial products **Held**: orders made restraining second defendant from engaging in certain activities for a period of 20 years
Legislation:	*Australian Securities and Investments Commission Act*

2001 (Cth), ss 5(2)(b), 12BAA, 12BAB, 12BB, 12DA(1), 12DB(1)(a), 12DB(1)(e), 12GBA(6)(b), 12GBCL

Corporations Act 2001 (Cth), ss 9, 79, 461(1)(k), 760A, 761G, 766C(1)(b), 769C, 911A(1), 1041H, 1101B, 1324

Evidence Act 1995 (Cth), ss 94 and 97

Federal Court of Australia Act 1976 (Cth), s 23

Corporations Regulations 2001 (Cth), reg 7.1.11–7.1.28

Cases cited:

Allam v Aristocrat Technologies Australia Pty Ltd (No 2) [2012] FCAFC 75

Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd; Aristocrat Technologies Australia Pty Ltd v Allam (2013) 297 ALR 406

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2) [2013] FCA 234

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) [2015] FCA 342

Australian Securities and Investments Commission v ActiveSuper (In Liq) (No. 2) [2015] FCA 527

Australian Securities and Investments Commission v Adler [2002] NSWSC 483

Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69

Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liquidation) [2017] FCA 497

Australian Securities and Investments Commission v Cassimatis (No 9) [2018] FCA 385

Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (No 2) [2019] FCA 24

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd [2019] FCA 1932

Australian Securities and Investments Commission v Fuelbanc Australia Limited [2007] FCA 960

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 1644

Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd [2019] FCA 1514

ASIC v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd [2020] FCA 1166

Australian Securities and Investments Commissions v

M101 Nominees Pty Ltd [2021] FCA 62

Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd [2016] FCA 292

Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd [2002] NSWSC 741

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd [2020] FCA 494

Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2) [2021] FCA 247

Australian Securities & Investments Commission v McDougall [2006] FCA 427

Australian Securities and Investments Commission v McIntyre [2016] FCA 1276

Australian Securities and Investments Commission v MLC Nominees Pty Ltd [2020] FCA 1306

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387

Australian Securities and Investments Commission v Parkes [2001] NSWSC 377

Australian Securities and Investments Commission v One Tech Media Ltd (No 6) [2020] FCA 842

Australian Securities and Investments Commission v Ostrada Equities Pty Ltd [2016] FCA 1064

Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd [2006] VSC 192

Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2) [2020] FCA 1463

Australian Securities and Investments Commission v West [2008] SASC 111

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) [2018] FCA 751

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) [2018] FCA 1701

Bernard Elsey Pty Ltd v Federal Commission of Taxation (1969) 121 CLR 119

Commonwealth Bank of Australia v Kojic [2016] FCAFC 186

Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited [1915] AC 705

Hamilton v Whitehead (1988) 166 CLR 121

Hughes v The Queen (2017) 263 CLR 338

	In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs [2013] NSWSC 106 *In the matter of Vault Market Pty Ltd* [2014] NSWSC 1641 *R v Lovell* [2012] QCA 43 *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2020] NSWSC 780 *Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC* [2020] NSWSC 61 *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	474
Date of hearing:	16 February 2021 and 9 March 2021
Counsel for the Plaintiff:	Caryn van Proctor
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First Defendant:	The First Defendant did not appear
Counsel for the Second Defendant:	William Newland
Solicitor for the Second Defendant:	Scanlan Carroll
Solicitor for the Third Defendant:	Ashurst

ORDERS

VID 524 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**M101 NOMINEES PTY LTD** First Defendant
	JAMES PETER MAWHINNEY Second Defendant
	SUNSEEKER HOLDINGS PTY LTD Third Defendant

ORDER MADE BY:	**ANDERSON J**
DATE OF ORDER:	**19 APRIL 2021**

THE COURT NOTES THAT:

For the purpose of this order, the "**Mawhinney Entities**" means:

1. the Second Defendant in his personal capacity;
2. any superannuation fund of which the Second Defendant or any of his immediate family members is a member; and
3. any trust or company outside of the Mayfair 101 Group through which Mr Mawhinney holds personal investments or shares.

THE COURT ORDERS THAT:

1. For a period of 20 years from the date of these Orders, the Second Defendant, by himself, his servants, agents, employees and any company of which he is an officer or member, be restrained from:
   (a) soliciting funds in connection with any financial product (as defined in Division 3 of Chapter 7 and s 9 of the *Corporations Act 2001* (Cth)) (**Financial Product**)), including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds;

(b) receiving funds in connection with any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds, other than financial products held by or issued to the Mawhinney Entities;

(c) advertising, promoting or marketing any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds; and

(d) without a Court order, removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with any Financial Product, including but not limited to products known as the M Core Fixed Income Notes, M+ Fixed Income Notes and Australian Property Bonds, other than Financial Products held by or issued to the Mawhinney Entities.

2. Paragraphs 5, 6 and 7 of the orders dated 13 August 2020 be vacated.

3. The interlocutory application filed by the Second Defendant on 10 September 2020 be dismissed.

4. The Second Defendant pay the Plaintiff's costs of the application for the injunction.

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

REASONS FOR JUDGMENT

ANDERSON J:

INTRODUCTION

1 The Plaintiff (**ASIC**), by its Originating Process dated 7 August 2020, sought orders for the winding up of the First Defendant, M101 Nominees Pty Ltd (**M101 Nominees**), pursuant to s 461(1)(k) of the *Corporations Act 2001* (Cth) (***Corporations Act***) on the ground that it is just and equitable. ASIC also sought injunctions pursuant to ss 1101B(1) and 1324(1) of the *Corporations Act* or s 23 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) restraining the Second Defendant (**Mr Mawhinney**) from:

(a) receiving or soliciting funds in connection with any financial product, including but not limited to products known as the "M Core Fixed Income Notes" (**Core Notes**), the "M+ Fixed Income Notes" (**M+ Notes**) and the "Australian Property Bonds";

(b) advertising, promoting or marketing any financial product, including but not limited to the Core Notes, the M+ Notes and the Australian Property Bonds; and

(c) removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with any financial product, including but not limited to the Core Notes, the M+ Notes and the Australian Property Bonds (together, the **Injunction**).

2 On 13 August 2020, I granted ASIC's application for *ex parte* interim orders appointing Mr Said Jahani and Mr Philip Campbell-Wilson as joint and several provisional liquidators of M101 Nominees and granted the Injunction on an interim basis and made other orders (until further order) against Mr Mawhinney.

3 On 29 January 2021, I granted ASIC's application seeking final orders that the provisional liquidators of M101 Nominees be appointed as liquidators of that company on the ground that it was just and equitable to do so: see *Australian Securities and Investments Commissions v M101 Nominees Pty Ltd* [2021] FCA 62.

4 This judgment concerns ASIC's application that the Injunction which I granted on 13 August 2020 be made on a permanent basis. That application is opposed by Mr Mawhinney.

5 At the trial, Ms Caryn van Proctor of counsel appeared on behalf of ASIC. Mr William Newland of counsel appeared on behalf of Mr Mawhinney.

6 The First Defendant and Third Defendant did not make submissions in relation to the relief sought by ASIC in relation to Mr Mawhinney.

7 For the reasons that follow, I will make orders which, in short, restrain Mr Mawhinney from engaging in certain activities in relation to certain financial products for a period of 20 years.

SUMMARY OF THE EVIDENCE TENDERED

8 At trial, ASIC tendered in evidence, without objection from Mr Mawhinney's counsel, a Court Book (**CB**) which included the following affidavits:

(a) an affidavit of an ASIC solicitor, Ms Dayle Buckley, affirmed 5 August 2020 (CB, Tab 2) (**First Buckley Affidavit**) (providing details of ASIC's investigation) and 27 November 2020 (CB, Tab 9) (**Third Buckley Affidavit**) (providing information in relation to companies controlled by Mr Mawhinney, including IPO Wealth Holdings Pty Ltd and related entities (**IPO Wealth Group**) and IPO Capital Pty Ltd (**IPO Capital**));

(b) an affidavit of Jason Tracy affirmed 24 November 2020 (CB, Tab 6) (providing an independent expert opinion in relation to the security held over investments made by M101 Nominees);

(c) an affidavit of Hamish Mackinnon sworn 23 November 2020 (CB, Tab 4) (in relation to the IPO Wealth Group);

(d) an affidavit of an ASIC solicitor, Ms Lisa Saunders, sworn 6 November 2020 (in relation to service and advertising);

(e) an affidavit of Mr Peter Hui affirmed 15 January 2021 (CB, Tab 5) (an investor in the M+ Notes, who has not been able to redeem his investment);

(f) an affidavit of Mr Richard Rouse affirmed 19 November 2020 (CB, Tab 3) (an investor in the Australian Property Bonds, who has not received any interest payments or confirmation of his investment);

(g) an affidavit of Mr Kieran Egan sworn 25 November 2020 (CB, Tab 7) (an investor in IPO Capital, who has not been able to redeem his investment);

(h) an affidavit of Mr Jordan Hicks affirmed 15 January 2021 (CB, Tab 8) (an investor in IPO Capital, who has not been able to redeem his investment);

(i) the report of the provisional liquidators of M101 Nominees dated 24 September 2020 (CB, Tab 10).

9 On 29 January 2021, the solicitors acting for Mr Mawhinney in this proceeding advised the Court about certain matters which relate to this proceeding and proceeding VID 228 of 2020, being ASIC v Mayfair Wealth Partners Pty Ltd and others (**Mayfair Proceeding**). M101 Nominees is a party to both this proceeding and the Mayfair Proceeding. The solicitors for Mr Mawhinney in this proceeding advised the Court of the following:

> The parties have conferred in relation to how the contest about the permanent injunctions might conveniently be dealt with and have reached the following agreement (subject to the convenience of the Court):
>
> - The hearing of ASIC's application for permanent injunctions against Mr Mawhinney be adjourned to 15-17 February 2021, when a hearing is already set down in the proceeding ASIC v Mayfair Wealth Pty Ltd (VID 228/2020) (Mayfair Proceeding) (the Mayfair Proceeding to be dealt with first, however, before this proceeding). The defendants in the Mayfair Proceeding are currently unrepresented, and on the basis that that matter will proceed undefended, ASIC's estimate is that the Mayfair Proceeding will occupy 1 day;
>
> - Evidence in the Mayfair Proceeding be evidence in this proceeding in relation to the permanent injunctions sought against Mr Mawhinney …

10 On 2 February 2021, I made the following order (among others) in this proceeding:

> Evidence filed in proceeding VID228 of 2020 (ASIC v Mayfair Wealth Partners Pty Ltd & Others) is evidence in this proceeding in relation to the [ASIC's] application for injunctions against [Mr Mawhinney] pursuant to paragraphs 4 and 5 of the Originating Process.

11 ASIC, pursuant to that order, relies upon the evidence in the Mayfair Proceeding as evidence in this proceeding, in relation to its application for permanent injunctions against Mr Mawhinney.

12 By reason of the correspondence to the Court dated 29 January 2021 from Mr Mawhinney's solicitors, I am satisfied that Mr Mawhinney and his solicitors were on notice that evidence in the Mayfair Proceeding would be treated as evidence in this proceeding and that Mr Mawhinney had the opportunity to be heard in respect to the evidence tendered in the Mayfair Proceeding (to the extent it relates to this proceeding), but determined that the Defendants in the Mayfair Proceeding would be unrepresented and that the Mayfair Proceeding would proceed before the Court as an undefended matter. I am satisfied that, to the extent ASIC referred to evidence in the Mayfair Proceeding at the trial of this proceeding, Mr Mawhinney had a fair opportunity to confront and test that evidence.

EVIDENCE TENDERED BY MR MAWHINNEY

13 At the outset, it should be noted that, at trial, Mr Mawhinney did not tender any lay or expert evidence. Mr Mawhinney's counsel cross-examined ASIC's expert witness, Mr Tracy, with respect to the opinions he expressed in his expert report (to which I will come).

14 Significantly, Mr Mawhinney has not challenged the evidence of the liquidators relied upon by ASIC. Mr Mawhinney only sought to cross-examine the expert opinion of Mr Tracy. No other challenge was made to the evidence relied upon by ASIC.

TENDENCY EVIDENCE AND THE EVIDENCE RELIED ON BY ASIC

15 Before setting out the evidence relied on by ASIC, reference should be made to Part 3.6 (titled "Tendency and coincidence") of the *Evidence Act 1995* (Cth) (***Evidence Act***). Section 94(3) in that Part provides:

> **94 Application**
>
> …
>
> (3) [Part 3.6] does not apply to evidence of:
>
> (a) the character, reputation or conduct of a person; or
>
> (b) a tendency that a person has or had;
>
> if that character, reputation, conduct or tendency is a fact in issue.

16 Section 97 in Part 3.6 then provides:

> **97 The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
>
> (2) Paragraph (1)(a) does not apply if:
>
> (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
>
> (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

17 Section 99 provides that "[n]otices given under section 97 … are to be given in accordance with any regulations or rules of court made for the purposes of this section". Regulation 7(2) of the *Evidence Regulations 2018* (Cth) sets out the requirements for a notice under s 97(1).

18 In *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd; Aristocrat Technologies Australia Pty Ltd v Allam* [2013] HCA 21; 297 ALR 406, French CJ, Crennan, Kiefel, Gageler and Keane JJ stated that s 97 "must be read with s 94(1)" (at [30]).

19 In *Allam v Aristocrat Technologies Australia Pty Ltd (No 2)* [2012] FCAFC 75, Bennett, Middleton and Yates JJ stated that "[a] "fact in issue", for the purposes of s 94(3), should be understood to mean "ultimate fact in issue" …" (at [33]). In *Smith v The Queen* [2001] HCA 50, 206 CLR 650, Gleeson CJ, Gaudron, Gumrnow and Hayne JJ stated at [7]:

> In determining relevance, it is fundamentally important to identify what are the issues at the trial. On a criminal trial the ultimate issues will be expressed in terms of the elements of the offence with which the accused stands charged. They will, therefore, be issues about the facts which constitute those elements. Behind those ultimate issues there will often be many issues about facts relevant to facts in issue.

20 In *Hughes v The Queen* [2017] HCA 20, 263 CLR 338, Gageler J described the nature of tendency reasoning at [70]:

> Applied to evidence of past conduct, tendency reasoning is no more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.

21 Having regard to those principles, it will become apparent later in these reasons that much of the evidence ASIC relied upon was used as a basis for tendency reasoning. Broadly, ASIC relied on much of the evidence to submit that Mr Mawhinney has engaged in instances of certain past conduct, and, as a result, the likelihood is that Mr Mawhinney will engage in such conduct in the future.

22 Without more, that type of reasoning would be problematic because it would need to confront the tendency rule in s 97 of the *Evidence Act* in circumstances where ASIC has not complied with s 97(1)(a).

23 However, as stated above, Part 3.6 of the *Evidence Act* "does not apply to evidence of … the character, reputation or conduct of a person[,] or a tendency that a person has or had[,] if that character, reputation, conduct or tendency is a fact in issue": *Evidence Act*, s 94(3).

24 In this proceeding, there are certain "ultimate facts in issue" which can be broadly stated as follows. First, has there been conduct which enlivens jurisdiction under s 23 of the *FCA Act*

or ss 1101B or 1324 of the *Corporations Act*? Second, if there is such jurisdiction, does Mr Mawhinney have a tendency to engage in such conduct and is there accordingly a likelihood that Mr Mawhinney will engage in that conduct in the future? If there is an affirmative answer to that second issue, a legal issue arises as to what orders should be made (if any) to enjoin such conduct in the future in order to serve a relevant purpose within the contemplation of the *Corporations Act*.

25 In these circumstances, by reason of s 94(3) of the *Evidence Act*, Part 3.6 (including s 97(1)) "does not apply" to evidence which ASIC sought to use to prove the proposition that Mr Mawhinney has engaged in certain conduct and there is accordingly a likelihood that Mr Mawhinney will engage in that conduct in the future. As a consequence, I am satisfied that s 97 of the *Evidence Act* does not make inadmissible the tendency evidence which was the basis of a number of ASIC's submissions. I should also observe that Mr Mawhinney's counsel did not object to any evidence including tendency evidence being admitted into evidence.

26 I turn now to set out the evidence tendered by ASIC.

EVIDENCE RELIED ON BY ASIC

27 ASIC relies upon the following evidence to support the grant of permanent injunctions against Mr Mawhinney. That evidence largely concerned five products which ASIC contends were formulated and issued by entities controlled by Mr Mawhinney. Those five products or funds were:

(a) IPO Capital. I refer to the evidence relied on by ASIC in respect of IPO Capital below;

(b) the IPO Wealth Group. Evidence in respect of the IPO Wealth Group is referred to in more detail below;

(c) the Core Notes. By way of background, M101 Nominees received significant funds (approximately $65.6 million) from investors in the Core Notes, based on representations that there would be security for the full amount invested. Since 11 March 2020, M101 Nominees has been unable to repay funds invested in the Core Notes. The payment of interest to investors has also ceased. Evidence concerning the Core Notes is referred to in more detail below;

(d) the "M+ Notes". The M+ Notes were unsecured promissory notes issued by M101 Holdings Pty Ltd (**M101 Holdings**). Evidence concerning the M+ Notes is referred to in more detail below;

(e) the "Australian Property Bonds". Evidence relied on by ASIC concerning the Australian Property Bonds is referred to in more detail below. ASIC contends in respect of the Australian Property Bonds that Mr Mawhinney sought to raise funds from investors through this product. ASIC submits that investors in that product have not received interest payments due to them. ASIC submits that the Australian Property Bonds appear to be secured by properties at Mission Beach – that is, the same assets that are owned by various trusts that the relevant security trustee holds security over for the benefit of Core Notes investors. ASIC contends that Mr Mawhinney was seeking to raise funds for his stated purpose of improving "the Group's liquidity position": Rouse Affidavit [9]-22], [42] (CB Tab 3); First Buckley Affidavit [6.8], [132] (CB Tab 2).

28 In this proceeding there were various references to the "Mayfair 101 Group" of companies in various submissions and affidavits. That group of companies was not always precisely defined. This judgment will refer to the Mayfair 101 Group as comprising IPO Capital, the IPO Wealth Group, M101 Nominees, M101 Holdings and Mayfair Wealth Partners Pty Ltd (**Mayfair 101 Group**).

29 I turn to consider each of these aspects of ASIC's evidence in more detail.

IPO Capital

30 ASIC relied on a scheme which was referred to as IPO Capital. Set out below is the evidence referred to by ASIC in this regard.

31 Mr Mawhinney was the sole director of IPO Capital. The sole shareholder of IPO Capital was Online Investments Pty Ltd, and Mr Mawhinney was the sole shareholder in Online Investments Pty Ltd.

32 On 8 September 2016, Terry Marks of ASIC emailed a letter addressed to Mr Mawhinney, regarding IPO Capital. The letter stated (among other things):

> ASIC is writing to you as the proprietor and director of [IPO Capital].
>
> It has come to our attention that [IPO Capital], via the website http://www.120dayreturns.com/ (the Website), may be operating as a provider of Marketplace lending (peer-to-peer lending) products or otherwise providing financial services that require an Australian Financial Services (AFS) licence.
>
> ASIC's records indicate that neither [IPO Capital] nor yourself hold an AFS licence or authorisation as a representative of an AFS licence holder.

> ASIC is also concerned that the Website may include content that is misleading, false or deceptive in relation to the provision of financial services, including but not limited to the stated returns and security of the investment offer.
>
> …
>
> ASIC is seeking further information to ensure that [IPO Capital] and you are complying with your obligations under the Act and ASIC Act.

33 ASIC sought various information from Mr Mawhinney. Mr Mawhinney provided certain materials in relation to ASIC's request.

34 On 5 December 2016, Mr Don Christie of Astute Lawyers sent an email to ASIC attaching a letter dated 5 December 2016. The letter stated in part:

> We advise that we act on behalf of [IPO Capital].
>
> We have been provided with a copy of your letter to our client dated … 8 September 2016 …
>
> We believe that there are a number of issues that are raised in your letter that our client needs to address.
>
> We would like to discuss with you how the product might be "regularised" in order to move forward.

35 On 7 December 2016, ASIC emailed to Mr Christie a letter dated 7 December 2016. The letter states (among other things):

> ASIC has serious concerns in relation to your client's website www.120dayreturns.com (the First Website). Those concerns may be summarised as follows:
>
> - IPO Capital may be issuing debentures, and it may need an AFS licence if it provides financial advice.
> - If IPO Capital is issuing debentures, it is required to comply with Chapters 2L and 6D of the Corporations Act2001 [sic] (the Act).
> - Alternatively, if IPO Capital is not issuing debentures then it may be issuing interests in an unregistered managed investment scheme; or miscellaneous financial products. These issues require a product disclosure statement (PDS) to be given.
> - Additionally, ASIC takes the view that IPO Capital may be carrying on unauthorised banking business for the purposes of the Banking Act 1959 (Banking Act), legislation administered by APRA.
> - IPO Capital's claim that it works with Bell Potter is potentially misleading or deceptive.
>
> Whilst we note that the content of the First Website appears to have been removed recently, ASIC notes that another website, www.ipocapital.com.au (the Second Website), a website associated with IPO Capital, remains current. ASIC is currently undertaking a review of the Second Website, and whilst it is evident that reference to

> Bell Potter has been removed, a preliminary view is that most of the concerns raised in relation to the First Website are still significant in relation to the Second Website.

36 On 9 December 2016, Mr Christie sent an email to ASIC, stating: "I was instructed last night that the IPO capital website will be down today and the Google adwords directions to it will be deleted".

37 Mr Christie sent a letter to ASIC dated 4 January 2017. The letter stated (among other things):

> … Since July 2016 funds have been raised by placing advertisements on Google adwords directing the potential investor to one of the websites for either Eleuthera [Group Pty Ltd], or IPO Capital from where they are invited to contact Mr Mawhinney.
>
> Rates offered have varied.
>
> …
>
> Mr Mawhinney's initial clients were sourced locally and from overseas.
>
> While his initial contact was over the web each client was personally contacted.
>
> His understanding was that he was able to raise up to $2m up to 12 months from up to 20 investors excluding sophisticated and foreign investors.
>
> …
>
> A number of investments have been in excess of $500,000 which we believe would automatically make them sophisticated investors under S708.
>
> A number of investments have been made by overseas investors which would exclude them as investors under S708(5).
>
> Use of the phrase "Term Deposits" was initially used on the 28 September 2016 iteration of the website however no traffic/marketing was directed to the website until 17 October 2016. Use of the phrase was deleted as at 15 November 2016 …
>
> The website sought investments from sophisticated investors and while appropriate certificates were not obtained at the time of investment Mr Mawhinney has taken steps across December to rectify that issue by seeking the appropriate certificates or repaying smaller investors early with the return to date.
>
> …
>
> As stated above the google adwords and websites were shut down on 9 December 2016.
>
> In the interim we have made inquiries with a view to ensuring the product is structured with appropriate licences, support services and provides a compliant Information Memorandum.
>
> Discussion [sic] are underway (delayed by the Christmas break) with two parties, one which is prepared to appoint IPO Capital as an authorised representative for the purposes of issuing interests to sophisticated investors.

38 Attached to this letter was a list of investors in IPO Capital (presumably as at 4 January 2017). That attachment indicates that approximately 50 investors had invested.

39 On 11 January 2017, by email, Mr Christie informed ASIC that:

> … IPO Capital has engaged Vasco Fund Managers (Vasco FM) to prepare in conjunction with IPO Capital: a wholesale unit trust based on classes of units and terms to match those currently offered to investors; and an information memorandum and application form suitable for sophisticated investors.
>
> Once the Unit trust is formed Vasco FM will offer, subject to their final approval, a new entity and nominated personnel or contractors an authorisation or sub authorisation under their AFSL to act as fund manager.

40 On 19 January 2017, Mr Christie sent an email to ASIC attaching a draft Information Memorandum for the "IPO Wealth Fund" as well as a proposal from Vasco Investment Managers to establish a fund to invest in certain investments. The implication was that any investors in the non-compliant IPO Capital fund would be transferred to the compliant "IPO Wealth Fund".

41 Pausing there, in relation to IPO Capital, ASIC relevantly referred to the affidavit of Mr Keiran Egan sworn 25 November 2020. Mr Egan is 67 years of age. Mr Egan deposes that:

> … in approximately November 2016 I received a telephone call from the Managing Director, James Mawhinney. I cannot recall our exact conversation[.] [H]owever[,] I remember that James told me that the government's bank guarantee was worthless …

42 On 8 November 2016, Mr Mawhinney sent the following email to Mr Egan:

> Hi Kieran,
>
> Good to speak with you a few minutes ago. I have just arranged for our Information Pack to be emailed over to you.
>
> I can confirm that IPO Capital is Self-Managed Super Fund compatible. We have quite a number of Australian investors we work with who invest with us via their SMSF.
>
> **Term Deposit Rates**
>
> Our current term deposit rates are as follows -
>
> - 3 months – 3. 40% p.a.
> - 6 months – 3.65% p.a.
> - 12 months – 3.95% p.a .
> - 24 months – 4.25% p.a.
> - 60 months – 5.25% p.a.
>
> **November Bonus Interest**
>
> Investors that come on board this month are entitled to a bonus 0.25% per annum on top of the rates above for the term of their deposit.
>
> **Next Steps**

To proceed we just need the following –

- Deposit Agreement completed and returned by email or fax (see attached – I have amended it to include the bonus 0.25%)
- A copy of your driver's licence or passport (please advise if you don't have either of these)
- A copy of the transfer remittance advice

Feel free to contact me on the details below should you have any questions.

We look forward to welcoming you on board.

(Bold text in the original.)

43 Mr Egan's affidavit records that, in July 2017 and September 2017, Mr Egan made investments of $100,000 and $200,000 respectively with IPO Capital. The "Investment Agreement" dated 12 July 2017 entered into by Mr Egan is branded as "IPO Capital", while the agreement was with Eleuthera Group Pty Ltd (**Eleuthera**). In the Third Buckley Affidavit, Ms Buckley deposes that Eleuthera does not have a relevant Australian financial services licence. Mr Egan also received an "Account Statement" from IPO Capital dated 30 September 2020 in respect of Mr Egan's investment.

44 In these circumstances, the unchallenged evidence is that, in 2017, Mr Mawhinney, by way of IPO Capital or Eleuthera, continued to raise funds from Mr Egan without an Australian financial services licence, despite ASIC putting Mr Mawhinney on notice of this non-compliance in September 2016. The evidence before the Court is that Mr Egan has still not received the return of his second investment, being an investment of $200,000, which had a maturity date of September 2019.

45 ASIC also referred to the affidavit of Mr Jordan Hicks affirmed 15 January 2021. Mr Hicks is 29 years of age. In July 2017, Mr Hicks invested $295,000 with "IPO Capital". The majority of the funds for Mr Hicks' investment were sourced from a compensation payment made to Mr Hicks following an injury he sustained at work. The "Investment Agreement" entered into by Mr Hicks is branded "IPO Capital" and is an agreement between Mr Hicks and Eleuthera. To recall, the evidence is that Eleuthera does not have an Australian financial services licence. Again, this unchallenged evidence shows that, in 2017, Mr Mawhinney, by way of IPO Capital or Eleuthera, was raising funds from investors after Mr Mawhinney was put on notice of the serious non-compliance issues raised by ASIC in September 2016. Mr Hicks deposes that, as at the date of his affidavit, he has "not received the return of [his] investment with IPO Capital".

46 There are several other "IPO Capital"-branded "investment agreements" entered into between investors and Eleuthera which were dated in or around July 2017. These were exhibited to the Third Buckley Affidavit.

47 In short, the unchallenged evidence is that Mr Mawhinney, by way of IPO Capital or Eleuthera, continued to raise funds from investors after ASIC had raised concerns with Mr Mawhinney that an Australian financial services licence may be required and, in response, Mr Mawhinney arranged for the IPO Wealth Fund to be established under a third party's licence. I refer to the IPO Wealth Fund below.

48 I find that such conduct as referred to above is a contravention of s 911A(1) of the *Corporations Act*. Section 911A(1) provides that "a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services". There are exemptions to s 911A(1) in other subsections of s 911A, but none of these exemptions obviously apply and Mr Mawhinney has not filed any evidence which would indicate that the relevant entities could obtain the benefit of those exemptions.

IPO Wealth Group

49 As to the "IPO Wealth Group", ASIC relied on an affidavit of Mr Hamish MacKinnon sworn 23 November 2020. Mr MacKinnon is a registered liquidator practising at Dye & Co Pty Ltd, Insolvency Practitioners and Chartered Accountants. Mr MacKinnon's affidavit deposes to the following matters.

50 On 22 May 2020, Vasco Trustees Limited as trustee of the IPO Wealth Fund (**Vasco**) appointed Mr MacKinnon and Mr Nicholas Giasoumi as joint and several receivers and managers of the assets and undertaking of IPO Wealth Holdings Pty Ltd (**IPO Wealth**) and several other entities, which I will refer to collectively as the "**IPO Wealth Subsidiaries**". IPO Wealth and the IPO Wealth Subsidiaries were generally referred to in this proceeding as the "**IPO Wealth Group**".

51 On 2 July 2020, the Supreme Court of Victoria appointed Mr Giasoumi and Mr MacKinnon as joint and several provisional liquidators of IPO Wealth and the IPO Wealth Subsidiaries.

52 On 17 September 2020, the Supreme Court of Victoria appointed Mr Giasoumi and Mr MacKinnon as joint and several liquidators of IPO Wealth and the IPO Wealth Subsidiaries.

53 Mr MacKinnon and Mr Giasoumi have prepared a range of reports in relation to these entities. These reports were exhibits to Mr MacKinnon's affidavit in this proceeding.

54 One of those reports is dated 27 August 2020. That report records the following matters.

55 Mr Mawhinney is the sole director of IPO Wealth and the IPO Wealth Subsidiaries. The sole shareholder of IPO Wealth is Online Investments Pty Ltd, and Mr Mawhinney is the sole director and shareholder of Online Investments Pty Ltd. The sole shareholder of the IPO Wealth Subsidiaries is IPO Wealth.

56 The report provided the following overview of the "IPO Wealth Fund", IPO Wealth and the IPO Wealth Subsidiaries:

> The IPO Wealth Fund
>
> The IPO Wealth Fund is an unregistered unit trust governed by a Constitution dated 17 March 2017. Its trustee is Vasco Investment Managers Limited (Trustee). Investment in the IPO Wealth Fund was promoted by Information Memoranda. Investors are entitled to fixed "target" rates of return on their investments. Since its establishment, members of the public have invested more than $80 million in the IPO Wealth Fund. Some investments have been redeemed. There are currently 181 investors in the IPO Wealth Fund.
>
> Loans by the Trustee to [IPO Wealth]
>
> [IPO Wealth] borrowed moneys from the Trustee. The loan agreement between the Trustee and [IPO Wealth] provides that [IPO Wealth] agrees to pay to the Trustee an amount equal to 10 per cent per annum calculated and accruing daily on the outstanding balance of the loan. The loan is secured over the assets of [IPO Wealth] under a General Security Agreement.
>
> Loans by [IPO Wealth] to the [IPO Wealth Subsidiaries]
>
> In his recent public examination, Mr Mawhinney asserted that the funds borrowed by [IPO Wealth] from the Trustee were applied by [IPO Wealth] in acquiring shares in the [IPO Wealth Subsidiaries]. This is not consistent with the results of our investigations, which have led us to conclude that the funds were lent variously by [IPO Wealth] to the [IPO Wealth Subsidiaries] pursuant to executed loan agreements, one for each [IPO Wealth Subsidiary]. [IPO Wealth]'s loans to the [IPO Wealth Subsidiaries] are unsecured.
>
> Investments by the [IPO Wealth Subsidiaries]
>
> The [IPO Wealth Subsidiaries] invested the money they borrowed from [IPO Wealth] in various debt and equity investments. These investments were generally illiquid in nature and might not mature for a period of at least … three (3) years. During this period, the investments generally did not provide a return. This ultimately resulted in the IPO Wealth Group encountering significant cash flow issues, as the investments were not generating sufficient income or capital returns to enable [IPO Wealth] to pay the required interest to the Trustee. As a result, the Trustee was unable to meet investor redemptions and interest payments.

> Further, as the investments were somewhat speculative in nature, there would inevitably be successes and failures. Losses encountered in failed investments would need to be covered by gains in successful investments in order to enable [IPO Wealth] to meet its obligations to the Trustee and the investors.
>
> On 3 June 2020, the Trustee issued a Notice of Default and Demand to [IPO Wealth] for a total amount of $79,062,394.02 including unpaid interest, which [IPO Wealth] did not and does not have the capacity to pay when due.
>
> It is of particular concern that some … investments [by the IPO Wealth Subsidiaries] … have been transferred out of the IPO Wealth Group to other entities within the broader Mayfair 101 group.

57 As to the management of IPO Wealth and the IPO Wealth Subsidiaries, the report states:

> Mr Mawhinney is the sole director of all companies in the IPO Wealth Group. Mr Mawhinney gave evidence during the examination … that the [IPO Wealth Subsidiaries] largely operated off the one bank account of [IPO Wealth] and therefore any proceeds that were collected from the investments made by the [IPO Wealth Subsidiaries] would go directly into [IPO Wealth]. Accordingly, transactions between [IPO Wealth] and the [IPO Wealth Subsidiaries] can only be reconciled by reference to journal entries. The only financial statements for [IPO Wealth] that were completed and signed off by Mr Mawhinney were for the year ended 30 June 2017 at which stage [IPO Wealth] had only operated for a period of a little over 2 months. We have some concerns as to the accuracy of those financial statements with respect to:
>
> - the reporting of management fees as income; and
> - the investments held as at 30 June 2017.
>
> It appears that potentially both the income received and the assets held may have been overstated as at 30 June 2017. The [IPO Wealth Subsidiaries] have never completed any financial statements and all of their accounts are still in draft.
>
> The IPO Wealth Group has failed to produce any signed financial statements for the years ended 30 June 2018 and 30 June 2019. As a consequence, it has been difficult to come to a concluded view of any particular transaction recorded in the accounts as they are all effectively still in draft.
>
> In his recent public examination, Mr Mawhinney gave evidence that the accounts are only in draft form and should not be relied upon in determining a true and correct position regarding transactions. He gave evidence that the primary accounting document was the Quarterly Investment Portfolio Summary which the IPO Wealth Group provided to [a certain] Trustee and that the accounts of [IPO Wealth] and the [IPO Wealth Subsidiaries] should be based on this report. One of the problems with this approach is that the Quarterly Investment Portfolio Summary has few working papers and does not appear to have been produced from a properly maintained set of books of account.

58 The report states:

> During his public examination, Mr Mawhinney mentioned other persons involved in the administration of the affairs of the IPO Wealth Group, however, he acknowledged that he was the ultimate decision-maker in the group.

59 The report states:

… we have sufficient evidence to justify concerns with respect to: …

- poor documentation surrounding the acquisition of investments;
- agreements that have not been fully executed and security interests which were not registered on an appropriate securities register;
- investments that are, on the whole, illiquid in that their future realisation is likely to extend over many years;
- the acquisition of investments, the documented terms of which required interest
- payments, in circumstances where there was never any realistic prospect that such interest payments could be made;
- non-receipt of interest income on loans;
- a failure to attempt to collect interest payments which were overdue;
- documentation that suggested the ownership of shares in companies that did not reconcile with the share registers of those companies;
- inconsistent information as to whether convertible notes have been converted to equity;
- a lack of up-to-date information regarding a number of investments; and
- a lack of consistent information as to when investments were actually made.

60 The report further states:

> Having regard to the [analysis set out in the report], we consider it uncontroversial that the [IPO Wealth] is presently insolvent. It is not able to pay the amount which it currently owes to the Trustee and it is unlikely to be able to do so in the future. Mr Mawhinney conceded in the examination that [IPO Wealth] was insolvent.
>
> …
>
> We are of the view that [IPO Wealth] had inherent problems in funding the interest and redemption requirements of the loan facility. This was not a matter of mere temporary illiquidity. The requirement that interest would be paid quarterly, and the entitlement of investors to redeem their investment at short notice, was at odds with the investment strategy of the IPO Wealth Group. The investments made by the Group were largely speculative, long-term in nature and generally did not provide any short-term return to the IPO Wealth Group. We note that only two of the investments … have provided cash income to [IPO Wealth] and [the IPO Wealth Subsidiaries] in the 2020 calendar year.
>
> The first payment of a redemption to the Trustee by [IPO Wealth] was made on 3 October 2019. Within four months thereafter, [IPO Wealth] was in default of its loan obligations and it appears that subsequent interest and the repayment of redemptions were funded from director-related entities paying back funds which had been advanced to them by [IPO Wealth] up to July 2019.
>
> This is a structural issue and pre-dated any effect of COVID-19.
>
> We are also extremely concerned that Mr Mawhinney has:
>
> - advanced significant monies to entities with which he was associated up until

approximately July 2019;

- attempted to sell shares in Accloud PLC out of the IPO Wealth Group without proper care and diligence;
- altered the intended investment in the shares in the companies that owned Isola San Spirito to a long-term loan with an entity registered in the United Kingdom of which he is a director; and
- caused [IPO Wealth] to advance significant funds to 101 Investments Ltd and M101 Holdings Pty Ltd so that these entities could make their own investments with no benefit to the IPO Wealth Group from future income streams which might be generated by those investments.

As noted above, the first redemption from the Fund was made on 3 October 2019, only a day prior to [one of the IPO Wealth Subsidiaries] entering into an agreement to sell the Accloud PLC shares to [101 Investments Ltd] on 4 October 2019.

…

In summary, our preliminary investigations support a view that the insolvency of the IPO Wealth Group did not arise through temporary illiquidity, but came about through a structural liquidity issue connected to the performance of the underlying investments, and perhaps the design of the investment strategy.

61 As to the likely return to creditors, the report states:

Having regard to:

- the fact that all debt investments have 'observable data' of credit impairment; and
- none of the equity investments are particularly liquid,

it is presently our view that a full return to creditors is unlikely.

We have engaged corporate finance specialist to value and consider options for the realisation of the interest held [in a certain] investment. Of all the interests, this one is the most marketable (it is the only one generating cash income).

… However, depending on the recoveries from:

- realisation of 21,250,000 shares in Accloud PLC;
- the loan of $12,368,3210.25 from 101 IL;
- the loan of $3,266,204 against M101 Holdings Ltd; and
- the claim to the sale proceeds in the island of Venice,

we hold the view there will be a substantial shortfall to the Trustee.

62 As to potential claims which may arise out of the IPO Wealth Group, the report states:

We have formed the preliminary view that the claims set out below (among others) would be available to liquidators appointed to [IPO Wealth] and the [IPO Wealth Subsidiaries].

1. Recovery action in relation to:

(a) the loan of $12,368,3210.25 from [101 Investments Limited]; and

(b) the loan of $3,266,204 against M101 Holdings Ltd.

2. A claim to any sale proceeds arising out of [a certain] island in Venice.

3. Claims against Mr Mawhinney under Part 5.7B of the Corporations Act in relation to:

(a) the transfer of the Accloud shares to 101 Investments (on the basis that that transfer constituted an uncommercial transaction or an unreasonable director-related transaction);

(b) [transactions referred to as] the Poveglia and Retta share transfers to Okto Holdings (on the basis that those transfers constituted uncommercial transactions or unreasonable director-related transactions); and

(c) insolvent trading (in relation to [IPO Wealth] and each of the [IPO Wealth Subsidiaries]).

4. Claims against Mr Mawhinney for breaches of his directors' duties and/or misleading or deceptive conduct in relation to:

(a) causing the Poveglia and Retta shares to be transferred to Okto Holdings, rather than [a certain IPO Wealth Subsidiary];

(b) causing the transfer of the Accloud shares to 101 Investments Ltd;

(c) capitalising expenses across the [IPO Wealth Subsidiaries] and inaccurately increasing their value (which arguably caused the companies to be put into provisional liquidation and/or wound up …).

Any claims based upon breaches of Mr Mawhinney's duties as a director may be accompanied by applications for pecuniary penalties, relinquishment orders and/or compensation orders pursuant to Part 9.4B of the Corporations Act.

The above is a limited summary of the claims that may be brought by us if we were appointed liquidators of [IPO Wealth] and the [IPO Wealth Subsidiaries] …

63 ASIC relied on these matters to submit that Mr Mawhinney's conduct, in relation to the IPO Wealth Group, was indicative of several instances of conduct which entailed an inherently risky and fatally flawed investment scheme formulated and implemented by Mr Mawhinney. In light of the evidence concerning the Core Notes, the M+ Notes and the Australian Property Bonds (to which I will come), I agree.

64 On the basis of this evidence, ASIC submits that the IPO Wealth Group, and its demise, had similar features to the Core Notes, M+ Notes and the "Australian Property Bonds" products (to which I will come). I agree. In particular, the report of the liquidators of the IPO Wealth Group stated that "[t]he investments made by the Group were largely speculative, long-term in nature and generally did not provide any short-term return to the IPO Wealth Group". The report stated that there were "agreements that have not been fully executed and security interests

which were not registered on an appropriate securities register", and investments had been made which were, "on the whole, illiquid in that their future realisation is likely to extend over many years". Those are features which are wholly consistent with the problems associated with the Core Notes and the M+ Notes products (to which I will come).

65 Mr Mawhinney did not tender any evidence which responded to the issues raised in the report of the liquidators of the IPO Wealth Group.

66 I turn now to set out the evidence concerning the Core Notes, M+ Notes and the Australian Property Bonds.

The Core Notes

67 As indicated above, the First Defendant, M101 Nominees, was the issuer of a product which has been referred to in this proceeding as the "Core Notes". Set out below is evidence relied on by ASIC in relation to the Core Notes.

Representations made to Core Notes investors

68 A brochure in respect of the Core Notes dated 12 December 2019 was annexed to the First Buckley Affidavit. The title page of that brochure included the following:

> **M Core Fixed Income**
>
> A secured, asset-backed, term-based investment opportunity exclusively available to wholesale investors[.]
>
> (Bold text in the original.)

69 The brochure continued:

> **Tired of term deposits?**
>
> Activate your idle money and earn monthly distributions from a secured, asset-backed, term-based investment product.
>
> Investing in our [Core Notes] product is a smart and effective way of earning **competitive rates of return** and **monthly income** whilst interest rates are at record lows. We invite you to invest in [the Core Notes], a **secured, asset-backed term-based investment product** offered by a forward-thinking group that is working to **drive positive change** in the financial services and investment industry.
>
> (Bold text in the original.)

70 The brochure then included the following table:

Current Rates

INVESTMENT	FIXED INTEREST RATE
6 months	3.25%
12 months	3.95%
24 months	4.25%
36 months	4.50%
60 months	4.95%

These rates are available for wholesale investors investing in our M Core Fixed Income product.

71 The following text appeared below this table:

> Mayfair Platinum is the manager of our [Core Notes] product, which is issued by M101 Nominees Pty Ltd (the Issuer). Investment funds raised under our [Core Notes] product are used for ongoing investment and capital management purposes across the Mayfair 101 group of companies, a **regulated international investment and corporate advisory group** with offices in Melbourne, Sydney and London.
>
> (Bold text in the original.)

72 The following "Key Features" of the Cores Notes were listed:

- Supported by first-ranking, unencumbered asset security (see FAQs)
- A$250k minimum investment
- Fixed interest rates
- Monthly interest payments
- No setup or maintenance fees
- Dedicated Client Relationship Manager
- Individual, Company, Trust & Self-Managed Superannuation Fund (SMSF) compatible
- Available exclusively to wholesale investors
- Early redemption available (subject to liquidity and other applicable terms)[.]

73 The brochure contained a section titled "Frequently Asked Questions", which stated (among other things) the following:

> **How is the [Core Notes] product secured?**
>
> The [Core Notes] product is secured by a *pool of assets in respect of which first-ranking, registered security interests have been granted*. The assets are otherwise unencumbered, and are made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors held in the Issuer's dedicated M Core Fixed

Income bank account. *Such cash will only be used where there is dollar-for-dollar secured asset support.*

A third party security trustee, PAG Holdings Australia Pty Ltd, (ACN 636 870 963, AFSL Auth. Rep. No. 001278649) of Perpetuity Capital Pty Ltd (ABN 60 149 630 973, AFSL 405364), as trustee of the Mayfair Platinum Secured Notes Security Trust, administers the secured pool of collateral assets on behalf of investors, and the assets are revalued at least yearly to ensure d*ollar-for-dollar secured asset support for each dollar of [the Core Notes]*.

Why should I choose Mayfair Platinum?

The Mayfair 101 group was established in 2009 and has assets spanning 10+ countries across a diverse range of sectors, including financial services, wealth management, technology, property and emerging markets. Our capital management strategy provides considerable geographic, industry & sector, business maturity, and currency diversification, which is a key reason why investors entrust their funds with us.

Is Mayfair Platinum regulated?

Yes. Mayfair Wealth Partners Pty Ltd (t/a Mayfair Platinum) is a corporate authorised representative (#00176207) of Quattro Capital Pty Ltd, which holds an Australian Financial Services Licence (#334653).

How can you pay fixed interest rates higher than the banks?

The interest rates we offer our investors are facilitated by the Mayfair 101 group's capital management strategy. The group carefully selects opportunities to invest in that provide strong yields, capital growth, and refinancing opportunities that enable us to support principle [sic] and interest repayments to our investors.

Are my returns tied to the Issuer's investment performance?

No. The Issuer is obligated to pay the quoted rates of interest and principal on the [Core Notes] product, regardless of the performance of its investments.

Is the Issuer a bank?

No. However, many [Core Notes] investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts. We operate by accessing capital from third parties (our investors), paying our investors for access to that capital, and utilising that capital to grow the Mayfair 101 group.

…

What are the risks?

Investors should be mindful that, like all investments, there are risks associated with investing in our [Core Notes] product. Risks to take into consideration include general investment, lending, liquidity, asset, interest rate, cyber, related party transactions and currency risks.

…

Can I withdraw my money out early if I need to?

Yes, although redemptions are subject to liquidity and other applicable terms. Please note this may be subject to a 1.5% early withdrawal and liquidity fee. Please provide 30 days' notice in writing for amounts up to A$1m. For amounts above A$1m simply email your Client Relationship Manager and they will advise a repayment schedule

within 2 business days.

Is the [Core Notes] product covered by the Australian Government's Financial Claims Scheme (FCS)?

The Australian Government's Financial Claims Scheme (FCS) (or 'Government Guarantee') doesn't cover investments made in our [Core Notes] product. The Financial Claims Scheme has a limit of A$250k for each account holder per bank, and the banks have a bailout limit of just A$20b per bank. Be mindful that bank investments above A$250k aren't covered by the Financial Claims Scheme, which is a reason why [the Core Notes] is worth considering for larger investment amounts.

(Bold text in the original; italicised text added.)

The Deed Poll

74 The terms of the Core Notes are set out in a "Secured Promissory Note Deed Poll" (**Deed Poll**) entered into by M101 Nominees on 24 October 2019. The Deed Poll was annexed to the First Buckley Affidavit and has the following relevant terms:

(a) M101 Nominees "decided to issue secured redeemable promissory notes, in accordance with, on the terms of, and subject to the conditions set out in, [the Deed Poll]";

(b) the Deed Poll "binds [M101 Nominees] for the benefit of each Noteholder as if each such person were a party to [the Deed Poll], whether or not the person is in existence at the time of execution of this deed": cl 2.1;

(c) M101 Nominees "may, in its discretion, agree to the issue of a Note or a number of Notes, as determined by [M101 Nominees] from time to time": cl 3.1. The term "Notes" was defined as "secured redeemable promissory notes issued or to be issued by [M101 Nominees] under, and on and subject to the terms of, [the Deed Poll], which may be designated by [M101 Nominees] from time to time with a particular label or name, such as the "Mayfair Platinum Secured Notes" …": cl 1.1;

(d) the Notes were "debt obligations of [M101 Nominees] owing under [the Deed Poll], take the form of entries in [a certain] Register and are evidenced by Note Certificates": cl 3.5(a). "Each entry in the [relevant] Register constitutes a separate and individual acknowledgement to the relevant Noteholder of the indebtedness of [M101 Nominees] to that Noteholder": cl 3.5(a);

(e) M101 Nominees could, "from time to time, determine to create a Note Class" which would "provide for all Notes issued under that Note Class to have the same: … (i) name; (ii) Face Value; (iii) Note Term …; (iv) Maturity Date; and (v) Interest Rate": cl 3.2(a). The "Maturity Date" was defined as: "with respect to a Note, the last day of the Note

Term". The "Interest Rate" was defined as "the interest rate which applies to the debt obligation arising under a Note, which is determined by its Note Class": cl 1.1. The "Note Term" was defined as "the period of the loan conferred by the Note which is specified by its Note Class, and which begins on and from the date the Note is issued": cl 1.1;

(f) M101 Nominees was required to "calculate interest on the Monies Owing in respect of each Note daily on the balance of the Monies Owing, on the basis of a yearly interest rate equal to the Interest Rate, and a year of three hundred and sixty-five (365) days": cl 4.1;

(g) M101 Nominees was required to "pay interest which accrue[d] … to the Noteholder, on a calendar monthly basis, with payment due within five (5) Business Days following the end of the relevant calendar month": cl 4.3(a);

(h) a "Noteholder [could] notify [M101 Nominees] in writing that it require[d] all or a number of the Noteholder's Notes to be redeemed on the Maturity Date, by submitting a Withdrawal Notice": cl 5.1(a). If "a Withdrawal Notice [was] not received by [M101 Nominees] by thirty (30) days before the Maturity Date", the Notes "automatically roll[ed] over at the end of the Note Term, for a further period equal to the Note Term": cl 5.1(b);

(i) a "Noteholder [could] request that [M101 Nominees] redeem all or a number of the Noteholder's Notes on a date which [was] before the Maturity Date … by submitting a Withdrawal Notice": cl 5.1(a). However, the "Noteholder acknowledge[d] that [M101 Nominees was] under no obligation to agree to an Early Withdrawal Request, and [could] refuse to do so for any reason in [M101 Nominees'] sole and absolute discretion, with or without stating its reasons": cl 5.2(b);

(j) "[u]pon redemption of any Notes", M101 Nominees was required to "pay the Noteholder the total amount of the Monies Owing on those Notes calculated as at the Withdrawal Date": cl 5.5(a). There was "no priority of payments between Noteholders": cl 5.5(d). M101 Nominees could "in its absolute and sole discretion … pay any one … Noteholder in priority to any other Noteholder": cl 5.5(d);

(k) M101 Nominees could, "at any time, extend the Payment Date", if M101 Nominees:

  (i) "in its reasonable opinion, consider[ed] that it [did] not have sufficient Liquidity to fund the redemption";

(ii) "received multiple Withdrawal Notices in a short period which will have a negative impact on its Liquidity";

(iii) "consider[ed] that if the redemption [was] paid on the Payment Date, it may [have] affect[ed] [M101 Nominees'] Liquidity to pay future anticipated redemptions of other Noteholders' Notes": cl 5.6(a).

75 Clause 3.6 of the Deed Poll provides:

> **3.6 Notes secured**
>
> (a) Secured – The Notes are secured redeemable promissory notes.
>
> (b) STD - Certain parties will from time to time provide security for the payment by [M101 Nominees] of amounts due in respect of the Notes, to be held by a security trustee on behalf of the Noteholders, under the terms of the Security Trust Deed.
>
> (c) Attorney - Each Noteholder, for consideration received, appoints the security trustee under the Security Trust Deed and each officer for the time being and from time to time of that security trustee severally its attorney, in its name and on its behalf, to do all things and execute, sign, seal and deliver (conditionally or unconditionally in the attorney's discretion) all documents, deeds and instruments necessary or desirable in respect of the Security Trust Deed.
>
> (Underlining and bold text in the original.)

76 The "Security Trust Deed" was defined as:

> "Security Trust Deed" means the Security Trust Deed dated on or about the date of [the Deed Poll] entered into by [M101 Nominees] and other parties, under which certain parties provide security for the payment by [M101 Nominees] of amounts due in respect of the Notes, to be held by a security trustee on behalf of the Noteholders …"

The Security Trust Deed

77 M101 Nominees and PAG Holdings (Australia) Pty Ltd (**PAG Holdings**) entered into a "Security Trust Deed" on 24 October 2019 (**Security Trust Deed**). For present purposes, relevant terms of the Security Trust Deed were as follows:

(a) PAG Holdings declared "that it holds the sum of ten dollars (A$10) … and will hold the Trust Fund on trust for the Security Beneficiaries from time to time on the terms of this deed": cl 4.1. The "Trust Fund" included (among other things) "all money paid to" PAG Holdings under the Security Trust Deed: cl 1.1. The "Security Beneficiaries" referred to "all and each of the Noteholders from time to time" and "the Security Trustee

in its personal capacity as Security Trustee": cl 1.1. The Trust was to be known as the "Mayfair Platinum Secured Notes Security Trust": Schedule 1;

(b) subject to the Security Trust Deed, PAG Holdings was "entitled to exercise all Powers under the Securities (including those Powers conferred on trustees generally by statute and those conferred on trustees generally by law or equity in respect of the Securities) as if [PAG Holdings was] the sole beneficial owner of the Securities …": cl 8.1(a);

(c) PAG Holdings was "irrevocably appointed and authorised by the Security Beneficiaries to enter into the Securities and other Finance Documents to which it is expressed to be a party and act as trustee for the Security Beneficiaries and to enforce the rights under or in relation to the Securities and those other Finance Documents on behalf of the Security Beneficiaries in accordance with the Finance Documents": cl 8.1(c);

(d) "[d]espite anything else in" the Security Trust Deed "or any other Finance Document", M101 Nominees was required to "procure that at all times the Over-arching Obligations [were] complied with": cl 10.6. Those "Over-arching Obligations" included the following:

> Security - There are sufficient Security Providers providing sufficient Security in connection with this deed, *to comply with any statements contained in the Information Memorandum regarding the nature, amount or sufficiency of Security Interests* supporting the making of payments due in respect of the Notes. [The "Information Memorandum" was defined as "the information memorandum, by whatever name called (such as brochure, disclosure or offer document), issued from time to time by the Grantor to prospective or actual Noteholders regarding the details of arrangements relating to the Notes": cl 1.1];
>
> Use – [M101 Nominees] uses all or any part of any Security Property from time to time only and solely for ongoing investment and capital management purposes across the corporate group of which [M101 Nominees] is a member (the "Company Group").
>
> Security Interests – [PAG Holdings] holds the benefit of *first (1st) ranking Security Interest(s)* in assets, registered in the relevant statutory register, in favour of [PAG Holdings] under the terms of, and covered as Security Property by, this deed, *of a value which is at least equal to all amounts due in respect of all Notes outstanding*, where such assets must be either:
>
> (a) cash – the account of the Grantor with the financial institution, and with the details, referred to in the Specific Security Deed Poll (Bank Account) dated on or about the date of this deed and entered into by [M101 Nominees] in favour of [PAG Holdings] and all moneys from time to time in that account, in respect of which a first (1st) ranking Security Interest granted under that deed in favour of [PAG Holdings] is registered in the Personal Property Securities Register established under section 147 (Personal Property Securities Register) of the Personal Property Securities Act 2009 (Cth) (the "PPS Register");

(b) real estate – Australian real estate, owned by a member of the Company Group, in respect of which *a first (1st) ranking mortgage in favour of [PAG Holdings] is registered in the Land Registry of the relevant Australian State or Territory*;

(c) specific assets – specific, identifiable, *tangible* assets, with or without a serial number, owned by a member of the Company Group, *in respect of which a first (1st) ranking Security Interest granted under a specific security agreement or deed in favour of [PAG Holdings] is registered in the PPS Register*; or

(d) general assets – all or other present and after-acquired property owned by a member of the Company Group, *in respect of which a first (1st) ranking Security Interest granted under a general security agreement or deed in favour of [PAG Holdings] is registered in the PPS Register* …

(Emphasis added.)

78 In a letter to ASIC from PAG Holdings' solicitors dated 29 June 2020, PAG Holdings' solicitors stated that the "primary purpose of the [Mayfair Platinum Secured Notes Security Trust] is for [PAG Holdings] to hold security in relation to redeemable promissory notes issued by [M101 Nominees] to noteholders".

79 There was expert evidence about the security arrangements which were in fact implemented in relation to the Core Notes. I turn to set out that evidence.

The Expert Opinion of Mr Tracy

80 ASIC tendered and relied on an affidavit of Mr Jason Tracy of Deloitte affirmed 24 November 2020. Mr Tracy's affidavit annexed five documents, namely:

(a) a letter of instruction to Mr Tracy from ASIC dated 25 May 2020 (which was annexure "JMT-2");

(b) a letter of instruction to Mr Tracy from ASIC dated 1 June 2020 (which was annexure "JMT-3");

(c) an expert opinion dated 12 June 2020 (which was annexure "JMT-1");

(d) a supplementary expert opinion dated 12 August 2020 (which was annexure "JMT-4");

(e) a second supplementary expert opinion dated 14 September 2020 (which was annexure "JMT-5") (collectively, **Expert Opinion**): see Tracy Affidavit, Annexures "JMT1", "JMT4" and "JMT5" at CB, Tab 6.1, 6.4 and 6.5.

81 Mr Tracy is a Chartered Accountant, having been admitted as a member of Chartered Accountants Australia and New Zealand. Mr Tracy is also a Registered Liquidator. He has in

excess of twenty years' experience in the external administration of corporate entities and the assessment of entities on behalf of financial institutions and other debt providers. Mr Tracy also has experience in providing expert evidence in matters concerning the financial performance and position of corporate and other entities, as well as insolvency-related matters.

82 Mr Tracy was asked for his opinion on (among other things) whether the debts owed to Core Notes investors were secured and, if so, "[w]hat form does that security take", "[o]ver what assets is there security", and "[w]hat is the value of that security?"

83 At [3.4]-[3.6] of the expert opinion dated 12 June 2020, Mr Tracy described the Core Notes as follows:

> Core Notes are secured promissory notes issued by M101 Nominees. Core Notes were promoted as only available to wholesale investors with a minimum investment threshold of $250,000, for an investment term of six to 60 months. Interest was to be paid monthly at a fixed rate dependent on the investment term regardless of investment performance.
>
> Core notes were promoted as a "secured, asset backed, term-based investment", with a key feature being that they were supported by "first ranking, unencumbered asset security". Secured assets for Core Note investors comprise of cash in a bank account held in the name of M101 Nominees, real property assets in the Mission Beach region, Queensland, deposits paid for the purchase of real properties and loans made to related parties.
>
> The real property assets are held in trusts which Sunseeker Holdings is the unit holder. Security over the trust assets is generally established through a suite of security documents, whereby a third-party security trustee, PAG Holdings Australia Pty Ltd (PAG) which represents the interest of investors, is the secured party. As at 20 March 2020 a total of $59,208,332 was invested in Core Notes.

84 At [3.9], Mr Tracy's 12 June 2020 expert opinion notes:

> The Core Note investment brochure outlines the ability of M101 Nominees to freeze redemptions in the event of liquidity constraints. On 11 March 2020, M101 Nominees froze all redemptions due to liquidity concerns.

85 In relation to whether the debts owed to Core Notes investors were secured, Mr Tracy stated the following in his 12 June 2020 expert opinion:

(a) in relation to cash held in M101 Nominees' bank account, Mr Tracy noted that, as at 31 December 2019, M101 Nominees held cash at bank of $5,274,908. However, as at 20 March 2020, M101 Nominees' cash at bank was $572,561. Mr Tracy stated that, "[g]iven the security was in place prior to 31 December 2019 and 20 March 2020, it appears to me that this asset is secured". However, Mr Tracy noted that he did "not have bank statements to verify the bank account balances at those dates";

(b) in relation to a loan made to Eleuthera by M101 Nominees, Mr Tracy stated:

> The loan agreement between M101 Nominees and Eleuthera (a related party) is titled Facility Agreement. The facility agreement does not detail any information relating to proposed security arrangement in respect to the loan, nor does it detail the purpose of the loan. The loan commenced on 18 October 2019, has a limit of $250m, attracts an interest rate of 8.0% per annum and is for an initial term of 10 year with an option to extend. Full repayment is due before the expiry date, unless otherwise agreed in writing between the lender and the borrower.

(c) in respect of "[r]eal properties and deposits paid on properties but not settled", Mr Tracy stated:

> In respect to assets held in Mainland Property Holdings Pty Ltd (MPH) ATF Mission Beach Property Trust (MBPT) (82 properties, 30 deposits paid on properties not settled at 20 March 2020), I comment as follows: … Except for one real property at 999 Seaview Street, Mission Beach, *[the security trustee] did not have direct first mortgage security over the other properties held in MBPT at 31 December 2019 or 20 March 2020. In fact, it appears that a third party lender, Naplend Pty Ltd (Naplend)[,] has first registered mortgages on all titles except for one title, where it appears Australia and New Zealand Banking Group Ltd (ANZ) is first registered at 31 December 2019 and 20 March 2020*.
>
> …
>
> In respect to assets held in Mainland Property Holdings No 2 Pty Ltd (MPH2) ATF Mission Beach Property Trust No 2 (MBPT2) (24 properties, 54 deposits paid on properties not settled at 20 March 2020), I comment as follows: … *[the security trustee] does not have direct first mortgage security over any of the properties held in MBPT2 at 31 December 2019 or 20 March 2020. In fact, it appears that a third party lender, Naplend[,] has first registered mortgages on all titles.*
>
> …
>
> In respect to assets held in Mainland Property Holdings No 3 Pty Ltd (MPH3) ATF Mission Beach Property Trust No 3 (MBPT3) (11 properties and 19 deposits paid on properties not settled at 20 March 2020), … *[the security trustee] does not have direct first mortgage security over any of the properties held by MBPT3 at 31 December 2019 or 20 March 2020. In fact, it appears that a third party lender, Naplend[,] has first registered mortgages on all titles*.
>
> …
>
> In respect to assets held in Mainland Property Holdings No 8 Pty Ltd ATF Mission Beach Property Trust No 8 (MBPT8) (1 property at 20 March 2020), … [the security trustee] does not appear to have first registered security at 31 December 2019 or 20 March 2020. According to the PPSR it appears *[the security trustee]'s security was registered on 23 April 2020 and 15 May 2020 respectively, being after the date the property appears to have been acquired and after AllPAAP security was registered by Naplend and the Trustee for Naplend No 13. In the absence of a priority deed or other instrument giving priority it would appear the security interests of Naplend are ahead of Core Note investors*.

…

In respect to the asset held in Mayfair Asset Holdings Pty Ltd (MAH) ATF Mayfair Island Trust (MIT) (1 property at 20 March 2020), … *[the security trustee] does not have direct first mortgage security over the property held by MIT at 31 December 2019 or 20 March 2020. In fact, it appears that a third party, Family Islands Group Pty Ltd (Family Group) has registered mortgages on all titles*.

…

In respect to the assets held [by various other relevant trusts], I comment as follows:

(a) According to the PPSRs it appears in all instances that [the security trustee]'s security was registered on 23 April 2020 and 15 May 2020 being after the date the deposits appear to have been paid in respect to properties not settled.

(b) Based on the information made available to me there is a significant risk that [the security trustee] did not have first security at 31 December 2019 and 20 March 2020 despite deposits on properties not settled having been paid.

(c) In respect to the deposits paid on properties not settled, I am concerned that these may be at risk of forfeiture for failure to complete on the real property transactions.

…

In respect to assets held in Jarrah Lodge Holdings Pty Ltd ATF Jarrah Lodge Unit Trust No 1 (JLUT), … [the security trustee] does not appear to have first registered security. According to the PPSR it appears [the security trustee's] security was registered on 16 April 2020, 23 April 2020 and 15 May 2020, all being after the date the loan appears to have been made and *after AllPAAP security was registered by Naplend … on 23 December 2019 over JLUT*.

…

(Emphasis added.)

86 At [2.11] – [2.16], Mr Tracy's expert opinion dated 12 June 2020 concludes as follows concerning the security in place:

> While various security arrangements have been entered into between [the Security Trustee] as security trustee, M101 Nominees and the various trustees, it would appear, with one exception, *that [the security trustee] does not have direct first mortgage security over the real properties held in the various trusts at 31 December 2019 and 20 March 2020*.
>
> It also appears that deposits were paid on properties in instances where there was *no security* registered on the PPSR in favour of [the Security Trustee] at the time of the deposit being paid, including at 31 December 2019 and 20 March 2020.
>
> Further, in relation to the two related party loans, one of the loans appears to have had *no security* registered on the PPSR at 31 December 2019 and 20 March 2020, while the other appears to have *a prior registered third party* security at 20 March 2020.

> … [I]n my opinion, there are a significant number of instances where Core Note investor security was not first ranking and the assets were not otherwise unencumbered at 31 December 2019 and 20 March 2020.
>
> …
>
> In respect to the loan to [Eleuthera by M101 Nominees], it appears that the *loan is not secured*. *There is no security interest registered by [the security trustee] against Eleuthera on the PPSR and the documents made available to me make no reference to security being provided in respect to that loan at 31 December 2019 or 20 March 2020*.
>
> (Emphasis added.)

87 At [2.24], Mr Tracy's expert opinion dated 12 June 2020 states:

> In summary, it would appear that Core Note investor funds *were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020*.
>
> (Emphasis added.)

88 Mr Tracy's expert opinion dated 12 June 2020 also sets out further concerns regarding the asset security value, at [2.25] and [2.26]:

> In the absence of a funds flow showing the receipt of Core Note investor funds and payment from the M101 Nominees bank account, it is unclear whether all the funds from Core Note investors have flowed to secured assets.
>
> I have a number of concerns regarding the asset security values for Core Note investors:
>
> (a) There is a risk that prior registered security holders may be able to escalate their facilities and appoint receivers. In the event this happens, asset values and the recovery of funds to Core Note investors could be negatively impacted.
>
> (b) There is a risk given [Mayfair] was active in acquiring a large number of properties from October 2019 to April 2020 that these entities established a market price in an otherwise illiquid and small property market at Mission Beach. Consequently, there is a risk that the contract price in each sale contract is above market price in today's terms, negatively impacting the asset security values and recovery of funds to Core Note investors.
>
> (c) The deposits paid on the properties not settled totalling $5,852,387 at 20 March 2020 may be at risk of forfeiture due to failure to complete, especially if significant additional funds of $86,483,036 cannot be sourced to settle these transactions. It is unclear to me where these additional funds would come from.
>
> (d) The financial capacity of the related entities to repay the loans received from M101 Nominees is unclear in the absence of financial information outlining their financial position, historical and forecast performance.
>
> (e) The basis of the 4% uplift totalling $2,983,400 at 20 March 2020 applied by M101 Nominees to the carrying value of the 119 real property assets, including Dunk Island is not well supported by the documents made available to me. If this amount is excluded, there would appear to be a deficiency of $2,732,540 to Core Note investors, assuming full recovery of all other secured assets in line with M101 Nominees report to [the Security Trustee] at 20 March 2020.

89 Mr Tracy provided a further expert opinion dated 12 August 2020 which stated at [2.5]-[2.8]:

> The new documents [provided to Mr Tracy and] listed in Appendix 2 do not cause me to change my opinion outlined in my First Report, that [the security trustee] does not have direct first mortgage security (with one exception noted in my First Report) over the real properties held in the various trusts at 31 December 2019 and 20 March 2020.
>
> …
>
> The new documents listed in Appendix 2 do not cause me to change my opinion outlined in my First Report, that it appears there were deposits paid in instances where there was no security registered on the PPSR in favour of [the security trustee] at the time the deposit was paid, including at 31 December 2019 and 20 March 2020.
>
> …
>
> The new documents listed in Appendix 2 do not cause me to change my opinion in respect to the security position of the loan to Eleuthera as outlined in my First Report at 31 December 2019 and 20 March 2020, that is, that the loan is not secured.
>
> The new documents listed in Appendix 2 do not change my opinion in respect to the loan to [Jarrah Lodge Holdings Pty Ltd as trustee for the Jarrah lodge Unit Trust No 1 (**JLUT**)] as outlined in my First Report that [the security trustee] does not hold first ranking unencumbered asset security at 31 December 2019 and 20 March 2020 …
>
> In summary, I confirm my opinion in my First Report that it would appear that Core Note investor funds *were not and are not generally supported by first-ranking, unencumbered asset security at 31 December 2019 and 20 March 2020*.
>
> (Emphasis added.)

90 As to the value of the security held by the relevant security trustee, Mr Tracy's expert opinion dated 12 August 2020 stated at [2.9]:

> The new documents made available to me and detailed in Appendix 2 do not ameliorate the concerns that I raised in my First Report. In this regard, the new documents raise further questions:
>
> (a) The report from M101 Nominees to [the security trustee] shows a significant increase in the value of the Dunk Island asset, increasing the amount recorded from $11,000,000 at 20 March 2020 to $49,725,000 at 12 June 2020. There is no accompanying explanation for this increase.
>
> (b) There appears to have been an increase in deposits paid for properties not settled. It is unclear from the information made available to me the amount of funds required to settle these transactions and / or if these deposits are at risk of forfeiture.
>
> (c) The report from M101 Nominees to [the security trustee] shows a loan from FIG. It is unclear to me what this loan relates to and what rights may be afforded to this party, in particular, if it has security interests that rank ahead of those of the Core Note investors.
>
> (d) The ability of Eleuthera to repay its increased loan amount of $2,097,328 at 12 June 2020 given its balance sheet as at 31 May 2020 shows a negative net asset position of $9,526,997.

91 Mr Tracy also provided a second supplementary expert opinion dated 14 September 2020. Mr Tracy's second supplementary expert opinion concerned the omission of a comma in the initial brief provided to Mr Tracy. By way of summary, the initial brief set out that the Core Notes brochure had stated: "[t]he assets are … made up of Australian real estate assets held by Mayfair 101 Group entities, and cash". However, in fact, the Core Notes brochure stated: "[t]he assets are … made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash". That is, in the initial brief, a comma should have appeared after the words "Australian real estate".

92 In respect of this issue, Mr Tracy's second supplementary expert opinion stated at [3.4]:

> I comment as follows:
>
> (a) I have reviewed the Offer Document and acknowledge that a comma should be included as follows: "The assets are…made up of Australian real estate, assets held by Mayfair 101 Group entities, and cash…".
>
> (b) The omission was a typographical error.
>
> (c) The omission should be corrected, but it … do[es] not change my opinion expressed in my [earlier reports], in particular, that [the] *security trustee (with one exception) does not hold direct first ranking asset security over the Australian real property assets, whether acquired or deposits have been paid, nor loans advanced, which are the primary assets of each trust* …
>
> (Emphasis added.)

93 Mr Tracy's second supplementary expert opinion stated at [3.5]-[3.6]:

> I comment as follows:
>
> (a) Based on the records made available to me and searches of the Personal Property Securities Register (PPSR), the security … includes security over the units held by Sunseeker Holdings and granted in favour of the Security Trustee, PAG [Holdings].
>
> (b) *I query whether, based on my experience in realising assets of a similar nature, units in an unlisted trust can be considered "tangible assets"*.
>
> (c) The value of the units in each trust is directly referable to the value of the underlying Australian real property assets less … any prior ranking security interest registered over the relevant property, deposits paid on real property assets, the recoverable value of loans and other liabilities in the trust.
>
> (d) [Mr Tracy had not changed his opinion that the] security trustee does not hold direct first ranking asset security over:
>
> (i) the Australian real property assets which are the primary assets of a number of the trusts (with one exception); or
>
> (ii) loans advanced which are the primary assets of JLUT.
>
> (e) Based on the information made available to me, it is unclear if [the] security

> trustee has security over deposits paid for Australian real property assets. In my First Report I note the significant risk of forfeiture of deposits paid for failure to complete the real property transactions.
>
> … I note that that it appears that in many instances that the security was put in place after [31 December 2019 and 20 March 2020 (**Relevant Dates**)] and sometime after each relevant property was acquired, deposits paid, or loans advanced …
>
> The implication … is that, in many instances[,] at the time when the Core Note Investor funds were used to acquire and make deposits on Australian real property, Sunseeker Holdings had not yet entered into a Specific Security Deed (SSD) or registered its security over the units in the majority of trusts on the PPSR, *meaning that its interests were likely to be unsecured at the Relevant Dates and all other dates leading up to at least the time of registration on the PPSR*. Additionally, General Security Deeds (GSD) had also not yet been entered into as between the trustee of each trust and the Security Trustee … for the majority of the trusts.
>
> (Emphasis added.)

94 Mr Mawhinney has not filed or pointed to any evidence which adequately responds to these issues.

95 Mr Tracy was cross-examined on the opinions expressed in his various reports. In the course of the cross-examination, Mr Tracy acknowledged that:

(a) he is not a valuer and he did not conduct a valuation of the assets held by the "Mayfair companies";

(b) he had not been provided with "profit and loss or balance sheet statements of the entities within the Mayfair Group";

(c) he was not able to say "with certainty" that there is a shortfall, or a discrepancy, between (i) the debt owed to the Core Notes investors and (ii) the value of the security held by the relevant security trustee. However, Mr Tracy noted that he had "significant concerns around the basis of an uplift factor of 4 per cent which [was] applied to the value of the properties as at 20 March" because, if that "uplift factor" was omitted, "then there becomes a deficiency to the Core Notes investors". (This "uplift factor" is referred to at [2.26(e)] of Mr Tracy's expert opinion dated 12 June 2020, which is extracted above.) Mr Tracy stated that, without that uplift, there would be a deficiency, of some $2.7 million to the Core Notes investors, assuming a full recovery on all other secured assets.

96 I should state here that the cross-examination of Mr Tracy did not diminish the force of the opinions expressed by Mr Tracy in his Expert Opinion which I accept. Those opinions were based on a good deal of documentation provided to Mr Tracy by ASIC and Mr Tracy's

knowledge and experience. Mr Tracy's opinions as to whether there was security and the value of that security should be accepted, albeit with the qualification that Mr Tracy could not say "with certainty" that Core Notes investors would be in a position of deficit after the relevant assets were realised.

Provisional liquidators' report

97 ASIC also relies upon the investigations of the provisional liquidators of M101 Nominees as set out in the provisional liquidators' report dated 24 September 2020 (**Provisional Liquidators' Report**) which was tendered in evidence (CB, Tab 10). The liquidators were not cross-examined on the content of their report. I accept the findings of the liquidators which can be summarised as follows.

98 The Provisional Liquidators' Report referred to certain "key events" as follows at [25]:

> Based on my investigations to date, a timeline of the key events of [M101 Nominees], and in some cases the broader Mayfair 101 Group, from incorporation up to the date of my appointment is noted below:
>
> a. **18 October 2019** – [M101 Nominees] was incorporated and immediately began raising funds from investors via internet and newspaper advertisements. [M101 Nominees] offered a term-based investment option and made monthly interest payments on this product to [Core Notes] noteholders;
>
> b. **18 October 2019** – [M101 Nominees] entered into a loan agreement with Eleuthera to provide a facility of up to $250 million at an interest rate of 8% p.a, calculated and paid monthly in arrears within 30 days of the end of each calendar month. The loan term is 10 years and it is unsecured. While the loan agreement is not clear as to the purpose and use of the funds that are to be provided by [M101 Nominees], my investigations and discussions with [Mr Mawhinney] indicate that Eleuthera was used as a treasury entity, where funds were received from [M101 Nominees] as well as other fund raising vehicles and then transferred to other entities within the Mayfair 101 Group to make various investments;
>
> c. **24 October 2019** – [M101 Nominees] entered into a General Security Deed with the Security Trustee … The role of [the security trustee] in their capacity as Security Trustee is to act on behalf of the security beneficiaries, being the holders of the [Core Notes] raised by [M101 Nominees]. [The security trustee] was provided various securities …, *although of concern …, the security granted to them (with the exception of Mainland Property Holdings Pty Ltd ATF the Mission Beach Property Trust) under the terms of the General Security Deeds, specifically excluded real estate property (which makes up the majority, if not all of the assets owned by the various trusts)*;
>
> d. **November & December 2019** – [the security trustee] registered a number of securities ("AllPAPs") on the Personal Property Security Register ("PPSR") against a number of entities across the Mayfair 101 Group *noting the above mentioned exclusion for real property …*;
>
> e. **December 2019** – various entities in the Mayfair 101 Group had previously

entered into contracts to purchase a number of properties at Mission Beach in Queensland. These properties were due to settle in December 2019 and beyond, however the Mayfair 101 Group did not have sufficient funds to settle these properties as they fell due. As a result, the Mayfair 101 Group borrowed funds from a private lender Naplend Pty Limited ("Naplend") to fund the settlement of these properties.

The Naplend loan was at a rate of 24% p.a for a term of 4 months. However, it is now in default and this rate has increased closer to c. 40%. This facility was increased on a number of occasions to meet the ongoing financial obligations of the Mayfair 101 Group on various property settlements. *As security for the funds lent to the Mayfair 101 Group, Naplend was provided a first ranking mortgage over all of the Mission Beach properties owned by the Mayfair 101 Group, excluding one property that [the security trustee] took a direct security over ...*

The balance due on the Naplend loan as at September 2020, as advised by the Receivers of the various entities/trusts is c.$20 million. I have been unable at this time to verify the amount owing to a current loan statement;

f. **23 December 2019** – security provided to Naplend was registered on the PPSR in relation to the following entities[:] Mainland Property Holdings Pty Ltd, Mainland Property Holdings No 2 Pty Ltd, Mainland Property Holdings No 3 Pty Ltd, Mainland Property Holdings No 8 Pty Ltd and Jarrah Lodge Holdings Pty Ltd as trustee[s] for the [relevant] respective trusts …;

g. **31 December 2019** – Eleuthera ceased making interest payments due to [M101 Nominees] in respect of the loan facility agreement. Based on my review of [M101 Nominees'] Xero records, these outstanding interest payments were accrued and are showing as accounts receivable in the Balance Sheet of [M101 Nominees]. I note that Eleuthera made payments to [M101 Nominees] after this date. I have questioned this with [Mr Mawhinney] who has not been able to provide me with an explanation for these payments at the date my report was being finalised. I can only assume the payments related to a reduction in the principle [sic] amount borrowed, which is how it has been recorded in [M101 Nominees'] Xero account;

h. **11 March 2020** – properties at Mission Beach remained unsettled and the Mayfair 101 Group had insufficient funds to settle these properties by the due date. At this time it also had insufficient funds to pay redemptions to noteholders of [M101 Nominees]. Accordingly, redemptions were suspended due to liquidity issues. Redemptions are requests for payment from noteholders in respect of their invested capital invested either at maturity or prior to maturity;

i. **16 April 2020** – On the application of ASIC, the Federal Court made orders restraining entities within the Mayfair 101 Group from promoting and advertising select products, including the [Core Notes] offered by [M101 Nominees]. They also ordered a disclaimer to be included on their website and to be provided to each prospective new investor;

j. **April 2020** – properties at Mission Beach remained unsettled and the Mayfair 101 Group were unable to advertise to seek new investors;

k. **May/June 2020** – Distribution[s] for June 2020 and all future distributions to [Core Notes] noteholders were suspended and interest capitalised until further notice. Distributions relate to the monthly interest amounts paid to noteholders.

I note that the May 2020 distributions were paid in June 2020;

l. **May 2020** – A deed of variation was executed with the mortgagee of Dunk Island agreeing to a revised repayment schedule and the future sale of a 10 hectare parcel of land back to the mortgagee for $4.5 million subject to various conditions;

m. **July 2020** – the entities in the Mayfair 101 Group failed to meet the interest payments due to Naplend;

n. **July 2020** – instalment payments owed to the mortgagee of Dunk Island as part of the amended vendor finance facility were not made;

o. **July 2020** – the vendors of Dunk Island who provided a vendor finance facility and consequently held a first ranking mortgage entered into possession of Dunk Island …;

p. **2 July 2020** – Receivers appointed by [a different security trustee,] Vasco[,] as security trustee over various entities in the IPO Wealth Group. The Receivers have subsequently been appointed as Liquidators over other entities in the same IPO Wealth Group;

q. **10 July 2020** – [the security trustee for the Core Notes] applied to the Court regarding securities it had failed to register on the PPSR within the prescribed legal period and requested that these be backdated and registered at 30 June 2020 …

r. **30 July 2020** – the Court granted the request from [the security trustee] … to have the security registered on the PPSR as at 30 June 2020 subject to certain conditions;

s. **13 August 2020** – I was appointed Joint and Several Provisional Liquidator of [M101 Nominees] following an ASIC investigation and application to the Court;

t. **19 August 2020** – McGrath Nicol were appointed as Joint and Several Receivers and Managers of five entities in the Mayfair 101 Group where Naplend held first ranking securities over the real estate located at Mission Beach; and

u. **9 September 2020** – Philip Campbell Wilson and I were appointed Joint and Several Receivers and Managers over 15 entities in the Mayfair 101 Group by [the security trustee].

(Emphasis added.)

99 The Provisional Liquidators' Report stated that, "[d]espite clearly advertising to potential investors that their investment would be supported by 'first ranking, registered security' and 'the assets are otherwise unencumbered' in my opinion this did not occur": Provisional Liquidators' Report, [2]. The report noted that "[i]n reality the majority of the funds invested were provided to a related entity, [Eleuthera] on an unsecured loan basis for a term of 10 years at a rate of 8% p.a. [M101 Nominees] did not hold any security over the assets of Eleuthera": Provisional Liquidators' Report, [2].

100 The Provisional Liquidators' Report noted that, although the relevant security trustee took out "an [all present and after- acquired property (**AllPAP**)] over a number of entities/trusts, I note that in all instances except one, the AllPAP specifically excluded any real estate property": Provisional Liquidators' Report, [3]. "Effectively, the registered AllPAP secured little to no assets for [Core Notes] noteholders given the primary asset of these entities/trust [sic] was real estate property": Provisional Liquidators' Report, [3].

101 The Provisional Liquidators' Report stated that, "of the [approximately] $63.5 million advanced to Eleuthera by [M101 Nominees] and $44.4 million advanced by M101 Nominees to Eleuthera, only [approximately] $62.9 million was used to make real estate asset purchases": Provisional Liquidators' Report, [4]. The report stated that the "remaining funds were provided to other entities in the M101 Group as inter-company loans and also used to pay a large amount of operating expenses of the Mayfair 101 Group ([approximately] $21.7 million in FY20)": Provisional Liquidators' Report, [4].

102 The report stated that the "likelihood of any recovery by [M101 Nominees] of the Eleuthera loan is low due to":

(a) "[t]he majority of entities that are indebted to Eleuthera are the subject of separate insolvency proceedings in which steps are currently being taken to sell these entities' assets for the benefit of their secured creditors";

(b) "[a] number of the remaining entities that are indebted to Eleuthera are based overseas and the exact nature and recoverable value of these assets are unclear"; and

(c) M101 Nominees' "entitlement to recover the funds due from Eleuthera, if any asset recoveries are made, will need to be shared pro-rata with all other creditors of Eleuthera": Provisional Liquidators' Report, [5].

103 The report stated that:

(a) In "a winding up proceeding, creditors of [M101 Nominees] (effectively the [Core Notes] noteholders) would receive no return": Provisional Liquidators' Report, [6].

(b) The "business model of [M101 Nominees] was not sustainable. This is on the basis that [Core Notes] noteholders were investing predominantly for periods of 6 or 12 months, however the loan agreement with Eleuthera had a term of 10 years. On this basis, [M101 Nominees] would not have adequate funds to repay any contributions as

they fell due and as such [M101 Nominees] has been insolvent since inception and remains insolvent as at the date of this report": Provisional Liquidators' Report, [7].

(c) "[D]istributions and redemptions paid to [Core Notes] noteholders were funded out of funds raised from other [Core Notes] noteholders or to a lesser extent M+ [Notes] noteholders. There was a high level of frequency of fund transfers between [M101 Nominees] and Eleuthera which has masked the extent of this issue": Provisional Liquidators' Report, [8].

(d) The Provisional Liquidators' "investigations have uncovered a number of contraventions of the Corporations Act 2001 by both [M101 Nominees] and [Mr Mawhinney] primarily in relation to Section 180 and 1041H of the Act": Provisional Liquidators' Report, [9].

104 The Provisional Liquidators' Report further stated at [118]:

> Based upon the information available to me at the date of this report, it is my opinion that [Mr Mawhinney] may have been in breach of Section 180 of the [*Corporations Act*] as a result of:
>
> a. Failing to advise unsophisticated investors of the risks of the products being offered … Whilst [Core Notes] noteholders typically met the legal definition of a 'sophisticated investor', their characteristics frequently were more reflective of a retail investor. I have reviewed evidence gathered by ASIC as part of their investigations in which investors advised they were misled into thinking the product offered by [M101 Nominees] was similar to that of bank term deposits and had no risks. In reality, the funds invested into [M101 Nominees] were advanced to a related entity of [M101 Nominees] (unsecured) on terms which put investor funds at significant risk.
>
> b. Not ensuring that [Core Notes] noteholders were given security over the assets their funds were used to purchase. I note that [Core Notes] noteholders were advised in the FAQ of the information booklet for the product that they would be provided with 'first ranking, registered security' and 'the assets are otherwise unencumbered'. *However, the General Security Deed between the trusts and [the security trustee] state that the AllPAP provided to [the security trustee] on behalf of the [Core Notes] noteholders excluded real estate assets (noting this is the only asset type held by the trusts). Furthermore, the assets were clearly not "unencumbered" as mortgages were held by Naplend and the Family Islands Group over the real estate*.
>
> c. Despite [this], failing to ensure that a number of AllPAPs were registered by [the security trustee] on the PPSR within the prescribed period … [The security trustee] failed to correctly register a number of AllPAPs pursuant to Section 588FL of the Act and as such had to apply to the Court for rectification orders.
>
> d. Failure to ensure that the appropriate security was taken out to protect [M101 Nominees'] interest in the loan provided to Eleuthera. Given the significant sums advanced to Eleuthera it would be appropriate for the loan to be a secured loan and the security registered on the PPSR. I note that no related or third

party holds any security over the assets of Eleuthera.

e. Continuing to advance further funds to Eleuthera in 2020 under the terms of the facility at a time when Eleuthera was not meeting its interest payment obligations.

f. Paying redemptions of noteholders from other noteholder investments. I note that on 15 January 2020 [M101 Nominees'] bank balance was $12,943.76. In the period from 15 January 2020 to 21 January 2020 [M101 Nominees] received $152,174 from noteholders and $590,000 from Eleuthera. Also during the period, $700,000 was paid in redemptions and $50,000 paid to Eleuthera leaving a balance as at 21 January 2020 of $4,552.92. *As such, c. $160,000 of investor funds was used to meet redemption payments during this time.* I expect that this issue would have been further exacerbated, had it not been for the high volume of cash transfers between [M101 Nominees] and Eleuthera. That is:

i [M101 Nominees] raised funds from [Core Notes] noteholders which it advanced as a loan to Eleuthera via funds transfer;

ii Whenever [M101 Nominees] had to make a repayment or distribution to [Core Notes] noteholders, it relied on a repayment (funds transfer) back from Eleuthera to fund such payment; and

iii *Given Eleuthera was not generating any external income, I believe that the funds used to pay [Core Notes] noteholders were either sourced from their original funds or those of M+ [Notes] noteholders mixed into the Eleuthera bank account*.

(Emphasis added.)

105 The Provisional Liquidators' Report further stated at [120] in respect of s 181 of the *Corporations Act*:

> Based upon the information available to me at the date of this report, it is my opinion that [Mr Mawhinney] may have been in breach of Section 181 of the [*Corporations Act*] as a result of:
>
> a. Entering into the loan agreement with Eleuthera with no security or ability to enforce in the event of non-payment, to the detriment of [M101 Nominees] …; and
>
> b. Continuing to advance further funds to Eleuthera during 2020 where it would have become apparent to a 'reasonable person' [that] the ability to recover any such further advances would be limited …

106 The Provisional Liquidators' Report stated at [122]:

> Based upon the information available to me at the date of this report, it is my opinion that [Mr Mawhinney] may have been in breach of Section 182 of the [*Corporations Act*] as a result of:
>
> a. Entering into the loan agreement with Eleuthera with no security or ability to enforce in the event of non-payment, to the detriment of the Company as discussed at paragraph 118.d above; and
>
> b. Continuing to advance further funds to Eleuthera during 2020 where it would

> have become apparent to a 'reasonable person' [that] the ability to recover any such further advances would be limited …

107 As to s 184 of the *Corporations Act*, the Provisional Liquidators' Report stated at [126]:

> Based upon the information available to me at the date of this report, it is my opinion that [Mr Mawhinney] may have been in breach of Section 184 of the [*Corporations Act*] as a result of:
>
> a. Entering into the loan agreement with Eleuthera with no security or ability to enforce in the event of non-payment, to the detriment of [M101 Nominees] …; and
>
> b. Continuing to advance further funds to Eleuthera during 2020 where it would have become apparent to a 'reasonable person' [that] the ability to recover any such further advances would be limited as discussed [earlier in the provisional liquidators' report].

108 In respect of s 588G of the *Corporations Act*, the Provisional Liquidators' Report stated at [144]-[145]:

> Section 588G of the Act states that it is the director's duty to prevent insolvent trading. A person commits an offence if:
>
> a. A company incurs a debt at a particular time; and
>
> b. At that time, a person is a director of the company; and
>
> c. The company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
>
> d. The person suspected or there was reasonable grounds to suspect at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts.
>
> Paragraphs 80 to 101 of [the provisional liquidators'] report outline … investigations into the solvency of [M101 Nominees].
>
> It is my opinion [that M101 Nominees] has been trading insolvent since incorporation on the basis that it did not have a sustainable business model. Noteholders were investing predominantly for periods of 6 or 12 months, however the loan agreement with the related entity, Eleuthera (which [M101 Nominees] was advancing funds to) had a maturity term of 10 years. On this basis, the funds forwarded to Eleuthera were not due back to [M101 Nominees] for 10 years, meaning [M101 Nominees] would not have adequate funds to repay [Core Notes] noteholders as their debentures matured or fell due.
>
> This conclusion is evidenced by the analysis [earlier in the provisional liquidators' report] which shows that at no time over the period since incorporation did [M101 Nominees] have sufficient current assets to discharge its current liabilities …

109 In relation to s 1041H of the *Corporations Act*, the Provisional Liquidators' Report stated at [157]-[158]:

> Section 1041H of the Act states that a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely

to mislead or deceive.

As part of my investigations I have reviewed the product brochure provided to noteholders by [M101 Nominees] and Statement of Noteholder Secured Monies provided to [the relevant security trustee]. In taking into account the activities of [M101 Nominees] and the use of noteholders funds (the loan to Eleuthera) as detailed in this report, it is my view that [Mr Mawhinney] was in breach of Section 1041H of the Act for the following reasons:

a. The product brochure states in the FAQ section that a key feature of the product is that it is supported by 'first ranking, registered security' and 'the assets are otherwise unencumbered' on a dollar for dollar basis. *My investigations show that neither [M101 Nominees], nor Security Trustee held 'first-ranking security' over any assets of substantive value. First ranking mortgages were issued to Family Islands Group and Naplend over various properties rendering the statement that 'the assets are otherwise unencumbered' false*;

b. I have reviewed witness statements and affidavits prepared as part of the ASIC investigations and note that some of these investors disclosed to [M101 Nominees] that they were in the market for a term deposit and had come across the product while searching for a term deposit. It was disclosed that they only sought to invest for a short period and did not have an appetite for risk. They were assured by [M101 Nominees] that it was a term deposit product with no risk. During these discussions, the investor was not made aware that there was a chance they may lose their money, nor that [M101 Nominees] had the right to suspend redemptions or capitalise interest; and

c. [M101 Nominees] placed google adverts advertising the [Core Notes] which resulted in the Mayfair 101 Group's webpage being the first web link when potential investors searched for 'term deposits'. I believe that these advertisements were aimed at investors such as the above, who were unable to distinguish between the product they were sold and an ordinary term deposit which they had searched for.

(Emphasis added.)

110 ASIC relies upon the fact that the liquidators were not provided with all the books and records of M101 Nominees and, at the time of providing their report to the Court, were awaiting further books and records from Mr Mawhinney: Provisional Liquidators' Report, [10].

111 ASIC relies upon the fact that Mr Mawhinney advised the liquidators that the accounts of M101 Nominees "did not accurately reflect the true financial position and performance of [M101 Nominees] and associated entities": Provisional Liquidators' Report, [109].

112 Mr Mawhinney has not filed any evidence which responds to the Provisional Liquidators' Report.

Investor in the Core Notes: Mr Booth

113 ASIC relied on the affidavit of Mr John Booth affirmed 22 July 2020. Mr Booth's affidavit was filed in the Mayfair Proceeding (being proceeding VID 228 of 2020). At the hearing of

this matter, ASIC's Counsel stated that it relied on the evidence filed in the Mayfair Proceeding (pursuant to order 5 of the orders made in this proceeding on 2 February 2021, which is referred to above). Mr Booth's affidavit recorded the following matters.

114 Mr Booth is 74 years of age. He has been retired since approximately 2005 and has a self-managed superannuation fund.

115 In November and December 2019 and January 2020, Mr Booth saw multiple advertisements for "Mayfair Platinum" over several weeks in The Australian and West Australian newspapers. Mr Booth spoke to a representative of "Mayfair Platinum", who advised Mr Booth that the Core Notes were "secured". Mr Booth deposes that he did not understand entirely what this meant and that the risks of the investment were not explained to him. Mr Booth deposes that he was told that he would receive the capital he invested at the end of the term of investment.

116 On 3 December 2019, Mr Booth received an email from the Mayfair 101 Group in relation to Mr Booth's enquiry about the Core Notes product. This email attached a brochure and application form, as well as the "Mayfair 101 Corporate Brochure". The email stated:

> I have attached the information requested about our Secured Term product – [the Core Notes]. [The Core Notes are] *a dollar for dollar secured* and asset backed Note offering. A popular option for those seeking the added comfort of *complete security* to their investment.
>
> (Emphasis added.)

117 The benefits noted were "Fixed interest rates of 4.95%-6.25% p.a.", "Secured dollar for dollar and asset backed", "Options ranging from 6 to 60 months" and "Dedicated Client Relationship Manager".

118 On 23 December 2019, Mr Booth received a copy of his application to invest $500,000 in the Core Notes for 60 months at an interest rate of 6.25%. That application was signed by Mr Booth on 4 December 2019, and counter-signed by Mr Mawhinney on 23 December 2019. On 15 January 2020, Mr Booth received a copy of a "Note Certificate" concerning his investment of $500,000 for a term of 60 months at an interest rate of 6.25% per annum. Mr Mawhinney signed this Note Certificate on behalf of M101 Nominees.

119 On 29 January 2020, Mr Booth received a copy of his application to invest a further $250,000 in the Core Notes for 60 months at an interest rate of 6.25%. That application was signed by Mr Booth on 24 January 2020, and counter-signed by Mr Mawhinney on 29 January 2020. On 31 January 2020, Mr Booth received a copy of a "Note Certificate" confirming his investment

of $250,000 in the Core Notes for a term of 60 months with an interest rate of 6.25%. That Note Certificate was signed by Mr Mawhinney on behalf of M101 Nominees.

120 As to those investments, Mr Booth deposes as follows:

> I invested a total of $750,000 with Mayfair in the [Core] Notes product for a term of 60 months (5 years) with an interest rate of 6.25%. The investments were made via my self-managed superannuation fund …
>
> The money was previously held in Commonwealth Bank and Macquarie Bank accounts for a year or more. My investment of $750,000 in the [Core] Notes represents approximately 30% of my investment portfolio. This estimate is based on the value of my investments pre-COVID 19.
>
> At the time I invested with Mayfair:
>
> (a) *I considered that my investment in the [Core] Notes was comparable to or similar to an investment in a term deposit, and had a similar level of risk to a term deposit. This is because Mayfair's advertising indicated to me that they were better than the banks.*
>
> (b) I did not know that the Australian Prudential Regulation Authority (APRA) did not oversee companies in the Mayfair 101 group.
>
> (c) I did not know about the Australian Government's Financial Claims Scheme, also known as the Government Bank Guarantee.
>
> (d) I did not know what a debenture was, or that the [Core] Notes was a type of financial product called a debenture. I thought I was investing in a bond, not a debenture.
>
> (e) I did not understand that there was a risk that I could lose my capital.
>
> (f) I did not understand what was 'secured' in relation to my investment.
>
> (g) I did not understand that Mayfair had the right to elect to extend the date for repayment of my capital, or the ability to suspend redemptions. *[I was] advised … that the investment was 'secured' and that I would receive my capital at the end of the term.*
>
> …
>
> In my discussions with [an M101 Nominees' representative], no reference was made to the purchase of Dunk Island or properties at Mission Beach. If investments in Mission Beach and Dunk Island had been mentioned to me, I would not have invested in the [Core] Notes. This is because in my opinion, these are not solid or viable investments, as it is too far from Perth, and I don't think many people would want to visit these places at present. In my opinion, Mission Beach is just a heap of sand. I did not consider that these investments would generate an income in the near future, as nobody is going to visit Mission Beach and Dunk Island for years, particularly in the COVID-19 environment.
>
> (Emphasis added.)

121 Mr Mawhinney has not filed any evidence which responds to Mr Booth's affidavit. I accept the evidence in Mr Booth's affidavit in its entirety.

Other matters in relation to the Core Notes

122 ASIC submits that, on the evidence, it is unlikely that Core Notes investors will be able to recover the full amount of their principal investment.

123 ASIC submits that the security trustee for the Core Notes, PAG Holdings, has sought to appoint receivers. However, after investigation, the nominated receivers determined that there was significant doubt about whether the available assets would even cover their fees. The proposed receivers declined the appointment: First Buckley Affidavit, [6.1(b)], [75], [96] (CB, Tab 2) and (CB, Tab 2.20). In this respect, an annexure to the First Buckley Affidavit is a letter to ASIC from the solicitors for the security trustee for the Core Notes dated 29 June 2020. That letter states:

> We confirm that the Security Trustee attempted to appoint Craig Shepard of KordaMentha as a Controller (receiver and manager) over the security that the Security Trustee holds under clause 12.2(a) of the General Security Deed Poll in order to protect the interests of [Core Notes] Noteholders …
>
> Unfortunately, Mr Shepard informed us on 26 June 2020 that he and his partners are not prepared to accept the appointment as Controller. This is because, after having recently undertaken further enquiries (including PPSR searches and property searches of the underlying Dunk Island and Mission Beach properties), Mr Shepard and his partners are concerned about the significantly reduced value of properties in Northern Queensland and the fact that NAPLA holds mortgages on all bar one of the underlying properties and holds a second ranking ALLPAAP to the Security Trustee (such that his appointment as a receiver and manager may trigger NAPLA to exercise its rights in relation to the security it holds leaving no net equity in the security held by our client's under the Security Trust Deed).
>
> Absent the directors of the Security Trustee providing personal indemnities and/or providing the Controller with funding (which they are not in a position to do), Mr Shepard and his partners have decided it is too commercially risky an appointment for KordaMentha to accept. Fundamentally, their concern is that there is insufficient equity in the properties to take the job 'on spec'. Mr Shepard also stated that he doubted whether any other competent insolvency practitioner would be happy to accept an appointment as a receiver (assuming they undertake [a] similar amount of research) in the current circumstances due to the commercial risks and uncertainty referred to above. We have confirmed Mr Shepard's view with Stephen Longley at PwC …

124 I accept ASIC's submission that, on the evidence, any return to Core Notes investors is unlikely.

125 I turn to consider the evidence regarding the M+ Notes.

The M+ Notes

126 The M+ Notes were debentures issued by M101 Holdings. ASIC relied on the following evidence in relation to the M+ Notes.

Representations in the M+ Notes brochure

127 A copy of the M+ Notes brochure was annexed to the affidavit of Mr Peter Hui affirmed 15 January 2021. The cover page of the brochure described the M+ Notes as a "term-based investment opportunity exclusively available to wholesale investors". The brochure further stated:

> **Tired of term deposits?**
>
> **Congratulations on taking the first step towards boosting the income-generating potential of your idle money.**
>
> Investing in our M+ [Notes] product is a smart and effective way of earning **competitive rates of return** whilst official interest rates are at record-lows.
>
> We invite you to invest in M+ [Notes] and be part of a **forward-thinking group** that is **driving positive change** in the financial services and investment industry.
>
> (Bold text in the original.)

128 The brochure contained the following table:

Current Rates

Investment Term	Fixed Interest Rate P.A.	March Promotion Fixed Interest Rate (P.A.) *(ends 31st March 2020)*
3 months	3.65%	–
6 months	4.75%	5.45%
12 months	5.45%	–
24 months	5.75%	–
36 months	6.00%	–
60 months	6.45%	–

These rates are exclusively available for wholesale clients investing in M+ Fixed Income.

129 The following text appeared below this table of "Current Rates":

> Mayfair Platinum is the manager of our M+ [Notes] product, which is issued by Mayfair 101 Holdings Pty Ltd (the Issuer). Investment funds raised under our M+ [Notes] product are used for ongoing capital management purposes across the Mayfair 101 group of companies, a **regulated international investment and corporate advisory group** with offices in Melbourne, Sydney and London.
>
> (Bold text in the original.)

130 The following "key features" of the product were listed in the brochure:

- No setup or maintenance fees
- Fixed interest rates
- Monthly interest payments
- $100k minimum investment
- Dedicated Client Relationship Manager
- Individual, Company, Trust & SMSF compatible
- Available Exclusively to Wholesale Investors
- Early redemption available (subject to liquidity and other applicable terms)[.]

131 The brochure contained a section titled "Frequently Asked Questions", which stated:

> **How can you pay fixed interest rates higher than the banks?**
>
> The interest rates we offer our investors are facilitated by the Mayfair 101 group's capital management strategy. The group carefully selects opportunities to invest in that provide strong yields, capital growth, and refinancing opportunities that enable us to support principle [sic] and interest repayments to our investors.
>
> **Is the Issuer a bank?**
>
> No. However, many M+ [Notes] investors have chosen to move away from the banks due to historically low interest rates on term deposits and savings accounts. We operate by accessing capital from third parties (our investors), paying our investors for access to that capital, and utilising that capital to grow the Mayfair 101 group.
>
> **Are my returns tied to the Issuer's investment performance?**
>
> No. The Issuer is obligated to pay the quoted rates of interest and principal on the M+ [Notes] product, regardless of the performance of its investments.
>
> …
>
> **What are the risks?**
>
> Investors should be mindful that, like all investments, there are risks associated with investing in our M+ [Notes] product. Risks to take into consideration include general investment, lending, liquidity, interest rate, cyber, related party transactions and currency risks.
>
> …
>
> **Can I withdraw my money out early if I need to?**
>
> Yes, although redemptions are subject to liquidity and other applicable terms. Please note this may be subject to a 1.5% early withdrawal and liquidity fee. Please provide 30 days' notice in writing for amounts up to $1m. For amounts above $1m simply email your Client Relationship Manager and they will advise a repayment schedule within 2 business days.
>
> **Is the M+ [Notes] product covered by the Australian Government's Financial Claims Scheme (FCS)?**
>
> The Australian Government's Financial Claims Scheme (FCS) (or 'Government

> Guarantee') doesn't cover investments made in our M+ [Notes] product. The Financial Claims Scheme has a limit of $250,000 per account holder per bank, and the banks have a bailout limit of just $20b per bank. Be mindful that bank investments above $250,000 aren't covered by the Financial Claims Scheme, which is a reason why M+ [Notes] is worth considering for larger investment amounts.

The M+ Notes deed poll

132 An affidavit of an ASIC solicitor, Ms Lisa Saunders, sworn 15 April 2020, was filed in proceeding VID 228 of 2020 (being the Mayfair Proceeding). As stated above, pursuant to orders made in this proceeding on 2 February 2021, evidence filed in the Mayfair Proceeding is evidence in this proceeding in relation to ASIC's application for injunctions against Mr Mawhinney. Annexed to that affidavit is a copy of the "Promissory Note Deed Poll" (**M+ Notes Deed Poll**) entered into by M101 Holdings "in favour of" M101 Holdings and "each Noteholder".

133 The M+ Notes Deed Poll has the following terms:

(a) M101 Holdings "has decided to issue unsecured, redeemable promissory Notes". "Each Note will belong to a particular Note Class, which specifies the Note's Face Value, Note Term, Maturity Date and Interest Rate". "The terms of issue of the Notes are as set out in" the M+ Notes Deed Poll: M+ Notes Deed Poll, Recitals.

(b) The M+ Notes Deed Poll provided that M101 Holdings "may, in its discretion, agree to the issue of a Note or a number of Notes as determined by [M101 Holdings] from time to time": M+ Notes Deed Poll, cl 3.1.

(c) The M+ Notes are "debt obligations of [M101 Holdings] owing under [the] Deed Poll and take the form of entries in the Register and are evidenced by Note Certificates": M+ Notes Deed Poll, cl 3.5(a). Each "entry in the Register constitutes a separate and individual acknowledgement to the relevant Noteholder of the indebtedness of [M101 Holdings] to that Noteholder": M+ Notes Deed Poll, cl 3.5(a). The "Notes are unsecured promissory notes": M+ Notes Deed Poll, cl 3.6.

(d) M101 Holdings could "only issue Notes to Noteholders who are sophisticated investors, professional investors or wholesale clients (as defined in the Corporations Act)": M+ Notes Deed Poll, cl 3.10(b).

(e) "Interest on the Monies Owing in respect of each Note shall be calculated daily on the balance of the Monies Owing, on the basis of an annual interest rate equal to the Interest Rate": M+ Notes Deed Poll, cl 4(a).

(f) "A Noteholder may notify [M101 Holdings] in writing that it requires all or a number of the Noteholder's Notes to be redeemed on the Maturity Date, by submitting a Withdrawal Notice": M+ Notes Deed Poll, cl 5.1(a).

(g) There were terms which allowed Noteholders to make an "early withdrawal request". There were terms which enabled M101 Holdings to make an "early repayment" to Noteholders.

(h) Clause 5.6 of the M+ Notes Deed Poll stated:

> (a) [M101 Holdings] may at any time, extend the Payment Date if:
>
> (i) [M101 Holdings], in its reasonable opinion, considers that it does not have sufficient Liquidity to fund the redemption;
>
> (ii) [M101 Holdings] has received multiple Withdrawal Notices in a short period which will impact its Liquidity; or
>
> (iii) [M101 Holdings] considers that if the redemption is paid on the Payment Date, it may affect [M101 Holdings'] Liquidity to pay future anticipated redemptions of other Noteholders' Notes.
>
> (b) Any extension of the Payment Date will be made until the time that [M101 Holdings] considers that it has sufficient Liquidity to pay the Monies Owing on the redemption of the Noteholders' Notes, and any other upcoming redemptions which [M101 Holdings] reasonably anticipates.
>
> (c) If [M101 Holdings] extends a Payment Date, [M101 Holdings] may, at its discretion, make part payments of the Monies Owing prior to the extended Payment Date.
>
> (d) Subject to clause 5.5(c) if the Payment Date is extended, then Interest under clause 4 will continue to apply to the balance of the Monies Owing, calculated from the original Payment Date until until [sic] such time as the Monies Owing are repaid in full.

134 The M+ Notes Deed Poll was executed by Mr Mawhinney on behalf of M101 Holdings.

Mr Hui

135 ASIC relied on an affidavit of Mr Peter Hui affirmed 15 January 2021. Mr Hui's affidavit recorded the following matters.

136 Mr Hui is 79 years of age. He retired in 1992. Mr Hui deposes that he does not have a lot of investment experience, but he does manage his own investments, being his superannuation.

137 At the end of 2019, Mr Hui was "looking for a product that was similar to a bank term deposit, but that had a higher interest rate, since bank interest rates were low". Mr Hui read about fixed term investments offered by other institutions, but came across "Mayfair Platinum" and submitted an enquiry on the "Mayfair Platinum website".

138 On 18 March 2020, Mr Hui invested $150,000 in the M+ Notes for a period of 6 months with a purported fixed interest rate of 5.45%. Mr Hui received a "Note Certificate" concerning this investment which was signed by Mr Mawhinney as director of M101 Holdings.

139 However, M101 Holdings did not inform Mr Hui that, seven days before Mr Hui invested in the M+ Notes, M101 Holdings had, on 11 March 2020, already implemented a "Liquidity Prudency Plan". In a response to ASIC dated 27 March 2020 by Quattro Capital Group Pty Ltd (**Quattro**) (being the Australian financial services licensee for M101 Nominees and M101 Holdings), Quattro stated in respect of the M+ Notes:

> On 11 March 2020, in view of the apparent onset of COVID-19 and its assessed likely impact on the Australian economy, and the issuers [sic] decision in that light to manage prudently its portfolio during this time (by seeking to enhance liquidity, regulate redemptions to preserve investor value, and carefully manage capital), M101 Nominees Pty Ltd [sic] decided to exercise its right under clause 5.6 of the UN Deed (and terms used here bear the meanings given to them in the UN Deed) to extend the Payment Dates relating to Notes reaching their Maturity Dates, until the time that the Company considers that it has sufficient Liquidity to pay the Monies Owing on the redemption of the Noteholders' Notes, and any other upcoming redemptions which the issuer reasonably anticipates.

140 This statement appeared under the heading "M+ Fixed Income". It refers to M101 Nominees. However, I take that to be an error because M101 Nominees was the issuer of the Core Notes, not the M+ Notes. M101 Holdings was the issuer of the M+ Notes.

141 Mr Hui was not told of this decision, which was taken seven days *before* Mr Hui's investment. Mr Hui's affidavit records the following:

> I thought I had invested in the [Core Notes], as opposed to the [M+ Notes]. This is because I wanted to invest in the product which was described as "secured" and as having "dollar-for-dollar security ... supported by first-ranking, otherwise unencumbered asset security". I understood that my investment … would be secured dollar-for-dollar by first registered mortgages.
>
> …
>
> I … received a "Mayfair 101 Group - Investor Update" email dated 5 May 2020 … That email stated that:
>
> [(a)] Mayfair had launched a new Australian Property Bond product "to provide investors with the opportunity to earn a fixed income return of 5.25-9.20% p.a. supported by first registered mortgage(s)" …;
>
> [(b)] "Given the impending onset of COVID-19, ***in early March 2020*** we implemented our Liquidity Prudency Policy in order to protect the investment our clients have made with the Mayfair 101 Group" …;
>
> [(c)] "Earlier this month based on forecasts at the time, we expected to be in a position to begin facilitating end of term redemptions and lift the Liquidity

> Prudency Policy by 30 April 2020. However, the action brought by ASIC in recent weeks has meant we must continue to implement the Liquidity Prudency Policy until further notice" …;
>
> [(d)] "Investors in our M+ [Notes] and [Core Notes] products will continue to earn their fixed interest rate on their investment. However, while we navigate the current period please be advised that monthly income distributions for investors that have opted to receive their income as payments (as opposed to capitalise/compound the interest), will receive their distribution payment within 30 calendar days of month end (rather than within 5 business days as normal). This is an interim precautionary measure to enable the Group to manage liquidity" …;
>
> [(e)] "Redemptions will be processed upon the Liquidity Prudency Policy being lifted. We conservatively expect this to be in place for no more than 90-180 days whilst we take steps to boost the liquidity profile of the Group, however, we are taking steps to see that this is achieved in a much shorter timeframe and will advise our investors accordingly" …; and
>
> [(f)] "early redemptions are not being processed at present" …
>
> After reading this update, I became aware that Mayfair had implemented the redemption freeze on 11 March 2020. I cannot now recall exactly how I became aware of this information, but I know that it was either from reviewing the Mayfair Platinum website, or reading ASIC's Media Release in relation to the court action regarding Mayfair's advertising.
>
> ***At the time of investing in the [M+ Notes], I was not aware, and was not informed by … my Relationship Manager at Mayfair …, or anyone else at Mayfair, that redemptions had been suspended on 11 March 2020***. I believe I should have been informed of the freeze on redemptions which was implemented on 11 March 2020, prior to my investment on 18 March 2020. ***Had I been aware of the redemption freeze, I would not have invested in the [M + Notes].***
>
> (Emphasis added.)

142 Mr Hui further deposes that, according to the "Note Certificate" issued to him concerning the M+ Notes he invested in, the maturity date for Mr Hui's investment was 16 September 2020. As at 15 January 2021, Mr Hui has been unable to realise his investment. There is no evidence before the Court which indicates that position has changed.

143 Mr Mawhinney has not filed any evidence which responds to Mr Hui's affidavit. I accept the evidence in Mr Hui's affidavit in its entirety.

144 Two matters can be noted concerning Mr Hui's evidence. First, Mr Mawhinney personally signed the "Note Certificate" which issued M+ Notes to Mr Hui, and which was provided to Mr Hui. That Note Certificate is dated 18 March 2020. Second, from 11 March 2020, Mr Mawhinney must have known that redemptions in respect of the M+ Notes were suspended pursuant to the relevant "Liquidity Prudency Policy".

145 In these circumstances, Mr Mawhinney accepted $150,000 from an M+ Notes investor, Mr Hui, without telling that investor that redemptions in respect of the M+ Notes product were suspended. That is highly misleading conduct. Had Mr Mawhinney told Mr Hui that the relevant redemptions had been suspended, Mr Hui would not have invested his $150,000 in the M+ Notes. In addition, the Mayfair 101 Group (being a group of companies controlled by Mr Mawhinney) also sent Mr Hui a separate email, promoting a different debt product, being the "Australian Property Bonds". I will return to this latter product later in these reasons.

Mr Wiggill

146 ASIC relied on an affidavit of Mr Theo Wiggill sworn 15 January 2021. Mr Wiggill's affidavit was filed in proceeding VID 228 of 2020, being the Mayfair Proceeding. As stated above, pursuant to orders made in this proceeding on 2 February 2021, evidence filed in the Mayfair Proceeding is evidence in this proceeding for the purposes of ASIC's application for injunctions in respect of Mr Mawhinney. Mr Wiggill deposed to the following matters.

147 Mr Wiggill is 75 years of age and has been retired since July 2006. Mr Wiggill deposes that he established a self-managed super fund which currently has assets of approximately $8.55 million. That super fund holds various types of assets and investment products.

148 Mr Wiggill saw an advertisement for "Mayfair 101" in the newspapers in or around September or October 2019. The interest rate being offered in the advertisement "got [Mr Wiggill's] attention". Mr Wiggill deposes that, after seeing the advertisement, Mr Wiggill spoke to a representative of "Mayfair Platinum" who arranged a meeting at offices on Collins Street, Melbourne. At that meeting, Mr Wiggill was introduced to Mr Mawhinney who spoke to Mr Wiggill for approximately 20 minutes. Mr Wiggill does not recall discussing any risks of the investment.

149 Mr Wiggill and his wife, Clare, decided to invest $200,000 in the M+ Notes for six months with an interest rate of 6.45% in Mr Wiggill and Mrs Wiggill's own names (that is, not through their self-managed super fund). In relation to this investment, Mr and Mrs Wiggill signed an application form which is dated 4 September 2019. That application form is countersigned by Mr Mawhinney. On 23 September 2019, Mr Wiggill received a "Note Certificate" issued by M101 Holdings in relation to this investment. That Note Certificate is signed by Mr Mawhinney.

150 On or around 2 October 2019, Mr and Mrs Wiggill submitted an application to invest another $100,000 in the M+ Notes product. They invested it in their own names (again, not through the relevant self-managed super fund) for six months with an interest rate of 6.45%.

151 Mr Wiggill deposes that, when he made these investments, he was not aware that the Australian Prudential Regulation Authority (**APRA**) "did not supervise or regulate Mayfair Platinum". Mr Wiggill was aware of the Australian Government's Financial Claims Scheme and Mr Wiggill thought that the Australian Government's Financial Claims Scheme applied to Mr Wiggill's investments in the M+ Notes. Mr Wiggill further deposes as follows:

> I thought that I would be able to get my money back when the investments matured, because it was a term deposit, or that I could extend the term if I wished, but nothing like that Mayfair may not be able to return it or that redemptions could be frozen. Not once did I receive paperwork, or have explained, the fact that Mayfair 101 could unilaterally elect to withhold [the] return of capital and monthly interest payments.
>
> I did not realise that there was a risk that I could lose my term deposit investments, or that there were risks with this investment. If I had known there were risks, I would not have invested. Proper fiduciary standards should have been in place to ensure that Mayfair 101 always had cash on hand to meet end of term capital obligations.
>
> …
>
> At the time of swearing this affidavit I have not received the interest distributions payable for May and June 2020, nor have I received the return of the [first investment of $200,000].

152 Mr Mawhinney did not file any evidence which responds to Mr Wiggill's affidavit. I accept the evidence in Mr Wiggill's affidavit in its entirety.

Mr Donald

153 ASIC relies on the affidavit of Mr John Donald sworn 21 December 2020. Mr Donald's affidavit was filed in proceeding VID 228 of 2020, being the Mayfair Proceeding. As stated above, pursuant to orders made in this proceeding on 2 February 2021, evidence filed in the Mayfair Proceeding is evidence in this proceeding for the purposes of ASIC's application for injunctions in respect of Mr Mawhinney. Mr Donald's affidavit deposes to the following matters.

154 Mr Donald is 71 years of age and is retired. Mr Donald first heard about Mayfair through advertisements in newspapers. The "interest rates being offered in those advertisements got [Mr Donald's] attention".

155 Mr Donald "made an online enquiry by way of Mayfair's website" and was contacted by a representative of "Mayfair". That representative did not discuss the risks of the M+ Notes with Mr Donald. Mr Donald deposes that he was aware that the M+ Notes were "not a bank deposit", but thought they were "secured by property mortgages". Mr Donald understood that the M+ Notes were "not covered by the Australian Government under the Financial Claims Scheme".

156 Mr Donald ultimately decided to invest $200,000 in the M+ Notes for six months with an interest rate of 6.45%. Mr Donald completed the relevant application form on 23 September 2019, which is countersigned by Mr Mawhinney. Mr Donald received a "Note Certificate" in relation to this investment in the M+ Notes. That Note Certificate is signed by Mr Mawhinney.

157 On 1 October 2019, Mr Donald invested a further $100,000 in the M+ Notes for six months at an interest rate of 6.45%. Mr Donald received a "Note Certificate" for that investment as well, and that Note Certificate is also signed by Mr Mawhinney.

158 Mr Donald deposes that he does not "recall being asked to provide a Sophisticated Investor Certificate", and does "not believe that [he] supplied one to Mayfair prior to making" these investments. That evidence is unchallenged. I accept the evidence in Mr Donald's affidavit in its entirety.

159 In these circumstances, ASIC submits that M101 Holdings accepted an investment from Mr Donald, without complying with the relevant rules relating to "wholesale investors". I accept that submission and so find.

Ms Campbell

160 ASIC relies on the affidavit of Ms Kerrie Campbell affirmed 21 August 2020. Ms Campbell's affidavit is another of the affidavits which was filed in proceeding VID 228 of 2020, being the Mayfair Proceeding. It is relied on in this matter pursuant to orders made in this proceeding on 2 February 2021, which provided that evidence filed in proceeding VID 228 of 2020 is evidence in this proceeding for the purposes of ASIC's application for injunctions against Mr Mawhinney. Ms Campbell deposed to the following matters.

161 Ms Campbell is 52 years of age and is currently employed as a Chief Information Officer. Between August 2019 and November 2019, Ms Campbell "saw advertisements for Mayfair in magazines". Ms Campbell was "interested in the advertisements as they appeared to offer a genuine alternative to the banks; being low risk investments that delivered a sustainable source

of income". Ms Campbell ultimately spoke to a representative of "Mayfair", who spoke to Ms Campbell about investing in the M+ Notes product. Ms Campbell deposes as follows:

> I cannot recall the exact words spoken by [the representative] on that call, but I recall [that representative] said words to the effect that:
>
> (a) Mayfair invested in non-ASX companies to reduce risk;
>
> (b) Mayfair lent money to companies, who then paid a premium back to Mayfair who then paid investors an interest rate of 6.45% p.a.;
>
> (c) if the companies that Mayfair had invested in got into trouble, Mayfair would get out of these investments to reduce its risk;
>
> (d) it is a very low-risk investment;
>
> (e) Mayfair's products were only available to wholesale investors;
>
> (f) the minimum investment amount was $100,000;
>
> (g) Mayfair was not guaranteed under the government's Financial Claims Scheme (FCS);
>
> (h) the FCS only guaranteed the first $250,000 in a bank; and
>
> (i) any extra money held in the bank beyond $250,000 was not guaranteed by the FCS and was not risk-free.
>
> …
>
> To me, the investment model of lending to companies sounded similar to banking. This, along with [the] statement to me that Mayfair was also taking on risk when investing, helped convince me to invest with Mayfair.

162 On 22 September 2019, Ms Campbell completed the application form to invest in the M+ Notes product. Ms Campbell applied to invest $400,000 for six months at an interest rate of 6.45%. Ms Campbell "initially only wanted to invest $100,000", but, after Ms Campbell's conversation with a Mayfair representative, Ms Campbell "felt confident investing more money with Mayfair".

163 The application form Ms Campbell submitted to M101 Holdings is countersigned by Mr Mawhinney. Ms Campbell also received a "Note Certificate" issued to her by M101 Holdings in relation to this investment. That Note Certificate is signed by Mr Mawhinney.

164 Ms Campbell deposes that, as at the date of her affidavit, Ms Campbell has not been repaid her principal investment or any monthly interest distributions.

165 Mr Mawhinney did not file any evidence which responds to Ms Campbell's affidavit. I accept the evidence in Ms Campbell's affidavit in its entirety.

166 I turn now to set out the evidence concerning the Australian Property Bonds.

The Australian Property Bonds

16 April 2020 orders

167 On 16 April 2020, I made several orders which restrained Mayfair Wealth Partners Pty Ltd, M101 Holdings, M101 Nominees and Online Investments Pty Ltd from using, in their promotional material, certain phrases (such as "bank deposit", "capital growth", "certainty", "fixed term", "term deposit", and "term investment"): see *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494. I also required that each of those entities add to their websites, and provide to each prospective new investor in either the M+ Notes or the Core Notes, a copy of a notice which included the following statement:

> The Mayfair 101 Group of companies reminds investors prior to investing in the products offered by the Mayfair 101 Group that:
>
> 1. Mayfair 101 is not a bank, and nor are any of the companies in the Mayfair 101 Group. Therefore, the Mayfair 101 Group is not regulated by the Australian Prudential Regulation Authority (APRA) and investment in its products is not covered by the Australian Government's Financial Claims Scheme (colloquially known as the 'Government Bank Guarantee' which covers deposits up to A$250,000 per depositor, per bank).
>
> 2. As with all investment products, there are risks in investing in the Mayfair 101 Group's products.
>
> 3. Investing in the products offered by the Mayfair 101 Group is not the same as depositing money in a term deposit offered by a bank. Investing in Mayfair 101 Group products has a higher level of risk compared to investing in a bank term deposit.
>
> 4. In certain circumstances, the Mayfair 101 Group can exercise the right to suspend some or all redemptions at the end of the fixed term. The Mayfair 101 Group exercised this right on 11 March 2020. As such, all redemptions are currently suspended until such time as management agrees to lift the suspension and process redemptions. Your investment in the products offered by the Mayfair 101 Group may also be subject to suspension of some or all redemptions at the end of the fixed term. This is a risk that you should take into account.

168 ASIC's evidence discloses the following further matters.

169 On 24 May 2020, Mr Mawhinney sent an email to, it appears, employees of entities within the "Mayfair 101 Group" of companies. The email stated:

> Team,
>
> Later today or tomorrow there will be some media reports in relation to the IPO Wealth Fund and its associated entities that form part of the Mayfair 101 Group. I am providing an update ahead of time so you have some background in relation to the circumstances.

On Friday the trustee for the IPO Wealth Fund, Vasco Investment Managers, appointed a receiver to IPO Wealth Holdings Pty Ltd and its various special-purposes vehicles (SPV's – i.e. IPO Wealth Holdings No 2 - No 17) …

…

Restructuring Plan

The fact that Vasco has proactively made this decision without consultation now places us in a strong position to use this as a catalyst for further restructuring in the Group. The impact of COVID, then ASIC's proceedings, and now Vasco's decision, give us a sound basis for undertaking further restructuring *to enable* the Group to emerge with a simplified structure and also *eliminate the current ASIC proceedings*.

At this stage we are evaluating a course of action that will entail:

1. … Placing the 4 entities that ASIC has proceedings against into Voluntary Administration – this is an outcome ASIC is likely seeking from the proceedings anyway, and the VA process would immediately bring this to an end.

2. … Transferring Mayfair Platinum's investors (both secured and unsecured debenture holders) into a NewCo to preserve their entitlements (we can do this by providing investors notice in writing, without needing to seek their permission) …

3. … Transferring the Security Trustee's … collateral that it manages on behalf of the secured debenture holders to NewCo to preserve investor entitlements (the security is over the units of the unit trusts that hold the Mission Beach assets including Dunk Island)

We are aiming to be in a position to do this within 7-14 days to keep it in close succession to the media attention we are likely to have this week in relation to IPO Wealth.

…

Overarching Objectives

Through this restructuring process we will be seeking to achieve the following key objectives:

* Preserve value for Mayfair Platinum's investors

* *Diminish ASIC's attention on the Group*

* Protect our assets from recourse from receivers where practical

* *Enable our new initiatives to be launched without scrutiny*

* Boost the liquidity profile of the Group

* Clear creditors in a timely manner

* Minimise the media interest on the Group

Our new initiatives are progressing well and will enable us to continue our investment capabilities through two separate brands. The restructuring will be focused on ensuring these are successes in their own right, with Mayfair 101 being merely a shareholder and a consultant to develop the initiatives. They are both focused on developing our

interests in real estate and business credit, and will provide a significant liquidity boost to the Group. We expect to start to see the benefits of this from July onward.

(Emphasis added.)

170 Pausing there, I find that, as at 24 May 2020, Mr Mawhinney had three relevant objectives. First, "eliminat[ing] the current ASIC proceedings". Second, "[d]iminish[ing] ASIC's attention on the Group". Third, "[e]nabling … new initiatives to be launched without scrutiny".

171 On 15 June 2020, the evidence filed by ASIC shows that Mayfair Wealth Partners Pty Ltd changed its name to "Australian Income Solutions Pty Ltd". Mr Mawhinney remained the company's sole director.

172 On 19 June 2020, the email address "invest@australianpropertybonds.com.au" sent an email to various persons: see First Buckley Affidavit, Annexure "DB60" and an annexure to the affidavit of Mr Richard Rouse affirmed 19 November 2020 (I will return to Mr Rouse's affidavit below). The email had the subject line "Investment opportunity – 11 days left". That email stated:

173 The email continued:

Boost the income potential of your investment portfolio

In the midst of COVID-19 there are significant opportunities for investors seeking meaningful income, regular returns, peace of mind and the security of Australian real estate. Increased demand for credit via the non-bank finance sector is providing the ability for investors to fill the void left by the banks, and to benefit from emerging opportunities by supporting Australian businesses.

Current offer

Australian Property Bonds are providing qualified investors with the ability to boost the income of their investment portfolio with the following opportunities to invest by

making loans directly to property-owning entities, supported by first mortgage security[.]

174 The email then included the following table:

175 The fine print of the email stated that it was a "communication … published by Australian Income Solutions Pty Ltd (t/a 'Australian Property Bonds')".

176 On 21 June 2020, Mr Mawhinney sent a further email to various addressees, which stated:

> … We have had over *700 enquiries* totalling *over $100m* for our property bond product in the past few weeks (*we are getting around 20-30 new enquiries per day*). These leads are now starting to convert as of last week which is steadily *improving the Group's liquidity position. It is also enabling us to re-finance Napla's property-by-property [sic], thereby improving the Security Trustee's position further.*
>
> The Security Trustee Report will be updated to reflect this new funding and corresponding reduction in the Napla and Family Island Group facilities as we re-finance individual properties (including the 3 separate parcels on Dunk Island which we can now pay down individually under the Variation Agreement).
>
> …
>
> *Based on current estimates we are likely to be in a position to begin processing redemptions again for [Core Notes] investors* within the next 6-8 weeks, which is in line with the 3-6 month expectation we set with our investors in April this year.
>
> We also expect to get distributions back on track in the next 2 weeks, well within the 45 business day timeframe provided for under the Deed Poll.
>
> In short, despite the short term challenges we have had to deal with, things are looking up for us, our investors, our overall investment in Mission Beach and Dunk Island … Our strategy to turn the Group around is in progress and is working …
>
> (Emphasis added.)

177 Two matters should be noted about this email. First, it is tolerably clear that the Australian Property Bonds product, in a short period of time, was in a position to raise in the order of $100 million from approximately 700 enquiries.

178 Second, it is clear that the funds raised by way of the Australian Property Bond product would be used to "improve[e] the Group's liquidity position", "enabling [the] re-finance [of] Napla's [loan] property-by-property" and the "processing [of] redemptions again for [Core Notes] investors". However, there was nothing in the Australian Property Bonds promotional material which indicated that the funds raised via the Australian Property Bonds would be used to pay investors in a different product (being the Core Notes product), or to "improve the Group's liquidity position" or to repay borrowings that certain entities had received from a third party. As a consequence, I find that the representations made to potential Australian Property Bonds investors were highly misleading.

179 It can be readily inferred that, if not restrained, Mr Mawhinney would continue to engage in conduct of this type.

180 ASIC submits that this email evidences Mr Mawhinney's capacity to raise substantial funds quickly by way of marketing campaigns. ASIC submits that it takes time for suspect financial products to come to ASIC's attention, and then there is further time required to investigate, obtain injunctions or appoint liquidators (as appropriate). ASIC submits that, by the time these various steps have been taken, there exists a high likelihood that it can be either too late to recover funds for investors or the value of investments has substantially deteriorated. I agree.

181 ASIC also submits that the "Australian Property Bonds" product was a scheme that was essentially the same as the Core Notes product, and was designed to avoid the consequences of the orders of this Court made on 16 April 2020 (referred to above). I agree. On the evidence, it is open to infer, and I do infer, that the "Australian Property Bonds" product was an attempt by Mr Mawhinney to circumvent the orders of this Court, which restrained Mayfair Wealth Partners Pty Ltd, M101 Holdings, M101 Nominees and Online Investments Pty Ltd from using the phrases "bank deposit", "capital growth", "certainty", "fixed term", "term deposit", and "term investment", and required that the relevant Mayfair websites publish the notice that is referred to above. I will return to this matter later in these reasons.

Mr Rouse

182 In respect of the Australian Property Bonds, ASIC also relied on the affidavit of Mr Richard Rouse dated 19 November 2020. Mr Rouse is 84 years of age. Mr Rouse deposes to the following matters.

183 On or around 15 June 2020, Mr Rouse received a marketing email about "Australian Property Bonds" from the email address "invest@r.com.au", with the subject "Latest Fixed income opportunities". On 16 June 2020, Mr Rouse received an email from an "Investor Relations Manager" of Australian Property Bonds. That email stated:

> … We are providing … investors introductory opportunities featuring a fixed rate of 7.95% p.a for a 2-year or 9.20% for a 5-year minimum term, with the peace of mind and surety of first mortgage security.
>
> The key features of our offering are:
>
> - Fixed Rate of Interest;
> - Regular Monthly Coupon Payment - Distribution and/or Reinvestment option available;
> - Dedicated Investor Relationship Manager;
> - Registered First Mortgage Security; and
> - Initial Minimum Investment $100,000 wholesale investors only.

184 On 19 June 2020, Mr Rouse received an email from "invest@australianpropertybonds.com.au" with the subject "Investment opportunity – 11 days left". That is the same email which was sent to various other persons, and which I have referred to above: see First Buckley Affidavit, Annexure "DB60" and annexure "RFLR-9" to the affidavit of Mr Richard Rouse affirmed 19 November 2020.

185 On 26 June 2020, Mr Rouse advised Australian Property Bonds that he had posted a completed application form and cheque for an investment of $100,000. Mr Rouse advised that he was concerned that the investment may not reach Australian Property Bonds within the 11-day time period referred to in Australian Property Bonds' email to Mr Rouse on 19 June 2020. Mr Rouse was concerned about the timing of the cheque reaching Australian Property Bonds because there was "a promotional rate of interest that expired on 30 June 2020".

186 On 26 June 2020, Mr Rouse received an email from Australian Property Bonds which stated:

> I have discussed with my Managing Director, your situation and he has advised that we are more than happy to keep the interest rate open to you although the cheque may clear later than the 30th of June.

187 To recall, the evidence filed by ASIC shows that the sole director of Australian Income Solutions Pty Ltd (trading as "Australian Property Bonds") is Mr Mawhinney.

188 Mr Rouse deposes that he did not hear anything from Australian Property Bonds about his investment. As a consequence, Mr Rouse became concerned. Mr Rouse reported the matter to the police.

189 Mr Rouse deposes that:

> No one at Australian Property Bonds has contacted me. As at the date of signing this affidavit, I still have not received any information about my investment, nor have I received any interest payments for my investment.

190 I accept the evidence in Mr Rouse's affidavit in its entirety.

191 ASIC submits that the Australian Property Bonds product, and the experience of investors like Mr Rouse, is highly problematic and inappropriate conduct. ASIC submits that this conduct involved a company controlled by Mr Mawhinney selling products which were said to be a fixed, secured, mortgage investment, and then not communicating with investors, not responding to inquiries, not making payments of interest, and not sending any receipts or accounts in respect of the investment. ASIC submits that the conduct involved time-pressured marketing that was issued after Mayfair Wealth Partners Pty Ltd was restrained by the orders of this Court dated 16 April 2020 (which I have referred to above). ASIC submits that those circumstances provide a further basis for making injunctions of the kind ASIC seeks against Mr Mawhinney, in order to protect Australian investors. I agree. I will return to these matters later in these reasons.

Other evidence relied on by ASIC in respect of the various funds

192 ASIC relies upon the evidence that the Mayfair 101 Group owes approximately $211 million to investors who invested in its various products, being the Core Notes, M+ Notes, IPO Wealth Fund, IPO Capital and the Australian Property Bonds, as follows:

	Amount Owing	**As at date**
IPO Capital	$1,354,833	30 September 2020
IPO Wealth Fund	$79,062,394	6 November 2020
The M+ Notes	$68,981,286	30 March 2020
The Core Notes	$61,788,648	24 September 2020
Australian Property Bonds	$200,000	1 July 2020

	Amount Owing	As at date
Total	**$211,387,161**	

193 This table is taken from the Third Buckley Affidavit at [83] (CB, Tab 9). The table was prepared by Ms Buckley. It was referred to and extracted in ASIC's written submissions in this proceeding. Mr Mawhinney has not sought to challenge the figures in this table or contend that they are inaccurate. I find that approximately $211 million is owed to investors in the five funds referred to in the table above.

Evidence relied on by ASIC as to Mr Mawhinney's role

194 I find on the evidence relied upon by ASIC that Mr Mawhinney, as the sole director and controlling mind of the entities which offered the Core Notes, M+ Notes, Australian Property Bonds, IPO Capital and the IPO Wealth Group products, continued to seek to raise funds from investors after the "decision to implement the Liquidity Prudency Plan" was made on or around 11 March 2020, without disclosing that critical fact to investors and that, as a result, capital repayments were "suspended". In this regard, ASIC relied on the evidence of Mr Hui and Mr Rouse (referred to above) which I accept: see the affidavit of Mr Peter Hui affirmed 15 January 2021 at [11], [17], [18]-[19], [24] (CB, Tab 5); and the affidavit of Richard Rouse dated 19 November 2020 (CB, Tab 3). I find this conduct was undertaken by the corporate entities as described above and was done with the knowledge of Mr Mawhinney and was highly misleading conduct.

Other matters referred to by ASIC

195 ASIC also relies upon the evidence that, even after ASIC put Mr Mawhinney on notice of the need to obtain a financial services licence or authorisation, Mr Mawhinney continued to raise and retain funds using a company that did not have such licence or authorisation and failed to transfer the investments to a company that was so authorised. In this regard, ASIC relies on the evidence of Mr Egan and Mr Hicks (who were investors in the scheme known as IPO Capital, and are referred to above): see affidavit of Mr Kieran Egan sworn 25 November 2020; and affidavit of Mr Jordan Hicks affirmed 15 January 2021. ASIC also relies on the Third Buckley Affidavit at [21]-[61]. I have referred to the evidence of Mr Egan and Mr Hicks above. Mr Mawhinney has not filed any evidence which responds to or contests the evidence of Mr Egan and Mr Hicks. I accept the unchallenged evidence of Mr Egan and Mr Hicks. ASIC also points to the fact that these two investors, Mr Egan and Mr Hicks, should not have

been investing in the financial products as they were not wholesale investors. I agree and so find.

196 ASIC relies on the evidence in this proceeding and in proceeding VID228 of 2020 (being the Mayfair Proceeding). ASIC submits that there is ample evidence in both proceedings that the products offered by the companies (of which Mr Mawhinney was the sole director and ultimate beneficiary) were targeted to investors who were not sophisticated or experienced and who invested, in some cases, a good deal of their life savings or retirement funds. I agree and so find.

197 By way of example:

(a) Mr Booth's affidavit affirmed 22 July 2020 (referred to above) discloses that Mr Booth is 74 years of age and is retired. Mr Booth invested $750,000 in the Core Notes, which represented "approximately 30% of [Mr Booth's] investment portfolio". Mr Booth deposes that he did not understand what a debenture was or "what was secured" in relation to the Core Notes.

(b) Mr Hui's affidavit affirmed 15 January 2021 (referred to above) discloses that Mr Hui is 79 years of age and is retired. Mr Hui invested $150,000 in the M+ Notes. Mr Hui deposes that, while he manages a self-managed superannuation fund, he does not "have a lot of investment experience".

(c) Mr Theo Wiggill's affidavit sworn 15 January 2021 (referred to above) records that Mr Wiggill is 75 years of age and is retired. It is apparent from Mr Wiggill's affidavit that the $300,000 Mr Wiggill and Mr Wiggill's wife invested in the M+ Notes represented approximately 15% of the wealth held personally by Mr Wiggill and Mr Wiggill's wife (which is separate from the wealth held in their self-managed superannuation fund).

(d) Mr John Donald's affidavit sworn 21 December 2020 (referred to above) discloses that Mr Donald is 71 years of age and is retired. Mr Donald thought his investment in the M+ Notes was a "lower risk investment" and was "more along the lines of a corporate bond type of investment backed up by property mortgages".

(e) Mr Richard Rouse's affidavit affirmed 19 November 2020 (referred to above) records that Mr Rouse is an 84-year-old retiree. Mr Rouse invested in the Australian Property Bonds product.

198 I find, on the evidence ASIC has filed, that there have been no capital repayments made to investors since 11 March 2020, being the date when the "Liquidity Prudency Policy" was implemented. Mr Mawhinney has not put forward any evidence to suggest that any future payments will be made to investors.

199 In this respect, ASIC relies on the evidence, which I accept, that:

(a) in relation to approximately $79 million owing to investors in the IPO Wealth Fund, the liquidators have reported that a full return to creditors is unlikely, and there will be a substantial shortfall to the relevant trustee: Affidavit of Hamish MacKinnon sworn 23 November 2020, Annexure "HAM-3": Dye & Co Report dated 27 August 2020 (CB, Tab 4.3, page 2348);

(b) in relation to approximately $61 million owing to investors in the Core Notes, the liquidator estimates a "nil return" to Core Note noteholders: Provisional Liquidators' Report at [10] (CB, Tab 10, page 3020);

(c) in relation to approximately $65 million owing to investors in the M+ Notes, the liquidator (for the Core Notes) states that the M+ Notes noteholders are unlikely to receive any return: Provisional Liquidators' Report at [1], [52(d)(iv)], [58] and [75(b)] (CB, Tab 10, pages 3019, 3035, 3036 and 3038). At [75(b)] of the Provisional Liquidators' Report, the liquidators state "the M+ [Notes] noteholders who advanced funds to M101 Holdings are unlikely to receive any return".

200 In addition to that evidence, in the course of the hearing of this matter on 9 March 2021, I had a relevant exchange with Mr Mawhinney's Counsel in respect of Mr Rouse's investment in the Australian Property Bonds, which is recorded in the transcript as follows:

> HIS HONOUR: So what has happened to [Mr Rouse's] money?
>
> MR NEWLAND: … The evidence is that his check [sic] was cashed, that he was not brought on formally as an investor. That's the state of the evidence …
>
> HIS HONOUR: Well, that – so the state of the evidence as you've just put it to me means that Mr Rouse doesn't have the benefit of a first-ranking mortgage security.
>
> MR NEWLAND: That's right …
>
> HIS HONOUR: One thing I do know … [as] you quite properly conceded is that … Mr Rouse sent his cheque in, the cheque was banked, and Mr Rouse hasn't heard anything since [from Australian Property Bonds.]
>
> MR NEWLAND: That's correct … That is, I have to say – that is unsatisfactory.
>
> HIS HONOUR: … unsatisfactory wouldn't be the adjective I would use.

…

> HIS HONOUR: What about the evidence of Mr Rouse? … The fact that his cheque was banked, the fact that he's received no interest, the fact that he's not able to redeem the money, the fact he doesn't have a first mortgage; what about those facts?
>
> MR NEWLAND: Well, nobody's receiving redemptions and interest at the moment, because all of that's suspended.
>
> HIS HONOUR: Yes.
>
> MR NEWLAND: And, in relation to the cashing of that cheque, I've already said all I can say about that, your Honour. That's most unfortunate … to put [it] in mild terms.

201 ASIC submits that Mr Mawhinney is, and at all times was, the sole director and secretary of M101 Nominees. M101 Nominees is part of a broader group of companies (the Mayfair 101 Group) with a common director, Mr Mawhinney. I accept ASIC's submission and so find. As will be apparent, the Mayfair 101 Group raised money through various investment products, and used that money to acquire real estate and invest in private equity ventures, often indirectly through loans to related entities.

202 ASIC refers to the orders made in the Mayfair Proceeding (proceeding VID 228 of 2020) on 16 April 2020 (referred to above), which restrained Mayfair Wealth Partners Pty Ltd, M101 Holdings (the issuer of the M+ Notes), M101 Nominees and Online Investments Pty Ltd (t/as Mayfair 101) from using certain phrases in relation to advertisements related to those entities' marketing, and also required those entities to add certain notices on their websites and provide the notices to prospective investors: *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494.

203 ASIC relies on evidence, which I accept, that, prior to the grant of the interim injunction on 13 August 2020 in this proceeding, Mr Mawhinney expressed an intention to restructure the Mayfair 101 Group, create a new company and transfer investors from current companies to the new company. Mr Mawhinney also stated that one of the objectives of the restructure process was to "[p]rotect our assets from recourse from receivers where practical": First Buckley Affidavit, [145] and Annexure "DB61" (CB, Tab 2).

204 ASIC relies on evidence, which I accept, that shows representations were made to investors in (at least) the M+ Notes to the effect that distribution payments may be "restored", in circumstances where it was and remains unlikely that investors would in fact recover funds invested: First Buckley Affidavit, [152] (CB, Tab 2). In this respect, ASIC referred to the following email from Mr Mawhinney to various investors dated 11 July 2020:

> I am writing to you to provide an update on your investment with the Mayfair 101 Group. It has been a busy few weeks indeed.
>
> Our team continues to work around the clock to deliver on your interest and redemption payments in a timely manner. We acknowledge that the recent delays may have made this an unsettling and challenging period for you, however we remain committed to managing your investment in a diligent and careful manner.
>
> We are executing a plan which is aimed at lifting our Liquidity Prudency Policy, whilst preserving the value of the underlying assets. It will not happen overnight, however we are making solid progress towards this objective.
>
> A high priority we are also working on is to restore distribution payments to their normal schedule …
>
> There continues to be a strong level of interest in investing the Mayfair 101 Group, which is a fundamental component of improving the Group's liquidity position. The strategy we are working on is aimed at strengthening our foundation and delivering tangible outcomes for our investors and the initiatives we support …

205 ASIC relies on evidence, which I accept, that the books and records of most if not all of the relevant companies are in disarray, a fact admitted by Mr Mawhinney, and that they do not reflect the true position of the companies. The Provisional Liquidators' Report at [109] stated that Mr Mawhinney had "advised that the accounts of [M101 Nominees] and a number of associated entities did not accurately reflect the true financial positon and performance of [M101 Nominees] and associated entities". The report of the liquidators of the IPO Wealth Group (referred to above) also stated that the IPO Wealth Group failed to produce any signed financial statements for the years ended 30 June 2018 and 30 June 2019, and Mr Mawhinney gave evidence in a public examination that the accounts of the IPO Wealth Group should not be relied upon. Mr Mawhinney gave evidence that a "Quarterly Investment Portfolio Summary" was the IPO Wealth Group's "primary accounting document", but the liquidators noted that this summary "has few working papers and does not appear to have been produced from a properly maintained set of books of account".

206 ASIC relies on evidence, which I accept, that the investment schemes promoted by Mr Mawhinney have transferred substantial funds overseas, including to the British Virgin Islands. In this regard, ASIC relied on the "Receivers and Managers Report dated 28 May 2020" (CB, Tab 4.1) concerning the IPO Wealth Group. This referred to the "Accloud PLC" transaction as follows:

> Accloud PLC is an entity registered in the United Kingdom. The company conducts a software development business and is seeking to commercialise the same primarily through distribution in developing countries, in particular, India.
>
> …

On 30 August 2019, Accloud PLC issued to Companies House notice of resolutions pertaining to an intention for the Company to trade on the AIM market of the London Stock Exchange …

The Accloud PLC Director's report dated 27 September 2019 … included in the financial accounts to 30 March 2019, stated that:

> The Group is in the process of signing a contract with a major player infrastructure provider in India for customers that over five years would represent $5bn of revenue.

According to a statement as at 5 January 2020 filed with Companies House, Accloud PLC had issued 169,305,020 shares at 10p each for a total capitalisation of £16,930,502 …

On 27 February 2020, Accloud PLC reported through its website that it had entered a partnership agreement with the Federation of Industries and Associations ("FIA"), the leading representative trade body in the state of Gujarat, India … The Agreement would guarantee revenue for Accloud PLC through the sale of 150,000 prime licences and 250,000 mobile licences both in the first two years.

…

It appears from documentation we have seen that the [IPO Wealth Group's] Accloud PLC investments were transferred to *101 Investments Ltd, a British Virgin Islands company associated with Mahwinney*, in January 2019[,] on vendor terms for a value of €12, 156,310.61 . It appears that this sum has been treated as part of [a] $100 million facility agreement … which is not repayable for at least 15 years.

This has an obvious detrimental effect on cash flow.

This transaction was documented on *4 October 2019* by way of a share sale agreement, with the transfer of shares being effective on *30 January 2019 … The effect was that any benefit in the increase in the value of the shares after 30 January 2019 was transferred to 101 Investments Ltd to the detriment of the [IPO Wealth Group]*.

…

IPO Wealth reported to Vasco Trustees on a regular basis with an 'Investment Portfolio Summary'. From the end of January 2020, the [IPO Wealth Group's] equity interests in Accloud PLC were listed as having Nil value. The changes may be summarised as follows:

- As at 31 December 2019, the Investment Portfolio Report recorded inter alia: Equity Investment by IPO Wealth Holdings No 3 Pty Ltd, IPO Wealth Holdings No 6 Pty Ltd and 101 Investments Limited in Accloud PLC with carrying values totalling $14,892,632.39.
- As at 31 March 2020, the Investment Portfolio Report recorded inter alia: Equity Investments in Accloud PLC with a carrying value of $NIL.

(Emphasis added.)

207 This report also referred to the "Paymate India" transaction as follows:

> Paymate India is an entity registered in Mumbai, India. It conducts a business as a "business to business" digital payment solution provider predominantly throughout India.

> According to a letter from Mawhinney to Vasco dated 5 May 2020 …, two investments in Paymate India were made by the [IPO Wealth Group] and a third investment was made by *101 Investments Ltd, using loan funds from the [IPO Wealth Group]*.
>
> …
>
> The background to the concern for the Paymate India investment transfer or write-down is as follows:
>
> - As at 31 December 2019, the Investment Portfolio recorded: Equity Investment by IPO Wealth Holdings Pty Ltd in Paymate India with a carrying value of $3,686,610.46; and Equity Investment by 101 Investments Limited in Paymate India with a carrying value of $3,095,553.09;
> - As at 31 March 2020, the Investment Portfolio Report provided: Equity Investment by IPO Wealth Holdings Pty Ltd in Paymate India with a carrying value of $3,686,610.46; and Equity Investment by 101 Investments Limited in Paymate India with a carrying value of *$NIL*.
> - It should be noted that 101 Investments Limited is not a company owned by [the IPO Wealth Group].
>
> (Emphasis added.)

OPENING SUBMISSIONS

208 There were detailed opening submissions made by each of ASIC and Mr Mawhinney. I have set out below a summary of those submissions.

ASIC'S written opening submissions

209 In addition to the submissions already referred to above in outlining the evidence relied on by ASIC, ASIC made the following further submissions.

210 ASIC submits that s 1324 of the *Corporations Act* empowers the Court to make orders (including granting injunctions) to stop a party from engaging in conduct that is, or may, constitute a contravention of the *Corporations Act*. ASIC submits that the considerations to be taken into account (for the purpose of both interim and final injunctive relief) fall under the broad question of whether the injunction would have some utility or would serve some purpose within the contemplation of the *Corporations Act*.

211 ASIC submits that the grant of an injunction pursuant to s 1324 does not require an applicant to establish a contravention of the *Corporations Act*: citing *Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd* [2016] FCA 292; 111 ACSR 638 (***ASIC v Macro Realty***) at [23].

212 ASIC submits that the relevant principles were summarised by White J in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234; 93 ACSR 189 at

[622] citing *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; (2002) 42 ACSR 605 at [36]. ASIC submits that the relevant principles are threefold. First, the jurisdiction which the Court exercises under s 1324 is statutory and not traditional equitable jurisdiction. Second, the Court is not confined by the considerations that would apply if it was exercising such equitable jurisdiction. Third, the Court should consider whether the injunction will have some utility or will serve some purpose manifested by the *Corporations Act*. Relatedly, the Court should give greater weight to the question of whether the injunction will serve a purpose contemplated by the *Corporations Act* when ASIC is the applicant for relief.

213 ASIC submits that the grant of an injunction under s 1324 marks the Court's disapproval of the relevant conduct and operates as a deterrent to others: citing *ASIC v Macro Realty* at [54].

214 ASIC submits that s 1101B of the *Corporations Act* empowers the Court to make orders (including injunctions) in respect of contraventions of Chapter 7 of the *Corporations Act* if, in the opinion of the Court, it is desirable to do so: citing *ASIC v Macro Realty* at [55].

215 ASIC submits that the permanent restraint it seeks will have utility and serve a purpose manifested by the *Corporations Act* by preventing Mr Mawhinney from continuing to engage in the conduct that has put Australian investors' superannuation funds and investments at risk.

216 ASIC submits that its primary concern is that Mr Mawhinney will seek to use different corporate vehicles in the future to raise funds from investors using the same or similarly flawed schemes as the M+ Notes, Core Notes, and the IPO Wealth Group. ASIC submits that these three schemes all suffer from the same vices, namely that they are highly speculative and rely upon overly optimistic long-term valuations, but do not generate sufficient income to pay investors interest on funds or to meet capital repayments.

217 ASIC submits that Mr Mawhinney orchestrated the sale and marketing of products referred to as Australian Property Bonds after this Court made interim injunctions on 16 April 2020 in the Mayfair proceeding. ASIC submits that Mr Mawhinney commenced the sale and marketing of the Australian Property Bonds to circumvent the interim injunctions made in the Mayfair Proceeding (being proceeding VID 228 of 2020).

218 ASIC submits that the Australian Property Bonds product was advertised as having first registered mortgage security. However, for at least one investor, a title search of the relevant property reveals that, as at 12 November 2020, there is a first registered mortgage in favour of

Naplend Pty Limited and no registered mortgage in favour of the investor: Third Buckley Affidavit at [11]-[15] (CB, Tab 9); annexure "DB102" (CB, Tab 9.4); annexure "RFLR8" to Affidavit of Richard Rouse (CB, Tab 3.8).

219 ASIC submits that the Court may readily infer that the purpose of launching this new product, Australian Property Bonds, was to avoid the consequences of the interim injunctions made in the Mayfair Proceeding. ASIC submits that the evidence establishes that Mr Mawhinney sought to avoid the effect of the Court orders.

220 ASIC submits that the Court may readily infer that, without permanent injunctions in the form sought by ASIC, Mr Mawhinney will continue to commence and operate schemes that will result in significant risk to, and losses by, Australian investors. This inference, in ASIC's submission, was strengthened by the fact that Mr Mawhinney declined to give evidence.

221 ASIC submits that there is no evidence as to any legitimate business purpose that Mr Mawhinney would otherwise intend to engage in, in relation to fundraising through, and the marketing of, financial products.

222 In ASIC's submission, the Court can also readily conclude that it would not be sufficient for the protection of the public to permit Mr Mawhinney to engage in the sale and marketing of financial products on the basis that ASIC could pursue him for any further misconduct. That is so, in ASIC's submission, because of the speed with which Mr Mawhinney was able to raise and dissipate funds from investors which is demonstrated by Mr Mawhinney's own emails and the facts of this case (which are set out above).

223 ASIC referred to Mr Mawhinney's conduct in seeking to raise funds from investors after having implemented the "Liquidity Prudency Plan" and without disclosing to investors that capital repayments were "suspended". ASIC submits that was reprehensible conduct on the part of Mr Mawhinney.

224 ASIC submits that Mr Mawhinney continuing to raise and retain funds from investors, using companies which did not have a financial services licence, is of significant concern. ASIC submits that, even after ASIC's concern was raised with Mr Mawhinney, he failed to transfer investments to a company that did have a financial services licence and was authorised to receive such funds.

225 ASIC submits that the evidence in this proceeding, and in the Mayfair Proceeding, establishes that products offered by companies of which Mr Mawhinney was the sole director and ultimate

beneficiary were targeted to, and taken up by, investors who were not sophisticated or experienced and who invested most or all of their life savings or retirement funds.

226 ASIC submits that the evidence of the liquidators discloses that no capital repayments have been made since 11 March 2020 when the "Liquidity Prudency Plan" was implemented and that the liquidators have reported that there is likely to be either no return or a substantial shortfall in any return to investors.

227 ASIC submits that the evidence discloses serious concerns about Mr Mawhinney's management of the companies under his control. In particular, ASIC submits that the evidence establishes that the books and records of most, if not all, companies are in disarray and do not reflect the true position of the companies.

228 ASIC submits that Mr Mawhinney was the sole director and ultimate beneficiary of all companies involved in the M+ Notes, Core Notes and IPO Wealth Group products. ASIC submits that those companies made highly speculative investments which were not disclosed to investors. ASIC submits that the schemes were designed to benefit Mr Mawhinney at no risk to him and without in any way informing the investors of the true level of risk that they were facing.

229 ASIC submits that the three schemes identified have failed. They were, in ASIC's submission, inherently flawed and not capable of facilitating the repayment of amounts owed to investors without reliance on new investor funds. In this respect, ASIC submits that the three schemes have all the hallmarks of a "Ponzi scheme".

230 ASIC submits that the evidence establishes that, if not restrained, Mr Mawhinney will continue to raise funds from unsuspecting Australian investors at great risk that those funds will not be repaid. ASIC submits that the risk to investors cannot be ameliorated by ASIC's powers to take action after future contravening conduct is detected. This is so, in ASIC's submission, because of the speed with which Mr Mawhinney has been able to set up further investment schemes and it is likely that unsuspecting investors will lose money before ASIC can take any action. This, in ASIC's submission, is a very significant risk which amply justifies the permanent injunctions sought by ASIC.

231 For these reasons, ASIC submits that it is appropriate that Mr Mawhinney be permanently restrained from promoting any financial products (as defined in Division 3 of Chapter 7 and s 9 of the *Corporations Act*) and from raising funds through such financial products, including

through investments in the Core Notes, M+ Notes and Australian Property Bonds, and from transferring any assets acquired through funds raised by those financial products overseas to the detriment of investors.

Mr Mawhinney's written opening submissions

232 Mr Mawhinney opposes the grant of any permanent injunction against him. Mr Mawhinney contends that the Court should dismiss ASIC's application for the Injunction. Mr Mawhinney submits that the orders sought by ASIC are inappropriate to the facts of the case, when viewed as a whole. Mr Mawhinney further submits that the application of ASIC for injunctive relief is premature as the liquidation of M101 Nominees has not yet been finalised.

The Core Notes

233 Mr Mawhinney submits that investors in the Core Notes executed a Core Notes Deed Poll (referred to earlier in these reasons). Mr Mawhinney referred to the following terms in that Deed Poll.

234 First, in relation to security, the Deed Poll states at cl 3.6(b):

> **Certain parties will from time to time provide security** for the payment by [M101 Nominees] of amounts due in respect of the [Core] Notes, to be held by a security trustee on behalf of the Noteholders, **under the terms of the Security Trust Deed**.
>
> (The bold text represents those terms emphasised by Mr Mawhinney.)

235 Second, in relation to payments, the Deed Poll says the following at cl 5.5:

> Upon redemption of any Notes, [M101 Nominees] must pay the Noteholder the total amount of the Monies Owing. ... Payment will be due on the Payment Date **(or any extension to the Payment Date** made under clause 5.6).
>
> (Mr Mawhinney's emphasis.)

236 Mr Mawhinney also referred to cl 5.6, which provides:

> (a) Extension – **[M101 Nominees] may at any time, extend the Payment Date**.
>
> if:
>
> (i) insufficient liquidity – [M101 Nominees], in its reasonable opinion, considers that it does not have sufficient Liquidity to fund the redemption;
>
> (ii) multiple – [M101 Nominees] has received multiple Withdrawal Notices in a short period which will have a negative impact on its Liquidity; or
>
> (iii) future – [M101 Nominees] considers that if the redemption is paid on the Payment Date, it may affect [M101 Nominee's] Liquidity to pay

future anticipated redemptions of other Noteholders' Notes.

(b) Timing – Any extension of the Payment Date will be made until the time that **[M101 Nominees] considers that it has sufficient Liquidity** to pay Monies Owing.

(Mr Mawhinney's emphasis.)

237 Mr Mawhinney submits that investors in the Core Notes were provided with an offer document which consisted of a brochure and application form. Mr Mawhinney submits that the Core Notes offer document describes the Core Note as "[a] secured, asset-backed, term-based investment opportunity exclusively available to wholesale investors".

238 Mr Mawhinney submits that the Core Notes offer document describes the security arrangements as follows:

> The [Core Notes] product is secured by a pool of assets in respect of which first-ranking, registered security interests have been granted. The assets are otherwise unencumbered, and are made up of **Australian real estate, assets held by Mayfair 101 Group entities, and cash from investors** held in the Issuer's dedicated M Core Fixed Income bank account. Such cash will only be used where there is dollar-for-dollar secured asset support.
>
> (Mr Mawhinney's emphasis.)

239 Mr Mawhinney submits that the offer document describes three compliant classes of assets that can be used to secure investors' funds: first, Australian real estate, second, assets held by Mayfair 101 Group entities, and third, cash from investors.

240 Mr Mawhinney submits that the security for the Core Notes was managed by a third-party trustee appointed pursuant to the terms of the Security Trust Deed (which is referred to earlier in these reasons). The Security Trust Deed contains at Schedule 1 a description of the permissible security. The description mirrors what is written in the offer document with four separate types of property being permissible security: cash, real estate, a category described as "specific assets", and a category descried as "general assets". Specific assets and general assets are defined as follows:

> specific assets – specific, identifiable, tangible assets, with or without a serial number, owned by a member of the Company Group, in respect of which a first (1st) ranking Security Interest granted under a specific security agreement or deed in favour of the Security Trustee is registered in the PPS Register
>
> general assets – all or other present and after-acquired property owned by a member of the Company Group, in respect of which a first (1st) ranking Security Interest granted under a general security agreement or deed in favour of the Security Trustee is registered in the PPS Register.

241 Mr Mawhinney contends that the instructions provided by ASIC to Mr Jason Tracy of Deloitte, who provided the Expert Opinion (referred to above) on which ASIC relies in this application, wrongly stated that the Core Notes offer document contained the following description of security: "The assets are otherwise unencumbered, and are made up of Australian real estate assets held by Mayfair 101 Group entities, and cash from investors." That, Mr Mawhinney submits, is wrong. Mr Mawhinney submits that, in transcribing the text from the offer document, ASIC has removed a comma (after "real estate") and changed the meaning of the passage. Mr Mawhinney submits that, in any case, the offer document says that the Core Notes are issued "on and subject to the terms of the [Deed Poll]", which contains the provisions relating to security set out above.

242 Mr Mawhinney submits that ASIC wrongly relies on the conclusion reached in Mr Tracy's Expert Opinion that "it would appear, with one exception, that [the security trustee] does not have direct first mortgage security over the real properties held in the various trusts". Mr Mawhinney contends it was never a requirement of the Core Notes that security be direct first mortgage security over real property. Mr Mawhinney submits that the premise of Mr Tracy's Expert Opinion was a false description of the investment product.

243 Mr Mawhinney submits that what arises from the foregoing are several key aspects of the Core Notes. Those aspects are as follows:

(a) the product was only available to wholesale investors;

(b) security was not fixed to specific assets but was subject to alteration from time to time;

(c) security could come in the form of real property or cash, but also other assets offered by the Mayfair 101 Group; and

(d) repayments to investors were subject to delay at M101 Nominees' option according to its ability to pay.

244 Mr Mawhinney submits that these features of the Core Notes were not hidden from investors but were made express in the Deed Poll (referred to above) and the offer document. On that basis, Mr Mawhinney contends that neither he nor M101 Nominees have engaged in any conduct that is, or may, constitute a contravention of the *Corporations Act* and that the grant of an injunction will not have any utility and will not serve some purpose manifested by the *Corporations Act*.

Security

245 Mr Mawhinney further submits that the Security Trust Deed contains, at Schedule C, a mechanism by which new security can be added to, and, at Schedule D, a mechanism by which security can be removed from the pool of security that secures the obligations under the Core Notes. This, it was submitted by Mr Mawhinney, is consistent with what investors agreed to in the Core Notes Deed Poll.

246 Mr Mawhinney submits that the following submission of ASIC mischaracterises the security that was in place in respect of the investments:

> M101 Nominees received significant funds (approximately $65.6 million) from investors in debentures known as [the Core] Notes ... based on representations that there would be security for the full amount invested, when in reality those funds are **not secured to that extent or at all**.
>
> (Mr Mawhinney's emphasis.)

Liquidity Prudency Plan

247 Mr Mawhinney further submits that the Mayfair 101 Group's Liquidity Prudency Plan was provided to ASIC in April 2020. In this respect, Mr Mawhinney referred to the fact that the holder of the Australian financial services licence through which M101 Nominees was authorised, Quattro, wrote to ASIC on 1 April 2020, and provided information about the Liquidity Prudency Plan. Quattro explained the implementation of the Liquidity Prudency Plan as follows:

> On 11 March 2020, in view of the apparent onset of COVID-19 and its assessed likely impact on the Australian economy , and the issuers decision in that light to manage prudently its portfolio during this time (by seeking to enhance liquidity, regulate redemptions to preserve investor value, and carefully manage capital), M101 decided to exercise its right under clause 5.6 of the Secured Promissory Note Deed Poll executed by the SN Issuer on 24 October 2019 establishing the facility for issuing the Secured Notes . . . to extend the Payment Dates relating to Notes reaching their Maturity Dates, until the time that the issuer considers that it has sufficient Liquidity to pay the Monies Owing on the redemption of the Noteholders' Notes, and any other upcoming redemptions which the issuer reasonably anticipates.

248 Mr Mawhinney submits that the decision to implement the Liquidity Prudency Plan on 11 March 2020 was made by Mr Mawhinney amid a challenging period brought on by COVID-19. Prior to 11 March 2020, all investor interest and redemption payments were up to date in full. Mr Mawhinney submits that the Liquidity Prudency Plan was contemplated by the Core Notes Deed. Mr Mawhinney submits that it was always a feature of the terms of the Core Notes that payments were subject to such variation.

The "Ponzi scheme" characterisation

249 ASIC's submissions referred to the activities of the Mayfair 101 Group as "Ponzi-like". Mr Mawhinney submits that such a description is fundamentally wrong.

250 Mr Mawhinney points to a definition of a Ponzi scheme requiring as a critical element that the scheme is fraudulent. Mr Mawhinney points to the definition of a Ponzi scheme recently adopted by Rees J in *Re Courtenay House Capital Trading Group Pty Ltd (in liq)* [2020] NSWSC 780; 147 ACSR 1 (***Re Courtenay***) at [15]-[24]. Justice Rees stated at [15]:

> A Ponzi scheme was described by Chesterman JA in *R v Lovell* [2012] QCA 43 at [30]:
>
> > … a Ponzi scheme [is] a fraudulent investment operation that pays returns to investors from their own money or money paid into the scheme by subsequent investors rather than from any actual profit earned from money invested. The scheme entices new investors by offering returns legitimate investments cannot, returns that were both abnormally high and consistent. The perpetuation of the returns that a Ponzi scheme advertises and pays requires an ever increasing flow of money from subsequent investors to keep the scheme going.

251 Mr Mawhinney submits that critical to the definition of a Ponzi scheme is that it be a fraudulent investment operation which has zero chance of success: citing *Re Courtenay* at [22].

252 Mr Mawhinney submits that the investment schemes of which he is the architect do not meet the definition of a Ponzi scheme. Mr Mawhinney submits that, by 20 March 2020, the Mayfair 101 Group had purchased and settled 119 real property assets in and around Mission Beach and Dunk Island in Queensland. Mr Mawhinney submits that the Mayfair 101 Group had paid deposits on a further 111 real properties. The Mayfair 101 Group also held as an asset Dunk Island. Mr Mawhinney submits that these were real assets, with real value and real potential. In these circumstances, Mr Mawhinney contends that the operation of the Mayfair 101 Group could not be considered to be a fraudulent operation such as a Ponzi scheme.

253 Mr Mawhinney submits that, whilst interest payments were made to investors in part using funds deposited by new investors, the ability of M101 Nominees to do so was always part of the Core Notes. Mr Mawhinney submits that no business that takes on debt funding is required to quarantine funds raised from profit-making activities to meet interest obligations. Mr Mawhinney relies upon the Core Notes information brochure provided to investors which stated that "[i]nvestment funds raised under our [Core Notes] product are used for ongoing investment **and capital management purposes across the Mayfair 101 group of companies**" (Mr Mawhinney's emphasis).

254 Mr Mawhinney submits the use of new investor funds in this way does not make the Mayfair 101 Group operation fraudulent nor does it make it a Ponzi scheme. Mr Mawhinney submits that ASIC is wrong to characterise the operation of the Mayfair 101 Group as a Ponzi scheme. Mr Mawhinney submits that, at worst, the Mayfair 101 Group acquired assets faster than it grew its income, a fact which, when combined with the economic slowdown brought on by COVID-19, and the effect on investor confidence by ASIC's investigation and subsequent injunctions, led to liquidity problems. Mr Mawhinney submits that, to the extent that ASIC relies upon the characterisation of the Mayfair 101 Group investment products as a Ponzi scheme to justify the Injunction which it seeks against Mr Mawhinney, that submission should be rejected.

ASIC's application being premature

255 Mr Mawhinney further submits that ASIC's application for permanent injunctive relief against Mr Mawhinney is premature. Mr Mawhinney submits that the extent of any loss which will flow to Core Notes investors is not clear from the Provisional Liquidators' Report, nor from the Expert Opinion of Mr Tracy, and will not be known until after the liquidation process is finalised. Mr Mawhinney submits that it is not a foregone conclusion that the commencement of a liquidation of M101 Nominees will result in a liquidation. Mr Mawhinney submits that there are other possibilities such as a restructuring which could still possibly occur.

256 Finally, Mr Mawhinney submits that the breadth of the permanent injunctive relief sought against Mr Mawhinney is too wide and unjustifiably onerous. Mr Mawhinney submits that the breadth of the permanent injunction sought against him by ASIC will restrain him permanently from working in the financial industry. This, Mr Mawhinney submits, is not justified on the evidence tendered by ASIC.

ASIC's submissions in reply

257 On 11 February 2021, ASIC filed submissions in reply to Mr Mawhinney's submissions. ASIC's reply submissions can be summarised as follows.

Brief to the expert and security

258 ASIC submits that ASIC's expert, Mr Tracy, was asked by ASIC for an opinion concerning the types and values of securities that in fact secured debts owed to investors in the Core Notes. ASIC says the Core Notes' brochure was given to Mr Tracy and quoted in ASIC's letter to him as background material only.

259 ASIC says that the irrelevance of the missing comma in ASIC's brief to ASIC's expert (of which Mr Mawhinney complains) is confirmed by ASIC's expert, Mr Tracy of Deloitte. In Mr Tracy's second supplementary expert opinion dated 14 September 2020, Mr Tracy stated that nothing about the "missing comma" caused Mr Tracy to change the views he previously expressed about the identification and value of the relevant securities, or the issues that he had identified in relation to those securities.

260 ASIC submits that it may be accepted that, without the comma, the quotation from the brochure suggested that, according to the brochure, the Core Notes would be secured by first-ranking, registered security interests over assets falling within two classes: (i) Australian real estate assets held by Mayfair 101 Group entities; and (ii) cash. In fact, with the comma, the brochure suggested that the Core Notes would be secured by first-ranking, registered security interests over assets falling within three classes: (i) Australian real estate; (ii) assets held by Mayfair 101 Group entities; and (iii) cash.

261 ASIC says that position may have mattered if ASIC had asked the expert, Mr Tracy, whether the Core Notes were secured by interests over Australian real estate assets or cash. But ASIC contends that is not what ASIC asked the expert. Instead, ASIC says it asked the expert to identify *any* assets over which security existed. ASIC contends that question contained no restriction in relation to over "what assets" there existed security, and it asked the expert to identify any assets over which there was security.

262 ASIC submits that, as stated in (for example) the executive summary of Mr Tracy's expert opinion dated 12 June 2020, under the heading "Form of security and assets secured", the expert discussed the security position in relation to assets that were neither real estate nor cash. ASIC referred to [2.13] of the Expert Opinion, which discussed related party loans, and said:

> Further, in relation to the two related party loans, one of the loans appears to have had no security registered on the PPSR at 31 December 2019 and 20 March 2020, while the other appears to have a prior registered third party security at 20 March 2020.

263 ASIC submits that, if ASIC's expert, Mr Tracy, was addressing himself to the question of whether there was security over real estate or cash, that observation would have been irrelevant.

264 ASIC referred to certain of Mr Mawhinney's submissions which asserted that the relevant security arrangements met the requirements of the Core Notes Deed, the Core Notes brochure and the Security Trust Deed. However, ASIC submits that Mr Mawhinney's submissions do not address the key concerns raised by ASIC's expert. ASIC submits that:

(a) Mr Tracy's Expert Opinion noted that, as at 20 March 2020, there were 119 real properties said by M101 Nominees to have a value of $54.085 million;

(b) the security trustee for the Core Notes did not have first mortgage security in relation to any of those properties except one;

(c) instead, the security trustee has security over units in various trusts, the trustees of which owned those properties; and

(d) there are third party mortgages registered on all titles except one of them. Mr Tracy noted that the interests of those mortgagees "are likely to have priority to the interests of Core Notes investors".

265 ASIC referred to Mr Mawhinney's submissions which assert that "it was never a requirement of the Core Notes that security be direct first mortgage security over real property". ASIC says that implies that property security can exist by way of a charge over units in the unit trusts which hold real estate. However, ASIC submits there is no point having security over units in a trust that owns real property if the property has been mortgaged to third parties for the full amount of the property. ASIC submits that it is critical to know how much is owed to Core Notes investors by each of the trustees who have received investors' money, and what is the *net* equity in the real property available to repay those investors – that is, the value of the property (appropriately valued) less the amount owed to the mortgagees. ASIC submits that Mr Mawhinney has provided none of this information.

266 Moreover, ASIC submits that a security interest over units in a trust that holds real estate assets encumbered by prior first registered mortgages cannot sensibly be correctly described as a "pool of assets in respect of which first-ranking, registered security interests have been granted" and in which the "assets are otherwise unencumbered", as described in the Core Notes brochure. ASIC says such a statement would be grossly misleading, even if it is the case that the units themselves are not otherwise encumbered and the security over the units is registered. ASIC contends that such security may be worthless, or worth much less than the amount of the relevant debts owed to Core Notes unitholders. ASIC submits that representing otherwise is seriously misleading. In this respect, ASIC referred to Mr Tracy's second supplementary expert opinion dated 14 September 2020, in which Mr Tracy stated: "I query whether, based on my experience in realising assets of a similar nature, units in an unlisted trust can be considered "tangible assets" …", and:

> The value of the units in each trust is directly referable to the value of the underl[y]ing

> Australian real property assets less and [sic] any prior ranking security interest registered over the relevant property, deposits paid on real property assets, the recoverable value of loans and other liabilities in the trust.

267 ASIC submits that it is relevant to note in this respect that, although the security trustee of the Core Notes was given a general security over assets of the various security trusts to whom investors' money was paid, the general security specifically excluded real estate. ASIC submits that, given the security trustee does not, with one exception, have security over the real estate assets which comprise the underlying assets of the various security trusts, the security trustee cannot enforce its security interest for the benefit of Core Notes noteholders, for example, by appointing receivers to the real estate assets.

Issues raised by Deloitte and ASIC

268 ASIC submits that Mr Tracy's Expert Opinion referred to a loan agreement between M101 Nominees and a related entity, Eleuthera. That loan is unsecured. ASIC submits that Mr Tracy's Expert Opinion also drew attention to another related party loan – namely, the loan to Jarrah Lodge Holdings Pty Ltd as trustee for the Jarrah Lodge Unit Trust No 1 (**JLUT**). ASIC submits that JLUT in turn lent the following amounts to the following trusts: (a) BLP Investment Trust – $290,200; (b) Panetta Investment Trust – $288,225; and the (c) Tamminga Family Trust – $20,250.

269 ASIC submits that Mr Mawhinney's partner is Brigette Leigh Panetta and Mr Mawhinney's sister is Inga Tamminga.

270 ASIC says that Mr Mawhinney has not explained why almost half a million dollars raised from investors was "invested" in a trust which then lent that money to a trust apparently established for the benefit of Mr Mawhinney's partner, and (as to a much smaller but not insignificant amount) his sister's family trust. ASIC submits that Mr Mawhinney has not given any evidence about the recoverability of these related party loans, despite Mr Tracy's Expert Opinion stating:

> The financial capacity of the related entities to repay the loans received from M101 Nominees is unclear in the absence of financial information outlining their financial position, historical and forecast performance.

271 In addition, ASIC submits that the evidence indicates that Mr Mawhinney has sought to raise funds from investors through another product (being the "Australian Property Bonds" referred to above), which appear to be secured by properties at Mission Beach – that is, the same assets that are owned by various trusts that the Core Notes security trustee purportedly holds security over for the benefit of Core Notes investors. ASIC submits that Mr Mawhinney was using the

same assets – which were supposedly already providing (albeit in an indirect and thus imperfect form) security for the Core Notes – as security for new investors in yet another investment scheme he was promoting. ASIC submits that there has been no response by Mr Mawhinney to that concern.

272 ASIC also refers to [2.26] of Mr Tracy's Expert Opinion which states that Mr Tracy had a number of concerns regarding the asset security values for Core Notes investors, one being:

> There is a risk given [Mayfair] was active in acquiring a large number of properties from October 2019 to April 2020 that these entities established a market price in an otherwise illiquid and small property market at Mission Beach. Consequently, there is a risk that the contract price in each sale contract is above market price in today's terms, negatively impacting the asset security values and recovery of funds to Core Note investors.

273 ASIC submits that Mr Mawhinney's companies, in their attempts to create a "tourist mecca" in Mission Beach, may have created their own market in buying so many properties simultaneously. ASIC says that creates a risk that the value of each property recorded by M101 Nominees is above market value, exposing Core Notes investors to a serious risk of loss, and falsifying the "dollar-for-dollar" representation concerning the Core Notes' security position, which M101 Nominees made to investors. ASIC submits that it is also notable that Mr Tracy expressed doubt about the validity of M101 Nominees applying a uniform "4% uplift" to the value of the relevant properties at 20 March 2020. ASIC submits that Mr Mawhinney has not addressed these concerns either.

274 Further, ASIC refers to another of the concerns listed in [2.26] of Mr Tracy's expert opinion dated 12 June 2020 which was that:

> The deposits paid on the properties not settled totalling $5,852,387 at 20 March 2020 may be at risk of forfeiture due to failure to complete, especially if significant additional funds of $86,483,036 cannot be sourced to settle these transactions. It is unclear to me where these additional funds would come from.

275 ASIC says this indicates that almost $6m of investors' money appears to have been used to pay deposits on land purchase contracts that have since gone into default. ASIC submits that there is a very real risk that those deposits could be (or already have been) forfeited, leaving nothing for investors. ASIC submits that Mr Mawhinney has not addressed that concern either.

Liquidity Prudency Plan

276 ASIC submits that it has previously raised concerns that Mr Mawhinney has continued to seek to raise funds from investors after the "decision to implement the Liquidity Prudency Plan"

was issued. In this respect, ASIC referred to, among other things, its submissions dated 11 August 2020 in this proceeding. I have also referred to the evidence of Mr Hui above, which was that M101 Holdings took Mr Hui's $150,000 investment in the M+ Notes seven days after the "Liquidity Prudency Plan" was implemented and in circumstances where Mr Hui was not told anything about the "Liquidity Prudency Plan", or that redemptions had been frozen. ASIC submits that Mr Mawhinney has not responded to those concerns at all.

Injunctions

277 ASIC submits that, having regard to the terms of the injunctions sought by ASIC, Mr Mawhinney's opposition to the injunctions is not warranted. ASIC submits that its concern is that Mr Mawhinney will seek to use different corporate vehicles to raise funds from investors using the same or a similarly flawed scheme.

278 ASIC submits that it seeks injunctive relief pursuant to ss 1101B and 1324 of the *Corporations Act* and s 23 of the *FCA Act*. ASIC notes that, in *Australian Securities and Investments Commission v Cassimatis (No 9)* [2018] FCA 385 at [117]-[124], Dowsett J expressed doubt as to whether s 1324(1) empowered the Court only to restrain unlawful conduct. However, ASIC submits that, in that case, no relief was sought under s 1101B of the *Corporations Act* or s 23 of the *FCA Act*, which are not so constrained. ASIC submits that there are a number of cases in which the Court has granted injunctive relief restraining otherwise lawful dealings in financial products under ss 1101B and 1324 of the *Corporations Act*: citing *Australian Securities & Investments Commission v McDougall* [2006] FCA 427; (2006) 57 ACSR 175 (***ASIC v McDougall***) at [64]; *In the matter of Idylic Solutions Pty Ltd – Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; 93 ACSR 421 (***Re Idylic Solutions***) at [88]-[90]; *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; 103 ACSR 453 (***Monarch***) at [96]; *Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liquidation)* [2017] FCA 497; 120 ACSR 247 (***ASIC v Avestra***) at [234]-[235].

"Ponzi scheme"

279 ASIC refers to Mr Mawhinney's submissions in which Mr Mawhinney complains about the submission made on behalf of ASIC that the Mawhinney-controlled schemes, including the Core Notes, have Ponzi-like characteristics. ASIC says that Mr Mawhinney's submission, in essence, is that, because a Ponzi scheme has no real investment, and because the funds raised

by the Core Notes scheme were invested at least in part in real investments, the Core Notes scheme was neither a Ponzi scheme, nor had any characteristics of a Ponzi scheme.

280 ASIC disagrees. ASIC submits that, although the most common definition of a Ponzi scheme is one involving no real investments, that is not uniformly so. ASIC referred to the *Oxford Dictionary of Economics* (5th edition, 2017), which defines a "Ponzi scheme" as follows:

> [A "Ponzi scheme" is a] fraudulent investment scheme that pays a return to current investors using their own investment or funds from subsequent investors. A Ponzi scheme attracts investors by promising returns that are high relative to alternative investments. The promised returns can only be paid if the flow of new investment is sufficiently great. Since this cannot be sustained in the long run a Ponzi scheme must inevitably collapse …
>
> (Citing *ASIC v M101 Nominees Pty Ltd, in the matter of M101 Nominees Pty Ltd* [2020] FCA 1166 at [17].)

281 ASIC submits that the critical element of that description is not the absence of any real investment; rather, it is that the relatively high returns promised to old investors (including the redemption of those investments) can only be paid using funds contributed by new investors. ASIC says that is precisely what Mr Mawhinney's Core Notes scheme did. ASIC submits that the returns and redemptions promised to Core Notes noteholders could not be paid from the very small returns generated from investments and, instead, those returns and redemptions could only be paid using funds contributed by new investors.

282 ASIC submits that, in any event, the use of the phrase "Ponzi scheme" is not restricted to schemes that involve no investment at all. ASIC cites a publication of the US Securities and Exchange Commission, which discusses Ponzi schemes as follows:

> A Ponzi scheme is an investment fraud that pays existing investors with funds collected from new investors. Ponzi schemes are named after Charles Ponzi. In the 1920s, Ponzi promised investors a 50% return within a few months for what he claimed was an investment in international mail coupons. Ponzi used funds from new investors to pay fake "returns" to earlier investors.
>
> Ponzi scheme organizers often promise high returns with little or no risk. Instead, they use money from new investors to pay earlier investors and may steal some of the money for themselves.
>
> With little or no legitimate earnings, Ponzi schemes require a constant flow of new money to survive. When it becomes hard to recruit new investors, or when large numbers of existing investors cash out, these schemes tend to collapse[.]
>
> (Citing https://www.investor.gov/introduction-investing/investing-basics/glossary/ponzi-schemes.)

283 ASIC submits that the Provisional Liquidators' Report at [7] and [8] includes the following:

> [T]he business model of [M101 Nominees] was not sustainable. This is on the basis that [Core Notes] noteholders were investing predominantly for periods of 6 or 12 months, however the loan agreement with Eleuthera had a term of 10 years. On this basis, [M101 Nominees] would not have adequate funds to repay any contributions as they fell due and as such [M101 Nominees] has been insolvent since inception and remains insolvent as at the date of this report.
>
> [D]istributions and redemptions paid to [Core Notes] noteholders were funded out of funds raised from other [Core Notes] noteholders or to a lesser extent M+ [Notes] noteholders. There was a high level of frequency of fund transfers between [M101 Nominees] and Eleuthera which has masked the extent of this issue.

284 ASIC says that Mr Mawhinney seeks to pass off the need to use new investor funds to repay old investors as the ordinary result of a "business that takes on debt funding". ASIC submits that there are two flaws with that reasoning. First, in ASIC's submission, it is not what investors were told, given the "Frequently Asked Questions" section of the Core Notes brochure said:

> How can you pay fixed interest rates higher than the banks?
>
> The interest rates we offer our investors are facilitated by the Mayfair 101 group's capital management strategy. The group carefully selects opportunities to invest in that provide strong yields, capital growth, and refinancing opportunities that enable us to support principle [sic] and interest repayments to our investors.

285 ASIC says that a frank and honest answer, more consistent with the truth and indeed with Mr Mawhinney's own submissions, would have been to tell investors that their funds would be used to make highly speculative investments which, if profitable at all, may not be realised for many years, and, in those circumstances, the Mayfair 101 Group is reliant on continuing to attract new investors so as to use their money to repay old investors. ASIC submits that investors should have been told that if, for any reason, it becomes difficult to recruit new investors, there is a substantial risk that the entire scheme might collapse, leaving existing investors facing the loss of a large part (if not all) of their investment.

286 Further, ASIC submits that on no view could the activities of the Core Notes scheme, in using new investor monies (from this or any other Mayfair scheme) to repay old investors, be seen as the ordinary process of a profitable business refinancing debt. ASIC says that, rather than obtaining finance from a traditional lender, the evidence strongly suggests that the only way in which Mr Mawhinney was able to repay old investors was by attracting new investors, without telling the investors that fact.

Basis for orders

287 Finally, ASIC submits that the orders sought by ASIC are not premature. ASIC says the injunctions sought are amply warranted in light of the events established to date, including the facts to be found in this proceeding and on the basis of the evidence adduced in proceeding VID 228 of 2020 (being ASIC v Mayfair Wealth Partners Pty Ltd and Others).

CLOSING SUBMISSIONS

288 Following the hearing on 16 February 2021, both parties filed further closing written submissions, in advance of a further hearing on 9 March 2021 (which was held for the purposes of oral closing submissions). A summary of the parties' closing submissions is set out below.

ASIC's closing submissions

The form of relief sought by ASIC

289 ASIC submits that the Court may make restraining orders under, *inter alia*, s 1101B of the *Corporations Act*, where it appears to the Court that a provision of Chapter 7 of the *Corporations Act* has or may be contravened, against individuals other than the contravener. ASIC referred to *In the matter of Vault Market Pty Ltd* [2014] NSWSC 1641 (***Re Vault Market***), where Brereton J relevantly stated at [70] and [83]:

> … [T]he broadly expressed power in s 1101B(1) may authorise an order against a person other than the contravener. While satisfaction that a person has contravened a provision of Chapter 7 is a jurisdictional prerequisite, the only limitation on the order that can be made, once that requirement is satisfied, is that "the Court is satisfied that the order would not unfairly prejudice any person" …
>
> … The context and content of s 1101B indicates that its purpose is protective and remedial, rather than deterrent, in nature. … [W]hat was contemplated was an injunction to restrain misconduct that was ongoing, or to remove the risk of future misconduct when such a risk was suggested by a history of persistent past misconduct.

290 ASIC submits that, contrary to the submissions made on behalf of Mr Mawhinney, it is not necessary for ASIC to demonstrate that Mr Mawhinney is really at the "very worst end" of the spectrum of people against whom orders under these provisions are sought. ASIC submits that the relevant consideration is whether the "order is 'justified' having regard to the protective purpose of the power": citing *Australian Securities and Investments Commission v Gallop International Group Pty Ltd, in the matter of Gallop International Group Pty Ltd* [2019] FCA 1514; 138 ACSR 395 (***ASIC v Gallop***) at [323].

291 ASIC submits that, if regard is had to the "Santow list" of factors set out in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 (***Adler***) at [56], the factors leading to the imposition of the longest periods of disqualification relevantly include:

(a) large financial losses;

(b) high propensity that defendants may engage in similar activities or conduct;

(c) activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;

(d) lack of contrition or remorse; and

(e) disregard for law and compliance with corporate regulations.

292 ASIC submits that all of those factors apply to Mr Mawhinney.

293 ASIC submits that the Court has, on a number of occasions, considered it appropriate to make permanent restraining orders under s 1101B and s 1324 of the *Corporations Act*. In this respect, ASIC referred to the following authorities: *Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd* [2006] VSC 192; 57 ACSR 553 (***ASIC v PFS***); *Australian Securities and Investments Commission v Fuelbanc Australia Limited* [2007] FCA 960; 162 FCR 174 (***ASIC v Fuelbanc***); *Australian Securities and Investments Commission v West* [2008] SASC 111; 100 SASR 496; 66 ACSR 143 (***ASIC v West***); *ASIC v Gallop*; *Australian Securities and Investments Commission v One Tech Media Ltd (No 6)* [2020] FCA 842 (***ASIC v One Tech Media (No 6)***); *Australian Securities and Investments Commission v Secure Investments Pty Ltd (No 2)* [2020] FCA 1463; 148 ACSR 154 (***ASIC v Secure Investments (No 2)***).

294 ASIC referred to *ASIC v Gallop* at [326]- [328], where Charlesworth J stated:

> I consider Mr Wang to be a person who has the potential to do great harm to consumers in this jurisdiction by his involvement in financial services businesses, particularly by his use of a different corporate entity (Stumac) to continue the operation of the business following of the cancellation of the GIG AFSL and the installation of Mr O'Doherty as a director who would do his bidding.
>
> … In the present case, ASIC has devoted considerable resources into an investigation into GIG and the cancellation of its AFSL, only to be confronted with the same business enterprise arising from the ashes, controlled by the same proponent under a new corporate veil, and in all likelihood with some of GIG's former customers on its records. There is, I find, a high likelihood that Mr Wang will continue to "transfer" financial services businesses from one corporate form to another should the requirements of regulation prove too burdensome.
>
> Mr Wang has not adduced any evidence and there is accordingly nothing to suggest

> that he has gained insight into the seriousness of the conduct alleged and proven against him. If he is not restrained I consider there to be a very high likelihood that Mr Wang will continue to operate businesses in Australia and that he will do so with little or no regard for the requirements of Australian regulatory laws or the interests of consumers.

295 ASIC submits that identical considerations apply to Mr Mawhinney. ASIC submits that the evidence demonstrates that Mr Mawhinney has the potential to do great harm to Australian investors by his involvement in the sale and marketing of financial products, particularly by his use of different corporate entities to continue the operation of his businesses following the Court's restraint of his fundraising activities through the relevant debenture products. ASIC submits that, immediately upon being restrained from promoting one form of misleading, highly speculative financial product, Mr Mawhinney began promoting a similar product. ASIC contends that, having adduced no evidence, there is nothing to suggest that Mr Mawhinney has any appreciation of the wrongdoing that he has orchestrated and engaged in, he has expressed no contrition or remorse for his misconduct or for the very significant loss of investors' funds, despite his apparent acceptance in his submissions that investors will not receive "dollar for dollar" redemption.

296 ASIC also reiterated its reply submissions to the effect that the orders ASIC seeks are not premature.

The products sold

297 ASIC reiterated its submission that:

(a) in respect of the Core Notes, what was not explained to investors was that funds that they invested would be used to pay existing investors' redemptions, and that security would be over units in a trust which owned real property, in circumstances where there was no security over the underlying real property which had prior first ranking mortgages to third parties;

(b) in relation to the M+ Notes, misleading representations were made, including by statements that suggested that the products were similar, including in risk profile, to bank term deposits. ASIC submits that the relatively low interest rates offered made it even more likely that investors would consider the Core Notes and M+ Notes to have a similar risk profile to bank term deposits.

298 ASIC submits that, notwithstanding that the applicants for the relevant products were required to be wholesale investors within the meaning of the *Corporations Act*, the relevant products were targeted to, and invested in, by unsophisticated and inexperienced investors, as well as

investors who were in fact not "wholesale" within the meaning of the *Corporations Act*. ASIC submits that no contrary evidence was led, and the Court ought readily find that the persons to whom the relevant products were promoted, and who invested in them, included unsophisticated and inexperienced investors who did not appreciate the high degree of risk they were undertaking.

299 As to Mr Mawhinney's submission that the products were literally "alternatives" to bank term deposits, ASIC submits that any form of investment can be said to be an alternative to another, if one simply and only means that either could be chosen. However, ASIC submits that, if bank term deposits were not being referred to and relied upon as relevantly similar or appropriate products, there would have been no need to refer to them at all. ASIC submits that the products were literally "alternatives" to any other financial product, but no reference was made to contracts for difference, foreign exchange contracts, or other forms of risky financial investments. ASIC submits that the reference to term deposits was designed to, and did, create the impression that the products were, relevantly, similar to bank term deposits.

The Core Notes and security

300 ASIC submits that there is no merit in Mr Mawhinney's submission that the security position in respect of the Core Notes was appropriate because the documents did not require the investments to be secured against real property. ASIC submits that, in respect of the Core Notes, Mr Mawhinney established schemes that raised funds from unsuspecting members of the public, who believed that they would be protected by "first ranking" security over "unencumbered assets", when in fact the security obtained had little or no value at all.

The Naplend loan

301 ASIC referred to a submission by Mr Mawhinney to the effect that a contributing factor to the failure of the relevant products was the entry into a loan with an entity, Naplend Pty Limited, on unfavourable terms. ASIC submits that, even if that was true, there is no explanation of why Mr Mawhinney permitted the loan to be entered into, or how and why he had placed the relevant companies in such a desperate financial situation that they were reliant on lenders of last resort such as Naplend Pty Limited.

302 ASIC submits that the Provisional Liquidators' Report explained that the primary cause of the failure of the Core Notes scheme was the inherently flawed liquidity and funding model. ASIC submits that these are the same reasons why the IPO Wealth scheme failed. ASIC contends

that Mr Mawhinney caused companies within the Mayfair 101 Group to make highly speculative, long-term investments with investors' money and, if the investments paid off, his companies reaped almost all of the benefit – with the relevant investors simply receiving their money with interest. ASIC submits that, if the investments failed, the investors lost, with the Mayfair 101 Group companies not having been exposed themselves. ASIC submits that, while years would pass waiting for these speculative investments to fail or succeed, the relevant Mawhinney-controlled companies were entirely reliant on continuing to attract new investors to pay old ones out.

"Ponzi scheme"

303 ASIC reiterated that the fundamental problem with the schemes implemented by Mr Mawhinney is that they relied upon new investments to make payments due to existing investors. ASIC submits that position was not disclosed to investors, nor was the inherently risky nature of the investments or even the fact that repayments were, from March 2020, not being made to existing investors. ASIC contends that the schemes are "typical Ponzi schemes". ASIC contends, in any event, that nomenclature is of little moment and the inherent and undisclosed risks to unsophisticated and inexperienced Australian investors is the overriding concern.

Matters supporting grant of relief

304 ASIC submits that the following matters support the relief that it seeks.

305 ASIC's primary concern is that Mr Mawhinney will seek to use different corporate vehicles to raise funds from investors using the same or a similarly flawed scheme.

306 ASIC adduced evidence of three such schemes that have so far been implemented by Mr Mawhinney, including after the Court's intervention in respect of the IPO Wealth and relevant debenture schemes. ASIC submits that all of the schemes suffered from the vices referred to in detail in ASIC's written and oral opening submissions.

307 ASIC contends that Mr Mawhinney orchestrated the sale and marketing of products referred to as Australian Property Bonds after the Court made interim injunctions in the Mayfair Proceeding (being proceeding VID 228 of 2020). ASIC submits that the Australian Property Bonds product was advertised as having first registered mortgage security, but, for at least one investor, a title search of the relevant property reveals that, as at 12 November 2020, there is a first registered mortgage in favour of Naplend Pty Limited, and no registered mortgage in

favour of the investor. ASIC submits that, on the evidence, the Court may readily infer that the purpose of launching this new product was to avoid the effect of the Court's orders on 16 April 2020 in the Mayfair Proceeding.

308 ASIC submits that the Court can readily infer that, without injunctions in the form sought by ASIC, Mr Mawhinney will continue to commence and operate schemes that will result in significant risk to, and losses by, Australian investors.

309 ASIC submits that the Court can also readily conclude that it would not be sufficient for the protection of the public to permit Mr Mawhinney to engage in the sale and marketing of financial products on the basis that ASIC could pursue him for any further misconduct. ASIC submits that the speed with which Mr Mawhinney is able to raise and dissipate funds from investors is demonstrated by the evidence in this proceeding, and by the facts of this case.

310 ASIC submits that Mr Mawhinney continued to seek to raise funds from investors after the "decision to implement the Liquidity Prudency Plan" was issued without disclosing the critical fact that capital repayments were "suspended".

311 ASIC submits that, even after being alerted to the need to obtain a financial services licence or authorisation, Mr Mawhinney continued to raise and retain funds using a company that did not have such authorisation and failed to transfer the investments to a company that was so authorised. ASIC submits that two investors gave uncontested evidence about this, and those investors were not "wholesale investors" within the meaning of the *Corporations Act*.

312 ASIC submits that there is ample evidence in this proceeding and in the Mayfair Proceeding (proceeding VID 228 of 2020) that products offered by companies of which Mr Mawhinney was the sole director and ultimate beneficiary were targeted to, and taken up by, investors who were not sophisticated or experienced and who invested most or all of their life savings or retirement funds.

313 ASIC submits that no capital repayments have been made to investors since 11 March 2020, and no evidence was adduced by Mr Mawhinney to suggest that any future payments will be made. ASIC reiterated that more than $211 million is owing to investors from funds raised by companies run by Mr Mawhinney since 2016. ASIC submits that, in relation to approximately $79 million owing to investors in the IPO Wealth Group, the liquidators have reported that a full return to creditors is unlikely. ASIC submits that, in relation to approximately $61 million owing to investors in the Core Notes, the liquidator estimates a "nil return" to Core Notes

noteholders and, in relation to approximately $65 million owing to investors in the M+ Notes, the liquidator (for the Core Notes), states that the M+ Notes holders are unlikely to receive any return.

314 ASIC submits that the evidence discloses very serious concerns about Mr Mawhinney's management of companies generally. In this respect, ASIC submits that:

(a) Mr Mawhinney was the sole director and ultimate beneficiary of all companies involved in the relevant "Mayfair schemes";

(b) the books and records of most, if not all, of the relevant companies are in disarray and, as admitted by Mr Mawhinney, do not reflect the true position of the companies;

(c) the schemes relied on by ASIC were, and are, inherently flawed and not capable of facilitating the repayment of amounts owed to investors without reliance on new investors' funds;

(d) the evidence establishes likely breaches of Mr Mawhinney's directors' duties and other breaches of the *Corporations Act* which have not been addressed by Mr Mawhinney in evidence or at all.

Mr Mawhinney's closing submissions

315 Mr Mawhinney submits that, although the Court has wide jurisdiction under s 1324(1) of the *Corporations Act* (and the other provisions relied upon by ASIC), the Court should not grant an injunction unless the order is directed to, and appropriate to achieve, an end such as enforcing and giving effect to a relevant statute, for example, where there is a risk of future contraventions: citing *ASIC v West* at [210] and *ASIC v Secure Investments (No 2)* at [36].

316 Mr Mawhinney submits that, by seeking to permanently prohibit Mr Mawhinney from any further involvement in the various "Mayfair companies and products", and any future investment business that might be perfectly unobjectionable, ASIC goes too far. Mr Mawhinney submits that there is insufficient evidence for the Court to be satisfied that Mr Mawhinney will engage in conduct proscribed by law in the future.

Australian Property Bonds

317 Mr Mawhinney submits that, in relying on the Australian Property Bonds product to demonstrate that Mr Mawhinney will seek to use different corporate vehicles to raise funds from investors using the same or a similarly flawed scheme, ASIC fails to recognise the key

differences between the Australian Property Bonds product and the Core Notes and M+ Notes. Mr Mawhinney submits that, unlike the Core Notes and the M+ Notes, the Australian Property Bonds were designed to give investors direct, first ranking mortgages, over a specific piece of real property, and were designed to cure what ASIC regards as one of the defects in the previous products. Mr Mawhinney submits that the Australian Property Bonds contained the following statement about risk in the Australian Property Bonds Agreement:

> An investment in [Australian Property] Bonds should be considered as speculative in nature and will involve significant risks, due to the nature of the intended use by the Issuer of the money invested in return of the [Australian Property] Bonds.

318 Mr Mawhinney submits that the Australian Property Bonds cured what ASIC identified as defects in the Core Notes (to do with security and risk) and M+ Notes (to do with risk only, the M+ Notes never having been offered as a secured product). Mr Mawhinney submits that ASIC states that the "overriding concern" about the investment products that Mr Mawhinney oversaw was "[t]he inherent and undisclosed risks", and that issue was specifically addressed in the Australian Property Bonds. Mr Mawhinney also submits that the purpose of the Australian Property Bonds was to obtain funds to repay the loan from Naplend Pty Limited as quickly as possible, on a property-by-property basis, and not, as ASIC says, to avoid the effect of the Court's orders.

319 Mr Mawhinney submits that the Court should not accept ASIC's submission that, based on the Australian Property Bonds, the Court can readily infer that, without injunctions in the form sought by ASIC, Mr Mawhinney will continue to commence and operate schemes that will result in significant risk and losses by Australian investors. Mr Mawhinney submits that ASIC's application for permanent injunctions is based on risks not being adequately explained or disclosed to investors. Mr Mawhinney submits that, whatever can be said of the Core Notes and the M+ Notes, the Australian Property Bonds do not fail to explain or disclose the relevant risk profile of the product.

Other cases involving permanent injunctions

320 Mr Mawhinney's submissions set out a review of cases where permanent injunctions have been made, namely *ASIC v PFS*, *ASIC v West*, *ASIC v Fuelbanc*, *ASIC v Secure Investments (No 2)*, *ASIC v One Tech Media (No 6)*, and *ASIC v Gallop*.

321 Mr Mawhinney submits that none of these cases is analogous to the circumstances of Mr Mawhinney. Mr Mawhinney submits that this is because he has:

(a) not engaged in any fraud or theft;

(b) not personally enriched himself by any of his investment products, and any loss that will be incurred by investors has not been due to the enrichment of Mr Mawhinney;

(c) not been the subject of any declarations of statutory contravention in this proceeding;

(d) not been the subject of allegations that he has hindered ASIC's investigations or been other than co-operative;

(e) consented to a number of his companies being wound up (including the First Defendant in this proceeding);

(f) not created or otherwise involved himself in self-managed superannuation products, being a "special category" of investment;

(g) not run a managed investment scheme that was supposed to be registered but was not;

(h) not (at least since 2017) conducted a financial services business without the appropriate licence;

(i) limited his products (at least since 2017) to wholesale investors; and

(j) attempted to establish a genuine business that, if it went well, would have made profits which, in part, would have benefited investors.

322 Mr Mawhinney submits that there is some evidence, notably the structure of the Australian Property Bonds product, that shows that Mr Mawhinney did attempt, before he was halted by this proceeding and others, to move away from some of the aspects of the relevant products that ASIC has considered to be problematic.

Mr Egan and Mr Hicks

323 Mr Mawhinney submits that Mr Egan and Mr Hicks (whose evidence is referred to above) are not investors in Core Notes or M+ Notes. Instead, both are investors in IPO Capital, the Mayfair 101 Group's first ever financial product. Mr Mawhinney submits that these examples do not constitute a sufficient basis for the Court to find that Mr Mawhinney will not comply with legislative requirements in the future.

Representations to investors

324 Mr Mawhinney submits that all investors who bought the Core Notes or the M+ Notes products were provided with an offer document that said: "Is the Issuer a bank? No". Mr Mawhinney submits that the relevant offer documents explained the products were not covered by the

Financial Claims Scheme in the "FAQ" section. Mr Mawhinney submits that all investors who bought the Core Notes and M+ Notes product were subject to their respective Deed Polls, and those Deed Polls provided for the suspension of redemptions and capitalisation of interest. Mr Mawhinney submits that the Core Notes offer document did not state the Core Notes product was a property, mortgage-based, investment product (by contrast, the Australian Property Bonds did). Mr Mawhinney also submits that no declarations against Mr Mawhinney personally, in relation to any misleading and deceptive conduct, have been sought in proceeding VID 228 of 2020 (being the Mayfair Proceeding), or this proceeding.

Appropriate orders

325 Mr Mawhinney submits that, if Mr Mawhinney is to be the subject of orders based on investors incurring losses, then the Court should make factual determinations about what actual loss has been incurred, and what has caused those losses. Mr Mawhinney submits that there is no evidence that Mr Mawhinney attempted to steal the funds from his investors; rather, funds were invested. Mr Mawhinney submits that there was a genuine attempt to create a business that would generate income and returns sufficient to meet the obligations promised to investors. Mr Mawhinney contends that decisions were made, in essence, to buy a high volume of properties very quickly in late 2019 and early 2020; funds within the group were insufficient to complete forthcoming settlements; a decision was made to enter into the loan with Naplend Pty Limited, and it was expected (erroneously) to be a short-term facility.

326 Mr Mawhinney submits that these decisions constituted management decisions, and there is nothing in the nature of the Core Notes, the M+ Notes or the Australian Property Bonds that would compel those decisions to be made a second time, if Mr Mawhinney is ever permitted to engage in any form of fundraising again.

327 Mr Mawhinney submits that the Court is not limited to what is proposed by ASIC (ie permanent injunctions restraining Mr Mawhinney from acting in relation to both Mayfair and non-Mayfair fundraising activities) and the orders proposed by Mr Mawhinney (ie application dismissed with costs). Mr Mawhinney submits that the Court has the power to make whatever orders it thinks appropriate in the circumstances and this would include the power to make orders:

(a) which apply to the Core Notes and M+ Notes products only;

(b) which extend the existing interlocutory orders (eg for a year), and adjourning the application to allow either party to make submissions and put on fresh evidence once the liquidations (of M101 Nominees and other entities) are sufficiently advanced; or

(c) which apply for a period, but not permanently, for example 5 years, or 10 years.

ASIC's closing submissions in reply

328 On 4 March 2021, I directed that ASIC was to provide a short written submission in reply to Mr Mawhinney's submissions, directed to two matters: first, a response to Mr Mawhinney's submissions as to the appropriate orders and, second, any submissions concerning cases in which the Court has refused to grant any permanent injunction but has imposed a period of restraint, including the factors to be considered in fixing any period. ASIC filed those submissions on 8 March 2021.

329 In response to that direction, ASIC provided a table of cases in which various periods of restraint have been imposed. The table sought to summarise the factors considered in fixing the appropriate period of restraint in each case.

330 ASIC submits that it would not be appropriate to limit the scope of the restraining orders to the Core Notes and the M+ Notes, as suggested by Mr Mawhinney. ASIC submits that there is a real likelihood that Mr Mawhinney will engage in similar conduct utilising other corporate schemes. In this respect, ASIC referred to the Australian Property Bonds products.

331 ASIC submits that Mr Mawhinney has had ample opportunity to give evidence and to address the concerns raised by ASIC and the liquidators and has declined to do so. ASIC submits that it is appropriate that the Court deal with ASIC's application for final relief on a final basis, rather than make further interim orders which would extend the existing interlocutory injunctions which are in place.

332 ASIC submits that, in the circumstances of this case, it is appropriate, to further the protective purposes of the *Corporations Act*, to impose the restraining orders sought on a permanent basis. However, if the Court were to limit the period of any restraining orders imposed, ASIC submits that a period of no less than 15 years would be appropriate in the present case.

333 ASIC submits that, while ASIC does not allege that Mr Mawhinney was consciously dishonest, his conduct was indicative of serious irresponsibility and disregard for his legal obligations. ASIC submits that the schemes established by Mr Mawhinney have raised more than $200 million, some of which has been transferred overseas, and little of which, if any, is likely to be

returned to Australian investors. ASIC submits that this is a much greater loss than in the case of *Australian Securities and Investments Commission v McIntyre* [2016] FCA 1276 (***ASIC v McIntyre***), where restraint periods of 10 years were jointly proposed and imposed by the Court. ASIC submits that, in contrast to the McIntyres, Mr Mawhinney did not co-operate in any way in this proceeding and has not demonstrated any understanding of the significant concerns which support the restraining orders sought.

CONSIDERATION

334 I turn to consider the evidence and the parties' submissions. First, I will set out some principles relating to misleading and deceptive conduct. Second, I will set out certain findings and other matters having regard to those principles and the evidence. Third, I will consider whether the jurisdiction to make the orders sought has been properly enlivened. Fourth, I will consider whether the proposed orders should be made.

CONSIDERATION: PRINCIPLES RELATING TO MISLEADING AND DECEPTIVE CONDUCT

335 It is first necessary to briefly set out certain principles relating to misleading and deceptive conduct.

336 Section 1041H(1) of the *Corporations Act* provides:

> A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

337 Section 1041H(2)(a) of the *Corporations Act* provides that "[t]he reference in [s 1041H(1)] to engaging in conduct in relation to a financial product includes (but is not limited to) … dealing in a financial product". "Dealing" in a financial product includes "issuing a financial product" "whether engaged in as principal or agent": *Corporations Act*, s 766C(1)(b).

338 Section 12DA(1) of the *ASIC Act* provides:

> A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

339 Section 12BAB(1)(b) of the *ASIC Act* relevantly provides that "a person provides a financial service if they … deal in a financial product". The meaning of "dealing in a financial product" includes "issuing a financial product": *ASIC Act*, s 12BAB(7)(b).

340 A "financial product" is defined in s 12BAA and includes a "facility through which, or through the acquisition of which, a person … makes a financial investment" or "manages financial risk": *ASIC Act*, s 12BAA(1)(a) and (b).

341 Pausing there, in light of the evidence in this proceeding, there can be no doubt that the products offered by IPO Capital and the IPO Wealth Group, the Core Notes, the M+ Notes and the Australian Property Bonds were all "financial products" for the purposes of the relevant provisions of the *Corporations Act* and the *ASIC Act* set out above. There can be no doubt that, by issuing those products, the relevant issuers of those products were "dealing" in a financial product for the purposes of the relevant provisions of the *Corporations Act* and the *ASIC Act*.

342 Section 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* are in analogous terms and the same principles are applicable to both provisions: *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932; 140 ACSR 561 (***Dover***) at [92] (citing *Selig v Wealthsure Pty Ltd* [2015] HCA 18; 255 CLR 661 at [4]).

343 Sections 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* provide:

> A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
>
> …
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits …

344 The expression "financial services", as used in s 12DB, has the same meaning and application discussed immediately above with respect to s 12DA(1).

345 Sections 1041H and 12DA(1) "prohibit conduct that is misleading or deceptive or likely to mislead or deceive, whereas s [12DB(1)] prohibits the making of a false or misleading representation": *Dover* at [94]. Conduct "that contravenes ss 1041H and 12DA may involve, but need not involve, the making of a false or misleading representation": ibid.

346 Although the statutory language refers to "misleading or deceptive conduct" and "false or misleading representations", the cases establish that there is no material difference between these expressions in terms of their legal application: *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266 at [47].

347 The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Dover* at [98] (and the authorities there cited). Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: ibid. It is not necessary to prove an intention to mislead or deceive: ibid. It is unnecessary to prove that the conduct in question actually deceived or misled anyone: ibid. The relevant question is objective: whether the conduct has a sufficient tendency to induce error: ibid at [99].

348 It is useful to have those principles in mind before I summarise the findings on the detailed evidence which has been tendered in this proceeding. I turn to set out a summary of those findings.

CONSIDERATION: SUMMARY OF FINDINGS ON THE EVIDENCE AND OTHER MATTERS

349 I have already set out above a number of my findings in relation to the evidence tendered by ASIC in this proceeding, which was not relevantly challenged by Mr Mawhinney (save for a brief cross-examination of Mr Tracy, which is referred to above). In short, I accept ASIC's submissions concerning the evidence, and how that evidence should be characterised. Set out below is a summary or collation of the relevant findings on the evidence.

IPO Capital

350 In relation to IPO Capital, on the basis of the evidence tendered by ASIC (particularly the affidavits of Mr Egan and Mr Hicks), I find that IPO Capital provided financial products or financial services which required an Australian financial services licence, in circumstances where IPO Capital did not have such a licence. I find that IPO Capital or Eleuthera continued to provide financial products or financial services to at least Mr Egan and Mr Hicks without an Australian financial services licence, despite ASIC putting Mr Mawhinney on notice of this non-compliance in September 2016. In doing so, I find that IPO Capital contravened s 911A(1) of the *Corporations Act*.

IPO Wealth Group

351 In relation to the IPO Wealth Group, I accept the evidence of the reports of the liquidators of the IPO Wealth Group, which were unchallenged. I accept ASIC's submission that the matters set out in the report of the liquidators of IPO Wealth and the IPO Wealth Subsidiaries, which

was in evidence in this proceeding, are indicative of several instances of conduct that are also apparent in relation to the products offered by IPO Capital, M101 Nominees and M101 Holdings. Those several instances of conduct each entailed an inherently problematic, risky and fatally flawed investment scheme formulated and implemented by entities associated with Mr Mawhinney. I find that the IPO Wealth Group, and its demise, had similar features to the Core Notes and M+ Notes products.

Core Notes

352 In relation to the Core Notes, on the basis of the representations made in the Core Notes brochure, the Expert Opinion of Mr Tracy, the Provisional Liquidators' Report and the evidence of Mr John Booth, I find that investors in the Core Notes were told that their investment in the Core Notes would be supported by "first ranking, registered security" and "the assets are otherwise unencumbered". However, this did not occur. As a consequence, I find that M101 Nominees engaged in misleading and deceptive conduct and, on the basis of the evidence tendered in this proceeding, contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* (which are referred to above). These statements were misleading without needing to rely on s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*. However, in any event, these statements were representations as to a future matter, and, on the evidence, I find there were no reasonable grounds for making them. They are therefore deemed to be misleading pursuant to s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*.

353 On the basis of the Expert Opinion of Mr Tracy, the Provisional Liquidators' Report and the evidence of Mr John Booth, I also find that M101 Nominees represented to investors that the Core Notes were similar to, or comparable to, a term deposit, when in fact the Core Notes exposed investors to financial risk that is significantly higher than bank term deposits. In doing so, M101 Nominees contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*. These statements were misleading without needing to rely on s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*. However, in any event, these statements were representations as to a future matter, and, on the evidence, I find there were no reasonable grounds for making them. They are therefore deemed to be misleading pursuant to s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*.

354 On the basis of the Expert Opinion of Mr Tracy, I find that Core Notes investors' funds were used to lend money to JLUT. I find that JLUT in turn lent the following amounts to the

following trusts: (a) BLP Investment Trust – $290,200; (b) Panetta Investment Trust – $288,225; and the (c) Tamminga Family Trust – $20,250. I note that Mr Mawhinney has not tendered any evidence to adequately explain these transactions. I find that Mr Mawhinney's partner is Brigette Leigh Panetta and Mr Mawhinney's sister is Inga Tamminga. I find that these transactions entailed monies raised from Core Notes investors being lent to a trust which then lent that money to a trust established for the benefit of Mr Mawhinney's partner and Mr Mawhinney's sister's family trust. I find that there is nothing in the Core Notes offer documents which suggests Cores Notes investors' funds could or would be used to lend monies for the benefit of members of Mr Mawhinney's family. The use of such money cannot be said to have been disclosed by the Core Notes brochure's statement that "[i]nvestment funds raised under [the Core Notes] product are used for ongoing investment and capital management purposes across the Mayfair 101 group of companies". In these circumstances, M101 Nominees' failure to disclose that investors' funds could or would be used in this way was a glaring omission and constituted misleading and deceptive conduct, or conduct that is likely to mislead or deceive, by M101 Nominees, under s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*.

355 I note that, while this evidence provides a basis to find that M101 Nominees engaged in such misleading and deceptive conduct, it does not enable a finding that Mr Mawhinney personally benefitted, or stands to personally benefit, from these transactions.

356 As to Mr Mawhinney's submissions concerning the Core Notes, I reject Mr Mawhinney's submissions and accept ASIC's submissions. In this respect, the following matters should be noted.

357 First, Mr Mawhinney contended that it was never a requirement under the Core Notes Deed Poll that security be *direct* first mortgage security over real property. However, that is not to the point. Core Notes investors were told that they were investing in "a secured, asset-backed term-based investment product", that the Core Notes were "[s]upported by first-ranking, unencumbered asset security", and that the relevant assets were "revalued at least yearly to *ensure dollar-for-dollar secured asset support* for each dollar of [the Core Notes]" (emphasis added). But there was not first-ranking, unencumbered security in place, or "dollar-for-dollar secured asset support", in respect of the Core Notes. As the Provisional Liquidators' Report stated at [158]:

> … My investigations show that neither [M101 Nominees], nor [the] Security Trustee

> held 'first-ranking security' over *any assets of substantive value*. First ranking mortgages were issued to [third parties] over various properties rendering the statement that 'the assets are otherwise unencumbered' false[.]
>
> (Emphasis added.)

358 Second, Mr Mawhinney's submission that there was relevant security in place in respect of the Core Notes is of little moment. While the relevant security trustee had security over units in various trusts which had trustees that owned properties, those properties (except one) were mortgaged to third parties. As ASIC submitted, there is no point having security over units in a trust that owns real property if the property has been mortgaged to third parties for the full value of the property. A trust that holds real estate assets encumbered by prior first registered mortgages cannot sensibly (or accurately) be described as a "pool of assets in respect of which first-ranking, registered security interests have been granted" and in which the "assets are otherwise unencumbered", as described in the Core Notes brochure. In addition, although the security trustee of the Core Notes was given a general security over assets of the various security trusts to whom investors' money was paid, the general security *specifically excluded real estate*. As the Provisional Liquidators' Report stated at [118]:

> … the General Security Deed between the [relevant] trusts and [the security trustee] state that the AllPAP provided to [the security trustee] on behalf of the [Core Notes] noteholders excluded real estate assets (*noting this is the only asset type held by the trusts*). Furthermore, *the assets were clearly not "unencumbered"* as mortgages were held by Naplend and the Family Islands Group over the real estate.
>
> (Emphasis added.)

359 Third, I reject Mr Mawhinney's submission that monies raised from new Core Notes investors could be used to pay redemptions owed to old Core Notes investors because the Core Notes brochure stated that "[i]nvestment funds raised under our [Core Notes] product are used for ongoing investment and capital management purposes across the Mayfair 101 group of companies". An opaque reference to investors' funds being used "for ongoing investment and capital management purposes" is not an adequate or proper disclosure to the effect that new investors' funds could or would be used to pay redemptions owed to old investors. As ASIC submitted, a necessary and proper disclosure in the Core Notes brochure, consistent with the unchallenged evidence in this proceeding, would have been to tell Core Notes investors that their funds would be used to make speculative investments in a development project in north Queensland which, if profitable at all, may not generate profits for a number of years, and, in those circumstances, M101 Nominees was reliant on continuing to attract new investors so as to use their money to repay old investors.

360 Fourth, I reject Mr Mawhinney's submission that no business that takes on debt funding is required to quarantine funds raised from profit-making activities to meet interest obligations. That may be correct. However, there is no evidence that M101 Nominees had "profit-making activities". The evidence is to the contrary: the Provisional Liquidators' Report states that M101 Nominees "has been insolvent since inception and remains insolvent as at the date of" the Provisional Liquidators' Report: Provisional Liquidators' Report at [7]. Again, as ASIC submitted, Core Notes investors should have been (but were not) told that if, for any reason, M101 Nominees had difficulty recruiting new investors, there was a real risk that the Core Notes scheme would collapse, leaving existing investors facing the loss of a large part (if not all) of their investment. On the unchallenged evidence, that risk has fully materialised: the Provisional Liquidators' Report states that the likely return to Core Notes noteholders is a "nil return": Provisional Liquidators' Report, [10].

361 Fifth, Mr Mawhinney submitted that it was relevant that he had made a genuine attempt to create a business that would generate income and returns sufficient to meet the obligations promised to investors. Mr Mawhinney submitted that funds within the group were insufficient to complete a high volume of property settlements, a decision was made to enter into a loan with Naplend Pty Limited, and it was expected (erroneously) to be a short-term facility.

362 I reject this submission by Mr Mawhinney. The evidence is that "[t]he Naplend loan was at a rate of 24% p.a for a term of 4 months", but "it is now in default and this rate has increased closer to [approximately] 40%": Provisional Liquidators' Report, [25]. In relation to this loan, the transcript of the hearing on 16 February 2021 records the following exchange with Counsel:

> MR NEWLAND: Now, you will see that the interest rate [on this loan] is two per cent per month … This is why this all fell over. It's this agreement … [S]o you will see … there's a reference to default interest.
>
> HIS HONOUR: Yes.
>
> MR NEWLAND: And you will see there is an additional one per cent per month, bringing the total rate to three per cent per month, which is the equivalent of 36 per cent per annum, and as a separate obligation[,] … if the default is continuing, there's an extra one per cent per month, which gets us up to the 48 per cent per annum interest rates …
>
> HIS HONOUR: So your submission is this is why the group of companies are in the parlous financial state they're in at the moment[?]
>
> MR NEWLAND: Absolutely.
>
> …
>
> HIS HONOUR: But there's another thing … [T]hese investors were never told that the

entity which they were investing in was going to take out a mortgage like the NAPLEND [loan].

MR NEWLAND: Yes, yes.

HIS HONOUR: [That is, the] NAPLEND mortgage with interest at two per cent per month, and in default three per cent per month …

MR NEWLAND: And more … I could take your Honour right through it, but take it from me: this is … one of the worst loans you could ever imagine.

HIS HONOUR: So why on Earth did Mr Mawhinney go into it?

MR NEWLAND: That's a good question. He needed money, because he had all these settlement obligations coming up, because the investment products had taken off …

MR NEWLAND: Now, the point of this is – a couple of points. Now, the Ponzi scheme issue is one that ASIC says doesn't particularly matter much, what matters is the reality of what happened to investors' money – or what might happen to investors' money. The only thing I would say about that is … for this application it does matter because this application is all about the conduct of Mr Mawhinney, and so, in my submission, it does make a difference as to whether Mr Mawhinney structurally set up a Ponzi scheme or whether Mr Mawhinney set up an investment business that failed because it bought too many assets too quickly and then took on a bad loan in order to meet settlement obligations. In my submission, there is a difference, and that's one of the reasons why I think it's important that your Honour has an appreciation for the existence of the NAPLEND loan, but also the terms and also the fact that it is not a related party transaction at all. To the contrary, it's elbows out, and it's really – in practical reality, that's where the investors' money is going to end up.

HIS HONOUR: Yes.

MR NEWLAND: It's going to end up with the family investment group, which is the Dunk Island loan … It's really the NAPLEND loan that really killed any prospect of the project sort of being able to get on its feet, and in my submission, the reason that matters is because it demonstrates that if there were problems in the way this business was set up, in that it was acquiring property at the rate of knots, bringing in money at a very fast rate, but acquiring properties even faster – it's not a – it wasn't all a problem that was designed to fleece investors, to enrich Mr Mawhinney. That's not what took place. Mr Mawhinney has not been enriched by this scheme.

HIS HONOUR: Yes.

MR NEWLAND: … Now, your Honour is going to say, rightly, well, how could any business that has no income hope to satisfy these interest obligations unless it acquired more investments from other investors putting money in?

…

MR NEWLAND: … ASIC is going to say, "Well, the income is nowhere near sufficient," and then I would say, "Well, the business was in its infancy." So look, all it is is that by the time the company go[t] through this bubble of settlements that was due and coming, by the time … that the Mayfair Group of companies got through that bubble of settlements, they then say they would have continued to rent these properties, you know, start generating some income …

363 I find these submissions unpersuasive for two reasons. First, again, these matters were never disclosed to Core Notes investors. Core Notes investors were never told that the Core Notes

investment proposal was to acquire "property at the rate of knots, bringing in money at a very fast rate, but acquiring properties even faster" and that, as a result, a loan with a very large rate of interest would be, or might be, entered. That loan was described as "one of the worst loans you could ever imagine".

364 Second, there is no evidence which could provide an adequate answer to the critical question posed by Mr Mawhinney's Counsel, namely: how could any business that has no or very little income hope to satisfy the interest obligations owed to Naplend Pty Limited and Core Notes investors unless it acquired funds from new investors putting money in? Separately, why was that position not explained to Core Notes investors? Mr Mawhinney has tendered no evidence about those issues. They are critical issues that Mr Mawhinney failed to adequately address. As ASIC submitted, there is no evidence as to why Mr Mawhinney permitted the Naplend Pty Limited loan to be entered into, or how and why he had placed the relevant companies in such a desperate financial situation that they were reliant on lenders such as Naplend Pty Limited. In these circumstances, ASIC's submission that the Core Notes scheme was inherently problematic and fatally flawed must be accepted. In this respect, ASIC's submission is relevantly supported by both Mr Tracy's Expert Opinion and the Provisional Liquidators' Report.

M+ Notes

365 In relation to the M+ Notes, on the basis of the affidavit of Mr Hui, I find that the issuer of the M+ Notes, M101 Holdings, took an investment from Mr Hui without disclosing to Mr Hui the critical fact that M101 Holdings had, before Mr Hui made his investment, implemented a "Liquidity Prudency Plan" which suspended redemptions in respect of the M+ Notes. That was highly misleading. In doing so, I find that M101 Holdings contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*.

366 On the basis of the representations in the M+ Notes brochure and the affidavits of Mr Wiggill and Ms Campbell, I find that M101 Holdings represented to Mr Wiggill and Ms Campbell that the M+ Notes were comparable, or entailed similar risk, to a term deposit, when in fact the M+ Notes were nothing like a term deposit. I find that, in doing so, M101 Holdings contravened s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*. These statements were misleading without needing to rely on s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*. However, in any event, these statements were representations as to a future matter, and, on the evidence, I find there were no reasonable

grounds for making them. They are therefore deemed to be misleading pursuant to s 12BB of the *ASIC Act* and s 769C of the *Corporations Act*.

367 On the basis of the evidence of Mr John Donald, I find that M101 Holdings accepted funds from Mr Donald when Mr Donald was not a "wholesale investor" (within the meaning of s 761G of the *Corporations Act* and *Corporations Regulations 2001* (Cth), Chapter 7, Part 7.1, Division 2). I therefore find that Mr Donald was provided with financial services in circumstances where Mr Donald was a "retail client" (for the purpose of the *Corporations Act*) and in circumstances where M101 Holdings did not comply with the regime in Chapter 7 of the *Corporations Act* in relation to "retail clients".

368 On the basis of the Provisional Liquidators' Report, I find that distributions and redemptions paid to Core Notes noteholders were funded using monies raised from M+ Notes noteholders. At [118], the Provisional Liquidators' Report set out the basis for the report's statement that "funds used to pay [Core Notes] noteholders were either sourced from [Core Notes noteholders'] original funds or those of M+ [Notes] noteholders". On the basis of the evidence of Mr Wiggill, Ms Campbell, and the M+ Notes brochure, I find that M+ Notes investors were never told that their investment could or would be used to fulfil obligations to investors in a different product, being the Core Notes product. (That position was not disclosed by the M+ Notes brochure's general and opaque statement that "[i]nvestment funds raised under our M+ [Notes] product are used for ongoing capital management purposes across the Mayfair 101 group of companies".) In failing to disclose that material fact to M+ Notes investors, I find that M101 Holdings contravened s 1041H of the *Corporations Act* and s 12DA(1) of the *ASIC Act*.

The Australian Property Bonds

369 In relation to the Australian Property Bonds, I make the following findings.

370 I find that the Australian Property Bonds were a product which was launched to circumvent the orders of the Court made on 16 April 2020 in the Mayfair Proceeding. Those orders required (among other things) that M101 Nominees and M101 Holdings make certain disclosures to investors in the Core Notes and the M+ Notes respectively. The Australian Property Bonds were launched, in the words of Mr Mawhinney's email dated 24 May 2020 (referred to above), as a "new initiative" which could be "launched without scrutiny".

371 The Australian Property Bonds had three features which are relevant for present purposes. First, the Australian Property Bonds raised funds which were intended to be used to pay a loan which the Mayfair 101 Group had entered: see Mr Mawhinney's email dated 21 June 2020 referred to above (it was "enabling [the] re-finance [of] Napla's [loan] property-by-property"). Second, it was a product which raised funds that were intended to be used to pay redemptions to investors in a different product, being the Core Notes product: ibid. Third, it was a product which raised funds in order to "improve the [Mayfair] Group's liquidity position": ibid. However, none of that was disclosed to Australian Property Bonds investors or prospective investors. I find that those matters were not disclosed to investors in the Australian Property Bonds product.

372 As a consequence, the representations made to Australian Property Bonds investors were highly misleading. In these circumstances, I find that Mayfair Wealth Partners Pty Ltd (which eventually changed its name to Australian Income Solutions Pty Ltd) has engaged in misleading and deceptive conduct within the meaning of s 1041H of the *Corporations Act* and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*.

373 Finally, on the basis of the evidence of Mr Rouse, I find that Australian Income Solutions Pty Ltd has simply taken Mr Rouse's $100,000, has not even issued the relevant financial product to Mr Rouse and has subsequently not contacted Mr Rouse. Such conduct is reprehensible. No competent, fair or reasonable financial services provider takes money from an investor without having proper administrative procedures in place to ensure the relevant product is issued to the relevant investor. Such conduct at the very least contravened s 1041H of the *Corporations Act* and s 12DA(1) of the *ASIC Act*.

374 As to Mr Mawhinney's submissions concerning the Australian Property Bonds, I reject Mr Mawhinney's submissions and accept ASIC's submissions. In this respect, two matters should be noted.

375 First, I reject Mr Mawhinney's submission that, unlike the Core Notes and the M+ Notes, the Australian Property Bonds were designed to give investors direct, first ranking mortgages, over a specific piece of real property, and were designed to "cure" what ASIC regards as one of the defects in the previous products. This is because, as ASIC submitted, for at least one Australian Property Bonds investor, a title search of the relevant property reveals that, as at 12 November 2020, there is a first registered mortgage in favour of Naplend Pty Limited, and no registered mortgage in favour of the investor. That evidence is unchallenged, and Mr Mawhinney has not

put on any evidence in relation to it. In these circumstances, the issues with security which arose in respect of the Core Notes product were not "cured" by the Australian Property Bonds product.

376 In addition, the evidence of Mr Rouse is that Mr Rouse has invested $100,000 in the Australian Property Bonds and not received the relevant product at all. That position does not amount to "curing" the serious mismanagement which arose in respect of the Core Notes and M+ Notes products.

377 Second, I reject Mr Mawhinney's submission that the Australian Property Bonds were not intended to circumvent this Court's orders on 16 April 2020 in the Mayfair Proceeding (being proceeding VID 228 of 2020), which I have referred to above. I am not persuaded that Mr Mawhinney's submission adequately accords with the relevant chronology of events. I accept ASIC's characterisation of the relevant chronology.

378 In this respect, on 16 April 2020, the Court made orders which restricted the phrases that could be used by several Mawhinney-controlled entities, and required that a notice be given to any new prospective investors in the Core Notes or the M+ Notes. On 24 May 2020, Mr Mawhinney sent an email (extracted above) which stated that "eliminat[ing] the current ASIC proceedings", "[d]iminish[ing] ASIC's attention on the Group" and "[e]nabl[ing] our new initiatives to be launched without scrutiny" were Mr Mawhinney's objectives. The evidence is that the only "new initiative" launched was the Australian Property Bonds and I find that Mr Mawhinney's reference to "new initiatives" in his email of 24 May 2020 was a reference to the Australian Property Bonds. On 15 June 2020, Mayfair Wealth Partners Pty Ltd (which was one of the entities restrained by the orders of 16 April 2020) changed its name to "Australian Income Solutions Pty Ltd". On 19 June 2020, Australian Income Solutions Pty Ltd launched the Australian Property Bonds, which had marketing materials that were, in essential respects, very similar to the Core Notes.

379 In all of the circumstances, it should be inferred, and I find, that the Court's orders on 16 April 2020 frustrated fundraising by way of the Core Notes and the M+ Notes and, as a consequence, launching the Australian Property Bonds was designed to circumvent that position and, in doing so, circumvent the terms and the purpose of the orders made by this Court on 16 April 2020 in the Mayfair Proceeding (proceeding VID 228 of 2020). That position is encompassed by Mr Mawhinney's stated intention of "eliminat[ing] the current ASIC proceedings" and

"[d]iminishing ASIC's attention on the group". In addition, I note that Mr Mawhinney has filed no evidence about his state of mind in launching the Australian Property Bonds.

The role of Mr Mawhinney

380 It should be noted that the findings set out above concern the actions of various companies. The Injunction sought by ASIC is directed towards Mr Mawhinney "by himself, his servants, agents, employees and any company of which he is an officer or member". It is therefore appropriate to say something about Mr Mawhinney's involvement in the conduct of the companies set out above. However, let me first say something about certain concepts.

Directing mind and will

381 In *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705, Viscount Haldane LC stated at 713:

> … a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

382 In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, Lord Reid, at 170, stated in similar terms:

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

383 In *Bernard Elsey Pty Ltd v Federal Commission of Taxation* (1969) 121 CLR 119, Windeyer J stated at 121:

> The company Bernard Elsey Pty. Limited was formed in 1951 by Mr Bernard Elsey, whom I shall for convenience call simply Elsey. The company then carried on a radio business at Toowoomba. This business was given up in 1956, and the company was thereafter inactive until it entered into the transactions out of which this case arises. It was, however, still in existence; and when the present story begins it was there, a legal person ready and waiting to be used by Elsey for his purposes. He and a Mr J. F.

> McConachie of Toowoomba, an accountant who was his taxation agent, were at all relevant times directors of the company. They were the only shareholders, Elsey having nine hundred and ninety-five shares and McConachie five shares. Elsey was in complete control of the company's business. The company existed simply to do his bidding and to alleviate his liabilities. Indeed it was for him really only a name of convenience: he personally carried out the undertakings of the company with which this case is concerned. I assume that these undertakings were all within the powers the company had under its memorandum of association. When the purpose with which it entered into business transactions is to be considered, it is Elsey's purpose that is meant.
>
> His mind was the company's mind …

384 In *Hamilton v Whitehead* (1988) 166 CLR 121, Mason CJ, Wilson and Toohey JJ stated at 127:

> There can be no doubt, on the facts of the present case, that the respondent, in placing the advertisement and in dealing with those who replied to it, was the company. He was its managing director and his mind was the mind of the company.

385 In *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421 (***Kojic***), Edelman J stated at [95]-[96]:

> After attribution became accepted in the late 19th and early 20th century, the usual rule of attribution permitted an agent's knowledge to be attributed to the corporation where the agent was a person so centrally concerned with the corporation's operations such as to be considered its "directing mind and will" ...
>
> Although the "directing mind and will" rule of attribution involves an anthropomorphism which can be misleading, in many cases it presents no difficulty …
>
> (Citations omitted.)

386 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751; 266 FCR 147, Beach J stated at [1659]-[1660]:

> Lord Thurlow in 1778 succinctly expressed the point that a corporation has "no soul to damn, no body to kick". Strictly, corporations are mindless. Accordingly an individual state of mind needs to be attributed to the corporate entity, particularly where one is focused upon the motivation or purpose for an action. But whose?
>
> I have said elsewhere that the conventional approach has been to identify the individual who was the "directing mind and will" of the corporation in relation to the relevant act or conduct and to attribute that person's state of mind to the corporation. But after the injection of flexibility into that concept by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506 to 511, metaphors and metaphysics have had diminished utility. First, there are no longer the rigid categories for identifying the "directing mind and will" that may be perceived to have existed after Viscount Haldane LC's use of the phrase in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 and indeed after *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 until *Meridian.* Second, and relatedly, the appropriate test is more one of the interpretation of the relevant rule of responsibility, liability or proscription to be applied to the corporate entity. One has to consider the context and purpose of that rule. If the relevant rule was intended to apply to a corporation, how was it intended to apply? Assuming that a particular state

> of mind of the corporation was required to be established by the rule, the question becomes: whose state of mind was for the purpose of the relevant rule of responsibility to count as the knowledge or state of mind of the corporation? (see *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2015] 2 WLR 1168 at [41] per Lord Mance). The question is one of the interpretation of the relevant rule taking into account its context and purpose. Now once you have asked and answered that question and identified the individual in question, you may then apply the title of "directing mind and will". But so to proceed adds little to the analysis. The label "directing mind and will" is nebulous if not question begging. It also follows that if you use such a label, then it will have variable application even within the same corporation depending upon the particular context and function of the relevant rule of responsibility. And as soon as one admits of that variability, the advantages in using the label become illusory, except to distinguish such a person who can be identified with the corporation from a person for whose acts the corporation is merely vicariously liable (*Bilta* at [70] per Lord Sumption). I agree with Lord Walker of Gestingthorpe who suggested that it might be better if the label "directing mind and will" was allowed to fade away (see *Moulin Global Eyecare Trading Ltd (in liquidation) v Commissioner of Inland Revenue* [2014] HKCFA 22 at [106]).

387 In *Gregg v R* [2020] NSWCCA 245, Bathurst CJ stated at [489] (Hoeben CJ at CL and Leeming JA agreeing):

> In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507, 509 and 511 ("*Meridian Global*"), Lord Hoffman, delivering the advice of the Privy Council, stated that in the context of liability for regulatory offences the question was who for the purpose of the statute was to be treated as the company, and whose acts should be attributed to the company, stating that the true question was one of construction not of metaphysics: see also *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751; (2018) 127 ACSR 110 at [1660] where Beach J after referring to *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2016] AC 1 at [41] and *Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue* [2014] HKCFA 22 at [106] suggested it might be better if the label "'directing mind and will' was allowed to fade away".

Section 79 of the Corporations Act and s 12GBCL of the ASIC Act

388 In addition, s 79 of the *Corporations Act* provides:

> **Involvement in contraventions**
>
> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

389 Section 12GBCL of the *ASIC Act* provides:

> **Attempt and involvement in contravention treated in same way as actual**

contravention

A person who:

(a) attempts to contravene a civil penalty provision; or

(b) is involved in a contravention of a civil penalty provision;

is taken to have contravened the provision.

390 Sections 12DB to 12DN are "civil penalty provisions" under the *ASIC Act*: *ASIC Act*, s 12GBA(6)(b).

391 Section 5(2)(b) of the *ASIC Act* provides that, "[u]nless the contrary intention appears … an expression that … is used, but not defined, in [the *ASIC Act*] … has the same meaning in [the *ASIC Act*] as in the" *Corporations Act*. Section 5(2)(b) of the *ASIC Act* "has the effect that the expression "involved in a contravention" used in s 79 of the *Corporations Act*, has the same meaning for the purposes of the *ASIC Act*": *Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC* [2020] NSWSC 61; 143 ACSR 241 at [69].

Mr Mawhinney's directorships and shareholdings

392 In light of those matters, it should be noted that Mr Mawhinney was at all relevant times:

(a) the sole director of Mayfair Wealth Partners Pty Ltd, which, on 15 June 2020, changed its name to Australian Income Solutions Pty Ltd;

(b) the sole director of M101 Holdings, which was the issuer of the M+ Notes;

(c) the sole director and shareholder of Online Investments Pty Ltd, which at all relevant times was the sole shareholder of Mayfair Wealth Partners Pty Ltd and M101 Holdings; and

(d) the sole director of M101 Nominees, which was the issuer of the Core Notes. Mr Mawhinney was a director of Mayfair Group Pty Ltd, which at all relevant times was the sole shareholder of M101 Nominees. Mr Mawhinney was a director and sole shareholder of Sunseeker Holdings Pty Ltd, which was the sole shareholder in Mayfair Group Pty Ltd;

(e) the sole director of IPO Wealth and the IPO Wealth Subsidiaries. The sole shareholder of IPO Wealth was Online Investments Pty Ltd, and Mr Mawhinney was the sole director and shareholder of Online Investments Pty Ltd. The sole shareholder of the IPO Wealth Subsidiaries was IPO Wealth;

(f) the sole director of Eleuthera;

(g) the sole director of IPO Capital. The sole shareholder of IPO Capital was Online Investments Pty Ltd and, as stated above, Mr Mawhinney was the sole director and shareholder of Online Investments Pty Ltd.

393 On the evidence, I find that Mr Mawhinney was the ultimate beneficiary of each of the relevant entities whose conduct is referred to in these reasons.

394 In relation to IPO Wealth, the relevant liquidators' report states:

> During his public examination, Mr Mawhinney mentioned other persons involved in the administration of the affairs of the IPO Wealth Group, however, he acknowledged that he was the ultimate decision-maker in the group.

395 In addition, Mr Mawhinney's signature appears on the investment agreements entered into with the various investors which filed affidavits in these proceedings. Mr Mawhinney's signature also appears on the "Notes Certificates" issued to several of those investors.

Findings in relation to Mr Mawhinney's role

396 In light of Mr Mawhinney's roles (as set out above) and the evidence referred to earlier in these reasons, I am satisfied that Mr Mawhinney was the controlling or directing mind and will of each of the corporate Defendants and of M101 Holdings, IPO Capital, IPO Wealth and Mayfair Wealth Partners Pty Ltd. In truth, on the evidence, Mr Mawhinney is the only person that could have been the relevant entities' directing mind and will. (In other words, this is one of those cases where finding the "directing mind and will" of an entity "presents no difficulty": see *Kojic* at [96].) I am satisfied on the evidence that these entities were at all relevant times the corporate alter egos of Mr Mawhinney. I am satisfied that Mr Mawhinney was a person "involved" in the conduct (which is the subject of the findings above) of the relevant entities within the meaning of s 79(c) of the *Corporations Act* and s 12GBCL(b) of the *ASIC Act*.

CONSIDERATION: JURISDICTION

397 In light of the findings which I have set out above, the question arises whether there is jurisdiction to make the injunctions which ASIC seeks. In this respect, ASIC sought permanent injunctions against Mr Mawhinney "pursuant to sections 1101B(1) and 1324(1) of the [*Corporations Act*] and/or section 23" of the *FCA Act*. I turn to consider those statutory provisions.

Statutory provisions and principles

Section 23 of the FCA Act

398 Section 23 of the *FCA Act* provides that:

> The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

Section 1101B of the Corporations Act

399 Section 1101B(1)(a)(i) of the *Corporations Act* relevantly provides:

> (1) The Court may make such order, or orders, as it thinks fit if:
>
> (a) on the application of ASIC, it appears to the Court that a person:
>
> (i) has contravened a provision of [Chapter 7], or any other law relating to dealing in financial products or providing financial services …
>
> However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.

400 Section 1101B(4) provides (among other things):

> *Examples of orders the Court may make*
>
> (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
>
> (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
>
> (i) a provision or provisions of [Chapter 7]; or
>
> (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or
>
> …
>
> (e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and
>
> (f) an order restraining a person from providing any financial services that are specified in the order …

401 In *Re Vault Market*, Brereton J stated at [69]-[72]:

> Section 1101B(1)(a)(i) empowers the Court to "make such orders as the Court thinks fit" where, on ASIC's application, it appears to the Court that "a person has contravened" a provision of Chapter 7 (or any other law relating to providing financial services). Non-exclusive examples of the kinds of orders than can be made are set out in sections 1101B(4) and include, relevantly, "(a) an order restraining a person from carrying on a business ... in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene, a provision or

provisions" of Chapter 7.

> … [T]he broadly expressed power in s 1101B(1) may authorise an order against a person other than the contravener. While satisfaction that *a* person has contravened a provision of Chapter 7 is a jurisdictional prerequisite, the only limitation on the order that can be made, once that requirement is satisfied, is that "the Court is satisfied that the order would not unfairly prejudice any person". While the example in s 1101B(4)(a) refers to an order restraining a person from carrying on a business ... if *the* person has persistently contravened a provision or provisions of Chapter 7, it is an example only. More significantly, the example in s 1101B(4)(b) includes an order to the directors of a body corporate, where the body corporate was the contravener, and the examples in s 1101B(4)(c) and (d) expressly refer to a person who was involved in a contravention; these examples demonstrate that the general power in s 1101B(1), of which they are but illustrations, extends to authorise an order against a person other than the contravener – provided that the order would not unfairly prejudice any person. **That power does not depend on establishing that the person against whom the order was made was "involved", within the meaning of s 79, in the contravention, although the degree and nature of the relationship between the person and the contravention would no doubt be highly relevant to the exercise of the discretion to make such an order.**
>
> I have accepted, above, that Vault has contravened s 911A, s 911C and s 1041H, all of which are within Chapter 7. Although it may be doubted whether Vault's contraventions are properly described as "persistent", the reference to "persistent" contravention in the example in s 1101B(4)(a) does not make persistence a jurisdictional prerequisite to an order under s 1101B(1). Mr Amin has notice of the application and, in circumstances where he consents to an order against him, it cannot be said that the order would unfairly prejudice him.
>
> The power to make orders under s 1101B(1), against both Vault and Mr Amin, is therefore enlivened.
>
> (Italicised text in the original; bold text added.)

Section 1324 of the Corporations Act

402 Section 1324 of the *Corporations Act* relevantly provides:

> (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act; or
>
> (b) attempting to contravene this Act; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
>
> (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
>
> (f) conspiring with others to contravene this Act;
>
> the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct

and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

…

(6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

Application to the facts of this case

403 Having regard to those statutory provisions, I note the following.

404 As to s 1101B, a precondition to making an order under s 1101B(1) is that, "on the application of ASIC, it appears to the Court that a person … has contravened a provision of [Chapter 7], or any other law relating to dealing in financial products or providing financial services" (underlining added). There is no controversy that ASIC has made the relevant application, so that criterion is satisfied. In addition, on the basis of the findings which I have detailed earlier in these reasons, I am satisfied that:

(a) IPO Capital contravened s 911A(1) of the *Corporations Act*, which is a provision of Chapter 7;

(b) M101 Nominees and M101 Holdings have contravened s 1041H of the *Corporations Act* (which is a provision in Chapter 7) and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act* (which are "law[s] relating to dealing in financial products or providing financial services");

(c) M101 Holdings' dealings with Mr Donald were a contravention of the provisions of Chapter 7 concerning the provision of financial services to "retail clients";

(d) Mayfair Wealth Partners Pty Ltd (which eventually changed its name to Australian Income Solutions Pty Ltd), in its dealings concerning the Australian Property Bonds and Mr Rouse, contravened s 1041H of the *Corporations Act* and and ss 12DA(1), 12DB(1)(a) and 12DB(1)(e) of the *ASIC Act*;

(e) Mr Mawhinney is a person that "has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention[s]" by IPO Capital,

M101 Nominees, M101 Holdings and Mayfair Wealth Partners Pty Ltd: see findings made above and s 79(c) of the *Corporations Act* and s 12GBCL(b) of the *ASIC Act*.

405 In these circumstances, I am satisfied that the jurisdictional precondition in s 1101B(1) is satisfied and jurisdiction to make orders under s 1101B(1) is enlivened.

406 As to s 1324 of the *Corporations Act*, for the reasons stated in relation to s 1101B and on the basis of the findings made above, I am satisfied that Mr Mawhinney is "a person" who "has engaged … in conduct that constituted … being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of [the *Corporations Act*]": *Corporations Act*, s 1324(1)(e). I am therefore satisfied that the jurisdictional precondition in s 1324 has been enlivened and, as a result, the Court has power to:

> … grant an injunction, on such terms as the Court thinks appropriate, restraining [Mr Mawhinney] from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

407 Finally, I should note that I reject Mr Mawhinney's submission that, if Mr Mawhinney is to be the subject of orders based on investors incurring losses, then the Court should make factual determinations about what actual loss has been incurred, and what has caused those losses. That submission should not be accepted because there is no indication in ss 1101B or 1324 to the effect that a court must assess loss as a jurisdictional precondition to making orders under those provisions. The relevant jurisdictional precondition relates to contravention, not the ascertainment of the quantum or cause of actual loss.

Summary: jurisdiction is enlivened

408 As the power to make orders under ss 1101B and 1324 is enlivened, I turn to consider the orders proposed by ASIC.

CONSIDERATION OF THE PROPOSED ORDERS

Principles concerning s 1101B and s 1324 of the *Corporations Act*

409 In *ASIC v McDougall*, Young J stated at [64]:

> Section 1324 permits the Court to grant an injunction "on such terms as the court thinks appropriate". These words echo the concluding words of s 80(1) of the *Trade Practices Act 1974* ("TPA") which state that the Court may grant an injunction in such terms as the Court determines to be appropriate. These words were introduced into s 80(1) by a 1983 amendment to the TPA, which, to adapt the language used by French J in *OD Transport Pty Ltd v WA Government Railways Commission* (1987) 13 FCR 500 at 508, freed the power conferred by s 80 from the previous constraint that the injunction granted under it must restrain a person from engaging in conduct that constitutes or

would constitute a contravention of Part IV of Part V of the TPA or one of the species of accessorial participation there listed.

410 In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; 235 FCR 181, White J stated at [622]:

> The principles relating to the exercise of the discretion under s 1324 are settled. In *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; (2002) 42 ACSR 605, Palmer J set out several of the applicable principles at [36]:
>
> (a) the jurisdiction which the Court exercises under s 1324 is statutory, and not the Court's traditional equity jurisdiction;
>
> (b) the Court is not to be confined by the considerations which would be applicable if it was exercising its traditional equity jurisdiction;
>
> (c) the Court should consider whether the injunction will have some utility or will serve some purpose within the contemplation of the Corporations Act, and that is so whether the application is for a permanent injunction under subs (1) or an interim injunction under subs (4);
>
> (d) when the application is made by ASIC rather than a private litigant, the Court is likely to give greater weight to the question of whether the injunction will serve a purpose within the contemplation of the Corporations Act.
>
> The Court may grant a permanent injunction even when a winding up order has already been made against a corporate defendant … Like the making of a declaration, the grant of an injunction under s 1324 may serve to mark the Court's disapproval of the defendant's conduct and operate as a deterrent to others: *Australian Securities and Investments Commission v Storm Financial Ltd (Receivers and Managers Appointed) (in liq) (No 2)* [2011] FCA 858 at [49]; *Re Idylic Solutions* [2013] NSWSC 106 at [66], [69].

411 In *ASIC v Macro Realty*, Beach J stated at [53]-[54]:

> As I have said, s 1324 of the Act empowers the Court to make the relevant orders … First, the jurisdiction which the Court exercises under s 1324 is statutory and not traditional equitable jurisdiction. Second, the Court is not confined by the considerations that would apply if it was exercising such equitable jurisdiction. Third, the Court should consider whether the injunction will have some utility or will serve some purpose manifested by the Act. Relatedly, the Court should give greater weight to the question of whether the injunction will serve a purpose contemplated by the Act when ASIC is the applicant for relief.
>
> Further, the grant of an injunction under s 1324 marks the Court's disapproval of the relevant conduct and operates as a deterrent to others.

412 In *ASIC v Avestra*, Beach J stated at [235] that, "[s]elf-evidently, the Court's power to grant injunctions under s 1324(1) is substantially protective in its purpose".

413 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585, Beach J stated at [183]-[185]:

> ASIC further submits that a compliance program tailored to addressing the contraventions established falls within the scope of s 1101B. It says that that provision is broad enough to empower me to make an order requiring a contravener to establish a compliance program tailored to remedying the contraventions established. I agree, and would note the following. First and generally speaking, one should not read provisions conferring jurisdiction on, or granting powers to, a court by making implications or imposing limitations which are not found in the express words. Second, it is no objection to an order requiring a compliance program to be established that it is in a form of mandatory injunction; I would note that the illustrative orders set out in s 1101B(4) contain examples that are mandatory in nature. Third, what the court "thinks fit" is not at large. The power must be exercised judicially having regard to the text, context and purpose of the Corporations Act. Now given that this is a power that must relate to a contravention, a compliance program can be readily accommodated within its scope as an order designed to ensure that a contravention of a similar kind does not occur again. And given that one of the purposes of the civil penalty regime is deterrence, a compliance program can address specific deterrence …
>
> … [B]oth s 1101B of the Corporations Act and s 12GLA of the ASIC Act confer a broad discretionary power. So much is evident from the text of s 1101B(1), which provides that the Court "may make such order, or orders, as it thinks fit".

414 In *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55; 142 ACSR 277, Lee J stated at [236]-[238]:

> Section 1101B(1) of the Act relevantly provides that, on the application of ASIC, if it appears to the Court that a person has contravened a provision of Ch 7 of the Act, the Court may make such order or orders "as it thinks fit", subject to being satisfied that the order would not "unfairly prejudice any person". Clearly, this is a provision which affords the Court a broad discretionary power …
>
> It has been said in respect of equivalent provisions of pre-uniform companies legislation, that courts are "left at large to determine each case according to the justice and equity of the circumstances" and "prima facie, any exercise of the discretions given to the court under the Code which enables all parties to return to the positions they were in before the impugned acquisition took place is a proper exercise of that discretion" …
>
> I consider that in this case it is appropriate that both backward-looking and forward-looking orders are made under s 1101B. The backward-looking orders attempt to go some way to repair the harm that has been done by ensuring affected clients have been adequately compensated. The forward-looking orders are aimed at supplementing the penalties and ensuring specific deterrence in guarding against the possibility of the contravening conduct happening again.
>
> (Citations omitted.)

Is the scope of the proposed restraint appropriate?

415 Putting to one side the period of the restraint proposed by ASIC, having regard to the matters I have set out above, I am satisfied that an injunction of the breadth which is sought by ASIC is justified and appropriate for the following reasons.

416 First, the object of Chapter 7 in s 760A includes the promotion of "confident and informed decision making by consumers of financial products and services", "fairness, honesty and professionalism by those who provide financial services", and "fair, orderly and transparent markets for financial products". The *Corporations Act* "generally is concerned primarily with protection of the public interest in the prevention of particular conduct": *Re Idylic Solutions* at [59]; *Monarch* at [100].

417 Second, protecting the public from harmful activity by cavalier financial services providers promotes "confident and informed decision making by consumers of financial products and services", "fairness, honesty and professionalism by those who provide financial services" and "fair, orderly and transparent markets for financial products": *Corporations Act*, s 760A; see also *Monarch* at [100].

418 Third, on the findings I have made, and the evidence I have accepted, Mr Mawhinney is such a cavalier financial services provider. The scope of the orders sought by ASIC would, in the future, protect individuals dealing with Mr Mawhinney or entities which are controlled by him. Mr Mawhinney has been involved in multiple contraventions spanning a number of years: *Monarch*, [100]. Those contraventions have involved a number of provisions of the *Corporations Act* and the *ASIC Act*. Mr Mawhinney's conduct can be characterised as "serious, incompetent and reckless" and displaying "a propensity for conduct in disregard of the requirements" of financial services laws: *Monarch*, [100].

419 In this respect, having regard to the evidence and findings set out above, and like the position in *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; ACSR 484 (***ASIC v Financial Circle***):

(a) I am satisfied that the contraventions and findings outlined in this judgment "are a particularly egregious example of the kind of conduct that the statutory provisions are designed not merely to prevent, but to dissuade and sanction in the strongest terms": *ASIC v Financial Circle* at [169];

(b) I am satisfied that there is a high likelihood that Mr Mawhinney, or entities controlled by Mr Mawhinney, will engage in similar conduct if not prevented by the Court from doing so: see *ASIC v Financial Circle* at [171]. This is evident from the fact that Mr Mawhinney engaged in conduct that was designed to circumvent this Court's orders on 16 April 2020 in the Mayfair Proceeding (proceeding VID 228 of 2020). It also evident from the fact that Mr Mawhinney provided unlicensed financial services to Mr Egan

and Mr Hicks, despite ASIC putting Mr Mawhinney on notice of this non-compliance in September 2016.

(c) I am satisfied that Mr Mawhinney "knew or ought reasonably to have known" that the relevant entities' "conduct was not compliant with financial services laws, thus indicating a disregard for the law and its obligations to comply with corporate regulations": *ASIC v Financial Circle* at [170].

420 Fourth, I am not satisfied that it is appropriate to tailor the orders to reduce the scope of the orders ASIC has sought. This is because Mr Mawhinney has demonstrated a high propensity to circumvent or simply ignore financial services regulation (see the various findings and contraventions referred to above). In addition, Mr Mawhinney has in the past established schemes quickly in a manner which was designed to defeat the terms and purpose of restraints which have been placed on companies he controls (see the circumstances concerning the Australian Property Bonds product referred to above). As a consequence, reducing the scope of the orders sought by ASIC would, in my view, merely serve to defeat the protective purpose of those orders.

421 Having regard to the high risk posed by Mr Mawhinney to the public as evidenced by the findings which I have made in this proceeding, I am satisfied that the scope of the orders sought by ASIC is appropriate. Mr Mawhinney's conduct can accurately be described as reprehensible conduct which demonstrates a complete disregard for financial services laws and, as a consequence, places the public at great risk of financial loss should Mr Mawhinney not be restrained by the form of injunction sought by ASIC.

422 Finally, I reject Mr Mawhinney's submission that the liquidation of M101 Nominees has not yet been finalised and, as a result, the orders sought by ASIC are premature.

423 First, as referred to above, the jurisdictional precondition to orders under ss 1101B and 1324 relates to the existence of a relevant contravention, not the precise ascertainment of the final financial position of the contravener.

424 Second, Mr Mawhinney has had every opportunity to respond to the evidence filed in this proceeding since it was commenced on 10 August 2020. In particular, the expert opinion of Mr Tracy dated 12 June 2020 was annexed to the First Buckley Affidavit. On 13 August 2020, I ordered that the First Buckley Affidavit (among other documents) be served on the Defendants, including Mr Mawhinney. The affidavit of Ms Lisa Saunders sworn 6 November

2020 deposes that, on or around 14 August 2020, the First Buckley Affidavit was served on Mr Mawhinney's then solicitors (who had instructions to accept service on Mr Mawhiney's behalf). The Provisional Liquidators' Report was provided to the Court by the provisional liquidators on 24 September 2020. The parties to this proceeding (and their solicitors) were copied to that correspondence. The Provisional Liquidators' Report has been referred to extensively by both parties. In these circumstances, it cannot be said that Mr Mawhinney has not had a proper opportunity to consider and address the evidence filed in this proceeding.

425 Third, there is simply no evidence concerning how the financial position of M101 Nominees might change between now and after the liquidation of M101 Nominees is completed. There is no evidence which could provide a basis for a reasonable expectation that the position of M101 Nominees may change. The evidence is that M101 Nominees has been insolvent for some time and Core Notes noteholders are unlikely to receive any return. There is no basis to reasonably conclude that position may change.

426 Fourth, there is ample evidence from which the Court can readily conclude that Mr Mawhinney's continued fundraising, and marketing of financial products and services to Australian investors, presents a real and significant risk to investors. The evidence and submissions filed in this proceeding are the basis for the serious findings above, which amply justify orders being made on a final basis.

What should be the period of the restraint?

427 The question therefore arises as to the appropriate period of the restraint. ASIC seeks a permanent injunction or, if not permanent, a restraint of not less than 15 years. Mr Mawhinney opposes any period of restraint. I turn to consider the principles concerning the period of a restraint.

The "Santow list"

428 In *ASIC v Financial Circle*, O'Callaghan J stated at [160]-[167]:

> ASIC seeks permanent injunctions against Financial Circle restraining it from:
>
> (1) carrying on, among other things, a financial services business and providing financial product advice (**financial services injunction**); and
>
> (2) providing credit, or otherwise entering into a credit contract as a credit provider (**credit injunction**).
>
> …
>
> *Principles*

The financial services injunction is sought pursuant to ss 1324(1) and 1101B(1)(a) of the Corporations Act and s 12GD(1) of the ASIC Act …

In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* [2015] FCA 527 at [23], the Court identified that financial services injunctions are designed to protect the public, have a denunciatory and deterrent purpose, but are not punitive in nature.

In *Monarch*, Gordon J held at [98]-[99]:

> In considering whether, and if so, for what period, financial services disqualification orders are to be made, it is appropriate and permissible to have regard to the factors [relevant to disqualification from managing corporations] summarised in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483 at [56], which operate as guidelines for consideration of the circumstances of a particular case …
>
> As the Corporations Act is concerned primarily with the protection of the public interest in the prevention of particular conduct, considerations of public policy are relevant in the exercise of the discretion to grant an injunction under s 1324 …

In *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [56] (***Adler***), the Court identified the following propositions (omitting citations):

> Factors that have led to the imposition of the longest periods of disqualification (that is, disqualifications of 25 years or more) include:
>
> - large financial losses;
> - high propensity that the defendant may engage in similar activities or conduct;
> - activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;
> - the defendant's lack of contrition or remorse;
> - disregard for the law and compliance with corporate regulations;
> - dishonesty and intent to defraud; and
> - previous convictions and contraventions for similar activities.
>
> In cases in which the period of disqualification ranged from 7 years to 12 years, the factors that led to the conclusion that these cases were serious though not the 'worst cases', included:
>
> - serious incompetence and irresponsibility;
> - substantial loss;
> - the fact that the defendant has engaged in deliberate courses of conduct to enrich himself or herself at others' expense, but with lesser degrees of dishonesty;
> - continued, knowing and wilful contraventions of the law and disregard for legal obligations; and

- lack of contrition or acceptance of responsibility, although that must be weighed against the prospect that the defendant may reform.

The factors leading to the shortest disqualification (that is, disqualifications for up to 3 years) were:

- although the defendant had personally gained from the conduct, he or she had endeavoured to repay or partially repay the amounts misappropriated;
- the defendant had no immediate or discernible future intention to hold a position as manager of a company; and
- the defendant had expressed remorse and contrition, acted on advice of professionals and had not contested the proceeding against him or her.

429 These principles have been applied to the grant of injunctive relief under s 1101B and s 1324 of the *Corporations Act* to restrain a person from providing financial services: see, for example, *Australian Securities and Investments Commission v ActiveSuper (In Liq) (No. 2)* [2015] FCA 527; 106 ACSR 302 at [29]-[30] per White J; *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064 at [52]-[54] per Davies J; *ASIC v McIntyre* at [31]-[36] per Bromwich J; *Australian Securities and Investments Commission v CFS Private Wealth Pty Ltd (No 2)* [2019] FCA 24 (***ASIC v CFS Private Wealth***) at [67]-[70] per Reeves J.

430 In *Re Vault Market*, Brereton J at [83] expressed some reservations about the unqualified application of the "Santow list" to an order under s 1101B restraining a person from carrying on a financial services business. Justice Brereton stated that "the context and content of s 1101B indicates that its purpose is protective and remedial, rather than deterrent, in nature".

431 Whilst I accept the reservation expressed by Brereton J and acknowledge that the context and content of s 1101B indicates that its purpose is primarily protective and remedial (rather than necessarily deterrent) in nature, the "Santow list" provides a useful list of factors which, in the appropriate case, assists the principled exercise of the Court's discretion as to what orders the Court "thinks" are "fit" (under s 1101B) and the terms of the restraint that the "Court thinks appropriate" (under s 1324).

432 In these circumstances, I turn to evaluate the "Santow list" in light of the facts of this case.

Evaluating the "Santow factors"

Large financial losses

433 On any view, the financial losses in this case are very large. The unchallenged evidence is that over $211 million has been raised by way of IPO Capital, the IPO Wealth Fund, the M+ Notes, the Core Notes and the Australian Property Bonds. The current state of the evidence is that investors in those schemes are unlikely to receive any return and that those funds have been lost. Even putting to one side the losses associated with IPO Capital and IPO Wealth, the unchallenged evidence is that the funds raised by way of the M+ Notes and the Cores Notes amount to approximately $130 million. The current state of the evidence is that investors in those schemes are unlikely to receive any return and that those funds have been lost. This is a degree of financial loss that is significantly larger than in other cases.

434 By way of comparison, in *ASIC v CFS Private Wealth*, ASIC established that, over a nine year period, a Mr Miller caused more than $4.7 million to be transferred to CFS Corporation. ASIC's investigations revealed that Mr Miller did not, in fact, invest those monies as he had represented he would do, but rather he used them for his own personal purposes and to make interest payments to other clients. While the proceeding was undefended, Justice Reeves restrained Mr Miller from providing financial services for a period of 25 years.

435 In *ASIC v McIntyre*, investor funds of almost $7 million had been lost and very little was ever likely to be returned. The parties agreed that each of the two natural person defendants, Mr Jamie McIntyre and Mr Dennis McIntyre, should be restrained for 10 years from (among other things) providing financial product advice within the meaning of s 761A of the *Corporations Act* or dealing in financial products within the meaning of that provision. Justice Bromwich stated that such a restraint was "entirely appropriate given the seriousness of the conduct and the severe damage that has been occasioned to so many individual investors": *ASIC v McIntyre*, [36].

436 In the circumstances, the size of the financial loss in this case can only put the period of the restraint at the upper end of the spectrum.

High propensity that the defendant may engage in similar activities or conduct

437 In light of the findings which I have made in this proceeding, I have no confidence that Mr Mawhinney will not in the future seek to formulate and sell products which have similar

characteristics to the products offered by IPO Capital, IPO Wealth, M101 Nominees, M101 Holdings and Mayfair Wealth Partners Pty Ltd (or Australian Income Solutions Pty Ltd).

438 This is so for four reasons. First, Mr Mawhinney has on several occasions engaged in conduct that entailed an inherently problematic, risky and fatally flawed investment scheme, which is apparent in relation to the products offered by IPO Capital, M101 Nominees, M101 Holdings and IPO Wealth.

439 Second, I have found that Mr Mawhinney launched the Australian Property Bonds product in order to circumvent the orders of the Court made on 16 April 2020 in the Mayfair Proceeding (proceeding VID 228 of 2020), which require M101 Nominees and M101 Holdings to make certain disclosures to investors in the Core Notes and the M+ Notes respectively. That is, when a restraint was imposed on Mr Mawhinney, Mr Mawhinney's reaction was to formulate a further scheme designed to circumvent the restraint.

440 Third, Mr Mawhinney caused the relevant corporate entities to engage in contravening conduct in circumstances where he knew or ought reasonably to have known that it was very likely not compliant with financial services laws. As early as September 2016, for example, Mr Mawhinney was put on notice that IPO Capital may be engaged in unlawful unlicensed conduct, and yet IPO Capital or Eleuthera continued to provide financial products or financial services to at least Mr Egan and Mr Hicks without an Australian financial services licence.

441 Fourth, there is simply no evidence tendered by Mr Mawhinney that he has reformed or that he does not intend to cease implementing highly problematic investment schemes.

442 In these circumstances, I conclude that there is a high propensity that Mr Mawhinney may in future engage in similar activities or conduct. This is a factor which places the length of the restraint at the higher end of the spectrum.

Activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy

443 In relation to this factor, in *Australian Securities and Investments Commission v Parkes* [2001] NSWSC 377; 38 ACSR 355, Austin J stated at [181] that the relevant "defendant's field of activity, management and financial consultancy, is an area where the potential to do damage is especially high compared, say, with a defendant whose expertise is in making cement".

444 As I have set out in detail above, Mr Mawhinney was not a low-level or mid-level employee of a corporate wrongdoer. He was the director, controlling mind and will, and ultimate beneficiary of each of the relevant corporate entities.

445 The relevant corporate entities were engaged in offering financial products to wholesale investors, which is a category of investors that are not subject to the usual protections afforded to retail investors. On the basis of the evidence, as a matter of fact, the relevant investors were not sophisticated in matters of finance.

446 On the evidence, it is apparent that many of the investors in Mr Mawhinney's products were Australians that were investing their life savings or monies held in self-managed superannuation funds. The evidence also discloses that those investors were generally seeking investment products with a relatively conservative risk profile, and that they were led to believe that Mr Mawhinney's products were low risk investments.

447 In the circumstances, I conclude that Mr Mawhinney's fields of activity have a high potential to do very significant financial damage to persons who:

(a) as a matter of fact, are not sophisticated in matters relating to finance and investment;

(b) as a matter of law, may qualify as wholesale investors and may not therefore be subject to various protections afforded to "retail clients"; and

(c) in any event, invest a large proportion of their life savings in products which they were led to believe, and believed, were low risk investment products.

448 This is a further factor which places the length of restraint at the high end of the spectrum.

The defendant's lack of contrition or remorse

449 I accept ASIC's submission that Mr Mawhinney has shown no contrition or remorse in this case. Like one of the defendants in *ASIC v Gallop*, Mr Mawhinney "has not adduced any evidence and there is accordingly nothing to suggest that he has gained insight into the seriousness of the conduct" involved in this case: *ASIC v Gallop*, [328]. Having adduced no evidence, there is nothing to suggest that Mr Mawhinney has any appreciation of the conduct that he has orchestrated and engaged in, and the financial harm that he has caused to investors in his products. Mr Mawhinney has expressed no contrition or remorse for the very significant loss of investors' funds, despite the apparent acceptance in Mr Mawhinney's submission that investors will not receive "dollar for dollar" redemption.

450 This is a factor which places the length of the restraint to be imposed at the higher end of the spectrum.

Disregard for the law and compliance with corporate regulations

451 In light of the evidence and findings I have made in this proceeding, it can be stated that Mr Mawhinney has a total disregard for the law and compliance with financial regulation. It is unnecessary to set out all of the findings again. It is sufficient to say that, on the basis of those findings, I am satisfied that Mr Mawhinney has a complete lack of regard for, or appreciation of, the very important purposes served by financial services laws. In addition, I note that, beyond financial services laws, the evidence in this proceeding also demonstrates Mr Mawhinney's total disregard for corporations law and governance generally. By way of example, the evidence shows that Mr Mawhinney has had no regard for laws concerning insolvent trading and directors' duties.

452 This is a factor which places the length of the restraint to be imposed at the higher end of the spectrum.

Dishonesty and intent to defraud

453 ASIC does not allege conscious dishonesty by Mr Mawhinney. As a consequence, there is no basis to find that Mr Mawhinney engaged in conscious dishonesty or an intent to defraud.

454 In these circumstances, it would not be appropriate to impose the longest period of restraint (eg in the order of 25 years or more) on Mr Mawhinney: see *ASIC v Financial Circle* at [160]-[167] citing *Adler* at [56].

455 However, while ASIC does not allege conscious dishonesty by Mr Mawhinney, Mr Mawhinney has shown "incompetence and serious irresponsibility" and a "disregard for legal obligations and the substantial losses suffered by investors": *ASIC v McIntyre* at [32] (per Bromwich J).

Previous contraventions for similar activities

456 Declarations of contraventions have been made in the Mayfair Proceeding, being proceeding VID 228 of 2020: see *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd (No 2)* [2021] FCA 247. Broadly, those contraventions relate to misleading and deceptive conduct in respect of the M+ Notes and the Core Notes.

457 Other than those contraventions, there is no evidence that Mr Mawhinney has been the subject of declarations of contraventions in other Australian proceedings.

458 However, I do not find that this factor weighs heavily in Mr Mawhinney's favour. This is because, in this proceeding, there are at least five products (namely, products offered by IPO Capital, IPO Wealth, M101 Nominees, M101 Holdings and Australian Income Solutions Pty Ltd) which the evidence demonstrates are highly problematic and have similar issues. That conduct has entailed inherently problematic, risky and fatally flawed investment schemes formulated and implemented by entities directed by Mr Mawhinney.

Summary

459 Having regard to and synthesising those factors, I have reached the view that Mr Mawhinney falls somewhere in between the following two categories:

(a) the category described in *Adler* as "the longest periods of disqualification (that is, disqualifications of 25 years or more)" (**25 Years or More Category**); and

(b) the category described in *Adler* as a "period of disqualification [of] 7 years to 12 years" (**7 to 12 Years Category**).

460 That is so for two reasons. First, Mr Mawhinney's conduct satisfies most of the factors in the 25 Years or More Category and the 7 to 12 Years Category, save that Mr Mawhinney's conduct does not satisfy the "dishonesty and intent to defraud" factor or the "previous convictions" factor which are in the 25 Years or More Category. Second, as set out above, an analysis of each factor in the "Santow list" ensures Mr Mawhinney's conduct calls for a period of restraint at the higher end of the spectrum.

461 In these circumstances, and having regard to all of the evidence and findings outlined above, I have reached the conclusion that an appropriate period of restraint in all the circumstances is a period of 20 years. In reaching that conclusion, I have considered the "Santow factors" and I have had particular regard to the following matters.

462 First, as the assessment of the evidence earlier in these reasons should show, I have found that Mr Mawhinney's involvement in contraventions of the *Corporations Act* and the *ASIC Act* are of a very serious kind and warrant a very substantial period of restraint.

463 Second, the amounts that have been raised by Mr Mawhinney are very substantial. On the evidence, across the various funds, the amounts raised from investors are in excess of

$211 million. On the evidence before the Court, there is a substantial likelihood that most, if not all, of those investors will never be repaid their principal or interest. Mr Mawhinney has a propensity to raise vast amounts of monies from an unsuspecting public using similar schemes. By way of example, the evidence discloses that, after launching the Australian Property Bonds product, within a matter of weeks, Mr Mawhinney had received enquiries from investors who were collectively seeking to invest in the order of $100 million.

464 Third, Mr Mawhinney has an ability to implement these schemes quickly through various corporate emanations. By way of example, in the case of the Australian Property Bonds product, I have found that scheme was formulated and implemented quickly in an attempt to circumvent the orders made by this Court on 16 April 2020 in the Mayfair Proceeding.

465 Fourth, Mr Mawhinney has shown a total disregard for the *Corporations Act* and the *ASIC Act*. I have no confidence that he will adequately comply with the obligations set out in that legislation in the foreseeable future. As I have stated, I have no confidence that Mr Mawhinney properly understands or appreciates the protective purposes of Australian financial services laws, or the importance of properly disclosing relevant and material matters to prospective investors.

466 Fifth, the evidence discloses, and I find, that Mr Mawhinney accepted funds from new investors for the purpose of making interest and redemption payments to old investors, when there was a real likelihood that the subsequent investors would lose some or all of their monies. Subsequent investors were not informed that their invested funds would, could or might be used to pay distributions to current investors.

467 I have not imposed a permanent restraint or a restraint which is in the range of 25 years or more for three main reasons.

468 First, Mr Mawhinney's conduct, while reprehensible, has not been the subject of a criminal conviction. That is not to say that a criminal conviction is necessary for a permanent restraint to be imposed. However, it is a relevant factor in the context of this case.

469 Second, I have serious concerns as to what has become of the funds invested in Mr Mawhinney's various investment schemes and whether Mr Mawhinney stands to benefit personally from those schemes. However, the evidence does not currently enable me to make a finding that Mr Mawhinney personally benefitted, or stands to personally benefit, from Mr Mawhinney's failed investment products.

470 Third, ASIC does not allege that Mr Mawhinney engaged in conscious dishonesty or an intent to defraud.

Would the order unfairly prejudice any person?

471 Finally, I note that "the Court can only make … an order [under s 1101B(1)] if the Court is satisfied that the order would not unfairly prejudice any person". As to this criterion, the orders are to be imposed on Mr Mawhinney. Mr Mawhinney has had every opportunity to participate, and indeed has participated fully, in this proceeding. Mr Mawhinney has made detailed submissions opposing the orders. There has been no suggestion that the orders would unfairly prejudice any person. In these circumstances, I am satisfied that the orders to be imposed will not unfairly prejudice any person.

DISPOSITION

472 For the reasons given, I will make orders under ss 1101B(1) and 1324(1) of the *Corporations Act* which are substantially in the terms sought by ASIC, save for two matters.

473 First, for the reasons given, the period of restraint imposed on Mr Mawhinney will not be a permanent restraint and will be for a period of 20 years.

474 Second, ASIC sought an order that, in short, would have restrained Mr Mawhinney from removing or transferring from Australia any assets acquired directly or indirectly with funds received in connection with certain financial products (other than financial products held by or issued to certain entities referred to as the "Mawhinney Entities"). I have qualified that order in the orders that will be made, so that any such removal or transfer cannot occur "without a Court order". I have added that qualification because it is not presently possible to foresee the outcome of, or processes required by, the various liquidations which are ongoing in relation to entities associated with Mr Mawhinney. As a consequence, I consider it appropriate to make provision for a mechanism by which Mr Mawhinney (or a relevant entity associated with Mr Mawhinney) could seek an order from the Court that relevant assets be removed or transferred from Australia.

I certify that the preceding four hundred and seventy-four (474) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate:

Dated: 19 April 2021